

**Article 370 and Article 35-A:
Discriminatory in nature**

Part A

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Why Articles 370 And 35A Should Be Scrapped

In the backdrop of the Pulwama Attack, once again the justified rage of the public turns to the “special” status on the state of Jammu and Kashmir. Before proceeding to the crux of why this timid stop-gap has been deleterious for the country, it must be pointed out that radicalisation of

Kashmiris is a disparate issue, best dealt with through the Vajpayee doctrine of “Insaniyat”, combined with no countenance of separatists.

However, the provision empowering the state with ‘special’ status has always been the elephant in the room. Jammu & Kashmir has, along with its sensitive topography, appears like a foreign policy issue, instead of a domestic one due to its status in our Constitution. There exists an unnecessary chasm between citizens of Kashmir and the rest of India. It borders on being trite, but nonetheless, sadly, must be reiterated – Article 370 and Article 35-A must go.

Article 370 details the relationship Kashmir will share with the rest of the country; Article 35-A grants permanent residents of Kashmir some special rights. From the get-go, the Constitutional relationship of India with this state has been adversely lopsided. India has already ensured the states with the Mizos and the Naga population with constitutional safeguards(special provisions) such as protecting their social practices India has an assortment of examples where it has performed positive discrimination for groups (Articles 15 and 16) and as mentioned – states.

The problem, to put it succinctly, is that with Kashmir the positive discrimination has tended to be insidious. Instead of taking a legislative route, Article 35-A was passed through a Presidential order. It subverted the law-making powers of the legislature, granted by the Constitution. They cannot amend the Constitution. Even an ordinance, which this was most decidedly not, has to be passed by Parliament. The order, passed in 1954 by the President, was due to fulfilling Article 370 (1) (d). Article 370 itself was supposed to be temporary; the first word of the Article is temporary. It still sits under Part XXI which is titled “*Temporary, Transitional and Special Provisions*”.

The state of J&K itself has done phenomenally well on its indicators as an Indian state should. It has grown by almost 7% last year, ensured a greater number of schools per household and even health and connectivity outcomes have outperformed expectations. A big reason is that it is also heavily subsidized by the Centre. A study showed that it has received, from 2000-2016, 10% of all Central funds despite having 1% of the population. It is an economic powerhouse waiting to be unleashed. Article 370, very obviously, however, is still an impediment in restricting private or global investment into the state.

If Indians (non-Kashmiris) cannot invest in land or property, how can manufacturing firms or multinational corporations? These might have provided jobs to the young people of Kashmir. It also stops public colleges such as medical colleges from adequately fulfilling vacancies. Professors cannot be hired from outside the state except in extremely low quotas. These and many more ensure that unemployment increases, which make the advent of radicalization, more viable. Hence, Article 370, the pernicious basis of Article 35-A must go.

Article 370 itself is gender neutral, but the way permanent residents are defined in the state constitution based on the notifications issued in April 1927 and June 1932 during the Maharaja's rule — seems biased against women. The 1927 notification included an explanatory note which said: *“The wife or a widow of the state subject ... 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.”* This was widely interpreted as also suggesting that a woman from the state who marries outside the state would lose her status as a state subject.

The only way to repeal Article 370 would be by the President through a notification but not without the concurrence of the Constituent Assembly of Jammu and Kashmir. The Constituent Assembly, of course, disbanded in 1956 and almost all members are presumably dead. Before dissolution, the Constituent Assembly neither recommended abolishing Article 370 neither, did they advocate for it to be permanent. As for Article 370, 45 Presidential Orders have been used to extend components of India's Constitution into J&K. Almost all Union List subjects are applicable, most of the Concurrent List ones, a handful of Schedules and 260 of 395 Articles. Article 370, via orders, has been modified so many times, it can be expelled from the Constitution as well without taking 'concurrence' of the now-defunct Constituent Assembly. The Constitution has been recognised as a living document, after all.

Article 35A must go

Valmiki (Dalits) were brought to Jammu and Kashmir (J&K) in 1957 by the State Government. From that time, the present and future generations are compelled to become sweepers and that too only in the Municipality of Jammu. Valmikiyas are not given the Permanent Resident Certificate (PRC) and they are eligible only for the post of 'sweeper'. This leaves them with only one option that is to take the broom and clear the dirty streets of Jammu. The youth of this community in J&K may be qualified to become teachers, lawyers, doctors, engineers yet they are eligible for the post of sweeper only. There are West Pakistan Refugees and Gorkhas, and the PRC is not conferred on them, as a result, they are not entitled to property rights; employment in state government; participation in Panchayat, municipalities and legislative assembly elections; admission to government-run technical education institutions; scholarships and other social benefits, voting rights, right to join central services. Women in J&K cannot choose her life partner outside the state. All of this is happening due to the implementation of Article 35A in the state of J&K. This article is unconstitutional, discriminatory and biased.

What is Article 35A?

Article 35A enables the J&K Assembly to define 'permanent residents' and allows it to give PRC to people in J&K. Though the PRC holders are entitled to various rights and privileges, which are denied to the non-PRC persons but this provision also gives legal sanction to discriminate even among the PRC holders. Article 35A is that part of the Constitution of India which was added by the President of India without getting it discussed and approved by the Parliament of India. It is against the spirit of the Constitution of India. This provision discriminates on the basis of caste, class, gender, and place of origin in clear contravention to the fundamental rights enshrined in the constitution of our country.

IMPLICATIONS of ARTICLE 35A?

No one, except those defined as 'permanent residents' with PRC are entitled to property rights; employment in state government; participation in Panchayat, municipalities, and legislative assembly elections; admission to government-run technical education institutions; scholarships and other social benefits, voting rights, right to join central services. Thus, it discriminates against the rest of the Indian citizens. This Article has denied all the above-mentioned rights to various communities, like the Scheduled Caste Valmikiyas from Punjab, West Pakistan Refugees, Gorkhas, Women living in Jammu-Kashmir for the past six decades.

The Indian Administrative Services (IAS) officers, who retire after working in J & K for 30-32 years to ensure smooth administration of the state, cannot even buy a house in the state. Nor can their children study or work in any govt. institutions of the state.

Since the J&K borders two hostile nations and also due to consistent terrorist activities in the state, the largest number of soldiers attained martyrdom in J&K. Of the 21 Param Veer Chakras awarded to soldiers fighting at the borders, 16 were awarded for fighting at Jammu Kashmir borders, and of these 15 soldiers were from outside the state. However, it is ironical that those who lay their lives to protect the land are not given even a small piece of land, because they are outsiders.

Detrimental for the PRC holder also:

No industrialists invest here as they cannot own the land for his factory, which, if allowed, could provide employment to the locals.

With ulterior motive to keep the people belonging to Scheduled Caste (SC) away from Political Power, it has been decided that the seats in the legislature of the state shall not be increased for them till the year 2031, denying them representation in the legislature as per the ratio of their population.

Tribals comprise nearly 15% of the State's population, but political reservations for Scheduled Tribes are non-existent and they are denied social justice and equitable distribution of opportunities.

People from outside J&K are denied right to take up any govt job, resulting in a serious dearth of qualified experts in professional educational institutions, including medical and engineering colleges. This has a detrimental effect on the quality of professional education and the local students are suffering.

Qualified doctors, specialists and researchers from other states do not work in J&K. There is an acute shortage of doctors in super specialty hospitals and professors in the Medical Colleges.

It is important to debate the constitutional validity of Article 35A, which was inserted in the constitution, without even discussing and approving it from the parliament. Modern day India certainly cannot allow such grievous forgery of the past to continue to darken the future of its citizens. Together we can ensure equality, liberty, and justice for the sufferers. This regressive, discriminatory, biased and unjust law must be repealed. Please sign my petition and join me in the fight for the dignity and rights of lakhs of people in the state of J&K.

The myth of outsiders' invasion in J&K

J&K, a constitutionally privileged state in India, does exactly what the most anti-women countries do under its prevailing permanent residency laws. From 1927, when the Dogra autocratic ruler Hari Singh introduced the law, women of J&K were disqualified as 'permanent residents' if they married non-permanent residents. The archaic law was overruled in 2002 by the J&K High Court. But, in 2019, the women of the state still can't pass on their state subject rights to their children and non-permanent resident spouses.

Hari Singh had brought in the law as an economic protectionist measure against the influx of populations from neighbouring Punjab that was under British colonial rule. The law was inserted as Article 35A in the Indian Constitution through a presidential order in 1954, eight years after J&K acceded to India on October 26, 1947. It was based on the terms on which J&K's popular leader Sheikh Abdullah negotiated Article 370 with New Delhi in 1949.

Article 35A empowers J&K's legislature to define the state's 'permanent residents', and their special rights and privileges. J&K's Constitution, which came into existence in 1956, retained the Dogra autocracy's law prohibiting non-permanent residents from 'permanent settlement' in the state, acquiring immovable property, getting government jobs, scholarships and aid. The law even barred refugees from then-West Pakistan living in J&K since Partition from acquiring state subject rights.

In 2002, when the J&K High Court favoured limited 'gender neutrality', it evoked brazen patriarchal reactions from regional political parties. Both National Conference (NC) and Peoples Democratic Party (PDP), ironically headed by a woman, tried their best to subvert the verdict by passing a new legislation to disqualify the women who married 'outsiders'.

Kashmir's political leadership has been arguing that J&K is not the only state in India with prohibition on 'outsiders' to settle, and, therefore, Article 35A in their state should be left alone. This is true. But such regressive laws in India exist only because of xenophobic tendencies and irrational fears about 'an invasion' (both sociopolitical and economic) of

'outsiders', which holds no basis in reality. The common refrain today is that the influx of migrants from 'Hindu' India will unleash demographic change and dilute the religious identity of Muslim-majority Kashmir valley. The fact is, neither Hindus of Jammu nor Buddhists of Leh, despite being state subjects of J&K, have made any attempts to settle in the Valley in the last 72 years. On the other hand, while Kashmir insurgency evicted its entire indigenous minority, Kashmiri Pandits, Muslims have also moved out in massive numbers and settled in not only Hindu-dominated Jammu, but also in 'Hindu-dominated' cities like Kochi, Kolkata and Jaipur.

Also, in the overwhelming majority of states where there are no prohibitions on the purchase of land by 'outsiders', the basic demographics and cultural identity of different ethnic groups remain intact. No economic or otherwise migration from one state to another has eroded the distinctness and diversity of India's states. In any case, in a world where cultures are being influenced, and constantly changing, primarily because of mass media and the internet, to think of living in silos is being regressive.

Time for Article 370 to Go?

We must not forget that the continuance of Article 370 is the biggest hurdle to a lasting solution to the Kashmir conundrum. Twelve days after the Pulwama suicide bombing that left nearly 40 CRPF jawans dead, India retaliated. In the early morning hours of Tuesday, four Mirage 2000 fighter jets took out terror outfit Jaish-e-Mohammed (JeM)'s camps at Balakot, Manshera, inside Pakistani territory. On the very next day, Omar Abdullah, National Conference leader and former chief minister, gave an interview in which he said, "Tinkering with Article 370 or 35A will be disastrous for Jammu and Kashmir." As if the timing wasn't suspicious. But, then, what else would Abdullah say? Why wouldn't he try to save what is akin to a hereditary "jagir" (fiefdom) of political heirs like him the Muftis?

Indeed, it is this opposition to the abrogation of Article 370 that Muslim-dominated Kashmiri political parties share. Unfortunately for them it is also what they have in common with separatists in the Valley. Actually, what Abdullah probably meant is that the repeal of this "Temporary, Transitional and Special Provision" of the Indian Constitution would be disastrous to his party. He might have added that it would also prove the undoing of all other overt, quasi, or crypto separatists who have thrived all these decades on Jammu and Kashmir's "special status." Resisting full integration with the Indian Union, they have given a handle to Pakistan to interfere, as also an excuse to Western powers to refer to the area as India-occupied Kashmir. Who in the world dares call Tibet "China-occupied"? Our own J&K, in comparison, acceded legally not by invasion or conquest.

A couple of years back, Jitendra Singh, Minister of State in the PMO and MP from Udhampur, dared to wonder if Article 370 "actually worked to J&K's disadvantage." Not only did Mehbooba Mufti condemn his statement, but Omar Abdullah went on to tweet rather ominously, "Mark my words & save this tweet - long after Modi Govt is a distant memory either J&K won't be part of India or Art 370 will still exist." As if it is that flimsy provision that keeps the state tied to India not the force of arms in the face of a relentless ongoing war waged by Pakistan. Isn't it time to retort, "Yes, Mr. Abdullah, we have marked your words but, sorry to say, you may actually have to eat them."

Not only is J&K a part of India, but the government has at last taken steps to dilute if not challenge Article 370. On Thursday, the Cabinet

approved extending reservations for SCs and STs to J&K by amending the “untouchable” Article 370. I called it “untouchable” because just last April, the Supreme Court had said that it had come to acquire a “permanent status.” This was quite in keeping with the October 2015 ruling of the J&K High Court. In a 60-page judgement, Justices HasnainMasoodi and Janak Raj Kotwal observed: “Article 370 though titled as ‘Temporary Provision’ and included in Para XXI titled ‘Temporary, Transitional and Special Provisions’ has assumed a place of permanence in the Constitution. It is beyond amendment, repeal or abrogation, in as much as Constituent Assembly of the State before its dissolution did not recommend its Amendment or repeal.”

But Finance Minister ArunJaitley explained that the proposed Amendment would “serve the purpose of application of relevant provisions of the Constitution of India, as amended through the Constitution (Seventy Seventh Amendment) Act, 1995 and Constitution (One Hundred and Third Amendment) Act, 2019 for Jammu and Kashmir, by issuing the Constitution (Application to Jammu and Kashmir) Amendment Order, 2019 by the President under clause (1) of Article 370.” Justifying this decision, he added, “The Jammu and Kashmir Reservation (Amendment) Ordinance, 2019” would “give reservation benefits to the people living along the International Border in Jammu and Kashmir, who often face shelling from across the border.” The ordinance is to be promulgated by the President.

Kashmir was one of Jawaharlal Nehru’s Himalayan blunders; an integral part of that blunder was Article 370. Over the years it has proved to be practically useless to the people of J&K, keeping them underdeveloped, cut off from the national mainstream, and vulnerable to cross-border intrusions. Whatever its legal or historical status, the time has come to amend, if not end Article 370.

We must not forget that the continuance of Article 370 is the biggest hurdle to a lasting solution to the Kashmir conundrum. As such, it is the other side of the Pulwama massacre. Strikes across the border are only one way to avenge or redress the latter. But the internal rectification required is the full and complete integration of Jammu and Kashmir with the rest of India. In order to accomplish this, Article 370 must go.

The Need for The Removal Of Article 370

Before starting with removal of Article 370, let us go to the historical background and have a brief look on what Article 370 is and the provisions under it. The Article 370 of Indian constitution is a provision by the virtue of which the State Jammu and Kashmir has acquired a special status . It provides a fairly high degree of independence to the state, enables the state to have its own Constitution and it's own national flag. The provisions of Article 238 shall not apply in relation to the State of Jammu and Kashmir; also Article 368 (which contains Amendment clauses) is applied to whole of india, except to the state of Jammu and Kashmir, unless applied by an order of President of india under Article 370. The provisions of Article 1 and of this Article shall apply in relation to that state and it also permits the state to give some special privileges to its “permanent residents”.

Article 370 was drafted by Shiekh Abdullah. He was appointed by Prime Minister of Jammu and Kashmir, Mr. Hari Singh, and Pt. Jawahar Lal Nehru. At the time when the Constitution of India was being drafted, for all the laws apart from communication, foreign affairs, finance and defence, the Parliament of India depended upon the consensus of the State Government. Moreover, the Centre cannot declare financial emergency under Article 360 in the state, except for the situations like war or external violence.

In 1947, when Maharaja Hari Singh declared Jammu and Kashmir independent, Pakistan immediately launched a non – official war to free the region from Hindu rule, in which there were majority of Muslims. Soon after, Maharaja Hari Singh realised that he was unable to protect the state, when he asked Indian government for help. The Indian government was ready to aid but with the condition that Kashmir would accede to India. The Maharaja agreed upon the same and the Indian government and the Maharaja signed the accession treaty (“the Instrument”) on October 26, 1947.

The Clause 5 of the accession treaty stated that it could not be altered without the state's consent. Clause 7 specifically protected the state's right to ratify the application of any future constitution of India in its territory. It read as:

“Nothing in this Instrument shall be deemed to commit me in any way to acceptance of any future Constitution of India or fetter my discretion to

enter into arrangements with the Government of India under any such future Constitution.”

Removal of article 370 – the importance

As the matter of point, Article 370 should be removed from Constitution of India, as Jammu and Kashmir is also a part of our country. It also has many other cons as, because of Article 370, there are very less industries, which is directly related to employment. This means that because of this provision, people have to migrate to other states in search of jobs. Also it has become a terrorist prone region because of this Article. Due to Article 370, RTE, RTI, CAG and many Indian laws aren't applicable in Kashmir which has a situation of corruption.

Some more reasons as to why the Article should be removed are:

1. The state, upon removal, will prosper economically and socially.
2. Social amalgamation will reduce the threat of militancy.
3. Kashmir could be one of the top tourist destination after complete development.
4. It will also prove to be good diplomacy to deal with Pakistan over territorial disputes.
5. It will politically give chance to all parties to rule the state and allow its development.

There could be many other minor or major advantages of abolishing Article 370 and give full course to J&K to prosper.

Thus, the Article 370 needs to be removed from the Constitution of India, so as to make Jammu and Kashmir as developed and prosperous as other states in India. That is also necessary to make the people of Jammu and Kashmir feel that they are no different from other citizens of the country, and to protect the minorities like kashmiripandits.

Remove Article 370 & 35A. This is fertiliser for terrorism in Kashmir

Was an attack so huge in scale like Pulwama possible without the help of the regional residents?. Even after Pulwama attack we continue to lose our brave soldiers. This is right time to take solid decisions.

What is Article 370? Every Indian must know.

Article 370 of the Indian constitution is an article that gives autonomous status to the state of Jammu and Kashmir. The article is drafted in Part XXI of the Constitution: Temporary, Transitional and Special Provisions. The Constituent Assembly of Jammu and Kashmir, after its establishment, was empowered to recommend the articles of the Indian constitution that should be applied to the state or to abrogate the Article 370 altogether. After the J&K Constituent Assembly later created the state's constitution and dissolved itself without recommending the abrogation of Article 370, the article was deemed to have become a permanent feature of the Indian Constitution.

Its Heading itself states "Temporary Provisions" and transitional so why wasn't it annulled at the 1957 first Jammu and Kashmir Legislative Assembly Election.

In the years since Independence, this article was to be removed. But due to bad administration and wars between India and Pakistan, this article has not been touched.

- Jammu - Kashmir's citizens have dual citizenship.
 - Jammu - Kashmir's national flag is different.
- Jammu - Kashmir' Legislative Assembly's term is 6 years.
Whereas its 5 years for the States of India.
- In Jammu - Kashmir it's not a crime to insult India's national flag or the national Symbols!
 - The order of the Supreme Court of India is not valid in Jammu - Kashmir.
 - Parliament of India may make laws in extremely limited areas in terms of Jammu - Kashmir
 - In Jammu-Kashmir: If a Kashmiri woman marries a person of any other state of India, Kashmiri citizenship to that female ends!. In contrast if a Kashmiri woman marries a person from Pakistan that person will get

citizenship of Jammu - Kashmir. It is providing Indian citizenship to Pakistani terrorists.

- Because of Section 370

RTI does not apply in Kashmir.

RTE is not implemented

CAG does not apply...

Indian laws are not applicable.

- Sharia law is applicable to women in Kashmir.

There are no rights to panchayats in Kashmir.

- Minorities in Kashmir [Hindus and Sikhs] do not get 16% reservation.

- Due to Section 370

Indians in other states cannot buy or own land in Kashmir. However Kashmiri can buy land in all over India.

- Private industries does not establish because they cannot acquire own land. This leads to unemployment in youths. This unemployment give them enough time to take part in activities like stone pelting and separatism movement.

- Because of Section 370 Pakistanis gets Indian citizenship for which they only need to marry a girl from Kashmir.

- It's a good to remove section 370, because due to this our security and nationalism compromised in Kashmir.

Section 370 has to be removed. Section 370 act as a fertilizer for terrorism. Separatist are taking advantage of this.

Why every time after the death of a terrorist, we observe acts of stone pelting on our army, every time; have you ever listened such kind of wickedness in any other country?

Why do these separatist organizations and other regional parties render a quiet attitude at the martyrdom of our brave soldiers, but observe a mourning for hundreds of days at the death of terrorists like Wani, who have made the valley a living hell?

Article 370: The root Reason of Kashmir problem

Now days after the imposing of governor rule in Jammu and Kashmir, the issue of Article 370 is again in controversy. Article 370 covers under the part 21 of Indian Constitution which gives the provision of special status to the Jammu and Kashmir.

Main feature of Article 370 :

- (1) Indian Parliament cannot make any law without the consent of state Assembly
- (2) Jammu Kashmir has its own flag and constitution
- (3) President rule cannot be proclaimed in that state Only Governor rule can be imposed
- (4) Jammu Kashmir has its own Criminal code which name is Ranbir Penal code

Jammu Kashmir is not only such state those have a status of special state . There are many state like Nagaland, Assam , Manipur, Arunachal Pradesh etc., but in those state . There is no such type of provision who separate them from India. Such type of special provision is totally against the unity and integrity of India which is already mentioned in Indian preamble and in the year 1994 This resolution have been passed by Indian Parliament that Kashmir is a integral part of India.

If Jammu Kashmir is a part of India than why Kashmir have its own constitution
and this rumour has been spreading by the anti nationalist forces that Article 370 is a basic structure of our constitution but it is absolutely false
Article 370 is a temporary provision
In Conclusion I would likely to says that special status of Jammu and Kashmir should be abolished.

And Clause 3 of Article 370 makes it clear that Article 370 can be revoked if a new constituent Assembly of Jammu and Kashmir is convened and willing to recommend its revocation.

The Riddle of Democracy, Violence and Politics in Kashmir

With the revocation of Article 35A of the Constitution being a big agenda on BJP's manifesto, how long will this struggle last and how shall the people, politicians and militants in Kashmir keep their struggle alive to defend their homeland, is a question of careful empiricism. The conundrum of Democracy, Violence and Politics in Kashmir of which the whole population has been a victim over the years requires immediate attention and acknowledgement.

Kashmir, since its legal birth, has been raised in an extremely violent atmosphere, be it at the time of partition, post the instrument of accession, to disputed elections, to militant insurgency groups on the rise and of course the three wars that took place between India and Pakistan over the course of Kashmir's distraught political history continue to cast a heavy shadow on its present. Since then it has been a bone of contention between these two countries and has witnessed the wars of 1947, 1965, and 1999 being fought over and on its soil.

With the exercise of Assembly Elections being highly anticipated in Kashmir by all the political parties to muster their desired share of power, what do the assembly elections hold for people? When a common Kashmiri man was approached for the purpose of this piece, Talib Malik, a 25-year-old engineer simply said, "We don't believe in the Constitution of India, it violates our special rights as Kashmiris".

A less lit up aspect of elections in Kashmir is the preservation of ancestral leadership that has been a major element of mistrust among Kashmiri voters. However, now that new faces such as Ex-IAS Officer Shah Faesal, Shehla Rashid and Er. Rasheed are emerging, it seems that Kashmiri voters have a plethora of options to choose from.

In July 2016, Burhan Wani, a HizbulMujahideen commander was eliminated from the valley and his killing triggered unrest and unleashed an

unquenchable wave of rage and ferocity among the Kashmiri population who shouldered his funeral procession. Recently, Burhan Wani's successor Zakir Musa met the same fate. With thousands who appeared to mourn the loss of the slain militant, it sent a loud and clear message that the Kashmiri population is not ready to be bullied in the name of democracy and security.

Commenting on the behavior of Kashmiri voters over the years, Danish Bhat, a member of the National Conference party, said that during the early years, post 1947, the voter turnout was remarkable. However, over the successive years owing to events like the imprisonment of Sheikh Mohammed Abdullah, then the systematic erosion of internal autonomy have contributed to low voter turnout during elections over the years.

Another blow to Kashmiri voters struck them when the preferred party in the 2014 elections People's Democratic Party chose to ally with BJP to form the government. Now, this particular strategic move cost the PDP heavily, which they regret.

Since the coming of the BJP government, Kashmir has seen heavy militarization, increased violence against civilians by Indian forces and a sudden high in recruitment of educated youth into militancy, which has in turn created an aversion towards the idea of voting and democracy as a concept in general.

Failures of Kashmiri leaders in fulfilling basic promises of access to water, electricity and good road transport has also pushed away many voters. The problems in Kashmir and the Kashmir Problem increasing manifold times every other day has been instrumental in driving voters away from polling booths and towards more funerals of youth engaged in militancy fighting for the Kashmir that they love and aspire to autonomously rule one day.

Why Article 35A is obnoxious and temporary

Article 35A violates the very concept of equality enshrined in the Constitution of India. Its treatment of non-permanent residents of J&K is akin to treating its own people as second rate citizens. They cannot buy immovable property in J&K, are not eligible for employment by the state government, cannot contest or vote in local body or Assembly elections, cannot avail of scholarships and other grants offered by the state government to its permanent residents and, above all, cannot seek redress in any court, local or national. Most importantly, it deters the corporate sector from investing in the state as sans the provisions to buy immovable property, such investments make little business sense. The state, thus, remains dependent on the Centre for financial assistance, its economy being dependent for the most part on government jobs and doles from the Centre to enable the state to meet its obligations.

The provisions of Article 35A also violate the principles of gender equality. Section 6 of the Constitution of J&K, which derives its power from Article 35A, discriminates against women residents of the state who marry a person from another state. The children from such unions are not entitled to the Permanent Resident Certificate (PRC) or the benefits consequent thereupon, such as the right to acquire immovable property and a government job. The same, however, does not apply to the offspring of a male who marries a woman from another state. This provision has been challenged in the High Court of J&K by Parabhjit Kour Modi, who has been continuously living and working in the state after her marriage, along with her non-J&K resident husband and two children, who plead that Section 6 of the State Constitution be declared *ultra vires* of the Constitution of India. The response to the above petition by the then Law Secretary Mr Mohammad Ashraf Mir merely confirmed the discrimination. “Legally and technically”, he said, “her children are the children of her husband who is from a different state; are not entitled to the permanent resident certificate or the benefits consequent thereupon.”

Earlier, women such as Parabhjit Kour Modi used to completely lose the ‘permanent resident status’. After a long legal battle, in 2002, the women of the state won the right to retain their permanent resident status

after marriage. But the discrimination continues— because their children are still not eligible for the PRC, which means they cannot get admissions to professional colleges and cannot apply for state government jobs. They also cannot inherit their mother’s property or buy property themselves. Such a situation is particularly traumatic and extraordinarily painful for women who marry ‘outsiders’ and later get widowed or divorced. They face added trauma as their children have no future in the state of J&K.

It is also a travesty of justice that the Balmikis and Gorkhas who have been staying in the state for generations as also the West Pakistan refugees have been denied the permanent resident status with all its attendant benefits. In May 2017, a petition was filed by Charu Wali Khanna, a lawyer and former member of the National Commission for Women, and Seema Razdan Bhargav, a doctor. The petitioners refer to a 2003 judgment by the Jammu and Kashmir High Court, which notes that the state legislature had not enacted any law defining permanent residents. So “under the guise of Article 370 and Article 35A, the men and women state subjects are subjected to different treatments.” The contention of the petitioners in this case is that since Article 6 supersedes her and her children’s basic rights of residence, education and employment, as guaranteed to them as “citizens” of India under Article 14 of the Indian Constitution, therefore, 35A is unconstitutional and, hence, deserves to be declared invalid.

As stated earlier, it was on the strength of Article 35A that the J&K Assembly adopted Article 6 for this purpose in 1956. A Jammu based Non-Governmental Organisation (NGO), “We the Citizens,” has challenged the constitutional validity of Article 35A on the grounds that this Article was introduced in the Indian Constitution in 1954 only through a Presidential order. As per the NGO, *“Although it is within the rights of the President to pass such orders, yet any such order can become a part of the*

Indian Constitution only after it gets approval of both Houses of Parliament by a majority vote”. The NGO has accordingly questioned the intentions of the erstwhile central government for including this Article only as an “Annexure” of the Constitution and not incorporating it in the main text of the Constitution.

The case is now being heard in the Supreme Court of India, which has bunched together all such petitions and convened a Constitution Bench to review the constitutional validity of Article 35A. Should Article 35A be declared unconstitutional, then the special powers of the J&K Assembly to separately formulate laws on permanent residents will be held *ultra vires* as will Article 6 of the J&K Constitution, which effectively blocks the inflow of people from other parts of the country into the state of J&K. J&K will then be treated like any other state of India, which will, over time, lead to the complete integration of the state with the Indian union. The impact of Article 35A has been to impose a sense of exclusivity and separation from the rest of the country, which has led to confrontation and religious extremism, with violence focussed against non-Muslim residents of Kashmir—an unfortunate consequence of Article 35A—which led to nearly half a million Pandits being forced out of their homes. To make matters worse, Pakistani infiltrators and Wahhabi Maulanas from Uttar Pradesh and Bihar made their way into the Valley, which consequently led to the radicalisation of large segments of the population.

Article 35A is, thus, the one defining Article which acts as a hindrance to the holistic development of J&K, affecting every sector. It has created a constitutionally-approved apartheid, giving special political, administrative and legal powers to the ruling elite of J&K, and, at the same time, being discriminatory against women and the non-Kashmiri population in J&K and their supporters in the rest of India. Its repeal will go a long way righting a historical wrong and would be an important step in bringing peace to the region, though Kashmiri politicians will oppose the same.

Why Article 35A should removed

In a situation bordering on farce, the prospect of Article 35A being struck down by the Supreme Court has brought together all political, militant, religious and other activist groups in the Valley that have been traditionally at war with each. Now, in support of Article 35A, all such disparate groups—the National Conference (NC), People’s Democratic Party (PDP), Congress Party and Hurriyat—have come together, to support the most regressive clause in the state’s history. Fearing political marginalisation, PDP leader and Chief Minister Mehbooba Mufti was the first to warn the Centre that “there will be no one left in Kashmir to give a shoulder to the Indian tricolour if 35A is struck down”. Her arch rival, Farooq Abdullah, the former Chief Minister and head of the NC, had the temerity to warn New Delhi, “Kashmiris will make you forget the upheaval of the Amarnath movement when they rise up against nullifying of 35A.” Leaders of the Hurriyat and other fanatic groups too have launched a new calendar of *hartals* (public strikes) and warned New Delhi of a bloodbath if the Supreme Court gives such a verdict. Obviously, abrogation of Article 35A is seen by such people as the first step to rolling back the communal agenda followed for decades and the start of a new phase of participatory democracy, which ill suits their political purposes.

Article 35A is a symbol of “Kashmiri colonialism” over the rest of J&K. In a memorandum to the Union Home Minister and to the National Human Rights Commission, the Jammu & Kashmir People’s Forum presented cases of the communities whose fundamental rights have been “legally” snatched by the state government—the right to property; right to vote; right to employment; right to marriage by choice; right to higher education; right to be a member of a panchayat or a cooperative society; right to avail bank loans. These communities are:

1. Refugees from POJ&K who were forced to live and settle outside J&K after they crossed over to Jammu in 1947.
2. Kashmiri Pandits and Sikhs who were forcibly pushed out of Kashmir Valley.
3. West Pakistan Refugees (WPR) who migrated to adjoining Jammu in 1947.
4. Families displaced due to regular firing along the Line of Control

(LOC) with Pakistan.

5. Balmiki community members who were persuaded by Sheikh Abdullah to migrate from Punjab to J&K to undertake the scavenging of night soil.
6. Descendants of Gorkha soldiers of the Maharaja's Army. Women of J&K who married men from other states.
7. The children born of such offspring too are denied all rights. No such provision exists for the men who marry non-state subjects, making it a gender biased issue.
8. The people of Ladakh who have to live at the mercy of the Kashmiri administration.

Except for the exiled Pandit families and the people of Ladakh, all other communities mentioned in this list have been denied the status of permanent residents or state subjects because of Article 6 of the J&K Constitution, which draws its powers from Article 35A of the Indian Constitution.

It is a matter of shame that the weakest strata of society, the Balmikis, continue to be subject to the worst form of human rights abuses. As per the rules of the state, the resident certificate issued to such persons, even if they are third or fourth generation settlers, brands them as "eligible only for the job of a scavenger". So, even if a young lady from the community holds an MBBS degree, she can only be employed in the state as a *safai karamchari* (cleaning staff). Such abuse would put even Hitler's Nazis to shame. But the masses in India remain ignorant of such provisions.

In 1981, the J&K State Assembly used its absolute Kashmiri majority to pass a law, the J&K Resettlement Act, which opened the doors for those Kashmiris and their descendants who had migrated to Pakistan, or POJ&K during partition in 1947, to return to J&K as its legitimate citizens and take charge of their ancestral properties. However, refugees from POJ&K and their descendants, numbering about 1.5 million today, have not only been kept out of this legal provision but the state government has consistently refused to let them or their descendants settle in J&K as "state subjects". These communities have been demanding their right to those 24 seats in the Assembly which are left vacant in the name of POJ&K. Ironically, the Muslim refugees from Xinjiang and Tibet, who had migrated to Kashmir following the Chinese occupation of their countries in 1949 and 1959, respectively, have been granted "state subject" status, along with voting

rights in the Assembly by the J&K government. The communal agenda of previous state administrations was, thus, clear. The state was being turned into a state for Muslims only and Article 35A was the instrument used to carry out such a nefarious act.

The Future ahead of Kashmir

In modern times, the space for regressive laws is shrinking. But abrogation of laws like Article 370 and 35A will be opposed by vested interests. It has taken decades to rid the Muslim daughters of India of the evil and ignominy of triple *talaaq*—a pernicious custom whereby a Muslim male could divorce his wife by a simple rendering of the word *talaaq*, three times, by any means. Here too, the Muslim clergy, all male dominated, termed such a judgement by the apex court as an assault on their faith, conveniently forgetting that Muslim countries such as Pakistan have already enacted such laws decades ago. It is, thus, time for India to move on and not be held hostage to blackmail and threats from religious power brokers.

The addition or deletion or modification to any part of the Constitution of India amounts to an amendment to the Constitution. The power to so amend rests in Parliament as per procedures laid out in Article 368. It is a fact that Article 35A was never presented before the Parliament which *ipso facto* means that the then President bypassed the amending procedure as laid out in the Constitution and usurped the functions of Parliament. More worrying is the fact that this amendment has been concealed from the public gaze through subterfuge, by not mentioning the same in the text of editions of the main Constitution. As an example, when a new Article on the Right to Education was added to the Constitution after Article 21, it was named Article 21A and it came up in between Article 21 and Article 22. New copies of the Constitution subsequently had Article 21, Article 21A and Article 22 in sequence. Why then does Article 35A find no place in the copies of the Constitution printed after its enactment, when it should have been placed between Article 35 and Article 36? It is also not found in the list of Amendments to the Constitution. For some unfathomable reason, Article 35A appears in the Constitution only as an Appendix, as a result of which even legal luminaries are not aware of its existence. Jagdeep Dhankhar, a senior advocate of the Supreme Court and former Union Minister, in his keynote address at a function organised in the Nehru Memorial Museum and Library in September 2017, made the pertinent point that he too was unaware of the existence of Article 35A—an Article which outrages every word of the Preamble of the Constitution of India. Speaking at the same venue, the

former Governor of the state, Jagmohan said, “The common people of Jammu Kashmir, the poor, no one is benefitting from Article 370 or Article 35A—whether they are Hindus or Muslims. It is only vested interests, the elite, who have been benefitting from these provisions. So called ‘experts’, such as A. G. Noorani, are misleading the people by advocating for Article 370,” and reiterated that it is high time for this law to go.

It is time to give justice to the victims of Article 35A. These are the women of J&K who choose life partners from outside the state and in doing so, lose the right for their progeny to be state citizens. These are the migrants from West Pakistan who came in 1947 and settled in Jammu Division. They are the victims of partition who still languish and long for justice. These are the Balmikis, the *safai karamcharis* who have no hope for their children other than to remain in this profession, regardless of the academic level of accomplishment achieved by them. These are the Gorkhas of J&K, who have lived here since the 18th century and are denied citizenship rights till date. Such abuse of human rights must end in a free and democratic India.

It is time to repeal Article 370 and Article 35A. There will be violence instigated in the Kashmir Valley when the nation takes recourse to such action, but that cannot, and must not, deter the state from preserving the right to equality, enshrined in the Constitution. If it leads to a long and bloody struggle to preserve the basic character of the Constitution of India, then we, the people of India must go through with such struggle. We must remember that in the USA, the North went to war with the South, over the issue of human rights and Abraham Lincoln won the day. For the good of the people of India and for the residents of J&K, Article 35A must be repealed forthwith as it will pave the way for the development of the state and its total integration with the union.

Article 35-A: A Biggest Fraud on Constitution of India

A large number of political and defence analysts attribute instability in Jammu & Kashmir (J&K) to India's inability to fully integrate the State into the Union. The challenges towards such integration have historical roots, dating to the circumstances under which the State, led by Maharaja Hari Singh, acceded to India, following Pakistan's attempts to annex the State through force. Historically, Pakistan has been also consistently providing support to terrorist and to the separatist movements in J&K and has also extended such support to promote terror in other parts of the country, in furtherance of its own interests. The third factor is the imposition of Article 370 in the Constitution of India and the addition of Article 35A, through the provisions of Article 370 of the Constitution of India.

Article 35-A of the Constitution of India is an Article that empowers the J&K State's Legislature to define "permanent residents" of the State and provide special rights and privileges to those "permanent residents". It was added to the Constitution of India through a Presidential Order, i.e., the Constitution (Application to Jammu & Kashmir) Order, 1954, issued by the President of India on May 14, 1954, "in exercise of the powers conferred by" clause (1) of Article 370 of the Constitution of India, with the concurrence of the Government of the State of Jammu & Kashmir. This special status granted to the State of Jammu & Kashmir is believed to be the prime inhibiting factor in the complete integration of the State with the Union.

Brief History

During British Rule, the map of India consisted of territories that came directly under the Crown, and also 565 Princely States, which, while not being part of the Crown possessions, were tied to it in a system of subsidiary alliances. The Princely States had control over their internal affairs, but control over defence and external affairs rested in the hands of the British Government, under the Viceroy of India. In addition, there were several colonial enclaves controlled by France and Portugal. The government of India Act, 1935, introduced the concept of the Instrument of Accession, wherein, a ruler of a Princely State could accede his kingdom into the 'Federation of India'. Between May 1947 and the transfer of power on August 15, 1947, the vast majority of States signed Instruments of Accession. This was facilitated by the Congress, with its leaders such as C. Rajagopalachari arguing that as paramountcy "came into being as a fact and not by agreement," it would necessarily pass to the Government of independent India, as the successor of the British.

A few, however, held out. Amongst them were Hyderabad and Kashmir, which declared that they intended to remain independent. Hyderabad had a Muslim Ruler and Muslim nobility in an overwhelming Hindu majority State. After "Operation Polo," an Indian military action to restore order in the State, Hyderabad acceded to India and was absorbed into the Union. The State of J&K, however, posed a challenge of an altogether different nature.

1947: The Situation in J&K At the time of the transfer of power, the State of J&K was ruled by Maharaja Hari Singh, who had announced his intent to remain independent. Sheikh Abdullah, the leader of Kashmir's largest political party, the National Conference, was opposed to Hari Singh's Rule and was vociferously demanding his abdication. Pakistan, in the meantime, tried to force the hand of the Maharaja and sent in raiders, assisted by the Pakistan Army, to annex the State by force. Being confronted by a militarily hopeless situation, the Maharaja sought India's help to push back the invaders. India required the signing of an Instrument of Accession and setting up of an interim Government headed by Sheikh Abdullah in return. The Indian Army was airlifted to Srinagar and the raiders were halted a few miles from the city. Then, in a series of heroic actions, the Indian Army pushed back the Pakistan Army assisted raiders till the onset of winter halted the operations. When the Constitution of India came into force on January 26, 1950, special provisions were made for the State of J&K, in the form of Article 370 of Constitution of India, which was a temporary provision and remains so till date. Article 35-A is a provision incorporated in the Constitution of India giving the Jammu & 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.

Deceitful Incorporation of Article 35-A:

Article 35-A was incorporated in the Constitution of India in 1954 by an order of the then President of India Dr. Rajinder Prasad on the advice of Pt. Jawahar Lal Nehru Cabinet. The controversial Constitutional (Application to Jammu and Kashmir) Order, 1954 followed the 1952 Delhi Agreement entered into between Pt. Jawahar Lal Nehru, the first Prime Minister of India and the then Prime Minister of Jammu & Kashmir Sheikh Mohammad Abdullah, which extended citizenship to the "State Subjects" of

Jammu & Kashmir. So Article 35-A was added to the Constitution of India as a testimony of the special consideration to the Indian Government accorded to the "permanent residents" of Jammu & Kashmir. The Parliamentary route of law making was bypassed when the President of India incorporated Article 35-A into the Constitution of India. Article 35-A is a rarest example of invisible State meddling with the Constitution of India where it has no constitutional mandate. Article 35A was neither a part of the draft Constitution nor a part of the adopted and enacted Constitution of India. This Article was added to the fundamental rights of the Constitution by a Presidential Order, viz., Constitutional (Application to Jammu and Kashmir) Order 1954 which extended the application of various provisions of the Constitution of India to Jammu & Kashmir with such modifications, exceptions and alterations with the concurrence of the Government of the State. Article 368 of Constitution of India was also extended in its application to the State but with a proviso to the effect that "no such amendment shall have effect in relation to the State of Jammu & Kashmir unless applied by order of the President under clause (1) of Article 370 of "Constitution of India". Be that as it may, from the reading of this provision it cannot be construed that the President of India is empowered to exercise the constituent power of the Parliament under Article 368 of Constitution of India to add any provision in the fundamental rights part in its relation to the State of Jammu Kashmir.

The CO 1954, which superseded Constitution (Application to Jammu and Kashmir) Order 1950 of 26 January 1950, was issued under the permissible limits of Article 370 of Constitution of India - a temporary constitutional provision relating to the State of Jammu Kashmir. Article 370 of Constitution of India authorizes the President of India to extend the provisions of the Constitution of India in its relation to the State of Jammu & Kashmir as the President may by order specify. Article 370 (1) of Constitution of India enjoins four clauses, viz., clauses (a), (b), (c) and (d). Article 370 (1) (a) of Constitution of India reads as: "Notwithstanding anything in this Constitution, the provisions of Article 238 of Constitution of India shall not apply in relation to the State of Jammu and Kashmir"; Article 370 (b) of Constitution of India reads as: " 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 the 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; Article 370 (1) (c) reads: “the provisions of Article 1 and of this Article 370 shall apply in relation to that State”. Article 370(1)(d) of Constitution of India reads: “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-section (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”. Analysis of Article 35A - Constitutional anomalies: a case for Constitutional Conviviality.

The addition or deletion or modification to any part of the Constitution of India amounts to an amendment to the Constitution of India. The power to so amend rests in Parliament as per procedures laid out in Article 368 to the Constitution of India. It is a fact that Article 35-A was never presented before the Parliament which ipso facto means that the then President bypassed the amending procedure as laid out in the Constitution and usurped the functions of Parliament. The Muslim refugees from Xinjiang and Tibet, who had migrated to Kashmir following the Chinese occupation of their countries in 1949 and 1959, respectively, have been granted “state subject” status, along with voting rights in the Assembly by the J&K Government. More worrying is the fact that this amendment has been concealed from the public gaze through subterfuge, by not mentioning the same in the text of editions of the main Constitution. As an example, when a new Article on the 'Right to Education' was added to the Constitution of India after Article 21, it was named Article 21A and it came up in between Article 21 of the Constitution of India and Article 22 of Constitution of India. New copies of the Constitution of India subsequently had Article 21, Article 21A and Article 22 in sequence. Why then does Article 35-A find no place in the copies of the Constitution printed after its enactment, when it should have been placed between Article 35 and Article 36? It is also not found in the list of Amendments to the Constitution of India. For some unfathomable reason, Article 35-A appears in the Constitution only as an Appendix, as a result of which even legal luminaries are not aware of its existence. It is, thus, clear and lucid that Article 35-A was not added to the Constitution of India by following due procedures prescribed for amendment of the Constitution under Article 368 of Constitution of India. The Executive organ has brought it though the right of amendment to the Constitution lies with the legislative organ. It not only violates the constitutional procedures established by law but also against the basic structure of the Constitution of

India. Addition or deletion of an Article amounts to amendment to the Constitution, which could be done only by Parliament as per procedure, laid down in Article 368 of Constitution of India. However, Article 35-A was never presented before the Parliament of India. This means the President had bypassed the Parliament in his order to add Article 35-A. This also means that the amending power of Parliament under Article 368 of the Constitution of India was abridged in its application to Jammu & Kashmir. Article 35-A was included “surreptitiously” in the Constitution of India than by following the ordinary procedure of amendment under Article 368 of the Constitution of India, and is, therefore, “constitutionally vulnerable”. The President of India, by an Executive Order, added the Article 35A in the Constitution though Article 370 of Constitution of India does not confer Legislative powers to the President to amend the Constitution of India. Article 35-A not only violates constitutional procedures established by law but also the fundamental right guaranteed under Articles 14, 15, 16, 19, 21 of the Constitution of India. Article 35-A is a big "fraud" not only with the Constitution of India but with the Parliament of India too.

Why Article 35A Must Go:

The classification created by the Article 35-A suffers from the violation of Article 14 of Constitution of India. Equality before the Law and also against basic structure of the Constitution of India. The non-resident Indian citizens cannot have the rights and privileges, same as permanent residents of Jammu & Kashmir. It facilitates the violation of the right of women to ‘marry a man of their choice’ by not giving the heirs any right to property, if the woman marries a man not holding 'Permanent Resident Certificate'. Therefore, her children are not given Permanent Resident Certificate and, thereby, considering them unfit for inheritance – not given any right to such a woman’s property even if she is a permanent resident. It facilitates the free and unrestrained violation of fundamental rights of those workers and settlers like Scheduled Caste and Scheduled Tribe people who have lived there for generations. The Dalits and Valmikis who were brought to the State of J&K between 1950-60, were given 'Permanent Resident Certificates' on the condition that they and their future generations could stay in the State only if they continued to be scavengers. And even after six decades of service in the State, their children are safai-karmacharis and they have been denied the right to quit scavenging and choose any other profession. The industrial sector and whole private sector suffers due to the property ownership restrictions. Good doctors do not come to the State for the same reason. Children of non-state subjects do not get admission to State Colleges and Universities. It ruins the status of

West Pakistani refugees, who vote in the Lok Sabha elections, however, are barred from voting in State Legislative Assembly elections. Being citizens of India, they are not stateless persons, but being non-permanent residents of Jammu &

Kashmir, they cannot enjoy the basic rights and privileges as being enjoyed by permanent residents of Jammu & Kashmir. Their status is unequal amongst the equals. The basic aim and object of equality is rule against arbitrariness; arbitrariness and equality are sworn enemies to each other and do not see eye to eye each other. Equality is a means to achieve the ends of Rule of Law to serve the Rule of Life, which seems to be a naught in the case of refugees of West Pakistan settled in the State of Jammu Kashmir. Had they been settled in any part of the territory of India other than Jammu & Kashmir, they ought not to have been the sufferers. In the background of this submission, it appears that Article 35-A does not seem to be compatible with the basic feature of the Constitution of India. Article 35-A is even otherwise violative of the integrity of the nation as enshrined in the Preamble of Constitution of India. Thus, the classification created by Article 35A suffers from the vice of "intelligible differentia"; this differentia is artificial as it has no rational nexus/relationship with the basic object of the Constitution equality. Since Article 35-A is a mishmash of the textual Constitution of India and does not technically and legally qualify to be an Article of Constitution of India, and having already done enough damage and promoted separatists ideologies, so it must be declared as non-existent. For the good of the people of India and for the residents of J&K, Article 35-A must be repealed forthwith as it will pave the way for the development of the State of Jammu & Kashmir and its total integration with the Union of India.

ARTICLE 35A – The Biggest Fraud On The Constitution

Article 35A was not added to the Constitution by following due procedures prescribed for amendment of the Constitution under Article 368. The Executive organ has brought it though the right of amendment to the Constitution lies with the legislative organ. It not only violates the constitutional procedures established by law but also against the basic Structure of the Constitution of India. Addition or deletion of an Article amounts to amendment to the Constitution, which could be done only by Parliament as per procedure, laid down in Article 368. However, Article 35A was never presented before the Parliament. This means the President had bypassed the Parliament in his order to add Article 35A. This also means that the amending power of Parliament under Article 368 of the Constitution was abridged in its application to Jammu & Kashmir.

In other words, we can say that it is an amendment, without any reference to the Parliament. The classification created by the Article 35A suffers from the violation of Article 14, Equality before the Law and also against basic structure of the Constitution. The non-resident Indian citizens cannot have the rights and privileges, same as permanent residents of Jammu and Kashmir. It facilitates the violation of the right of women to 'marry a man of their choice' by not giving the heirs any right to property, if the woman marries a man not holding Permanent Resident Certificate (PRC). Therefore, her children are not given PRC and thereby considering them unfit for inheritance – not given any right to such a woman's property even if she is a permanent resident. It facilitates the free and unrestrained violation of fundamental rights of those workers and settlers like Scheduled Caste and Scheduled Tribe people who have lived there for generations.

The Dalits and Valmiki who were brought to the State of J&K between 1950-60, were given Permanent Resident Certificates on the condition that they and their future generations could stay in the State only if they continued to be scavengers. And even after six decades of service in the State, their children are safai-karmacharis and they have been denied the right to quit scavenging and choose any other profession. The industrial sector and whole private sector suffers due to the property ownership restrictions. Good doctors do not come to the State for the same reason.

Children of non-state subjects do not get admission to state colleges. It ruins the status of West Pakistani refugees. Being citizens of India, they are not stateless persons, but being nonpermanent residents of Jammu and Kashmir, they cannot enjoy the basic rights and privileges as being enjoyed by permanent residents of Jammu and Kashmir. Article 35A gives a free hand to the State government to discriminate between citizens of

India on an unfair basis and give preferential treatment to some by trampling over others, since the non-residents of the State are debarred from buying properties, getting a government job or voting in the local elections. The President of India, by an Executive Order, added the Article 35A in the Constitution though Article 370 does not confer Legislative powers to the President to amend the Constitution of India. Article 35A not only violates constitutional procedures established by law but also the fundamental right guaranteed under Articles 14, 15, 16, 19, 21 of the Constitution.

However, the Executive has not repealed it till date. Addition or deletion of an Article amounts to amendment to the Constitution, which could be done only by the Parliament as per the procedure lay down in Article 368 of the Constitution, but Article 35A was never presented before the Parliament. It means the President of India had bypassed the Parliament. This confirms that the amending power of the Parliament under Article 368 was abridged in its application to the Jammu and Kashmir. The classification created by the Article 35A suffers from violation of Articles 14, 15, 16, 19 and 21 of the Constitution. At present, Indian citizens cannot have the same rights and privileges as enjoyed by the permanent residents of Jammu and Kashmir. That apart, the industrial sector and the whole private sector also suffer due to the property ownership restrictions. Therefore, good doctors do not prefer to come to the State for the same reason.

The Article 35A gives a free hand to the State government to discriminate Indian citizens in arbitrary manner and give preferential treatment to some by trampling over others, since the non-residents of the Jammu & Kashmir are debarred from buying properties, getting a government job or voting in the elections. Article 35A facilitates the violation of the right of a woman to 'marry a man of her choice' by not giving her heirs any right to property, if she marries a man not holding PRC (Permanent Resident Certificate). PRC is not given to her children and thereby considering them unfit for inheritance – not given any right to such a woman's property even if she is a permanent resident of Jammu & Kashmir. Article 35A facilitates the free and unrestrained violation of fundamental rights of those workers and settlers like Scheduled Caste and Scheduled Tribe people who have lived in J&K for generations. Dalits and Valmiki who were brought to the State between 1950-60 were given Permanent Resident Certificates on the condition that they and their future generations could stay in the State only if they continued to be safaikarmacharis (scavengers). And even after six decades of service in

the State, their children are safai-karmacharis and they have been denied the right to quit scavenging and choose any other profession.

The industrial sector and whole private sector suffers due to the property ownership restrictions. Good doctors and experienced engineers and teachers do not come to the State for the same reason. The Children of other States do not even get admission in the Medical, Engineering and Professional Colleges and Universities. Article 35A also ruins the status of West Pakistani refugees. Being the Indian citizen, they are not stateless persons, but being non-permanent residents of J&K, they cannot enjoy the fundamental rights guaranteed under the Articles 14, 15, 16, 19 and 21 and the privileges, as being enjoyed by permanent residents of J and K. Article 35A gives a free hand to the State government to discriminate the Indian citizens in arbitrary manner and give preferential treatment to some by trampling others, since the non-residents of other States are debarred from buying properties, getting a government job or voting in the election.

Article 35A of the constitution is arbitrary and contrary to the Articles 14, 15, 16, 19, 21 of the Constitution. Hence, void and inoperative. Fundamental rights guaranteed under Part-III of the Constitution viz. right to equality, right to employment, right to equal opportunity, right to trade and business, right to form association, right to information, right to marry, right to privacy, right to shelter, right to health and right to education etc., is equally available to all Indian citizens throughout the territory of India including J & K.

ARTICLE 35A: A MISHMASH OF THE TEXTUAL CONSTITUTION OF INDIA!

Introduction — A revisit to Article 35A read with Articles 370 and 368

Article 35A was neither a part of the draft Constitution nor a part of the adopted and enacted text of the Constitution of India. This Article was an addition to the fundamental rights (Part III) of the Constitution by a Presidential Order, viz., Constitutional (Application to Jammu and Kashmir) Order 1954, which extended the application of various provisions of the Constitution of India to Jammu Kashmir with such modifications, exceptions and alterations with the concurrence of the government of the State. Article 368 was also extended in its application to the State but with a proviso to the effect that “no such amendment shall have effect in relation to the State of Jammu Kashmir unless applied by order of the President under clause (1) of Article 370”. Be that as it may, from the reading of this provision it cannot be construed that the President of India is empowered to exercise the constituent power of the Parliament under Article 368 to add any provision in the fundamental rights part in its relation to the State of Jammu Kashmir. The Constitutional (Application to Jammu and Kashmir) Order 1954 of 14 May 1954, which superseded Constitution (Application to Jammu and Kashmir) Order 1950 of 26 January 1950, was issued under the permissible limits of Article 370 — a temporary constitutional provision relating to the State of Jammu Kashmir.[1] Article 370 authorizes the President of India to extend the provisions of the Constitution of India in its relation to the State of Jammu Kashmir as the President may by order specify. Article 370 (1) enjoins four clauses, viz., clauses (a), (b), (c) and (d). Article 370 (1) (a) reads as: “Notwithstanding anything in this Constitution, the provisions of Article 238 shall not apply in relation to the State of Jammu and Kashmir”; Article 370 (b) reads as: “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 the 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; Article 370 (1) (c) reads: “the provisions of Article 1 and of this Article (370) shall apply in relation to that State”. Article 370(1)(d) reads: “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-section (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”.

Legal and Constitutional Construction of Articles 35A vis-à-vis Articles 370 and 368 both from legalese-imperative positivist to creative or pragmatic or realistic or relativist or social engineering interpretation perspectives

A plain reading of the language of Articles 370 and 368, both from legalese-imperative positivist as well as creative or pragmatic or realistic or relativist or social engineering interpretation, conclusively construes that it does not authorize the executive head of the Indian State, i.e., the President, to add by enacting any new provision in the text of the Constitution of India in its relation as well as application to the State of Jammu Kashmir. Of course, the President of India does not perform the constitutional functions entrusted to him himself rather acts with the aid and advise of the Council of Ministers headed by the Prime Minister of India, and as such, the text of the Constitution of India does not authorize the Council of Ministers to render such aid and advise to the President of India by adding any provision in the text of the Constitution of India in its relation and application to the State of Jammu Kashmir which is contrary to the constitutional permissibility. The constituent power to amend by way of addition, variation or repeal any provisions of the Constitution of India belongs to the Parliament under the umbrella of Article 368 and this power is an essential constituent function which cannot be effaced or abdicated or handed down to any other agency of the Government including the executive head of the Indian State — the President of India. Besides, the continuance retention of Article 238 in the textual language of Article 370 is itself ultra vires the basic structure of the Constitution of India because Article 238 stands repealed by the Constitution Seventh Amendment Act, 1956, by the enactment of Reorganization of States Act, 1956, which had done away with the nomenclature of Part A, Part B and Part C States. It seems a paradox! Further, the soup and sauce of the words ‘dominion of India’ and ‘dominion legislature’ could have been evaporated from the language of Article 370, because India and its Legislature are no more ‘dominion’ of any foreign agency or autochthony since India that is Bharat is the sovereign democratic republic from the adoption and enactment of the Constitution of India.

Constitutional (Application to Jammu and Kashmir) Order 1954 — The mother of Article 35A

Could the President step into the shoes of the Parliament while enacting Article 35-A through Constitutional (Application to Jammu and Kashmir) Order 1954? CO 1954 reads that after Article 35, the following new article shall be *added*, namely: 35A. Article 35-A reads: “*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 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”.

Analysis of Article 35A — Constitutional anomalies: a case for Constitutional Conviviality

The sole object of this new added Article 35A by the Presidential CO 1954 is to provide special rights and privileges to the permanent residents of Jammu Kashmir being citizens of India vis-à-vis the citizens of India, viz., employment in the State Government; acquisition of immovable property; settlement in the State; or scholarships and other forms of aid as per the discretion of the State Government. Article 35A makes a distinction between permanent residents of Jammu Kashmir as citizens of India and citizens of India not being permanent residents of Jammu Kashmir, and refugees from West Pakistan as citizens of India settled in Jammu Kashmir but not being permanent residents of the State of Jammu Kashmir. Both legalese-imperative positivist and creative or pragmatic or realistic or relativist or social engineering interpretation to the language of Article 35A leads to construe that permanent residents of the State of Jammu Kashmir being citizens of India enjoy special fundamental right and privileges within the State and also in any part of the territory of India; citizens of India not being permanent residents of the State enjoy fundamental rights in any part of the territory of India except the State of Jammu Kashmir; refugees from

West Pakistan, settled in the State of Jammu Kashmir, not being permanent residents of the State of Jammu Kashmir but being the citizens of India do enjoy the fundamental rights in any part of the territory of India but are deprived to enjoy the rights and privileges within the State of Jammu Kashmir. The provisions of Indian citizenship enjoined in Articles 5 to 11 of Part II of the Constitution of India shall be deemed to have been in relation to the State of Jammu Kashmir as from the 26th day of January 1950 as per CO 1950 and reiterated in CO 1954. The provisions relating to Indian citizenship do not make any of the distinctions as enumerated above. Thus, the classification created by Article 35A suffers from the vice of “intelligible differentia”; this differentia is artificial as it has no rational nexus/relationship with the basic object of the Constitution equality. What is the status of West Pakistani refugees? Are they stateless persons? Being citizens of India they are not stateless persons, but being non-permanent residents of Jammu Kashmir they are worst than stateless persons because they cannot enjoy the rights and privileges as being enjoyed by permanent residents of Jammu Kashmir. Their status is unequal amongst the equals. The basic aim and object of equality is rule against arbitrariness; arbitrariness and equality are sworn enemies to each other and do not see eye to eye each other. Equality is a means to achieve the ends of rule of law to serve the rule of life, which seems to be a naught in the case of refugees of West Pakistan settled in the State of Jammu Kashmir. Had they been settled in any part of the territory of India other than Jammu Kashmir, they ought not to have been the sufferers. In the background of this submission, it appears that Article 35A does not seem to be compatible with the basic feature of the Constitution of India.

The constitution Bench of the Supreme Court of India in *Bachan Lal Kalgotra v. State of Jammu and Kashmir* [2] had lost the opportunity to explain the constitution truth of Article 35A. It seems that the Apex Court was in oscillation in handing down the correct judicial policy with regard to the interpretation of the language of Article 35A. The vacillation of judicial verdict is clear from the conclusions drawn in the said case which shows that they have “vast undone” approach to the interpretation of Article 35A; it also shows “willing to wound but afraid to hurt” judicial approach; it also unfolds, with due apologetic submission, that the judges of the higher court are right because they are superior, not superior because they are right. The chief contentions in the said case were that refugees from West Pakistan domiciled in Jammu Kashmir State for forty years (now about sixty five years) had been denied permanent resident status in the State of Jammu Kashmir and basic rights of citizenship as available to the permanent residents of Jammu Kashmir, right to acquire immovable

property in the State, right to higher technical education and right to be elected to the State Assembly and local bodies. They had sought the permissibility under Article 35A read with section 6 of the Constitution of Jammu Kashmir thereof as permissible to the permanent residents of the State being the citizens of India. In the backdrop of the circumstances, the Apex Court, while dismissing the petition, explained its vacillation in these words:

In view of the peculiar Constitutional position obtaining in the State of Jammu and Kashmir, we do not see what possible relief we can give to the petitioner and those situate like him. All that we can say is that the position of the petitioner and those like him is anomalous and it is up to the Legislature of the State of Jammu and Kashmir to take action to amend legislature, such as, the Jammu and Kashmir Representation of the People Act, the Land Alienation Act, the Village Panchayat Act, etc. so as to make persons like the petitioner who have migrated from West Pakistan in 1947 and who have settled down in the State of Jammu and Kashmir since then, eligible to be included in the electoral roll, to acquire land, to be elected to the Panchayat, etc. This can be done by suitably amending the legislations without having to amend the Jammu and Kashmir Constitution. In regard to providing employment opportunities under the State Government, it can be done by the Government by amending the Jammu and Kashmir Civil Services, Classification of Control and Appeal Rules. In regard to admission to higher technical educational institutions also, the Government may make these persons eligible by issuing appropriate executive directions without even having to introduce any legislation. The petitioners have a justifiable grievance. We are told that they constitute nearly seven to eight per cent of the population of the State of Jammu and Kashmir. In the peculiar context of the State of Jammu and Kashmir, the Union of India also owes an obligation to make some provision for the advancement of the cultural, economic and educational rights of those persons. We do hope that the claims of persons like the petitioner and others to exercise greater rights of citizenship will receive due consideration from the Union of India and the State of Jammu and Kashmir. We are, however, unable to give any relief to the petitioners.

A neat scanning of the judicial oscillating observation shows that how the refugees from West Pakistan domiciled in the State of Jammu Kashmir have been made hapless victims in their own soil which they own close to their heart and soul. What a paradox!

Concluding observation:

Had the Apex Court interpreted the language of Article 35A vis-à-vis Articles 370 and 368, not in the legalese-imperative positivist approach, in the creative or pragmatic or realistic or relativist or social engineering or integrationist perspective, there could not have been the vices of haplessness, constitutional permissibility, incompatibility with the basic feature, inequality, bad classification having no rational nexus with the object of the constitutional law sought to be achieved.

“Article 35-A, A Constitutional Harakiri in J & K”

In the Constitution of India, the Article 370 is a constitutional web, always a fascinating subject for a student of constitutional law. Article 370 provides the mechanism to establish the system of governance in the State. Therefore, it would be interesting to closely examine the issue as to what is the constitutional scheme of Article 370.

The Reagent of Jammu and Kashmir on 25.11.1949 accorded his acceptance to the finally approved Draft Constitution of India. The Constituent Assembly enforced Article 394 itself, Articles 5, 6, 7, 8, 9, 60, 366, 367, 379, 380, 388, 391, 392 and 393 w.e.f 26.11.1950 and enforced rest of the Articles including Article 370 w.e.f. 26.01.1950.

On commencement of Constitution of India, by virtue of its own language of Article 370, only Article 1 and 370 were made applicable in relation to the State of Jammu and Kashmir. The Article 1 (1) declares that “India, that is Bharat, shall be a Union of States” Article 1 is a solemn declaration of the People of India that the Union of States is an indestructible Union of States. Therefore, no state has any power to secede from the Union. The issue of accession of the States stands settled politically and constitutionally and no one can make any reference to any term of the Instrument of Accession, so as to buttress any claim of sovereignty in people of Jammu and Kashmir as a distinct entity.

The constitutionalism is the power of governance derived by “WE THE PEOPLE OF INDIA”, entrusted to the constituted authorities and is limited by the Constitution of India. Therefore, it would be appropriate to identify the constituted authorities created under Article 370 itself who have been charged with the responsibilities of setting up the system of governance in the State of Jammu and Kashmir. Article 370 as originally enacted reads as thus;

370. (1) Notwithstanding anything in this Constitution,—

(a) the provisions of article 238 shall not apply 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 purposes of this article, the Government of the State means the person for the time being recognised by the President as the Maharaja of Jammu and Kashmir acting on the advice of the Council of Ministers for the time being in office under the Maharaja's Proclamation dated the fifth day of March, 1948;

(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 proviso 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.

At first stance, under Sub-Clause (a) of Clause (1) of Article 370, the Article 238 had been made inapplicable in relation to Jammu and Kashmir. Sub-Clause (a) is to be read with clause (2) of Article 370 so as to determine the scope of the work of state constitution making assigned to the State Constituent Assembly. The issue has arisen as to the width of the powers of the State Constituent Assembly to frame constitutional provisions which do not relate to part VI of the Constitution. However, due to paucity of space, the issue is not being discussed further.

Part VI of the Indian Constitution was not applicable at the first stance and rest of the provisions except Article 1 and 370, were to be applied by the President in exercise of powers under sub-clause (d) of the Clause (1) of Article 370.

The issue at hand is whether the President while exercising powers under sub-clause (d) of the Clause (1) is under some limitation and if so the extent of those limitations. The situation has emerged after the Judgment of

the Constitutional Bench of the Hon'ble Supreme Court in the cases of Kesavanand Bharti Vs State of Kerala (1973) 4 SCC 225, Smt. Indira Nehru Gandhi Vs Shri Raj Narain [1975] Sup SCC 1, Minerva Mills Ltd Vs Union of India [1980] 3 SCC 625 and R. C. Poudiyal Vs Union of India [1994] Supp. I SCC 324 on Basic Structure Theory.

If the President assents to an Amendment passed by two Houses, having the effect of effacement of the Basic Structure of the Constitution, the President who is under constitutional oath under Article 60 to preserve and uphold Constitution, can not be said to be true to his oath to preserve, protect and defend the Constitution. In Kesavanand Bharti Vs State of Kerala (1973) 4 SCC 225, the Article 60 along with the other constitutional provisions constituting the scheme of the Constitution has been held to operate as implied limitation on the width of powers of the Parliament to amend the constitution and thus, the theory of Basic Structure as sacrosanct emerged. The President by virtue of his oath, while applying Constitutional Provision with or without modification or restrictions in relation to J & K is under constitutional obligation to observe and preserve the fundamental features of the Constitution of India. The powers of the President being subject to such limitations of basic structure, the earlier decision of the Hon'ble Supreme Court of India in the case of Puran Lakhnupal Vs. The President of India and Others AIR 1961 SC 1519 upholding no limitation upon the powers of the President appears to be no longer good in law. It is humbly submitted that Puran Lakhnupal (Supra) has also been simply followed by the Hon'ble Supreme Court in the case of Sampat Vs J. & K. State AIR 1970 SC 1118 and both the judgments are the Judgments rendered in the period prior to the Judgment of the Hon'ble Supreme Court in the case of Kesavanand Bharti (Supra) and other judgments referred above.

The constitutional scheme does not appear to allow the President to efface or modify any basic structure / fundamental feature. Thus the issue has arisen how the two provisos to sub-clause (d) of Clause (1) of the Article 370 providing the requirement of consultation or concurrence with the state government can be said to be applicable in such case and the powers of the President to apply basic structure appears to be residing in the sub-clause (d) of Clause (1) of the Article 370 without any further

reference to two provisos. The issue is the nature of the powers of the President coupled with a constitutional duty to apply basic structure in relation to the State of Jammu and Kashmir.

The Right of Equality and equal protection of law under Article 14, Right to opportunity of educational institute funded by the State under Article 14 and 15, Right of employment in the State Services and Public Sector Institutions under Article 16, Right to reside and settle in any part of India (right to shelter) under Article 19(1)(e) and right to life under Article 21 are the human rights conferred under a constitutional scheme, by the people of India upon themselves, for the proper development as a human being and such rights have been held to be part of Basic Structure of the Constitution.

The President in purported exercise of powers under sub-clause (d) of Clause (1) of the Article 370 issued “The Constitution Order (Application to Jammu and Kashmir) Order 1954” whereby Part III relating to fundamental rights has been applied; but clause (3) of Article 16, reference of clause (3) of Article 16 in Article 35 has been omitted and an Article 35-A has been added after Article 35 in Part III in relation to Jammu and Kashmir.

Under the well-nit constitutional scheme, clause (3) of Article 16 and sub-clause (i) of clause (a) of Article 35 cumulatively provide for absolute and unalterable legislative powers of the Parliament, as against the absolute constitutional prohibition against the state legislature, to make law prescribing, in regard to a class or classes of employment or appointment to an office under the Government of, or any local or other authority within, a State, any requirement as to residence within that State prior to such employment or appointment. Article 35 starts with a Non-Obstante Clause and appears to be beyond the amending powers of the Parliament. The clause (3) of Article 16 was numbered and debated as clause (2a) after the clause (2) of Article 10 of the Draft Constitution. Shri Alladi Krishnaswami Ayyar while moving the insertion of clause (2a) of Article 10 observed as below;

The object of the amendment is clear from the terms and the wording of it. In the first part of the article, the general rule is

laid down that there shall be equal opportunity for all citizens in matters of employment under the State and thereby the universality of Indian citizenship is postulated. In paragraph 2 of article 10, it is expressed in the negative, namely that no citizen shall be ineligible for any office under the State by reason of race, caste, sex, descent, place of birth and so on. The next two clauses are in the nature of exceptions to the fundamental and the general rule that is laid down in the first part of the article. Now what the present amendment provides for is this that in case of appointments under the State for particular reasons, it may be necessary to provide that residence within the State is a necessary qualification for appointment by and within the State. That is the object of this amendment and instead of leaving it to individual states to make any rule they like in regard to residence, it was felt that it would be much better if the Parliament has lays down a general rule applicable to all states alike, especially having regard to the fact that in any matter concerning fundamental rights, it must be the Parliament alone that has the power to legislate and not the different Units in India. Under these circumstances I propose this amendment for the consideration of the House.

Dr. Ambedkar during the debate on the draft clause at hand, intervened and observed as below;

I did not quite follow. I shall explain the purpose of this amendment. (It is the feeling of many persons in this House that, since We have established a common citizenship throughout India, irrespective of the local jurisdiction of the provinces and the Indian States, it is only a concomitant thing that residence should not be required for holding a particular post in a particular State because, in so far as you make residence a qualification, you are really subtracting from the value of a common citizenship which we have established by

this Constitution or which we propose to establish by this Constitution. Therefore in my judgment, the argument that residence should not be a qualification to hold appointments under the State is a perfectly valid and a perfectly sound argument. At the same time, it must be realised that you cannot allow people who are flying from one province to another, from one State to another, as mere birds of passage without any roots, without any connection with that particular province, just to come, apply for posts and, so to say, take the plums and walk away. Therefore, some limitation is necessary. It was found, when this matter was investigated, that already today in very many provinces rules have been framed by the provincial governments prescribing a certain period of residence as a qualification for a post in that particular province. Therefore the proposal in the amendment that, although as a general rule residence should not be a qualification, yet some exception might be made, is not quite out of the ordinary. We are merely following the practice which has been already established in the various provinces. However, what we found was that while different provinces were laying down a certain period as a qualifying period for posts, the periods varied considerably. Some provinces said that a person must be actually domiciled. What that means, one does not know. Others have fixed ten years, some seven years and so on. It was therefore felt that, while it might be desirable to fix a period as a qualifying test, that qualifying test should be uniform throughout India. Consequently, if that object is to be achieved, viz that the qualifying residential period should be uniform, that object can be achieved only by giving the power to Parliament and not giving it to the local units, whether province or States. That is the underlying purpose of this amendment putting down residence as a qualification.

Thus the debates demonstrate that 'clause (3) of Article 16' and 'reference of clause (3) of Article 16 in Article 35' are inserted in pursuance of a well

thought out constitutional scheme of the fundamental rights which denudes the states from exercising any legislative powers to prescribe residence as requirement for employment in State services.

The President by means of Constitution Order 1954 effaced the 'clause (3) of Article 16' and 'reference of clause (3) of Article 16 in Article 35' in relation to Jammu and Kashmir and inserted Article 35-A in Part III in order to transfer such powers to the State Legislature. Article 35-A reads as thus;

"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."

Prior to the issue of "Constitution Order 1954", the term "Permanent Resident" had not figured anywhere in any of the "Constitution Order" nor in any Constitutional provision in J & K. Clause (a) of Article 35A confers powers on the State legislature to define "Permanent Resident". The issue has arisen as to whether the President can introduce a clause viz. clause (a) of Article 35-A conferring powers upon the State Legislature to define a

class of persons as “Permanent Residents” without any reasons or object of classification.

By virtue of Clause (a) of Article 35-A, the State Constituent Assembly enacted Section 6 defining “Permanent Resident” as the class of persons who had settled in the State as “State Subjects” in the period prior to May 1944 and their heirs only shall continue to be treated permanent resident irrespective of the fact that they actually reside in state of J & K or not. The status of “Permanent Residents” in the state of J & K appears to be a status by heredity now. The issue has arisen as to whether the citizens who are not termed as “permanent resident” can claim to be factually “permanent resident” of J & K.

Section 6 of the Constitution of J & K has been referred to in relevant legislations, rules and regulations to exclude the other citizens the right to seek admission in the State funded Medical Colleges and State Funded Engineering Colleges and Polytechnics, right to acquire and hold even a limited immovable property to built a home for his shelter under Article 19(1)(e) read with 19(1) (f), right to be considered for employment in the State Services or State Instrumentalities guaranteed under Article 14 and 16, and right to purchase and acquire limited property to start a small business even. So, the issue to be pondered is, “whether a life of a human without such human rights is a life at all or not?”

Part B

Concerns of those who are affected by Article 35-A

- Article 35A has forced Dalits in Jammu into a pathetic life. Unable to get a PRC they are devoid of jobs & education. But despite being victims of the Article they have never gone against the State.
- Article 35A has rendered lives of Dalits settled in Jammu hopeless. They are trapped into a vicious cycle of refugee life without a PRC, which they would never get because of 35A. Without PRC they are ineligible for any job and scavenging is the only option left with them to make their both ends meet.
- Because of Article 35-A children of those refugees who migrated to Jammu from west Pakistan have no rights, not even voting rights in spite of their parents having served in armed forces.
- Article 35-A and various other provisions of the constitution of J&K have deprived the marginalized population of the state of their basic constitutional voting right.
- The existing constitutional provisions in J&K have long treated the refugees from the then West Pakistan as outsiders and these people have been deprived of their rightful legal rights including rightful inheritance to land. Further their deep connect with India debunks the myth that lack of development leads to alienation.
- Article 35-A has denied the women of J&K of their right to property on marrying outsiders as also putting limitations on the constitutional and educational rights of their children. Ironically, such exclusionary provisions do not apply to the men marrying outsiders.
- Article 35-A allows section 6 of the J&K constitution to provide for discriminatory clauses i.e. rights of PRC vs non-PRC holders, rights of male vs female on marrying non-PRC.
- J&K based political class has constantly misguided the local youth to rise against India and utilize them for their own vested interests while protecting their own kith and kin from the turbulence.
- Abrogation of Article 370 would sever the umbilical cord of the state of J&K from India, is a baseless and false propaganda by the vested

political class of the state. Article 370 did not even exist when the accession was signed. Article 3 of the J&K constitution clearly mandated that J&K would remain an integral part of India. Article 147 of the J&K constitution also mandates that article 3 cannot be amended under any circumstances. Article 370 was included as a temporary provision in the constitution.

- J&K has no sovereignty outside the Constitution of India as declared by SC Judge.