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ARTICLE 35 A AND ITS COMPLICATION OF JAMMU & KASHMIR

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ABSTRACT

As of late, there has been an extraordinary discussion on the legitimacy of Article 35A of the Constitution, explicitly as it concerns J&K. This Article engages the state assembly to characterize "changeless occupants" of the express, their uncommon rights and benefits. It was additional to the law of the land through an executive demand of 1954 by the simultaneousness of the state administration of the day yet According to the Constitutional plan, legitimately the question of that Does the Chief of the country have sole capacity toward altering the Constitution through "Request"?. The present article features the legitimacy of the Constitution's Article 35A.

Keywords: Article 35A, Jammu & Kashmir, permanent residents

1. INTRODUCTION

One thing that has consistently activated me into a field of disarray is that out of 29 states in our nation why the Indian government has given extraordinary status to Jammu and Kashmir. What was the genuine story behind it? Presently to discover the answer to that why I began looking through articles furthermore, changes identified with Jammu and Kashmir and discovered the most disputable article for example Article 35-A. I began looking a few data sources in regards to Article-35 An in Bare Demonstration of Constitution however couldn't discover Article 35-An in it. I asked why Article-35 A has not been even referenced in Constitution's Bare Act book. Furthermore, this episode activated me to go for a profound investigation on Article-35 An and that is the reason I chose to compose an examination paper on it. Article 35A is an arrangement joined in the Constitution giving the Jammu and Kashmir Legislature an unconditional authority to choose who all are „permanent residents“ of the State and present on them unique rights and benefits in open division occupations, procurement of property in the State, grants and other open guide and government assistance. ¹It was added to the constitution through a presidential request of 1954 with the then Jammu and Kashmir government's concurrence. ²This Article 35A has not

¹ The Constitution (Application to Jammu and Kashmir) Order, 1954

² The Constitution (Application to Jammu and Kashmir) Order, 1954

been referenced in the primary content of the Constitution of India yet has been referenced as it were in Appendix–I THE CONSTITUTION (APPLICATION TO JAMMU AND KASHMIR ORDER,1954 to the Constitution of India. It is the Constitution (Application to Jammu and Kashmir) Request of the President of date 14 May 1954 that is set as Informative supplement – I to Constitution of India and just that (Appendix-I) Workmanship 35A is referenced.³

2. HISTORICAL ASPECT

J&K has been seeing broad fights and passing's in the state for years. To comprehend the Kashmir emergency it is basic to take a gander at the verifiable parts of J&K unequivocally. Jammu-Kashmir was a regal state under the British Empire in India and governed by the Dogra line. Since 19thcentury Jammu had been the decision place of Dogra Rajput's when Maharaja Gulab Singh was made an inherited lord by Sikh ruler Ranjit Singh. Maharaja Ranjit Singh had attached this area from Afghan rulers in 1819. After the Sikh destruction in the First Old English Sikh war (1845-1846) and under the Treaty of Amritsar (16 walks 1846), Gulab Singh, Raja of Jammu bought Kashmir from the East India Company for a reimbursement installment of 7.5 million Nanakshahi rupees, what's more, became Maharaja of Jammu and Kashmir. Jammu-Kashmir turned into a free august state under the suzerainty of the British Empire. ⁴Maharaja Hari Singh, the last leader of J&K was coroneted in 1925. He was administering the state at that point of freedom too. In 1947, when British India was separated into India and Pakistan under the Two-Nation hypothesis and the Indian Independence Act 1947 closure the suzerainty of the British Empire. During British standard, India has included domains direct under the British crown and 565 royal states. Regal states had control over their inward issues with the exception of resistance and outside undertakings. The Government of India presented the idea of the Instrument of Accession.⁵ J&K turned into a position of disputes in 1947 when there was a question before august states to join either India or Pakistan of which J&K was a section. According to the arrangement

³ Appendix–I THE CONSTITUTION (APPLICATION TO JAMMU AND KASHMIR ORDER,1954
http://jklaw.nic.in/constitution_jk.pdf

⁴ Digital Rare Book - Panikkar, K. M. 1930. Gulab Singh. London: Martin Hopkinson Ltd. p 111-125 -
https://www.rarebooksocietyofindia.org/postDetail.php?id=196174216674_10153458895756675

⁵Instrument of accession of jammu and kashmir_state,
http://jklaw.nic.in/instrument_of_accession_of_jammu_and_kashmir_state.pdf

of Divide and Rule British Government gave the states this decision to join either India or Pakistan. ⁶ After a long battle of promotion of regal states Junagarh, Hyderabad and J&K left with the inconvenience. Later on Junagarh and Hyderabad additionally turned into the piece of India according to the endeavors of Sardar Patel with a few formulae like bordering regions to India and decision dependent on the main religion of the populace. Extraordinarily J&K had basic limits with India and Pakistan both. Also, J&K had strict polarity between the standard of the Dogra line and most of the populace that was Muslim. This was a significant issue identified with the fate of J&K. Before the beginning of October 1947 inborn attacks from northwest Frontier Province, Maharaja expected to remain autonomous. Be that as it may, after the blockade of huge towns when these tribesmen up flooding towards Srinagar, Maharaja called for Military help from India which was given under the states of increase to India concerning the individuals. On October 26, 1947, the Maharaja offered a letter of increase to India, acknowledged by India without a vote by the Kashmiri individuals which prompted a discussion on the authenticity of accession.

3. SITUATION AND DEBATES BEFORE THE INDEPENDENCE AND DURING INDEPENDENCE

A. Prior to Independence (1927, 1932)

The questionable Article 35A of the Constitution, which is right now being tested in the Supreme Court for bearing Jammu and Kashmir Assembly lawful assent to give uncommon benefits to "changeless inhabitants", especially by forestalling non-State occupants to appreciate citizenship rights in the State. The discussion is frequently depicted as an issue of "uncommon status" of Jammu and Kashmir and the Article as a type of strange admission to the State. In the mid-twentieth century, political developments in the state were risen out against outcasts for the political character of individuals living in Kashmir. "Kashmir for the Kashmiri" development was flung by the Kashmiri Pandit network which was increased by the proceeding with the nearness

⁶ Khan Fakiha 2001 "Nuking Kashmir: Legal Implications of Nuclear Testing by Pakistan and India in the Context of the Kashmir Dispute" 29 Ga J Int'l & Comp Ltd. p 363, <https://digitalcommons.law.uga.edu/gjicl/vol29/iss2/6/>

of 'outcasts' from that point Punjab in government administrations. They raised an interest that solitary Kashmiris should just be utilized in state government occupations. On April 20, 1927, the then Maharaja of Kashmir, established Hereditary State Subject Order which conceded the particular state subjects with the privilege to circumstances in government workplaces and the option to land use and proprietorship. These rights were stretched out exclusively to the state subjects and disposed of any accessibility of the equivalent to the non-state subjects as request gave by Maharaja on June 27, 1932.⁵ Notification of 1927 by Maharaja restricted the work of non-state subjects in the open administrations; they were additionally not permitted to buy land which was increasingly basic for the fascination of the houseboats to British holidaymakers. "Kashmir In Strife: India, Pakistan and the Unending War".⁷ Under the warning 1932, displaced people from J&K State to outside regions will be viewed as State subjects and furthermore, the relatives of these exiled people brought into the world abroad for two ages these nationals of Jammu and Kashmir State will not be qualified for guarantee the inner rights conceded to subjects of this State by-laws. (Notice No. 13-L/1989, Issued by request of His Highness the Maharaja Bahadur dated Srinagar, the 27th June 1932, fourteenth March 1939, distributed in the Government Gazette dated 24th March 1989).

B. During Independence

In 1947, when British India was partitioned into two territories India and Pakistan by the Indian Independence Act 1947. This demonstration slipped by the centrality of the British Crown over the august states in India and set off the fire of division of the land. This was the phase when the states were allowed to pick any of the territory either India or then again Pakistan or could remain autonomous. There were 565 august states as perceived in British India. Nearly every single august state agreed to either India or Pakistan calmly aside from Hyderabad, Junagarh and Jammu Kashmir. Later on, the additional procedure was understood out for each of the three states however J&K. According to the segment status of J&K, the state with the larger part of the Muslim

⁷ Malhotra V P Brig (Retd) 2010 "Security and Defense Related Treaties of India", Vij Books India Pvt Ltd, New Delhi, pp 65-67, <http://journal.jusimperator.org/wp-content/uploads/2020/04/SUNIL-KUMAR-MISHRAv3i3.pdf>

populace was relied upon to join Pakistan however according to the common underlying foundations of Kashmir valley and partners with Indian National congress it was relied upon to join India.⁸

4. WHAT IS 35 A AND IT'S SPECIAL STATUS

A. Article 35 A

Article 35A was fused into the Constitution in 1954 by a request for the then President Rajendra Prasad on the counsel of the Jawaharlal Nehru Cabinet. The dubious Constitutional (Application to Jammu and Kashmir) Order of 1954 trailing the 1952 Delhi Agreement among Canter and J&K state, which broadened Indian citizenship to the 'Express subjects' of Jammu and Kashmir. Article 35A is an interesting arrangement of the Constitution of India however it is a piece of the Constitution, yet doesn't figure among the articles of the constitution. It isn't found after article 35 in the constitution however in Appendix I of the Indian constitution. Article 35A enables the Jammu and Kashmir State Legislature to characterize the rights and benefits of the State's 'lasting inhabitants' and their uncommon rights and benefits. It was uncommonly figured to secure the State subject laws that had just been characterized under the Dogra ruler Maharaja Hari Singh's system and told in 1927 and 1932. All things considered, this Article which came into power in 1954 with no nearness in the middle the articles had been unusual to people in general of India directly before the petitions brought up in the Supreme Court of India testing its sacred legitimacy. A Jammu based Non-Governmental Organization (NGO), "We the Citizens," West Pakistan Refugees Action Board of trustees lastly an appeal documented in May 2017 by Charu Wali Khanna, a legal counsellor and previous individual from the National Commission for Women, and Seema Razdan Bhargav, a specialist. They alluded to a judgment by the Jammu and Kashmir High Court in 2003, which transcripts that the state lawmaking body had not authorized any law characterizing changeless inhabitants. So "under the appearance of Article 370 and Article 35A, the people state subjects are

⁸ Guha, Ramachandra (2008), India after Gandhi: The History of the World's Largest Democracy, Pan Macmillian, pp. 220

exposed to various medications." It in this manner upraised an extraordinary discussion among all levels of the intellectual elite. A lady inhabitant of J&K Parabhjit Kaur Modi has been ceaselessly living and working in the state after her marriage, alongside her non-J&K occupant spouse and two kids had advanced in High court of J&K against the arrangement of Article 35A disregarding the standards of sexual orientation uniformity by victimizing ladies inhabitants of the state who wed an individual from another state. Her youngsters are not qualified for the Changeless Resident Certificate (PRC) or the advantages of the state subject in J&K like the option to secure unflinching property, getting admissions to proficient universities and utilized under government occupations. In 2002, the ladies of the state won the option to hold their perpetual inhabitant status after marriage. In any case, the separation proceeds with their youngsters are as yet not qualified for the PRC. They despite everything can't acquire their mother's property.⁹

B. Special Status –

we go through the proceedings of the Constituent Assembly it is clear that the issues concerning Jammu and Kashmir were discussed twice – first on 27 May 1949, and again on 17 October 1949. While discussing the Article 306 A of the draft constitution, a Muslim member of the Constituent Assembly, Maulana Hasrat Mohini, had warned that the grant of special status to Kashmir (on the score of religion) would enable it to “assume independence afterward.”¹⁰ Ultimately on 17 October 1949, the Indian Constituent Assembly adopted Article 370 as produced draft article 306 by Gopal Swamy Ayyenger of the Constitution ensuring the special status and internal autonomy to Jammu and Kashmir due to special conditions. Being a disputed territory, a fair and impartial plebiscite was required to be held in the state as per the UN mandate.

Subsequently, an uncommon status was given to the express that plainly gives that the arrangements of this Article with regard to the State of J&K are just 'brief' and not lasting.

⁹ Ahmed Ali Fayyaz, “J&K State-Subject Law on Property Rights Challenged Afresh in HC,” The Hindu, December 07, 2013, <http://www.thehindu.com/news/national/jk-statesubject-law-on-property-rightschallenged-afresh-in-hc/article5431349.ece>

¹⁰ Constituent Assembly Debates, Book No 5, Vol. Nos. X-XII, 6 Oct 1949 to 24 Jan 1950, reprinted by Lok Sabha Secretariat, New Delhi, Second Edition, 1989, p. 428, <http://www.indiandefencereview.com/revisiting-27-may-1949-to-understand-nehru-and-his-kashmir-policy/>

The Article came into power on 17 November 1952. Article 370 was figured to ensure the privileges of the state to draft its own constitution and to choose the extra powers to stretch out to the Union Government. Also, this article had a grave component not to be altered or abrogated by both of Union or State singularly. Article 370 hypothesized that the articles of the Indian Constitution enabling the Union Government over J&K would just be applied to the state with the simultaneousness of the State's constituent get together. This was a "transitory arrangement" which is expected to be relevant till the definition and reception of the State's constitution. This article itself gives the strategy for its change or disavowal in the constitution, that the Article will stop to be employable on the proposal of the Constituent Assembly of the State.¹¹

5. WHETHER IT IS A VOILATION OF FUNDAMENTAL RIGHTS

Indian constitution has constantly secured certain segments of the general public which have endured unfairness truly. Similarly, the Indian Constitution secures certain states to invulnerable from the constitution under part XXI which says "Impermanent, Transitional and Exceptional arrangements" given in from Article 369 to 392. In this part, the Indian Constitution to gives some impermanent stipulations to the State of Jammu and Kashmir. The primary expect to give these states some exceptional and impermanent arrangement was to ensure these states sway in certain territories. Furthermore, these are a portion of the highlights of our nation that makes our nation progressively just. Among every one of these arrangements Article 35A is the most far from being obviously true article identified with the province of Jammu furthermore, Kashmir and as indicated by this article a non-lasting occupant of the province of Jammu furthermore, Kashmir can't appreciate any legislature offices. Presently as we probably are aware there are two greatest contentions identified with Article 35A. Firstly, it is against the idea of equity among the Indian Citizens as we have examined previously. Also, is the inclusion of Article 35A in the Indian Constitution. The Presidential request made under Article 370 condition (1), sub provision (d) which engage the president to make special

¹¹ Das Gupta, Jyoti Bhusan 2012, "Jammu and Kashmir", Springer, p229,
https://www.researchgate.net/publication/332786796_ARTICLE_35A_ITS_IMPLICATIONS_A_QUEST_OF_STABILITY_IN_JAMMU_KASHMIR

cases and changes with respect to the state subjects and it ought to be steady with the State Government. Presently the principal debate is concerning the presidential request of 1954, Article 35A, Article 370 (1) (d). Presently it offers some significant conversation starters for example,

- whether the leader of India has the capacity to alter the constitution or not?
- Whether Article 35A is intrinsically legitimate as it appeared by the bypassing of all protected instrument?
- Presently to respond to every one of these inquiries we have to know the historical backdrop of how Article 35A was joined in the Indian Constitution.

A revision of this Constitution might be started distinctly by the presentation of a bill for the reason in either House of Parliament, and at the point when the bill is cruised in each House by the greater part of the all-out enrolment of that House what's more, by a larger part of at the very least two-third of the individuals from that house present and voting,(it will be introduced to the president who will give his consent to the bill and immediately) the Constitution will stand corrected as per the terms of Bill" Along these lines, it is very certain that Article 368 is the main approach to change the constitution by the method of expansion, variety or by cancelling any of the stipulations of the constitution. Hence taking into thought all the stipulation been referenced under Article 368 and Article 370, and deciphering it in all the habits conceivable it is clear that it doesn't approve the president for example the Executive head of India to include by sanctioning any new arrangements in the Indian Constitution in its connection just as an application to the territory of Jammu and Kashmir. Indeed, even on account of *Puranlal Lakhanpal v. The Leader of India* ¹²it was held that special cases and changes term must be deciphered in the most stretched out way conceivable, thus The President of India has the ability to 'change' the Constitution under Article 370. However the pinnacle court didn't talk about Article 35A of the Indian Constitution what's more, didn't clarified whether the president has the sole capacity to revise the constitution without the parliament. Since this has not been talked about even by the pinnacle court, it is pointing towards a

¹² AIR 1961 SC 1519

deduction that the President exclusively can't revise the constitution without including the parliament.

6. CONCLUSION

By the above investigation, we can say that neither the President of India has the selective capacity to correct the constitution through sidestepping the whole Constitutional instrument nor the Article 370 offers the capacity to the President to embed any Article in any Part of the Constitution. As indicated by the Constitutional plan, legitimately the topic of that the president can't make protected changes is settled yet 35-A it is something other than a legitimate issue. It is the need of great importance to discuss Article 35A in light of the fact that it has not just a protected or lawful issue, unexpectedly, it has a bigger financial and policy cantered issue. At present, the issue is sub judice under the steady gaze of the zenith court let's see what will be the choice of the Supreme Court of India on the Constitutionality of Article 35A. Subsequently mulling over all the above mentioned referenced focuses and alluded cases it is very clear that Article 35A isn't naturally substantial, and it is going about as a hindrance to the target of our constitution that is Equality and it is additionally hampering the genuine soul of the unity of our nation. Henceforth since Article 35A is unavoidably not legitimate it ought to be rejected off from our Indian Constitution.