



Policies & Perspectives



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In recent months and years, the common narrative on the ground in Jammu & Kashmir has revolved around regular unrest in the Kashmir valley, repeated cross-border driven terrorist attacks and encounters between Indian security forces and militants. The off-the-ground confrontation has been on the contentious Article 370 of the Constitution of India that confers special rights to the State by way of “temporary provisions”. There has been a clamour for its repeal on the ground that it has failed in its endeavour to effectively integrate the State into the Indian Union, and for its continuation on the premise that it is a principle element in actualising the integration not just in letter but also in spirit. Without going into the details of the provision, it would be useful to just list two of its sub-clauses to get a feel of its controversial nature. Two sub-clauses of Article 370(1) read as follows: “Notwithstanding anything in this Constitution” — Sub-clause (a): “the provisions of Article 238 shall not apply in relation to the State of Jammu and Kashmir”; Sub-clause (b): “the power of Parliament to make laws for the said State shall be limited to...” Article 238, which formed Part VII of the Constitution was eventually omitted by the Constitution (7th Amendment) Act, 1956. The repeal happened after the ‘part B’ States were removed and included as States after the amendment. The said States were nine in number which had been governed by Raj Pramukhs, and comprised the princely ones of Hyderabad, Jammu and Kashmir, Madhya Bharat, Mysore, Patiala and East Punjab States Union, Rajasthan, Saurashtra, Travancore-Cochin, and Vindhya Pradesh.

The tussle in political circles over Article 370 is on. But recent weeks have seen a shift in the focus of conversation from Article 370 to Article 35A (incidentally, both relate to matters of discrimination), primarily because the latter has reached the Supreme Court’s doorsteps for a decision and the court is seized of the issue. The other common factor is that both provisions deal with Jammu and Kashmir. A petitioner, Charu Wali Khanna, has challenged the validity of Article 35A (along with Section 6 of the Jammu and Kashmir Constitution, which deals with the permanent resident status) on the ground that the Article protects certain rights of the State’s Constitution which in turns denies property rights to native women who marry from outside the State.

The petitioner has argued that Section 6 of the State’s Constitution “restricts the basic 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 the permanent resident certificate. Her children are denied a permanent resident certificate, thereby considering them illegitimate...” Khanna is not the only petitioner; a non-governmental organisation, ‘We the Citizens’, too has filed a plea challenging the provision, and the apex court has tagged the two petitions together. We the Citizens has contended that Jammu and Kashmir’s autonomous status under Articles 370 and 35A was discriminatory in nature for non-residents of the State in matters of Government jobs and real estate purchases. The issue is likely to be heard by a five-judge Bench in case the apex court decides to deal with it. A Bench headed by Justice Deepak Mishra had told the counsel representing petitioner Wali Khanna, “If we



feel that the challenge to the validity is to be entertained, then it has to go to a five-judge Bench.” We are now, therefore, at a point where either the Supreme Court (a larger Bench) will hear the plea or will refuse to entertain it. We will know soon enough, but in any case the matter will not die down — at least politically.

It is interesting here to note that Wali Khanna, who married outside her caste and settled outside Jammu and Kashmir, has raised the issue of not just discrimination but also gender discrimination. She told the media “Despite being a Kashmiri Pandit by birth, the State does not recognise me as its citizen... Unreasonable classification between males and females and between females and females is against the spirit of Article 14 of the Constitution of India. She said that the laws were discriminatory because they restricted a woman’s choice of partner in marriage while still availing the benefits that an Indian married woman should have.

The insertion of Article 35A whittled down the provisions of Article 35 vis-a-vis the powers of Parliament and the State. While Article 35 mandated, inter alia, that “Parliament shall have, and the Legislature of a State shall not have, powers to make laws” with regard to various clauses of Articles 32, 33 and 34, Article 35A laid down the following: “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 of Jammu and Kashmir... 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.” The laws referred to here relate to conferring permanent resident status, State Government employment, acquisition of immovable property in the State, settlement in Jammu and Kashmir, and the right to scholarship and such other forms of aid as the State Government may provide. Minus Article 35A, the provisions of Article 35 would have governed matters of Jammu and Kashmir that have today acquired a controversial nature. While to an extent they still do in matters of criminal offences and the reach of the Supreme Court in adjudicating cases, the dilution has come elsewhere.

The impact of Article 35A largely bears on the provision for special treatment to ‘permanent residents’ of Jammu and Kashmir, thus differentiating these residents from the rest of the Indian citizens. It goes without saying that the definition of ‘permanent residents’ is in the State Legislature’s hands. Besides, the Article makes such laws valid regardless of the possibility that they are inconsistent with the Fundamental Rights as enshrined in the Constitution of India for the benefit of Indian citizens, vide Articles 15(1), 16(1), 19(1)(e-f). It is easy, therefore, to understand where the cause of discontentment arises — not just for the petitioners before the apex court who have challenged the validity of Article 35A, but for those others in the political, academic and social sectors who have taken a position against the ‘discriminatory’ provision. Given that Article 35A is clear enough in brushing aside the inconsistency that arises through discrimination against other citizens of the country who are not permanent residents of Jammu and Kashmir, it is necessary for the Supreme Court of India to settle the matter decisively. In short, the apex court has to say whether the discriminatory provisions are in keeping with the Fundamental Rights the Constitution confers on every Indian citizen or are valid despite the bias, or they are violative enough to be set aside.



The Constitution of Jammu and Kashmir, which was framed in 1956, defines 'permanent residents' as being "all persons born or settled within the State before 1911 or having lawfully acquired immovable property resident in the State for not less than ten years prior to that". In addition, "All emigrants from Jammu and Kashmir, including those who migrated to Pakistan, are considered State subjects. The descendants of emigrants are considered State subjects for two generations." To put it mildly, a Pakistani citizen who migrated to that country from Jammu and Kashmir, can buy property and settle there because he or she is considered a 'permanent resident', while Indian citizens who do not belong to that State cannot do so.

Even as the apex court is yet to apply its mind on whether to take up the validity issue of Article 35A, voices from the usual quarters are being heard in support of and against the provision. Some of the statements that have emanated are worrisome, in both content and design, because they seek to link the matter to Jammu and Kashmir's continuity in the Indian Union. State Chief Minister Mehboob Mufti, rather dramatically, announced that "no one will be left in the State to hold the National Flag" if Article 35A were to be tinkered with. Former Chief Minister Omar Abdullah declared that questioning the validity of the Article was equivalent to challenging the accession of the State. Another former Chief Minister and also former Union Minister Farooq Abdullah — who has been in the recent habit of making outrageous remarks — has 'discovered' in the move to challenge the provision, a devious design to change the demographic profile of Kashmir. Apparently, he believes that a dilution in the permanent residents definition will flood Kashmir with non-Kashmiris. What does he have to say, then, of the grievances of women from Jammu and Kashmir such as Wali Khanna? For politicians like these, raising a pitch against the provision is akin to diluting Jammu and Kashmir's special status and endangering its integration with India. Apparently, they believe that the fear of a reversal of the State's accession to India will help keep the discriminatory provisions in place.

Opposition to challenging the validity of Article 35A has come from certain academics as well. Srinath Raghavan, respected scholar and author associated with a New Delhi-based leading think tank, has questioned the exercise. Writing in a prominent English language daily, Raghavan says, "The legality of Article 35A is being challenged on the grounds that it was not added to the Constitution by a constitutional amendment under Article 368. This is a specious argument." He notes that the adoption of Article 370 had cleared the way for various other laws specific to the State of Jammu and Kashmir. For instances, a set of negotiations in 1952 between New Delhi and Srinagar — which resulted in the Delhi Agreement — led, among other things, to provisions for the regulation of rights of the permanent residents of the State. Raghavan adds that Article 35A "merely clarifies the different status of Jammu and Kashmir" with regard to the issue of permanent resident matter, and that "questioning the validity of this Article has no bearing on the rights of State subjects". He also says that the Presidential Order of 1954, which followed the Delhi Agreement, was very clear, and that "such orders have periodically been used to amend the State's Constitution". Raghavan winds up his opinion with the warning — very similar to those of the politicians who have positioned themselves in favour of the discriminatory provisions — that "any attempt to tamper with them (the special laws) is bound to result in a massive backlash" and that "at a time when Jammu and Kashmir stands close to



the boil, New Delhi can ill-afford to ignore the situation”.

While in a democratic set-up, voices in support of Article 35A should not and cannot be muffled — just as those in opposition to its continuation cannot be brushed aside as political propaganda — it must be remembered before castigating the Modi Government that it is not the Centre which has challenged the Article in the apex court, but private parties. The court has issued notices to the Union Government, and the Centre is duty-bound to respond in a manner it deems fit. It may be that the Union Government is inclined to favour the petitioners’ position — as it had done in the case of the validity of triple talaq among the Muslim community (the apex court has now held the practice as unconstitutional). But to seize upon this development and claim that the Centre is playing with fire and paving the way for the dismemberment of Jammu and Kashmir from the Indian Union, is both alarmist and unfair.

Finally, there is a second, and an equally alarmist, argument that has come forth from the pro-Article 35A camp. It is that, if the provision is repealed then the State of Jammu and Kashmir would revert to a pre-1954 situation (before the Presidential Order). This would mean, apart from other calamities, that the jurisdiction of the Supreme Court and the Election Commission of India would stand curtailed in Jammu and Kashmir. The Centre’s legal control over the State would then be limited to what it had originally been — in areas of defence, external affairs and communication. Besides, there is the small matter of the return of the titles of Sadr-e-Riyasat and Wazir-e-Azam to Kashmir, replacing the positions of Governor and Chief Minister!

Proponents of Article 35A need to premise their arguments on more serious grounds. The matter before the Supreme Court is to do with discriminatory provisions of the said Article. If — and there is a big If — the court decides to hear the matter, it surely will have weightier issues before it than to entertain the prospect of a return to archaic constitutional titles. As to the feared dilution of powers of the apex court or the poll panel, that is unlikely to happen, even if the Article is tweaked to make it less discriminatory.

(The writer is a senior political commentator and public affairs analyst)



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