



HUMAN RIGHTS AND ARTICLE 35A OF CONSTITUTION OF JAMMU & KASHMIR : A ANALYTICAL STUDY

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Abstract

This article focuses on Article 35A of the Indian Constitution, which is known as the "symbol of Kashmiri colonialism" over the remainder of Jammu and Kashmir. It is also the topic of the page you are now reading. Because of the substantial debate that ensued, the author of this article chose to zero down on this claim. The term "Provision" is used to characterise the act due of the historical significance of the term. Jammu & Kashmir claims in an open letter issued to the Union Minister and the Human Rights Council that Article 35A of the Indian Constitution has been rendered useless, allowing the Indian government to legitimately take away fundamental rights. The comment that inspired the birth of the word was made during a discussion about the Indian constitution. The freedom to labour, marriage, property ownership, and the right to vote are all fundamental liberties that may be rolled into one. Unfortunately, due to its flagrant contempt for the equality guaranteed by the Indian Constitution, Article 35A has come to symbolise Kashmiri colonialism. According to Article 35A of the Jammu and Kashmir Constitution, which is cited in Article 6 of the Jammu and Kashmir Constitution¹, women who marry outside of the state face prejudice. Even if the wedding is hundreds of miles away in a different country, this holds true. This provision of Article 35A, and indeed the whole article, directly contradicts the intent of the law which mandates gender equality. According to Article 35A of the constitution of the state of Jammu and Kashmir, foreign nationals who do not make their permanent home in the state are automatically awarded second-class citizenship. Since "justice" is defined otherwise in the preamble and article 14 of the Indian Constitution, Article 35A is in direct contradiction with those provisions.

Key Words:-Human Right, Fundamental Rights, Women empowerment, Education, Property, Violation of Right, Constitution of India, Preamble Article.



A. Introduction

The right to life, freedom, and the opportunity to pursue happiness are examples of inalienable rights, which apply to all people regardless of their nationality or origin. The term "civil rights" refers to a broad category of rights, including freedom from slavery and torture, the ability to freely practise one's religion or hold religious beliefs, the right to an equal opportunity for work and education, and a great number of other rights. There is no one who is excluded from having these rights; they are universal.

People have the right to human rights for a variety of reasons, including the fact that they are human beings, the fact that they are inherently vulnerable, or the fact that human rights are essential for the functioning of a fair society. This list contains a variety of fundamental rights, such as the right to vote, the freedom of expression, the right to join a union, and the right to one's own life. In theory, civil freedoms may be understood to relate to a wide variety of universal ideals or capabilities. Throughout history, people have fought for these rights, and they continue to do so even in modern times. Many individuals hold the opinion that the aforementioned qualities or beliefs enhance or safeguard human agency or interests.

The first generation of civil and political rights may be traced back to the 17th and 18th century revolutions in England, the United States, and France (i.e., those associated with the English, American, and French revolutions). Individualism and laissez-faire led to a preference for freedom from government involvement over rights to government action in the first generation's view of human dignity and civil rights. Laissez-faire economics and liberal individualism are two distinct social and economic theories. Civic pride is more of a "liberties to" attitude for the first generation than a "liberties from" mentality. As a consequence, those born after 1945 enjoy rights comparable to those specified in the Universal Declaration of Human Rights' Articles 2–21. It is important to remember that these rights are not only about life, but also about freedom from slavery and forced labour; the prohibition of violence and brutal treatment; the prohibition of imprisonment without reason; and the right to a family life, among other things. Both the right to own property and the right not to have it taken away from you at will are contained in that one right. These rights were very critical to the causes for which the American and French revolutions, as well as the rise of capitalism, were fought.



Nevertheless, it would be erroneous to argue that these and other rights of the first generation totally correspond to the concept of "negative" rights as opposed to "positive" rights. For instance, the right to personal safety, the right to a fair & public trial, the right to seek sanctuary from persecutors, and the hold free elections are all things that manifestly cannot be guaranteed in the lack of some kind of actively participating by the government. The idea of liberty, which acts as a buffer that protects the person, both on their own and also in conjunction with others, from the misuse of political authority, is the one thing that has remained static in this first-generation understanding. What I'm getting at here is this. Civil liberties are typically romanticised in Western liberal philosophy as a triumph of the individual against Hegel's worship of the state. Since World War II, it has been a guiding concept in the bulk of international declarations and agreements. This is in great part due to Nazi Germany's blatant rejection of civic belonging and political integration as key values.

Human rights include civil and political rights, such as:

1. The protection of one's right to speak freely.
2. The protection of one's right to religious or moral autonomy.
3. The legal right to own property
4. The right to freedom of assembly and peaceful assembly
5. The right to one's own solitude

The privilege or right to vote Everyone, no matter their nationality, sexual preference, gender, ethnicity, religious beliefs, or age, is entitled to same basic human rights. The Universal Declaration serves as the cornerstone upon which contemporary human rights are constructed (UDHR). The General Assembly of the United Nations approved all thirty articles of the Declaration in 1948. Ever since date, these articles have indeed been implicated in a variety of various national legislation as well as international treaties. Everybody, everywhere is subject to an United Nations declaration Of human Rights' guiding principles, which also include human dignity, justice, fairness, as well as the elimination of discrimination.

What is Article 35A



Article 35A is a clause which is included in the Constitution and grants complete discretion to a Jammu and Kashmir legislature regarding the determination as to who is considered to be a "permanent resident" of a state. Those who are given the rank of "permanent resident" are eligible for the same rights and benefits as citizens of India. Those include right to live and work in the public sector, the right to own property in the state, the entitlement to scholarship as well as other forms of public help and welfare. Those individuals, on either hand, who are not given such status are denied such rights, that results in the formation of an unimaginable barrier between both the communities and a legally sanctioned division of those who "have" and those who "do not have." The Constitution (Application to Jammu & Kashmir) Order, 1954 was issued by the President of India on May 14, 1954. It was called after the day it was published. The Constitution (Application to Jammu and Kashmir) Order, 1950 was rendered obsolete as soon as it went into force because of this new order.

The Constitution (Application to Jammu & Kashmir) Order, 1950 was rendered obsolete as soon as that happened into effect because of this new order. In addition to creating a bunch of alterations and changes, this presidential order also 'added' a new "Article 35A" to the Constitution of India, which can be found after Article 35.

However, this new article has not been included in the main original constitution anywhere. Article 35(A) gives the state Legislature the power to define "permanent residents" and to provide such residents rights as well as advantages that are unavailable to any Indian citizen who is not deemed a "permanent resident" according this definition. For the last 60 years, a great number of groups residing in Jammu & Kashmir have had their fundamental rights violated as a consequence of this article. Because of this, only individuals who are considered to be "permanent residents" are eligible for benefits including such land ownership, employment in the state legislature, participation in elections for panchayats, municipalities, and also the legislative Assembly, admission to government-run technical school systems, scholarships, as well as other forms of help in the form of social programmes.

The current discussion regarding the constitutionality of Article 35A of the Constitution represents nothing less than a radical departure from the previous practises. When I glanced at



the Constitution, I was startled to notice that Article 35A was not included in main body of the report; rather, it was included as an appendix to a Constitution. This made us quite confused. The question has to be asked before investigating the matter into the substance of Article 35A of the Charter.

It is just Article 368 that acknowledges the fundamental modification. In contrast, Article 35A wasn't really introduced to a Constitution by an amendment using Article 368, but by a Presidential Order enacted by Article 370. However, the question is, "Was the presidency entitled to use Article 370 to add a new constitutional requirement?"

The Constituent Assembly on 17th October 1949 canvassed Article 370 (draft Article 306A), it was proposed by N. GopalaswamiAyyangar in the following words:

“With regard to the other provisions in the Constitution, these will apply to the Jammu and Kashmir State with such exceptions and modifications as may be decided on when the President issues an order to that effect. That Order can be issued in regard to subjects mentioned in the Instrument of Accession only after consultation with the Government of the State. In regard to other matters, the concurrence of that Government has to be taken. Now, it is not the case, nor is it the intention of the members of the Kashmir Government whom I took the opportunity of consulting before this draft was finalised – it is not their intention that the other provisions of the Constitution are not to apply. Their particular point of view is that these provisions should apply only in cases where they can apply the only subject to such modifications or exceptions as the particular conditions of the Jammu and Kashmir State may require. I wish to say no more about that particular point at the present moment.”

The preceding paragraph makes it abundantly clear that the purpose of the Constituent Assembly wasn't to give the Legislature of Jammu and Kashmir or the President the authority to strip people living in Jammu & Kashmir of their fundamental human rights. It's something that is crystal clear after reading the paragraph. In point of fact, the purpose of Article 370 was to give the jammu and Kashmir the chance to become capable of being governed by the Constitution of



India, just like the other states. This was in contrast to the case which existed before the adoption of Article 370.

Legal residents of Jammu and Kashmir, as defined by state, shall have the capacity of seek special privileges from of the state, that can be contested as a violation of Part Iii of the Constitution. Article 35A, which states that the Jammu and Kashmir would have certain powers and authority, was incorporated in the Constitution by the President in 1954 through the Constitutional (Application of Jammu & Kashmir) Order. As according Article 370, the Presidential decree adds a clause to the Convention that cannot be done, but it also preserves Article 35A of the Charter, which is the same type as Schedule IX. A wall that can be broken since it contradicts any one of the constitution's fundamental principles.

Some Jammu and Kashmir legislation may be seen as discriminatory because of Article 35A, which prohibits discrimination on the basis of sexual orientation. This will undoubtedly be an intriguing issue to discuss when the legal residency definition in the state of Jammu and Kashmir is impacted by gender discrimination in light of recent court rulings that the practise of triple talaq is unlawful. In light of recent developments, the courts have determined that the practise of triple talaq is illegal, therefore allowing the right to divorce in cases of divorce. Supreme Court rulings in favour of Muslim women's battle against gender bias are within the subject of this topic.

According to the legislation governing marriage in Jammu and Kashmir, a woman from a country other than Jammu and Kashmir who marries an Indian citizen is automatically considered to be a resident of Jammu and Kashmir. However, if a woman marries a man who is not a legal resident of Jammu and Kashmir, she would lose her helen status. This is because her new husband will not be eligible for the programme. Because of the factors discussed above, the protections provided by Article 35A make it possible to challenge this arbitrary law as being in breach of Article 14. Legal residents are afforded a variety of extra advantages, such as the opportunity to work in state government, the right to acquire immovable property, and the freedom to settle anywhere within the state. Legal residents also have the opportunity to apply for financial help from the state government in the form of scholarships and other grants. If a



Kashmiri women were to marry a man who was not from Kashmir or who did not have a status that allowed him to live permanently in Jammu and Kashmir, she would no longer be eligible for any of the special privileges that are provided to Kashmiri women under Article 35A.

In the most recent plea which CharuWali Khanna has filed to the Supreme Court, she makes the fair argument that she is able to work and own a home or property in just about any part of the world, excluding the state in where her origins were located. Because this is an executive power, the phrase "with such exceptions" which is used in clause 1 of Article 370 cannot be provided such a broad interpretation in addition to making it capable of trying to add a provision to the Constitution. This is particularly true given the fact that this is the case. The highest court in the this nation has already issued numerous historic judgments in which it decided just on scope as well as degree of the judicial review that can be exercised on the executive branch of government. However, it has been asserted that Constitutional legality of the 1954 Order has already been examined not even once, but twice, by the Constitution High court.

In the case of *PuranlalLakhanpal v. President of India and Others* (1962), 1 Supreme Court Rule 688, the question at hand has been initially whether or not President of India does have the authority to alter the technique of electing house members of People from the state of Jammu & Kashmir by switching to a secret ballot instead of a direct election. The change in voting rules was deemed to be just an adjustment by the court when it gave its positive response as well as ruled this was the case.

Sampat Prakash v. State of Jammu & Kashmir and Anr. (1969) 2 SCR 365 was the second case to contest the Presidential Order, 1954. In this case, the issues that were raised have been of greater constitutional importance. Some of the problems that were brought up also included fact that the applicability of Article 370 was only transitory; the fact that the President in the guise of alteration cannot add a stipulation in the Constitution; and the reality that once Article 368 is made relevant to However, the Constitution Bench, which has been led by Chief Justice Hidayatullah, did not agree with all these reasons therefore rejected them (as he then was). In spite of all this, it has been about half a decade since then, and the petitions which have lately been filed to the Honorable Supreme Court have been written by people who identify as



Kashmiris. It is possible that the current time is the appropriate moment for the Supreme Court of the United States to step inside and intervene in order to protect the rights of the citizens living in Jammu and Kashmir. This would be done in order to protect the rights of the people living in Jammu and Kashmir. Since there is a time-honored tradition in our society that the judiciary settles many political disputes, this is also appropriate. That's why I think this is OK. One contemporary illustration of this age-old legacy is the debate over the practise of triple talaq, which is both a crucial step toward the achievement of our lifelong goal of having a uniform civil code in an independent India and a current example of this practise.

The Supreme Court's decisions have reinforced our country's fundamental rights. Justice Fazl Ali's noteworthy dissenting opinion that Fundamental Rights really aren't remote islands has since become established law. Article 19(1)(a) states that freedom of press is a fundamental right that is unremunerated, as well as the unanimous vote to designate the right of privacy a basic right shows that this country takes a basic dignity approach and making progress (inclusive of Fundamental Rights).

However, the High Court will have to deal with own set of difficulties. If the Court Rules that the President doesn't even have the authority to amend the Constitution by Article 370, the 1954 Order would've been declared unconstitutional, representing a major shift in the law's stance during the last 60 years.

Justice Subba Rao's plan for just a possible overturn in Golaknath's case may be needed. Justice Nariman's decision in the double talaq case overturning *State of Andhra Pradesh v. McDowell & Co.*, AIR 1996 SC 1627, which held that arbitrariness itself cannot be a ground to deem a law illegal, is of paramount importance. Article 35A is a nice example of a bit of legislation that appears to be random at first sight. It is conceivable that Article 35A would be declared illegal if the majority of the court agreed to Justice Nariman's view. Article 35A's validity will be upheld by the Supreme Court, that might or might not apply the "test of arbitrariness" to a constitutional change. This leaves open to interpretation.



B. Objectives of The Study

The present study is to assess and evaluate the following:

1. To examine the development of Society and world in respect of Human Right in Jammu and Kashmir.
2. To study the constitutional validity of Article 35A of the constitution of Jammu and Kashmir.
3. To critically evaluate the Judicial response on Article 35A of the constitution of Jammu and Kashmir.
4. To analyze the human right and Art35A with special reference to discrimination.
5. To suggest effective and legal measure as per to modern society and new era of human right.

C. Statement of Problem

As an alternative way to put it, there are undoubtedly other Articles of the Indian Constitution, including such Art330.(In the House of the People Lok Sabha, seats of Scheduled Castes and Scheduled Tribes were reserved.), Art332 (Reservation of seats in state legislatures for people of "scheduled castes" as well as "scheduled tribes") ,Art 335 (Service and employment claims by members of Sc / sts), Art14(equality before law), Art15{(4) -If the State wishes to make special provisions for those who are economically as well as educationally behind, this article or clause 2 of article 29 must not prevent from doing so.}, Art15{(5)- Nothing in this article or in subclause (g) of clause (1) of article 19 shall prevent the State from trying to make any special provision, by law, for the advancement of any communally as well as educationally disadvantaged classes of citizens and for Scheduled Castes or the Scheduled Tribes in so far as such special provisions connect to their admission to educational institutions such as private education institutions, whether or not such special provisions are aided or unaided by the State. This article also does not prohibit the State from making any special provisionA, other than the minority educational institutions referred to in clause (1) of article 30.] },Art16{(4)- There is nothing in this article that prevents the state from establishing a provision for the reservation of appointments or positions in favour of the any backward class of people who, inside the state's



judgement, are not sufficiently represented in the offerings that fall under the jurisdiction of the state.) , Article 19 (1e- to reside and settle in any part of the territory of India and Article 1d- to move freely throughout the territory of India), Article 19(5)- Nothing in sub-clauses (d) and (e) of the said clause shall enact the operation of any existing law in so much as it imposes, or prevents the State from making any law going to impose, reasonable restrictions of any of the rights conferred by the said post either in the interests of a general/State/ Parliament/any state legislature other than J&K to totally deny /violate the rights of all other citizens whereas under the shelter of Art 35A the J&K State Government / If you are an Indian citizen who is not a legal resident of J&K, the J&K State Legislature has the power to deny you the right to own property in J&K, to live anywhere in J&K, to work again for State government here anyway, or even to participate government-run engineering/medical/professional colleges, or to end up voting in J&K parliamentary elections or to serve in the J&K Legislative Council.

D. Review Of Literature

The following is a sample of the study materials that the investigator came across throughout the course of the project. Complete citations are included in the bibliography.

1. **Prasad, S.N.; Dharm Pal (1987). History of Operations In Jammu and Kashmir 1947-1948.** New Delhi: The Faculty is part of the Ministry of Defence in the Indian government. (printing performed at Thomson Press (India) Limited). That's the complete account of a military operations that did take place in Jammu and Kashmir during in the decades 1947 and 1948. These operations were carried out from an attempt to protect the Princely State of Jammu and Kashmir, that had recently joined the Eu of India, from a brutal incursion by Pakistan. The battle, that lasted for a entire year, was characterized by a number of triumphs and also tragedies, which are all described in depth and with impartiality. The Indian Army and Air Force, who had only recently recovered from the injuries caused by the Partition of India and it was in the midst of reorganising itself, emerged from this agony with just an effectively increase of brilliance and a bright halo.
1. **Basu, Durga Das (1988). Shorter Constitution of India.** New Delhi: Prentice Hall of India, The Indian constitution is collected in a set of two volumes by Durga Das Basu in his book Shorter Constitution Of India (Set Of 2 Volumes). This books



contains short and brief information about the articles and other amendments. As the name suggest, this book is the shorter version of Commentary On The Constitution Of India, which was also written by the same author. Since the formation of constitution in 1956, several changes have been made to improve and strengthen the laws, reforms, structure of system, etc. This book is for people who want information about the constitution's history, features, amendments, and articles. In this book, readers will also be familiarised with the fundamental rights and directive principles of state policy. In this book, the constitution is interpreted from the legal viewpoint. Details about small judiciary systems, like panchayats, municipalities, and planning commissions, are also included, along with a systematic, article by article explanation of the constitution. The fourteenth edition of Shorter Constitution Of India (Set Of 2 Volumes) was published by Lexis Nexis India in 2011. It is available in hardcover. Key Features:

- For better understanding of the constitution, this book contains charts, materials, and figures.
- It also includes three legislative lists, references, and borderline notes

2. Ian Richard Netton, Islam, Christianity and Tradition A Comparative Exploration This is not an Introduction to Islam, nor is it a textbook. There are many excellent introductions and textbooks in the marketplace already. One notes in particular David Waines, *An Introduction to Islam* (Cambridge: Cambridge University Press, 1995), Gerhard Endress, *An Introduction to Islam* (Edinburgh: Edinburgh University Press, 1988), Sachiko Murata and William C. Chittick, *The Vision of Islam: The Foundations of Muslim Faith and Practice* (London and New York: I. B. Tauris, 1996) and John L. Esposito (ed.), *Oxford History of Islam* (Oxford: Oxford University Press, 1999). All of these, in their diverse and very attractive ways, play a significant and important role in introducing student and scholar alike to one of the world's major religions. This book is a research monograph which aims to do much more than that. It operates generally within the sphere of comparative religion and is, specifically, a comparative exploration of the role of tradition/Tradition within two distinct faiths, Islam and Christianity. Specific leitmotifs include the roles of authority,



fundamentalism, the use of reason, *ijtihad*, and original comparisons between Islamic Salafism and Christian Lefebvism. ‘Salafism’ refers to that strain in Islam which looks backwards to the thought, practices and traditions of the Salaf (pious ancestors); ‘Lefebvism’ is a reference to the traditionalist thought and practices of the schismatic Archbishop Marcel Lefebvre (1905–91) who rejected much of the teaching of the Second Vatican Council (1962–65) and what he perceived as that Council’s overthrow of tradition/Tradition. It is recognised in my text that the word ‘tradition/ Tradition’ in both Islam and Christianity has a variety of senses and definitions. While this volume is not an Introduction to Islam, it does aim to be accessible to the serious non-specialist as well as to the seasoned scholar in the field. It aims to make connections; it aims to add immediacy to the text by its use, among a variety of primary and secondary sources, of contemporary newspaper and journal articles, documents, letters and encyclicals. It aims to present a lucid and stimulating text which can be read with pleasure and profit by the scholar as well as by the serious,

- 3. Bamzai P.N.K., - Kashmir and Power politics: From Lake Success to Tashkent, Delhi, 1966,** Kashmir, What an image of beauty and peace is evoked in one’s mind with the mere mention of the name ! From time immemorial it has appropriately been known as the “Paradise on Earth”. Paradoxically, Kashmir has, for quite some time, been associated with trouble and turmoil and even war. Inhabiting this meeting place of cultural waves from the North and the South, are a people who have been moulded in an atmosphere of beauty and blended cultures. A broad and liberal outlook governs their social and political life. This explains their love for a secular order of society. This motivated their accession, in October 1947, to India, the home of a multi-racial and multi-lingual society and it is for upholding this ideal that they had to face two unprovoked invasions in the last eighteen years. Pakistan, conceived in and built up on a different ideology-that only religion is the basis of nationality-attempted to annex Kashmir-the symbol of secular democracy-by force. The United Nations, which India approached early in 1948, has so far failed to redress the wrong, Interested Powers, taking advantage of the situation, allowed the issue to be side-tracked and get lost in



power politics. India was subjected to as cries of stresses and strains and the relations between the two neighboring countries got embittered, resulting in an armed clash between the two in August-September last year. It was then that the third neighbour, the USSR, took the initiative in arranging a meeting between the Prime Minister of India and the President of Pakistan at Tashkent, to smoothen and normalize the relations between the two countries.

4. **Butalia,Urvashi,(ed) - Speaking peace: women's voices from Kashmir. New Delhi, 2002,** In this book, Kashmiri women's lives are depicted in a number of ways. Interviews from Kashmiri women, reflection, alongside excerpts from the a variety of reports and books just provide basis for the pieces in this collection. As a team, we draw awareness to a crucial aspect of the conflict which has been overlooked.

E. Conclusion

Article 35A can't be questioned for its core construction, which is a myth. Supreme Court precedence, based on to an interpretation of Article 368's wording, was established in 1973 in *KesavanandaBharati v. State of Kerala* ruled that authority to amend the Constitution via Article 368 was not plenary as well as the Constitution's core elements could not be deleted in its whole. Article 370, a clause essential to India's federal framework, is not reflexively addressed in this rationale. Article 35A was adopted and over six decades ago, so it is likely that a good deal of property has changed ownership. It is impossible to challenge an amendment made before the *Kesavananda* decision on the basis of its basic structure in such instances when constitutional amendments impose rights and dignity on persons, as the High Court found in *Waman Rao vs Union of India*. Adopting a different position might have far-reaching repercussions.

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