

FOR THE DUSTBIN OF HISTORY

Relevant for: Indian Polity | Topic: Issues and Challenges Pertaining to the Federal Structure, Dispute Redressal Mechanisms, and the Centre-State Relations

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Contrary to the misconceived arguments of the dynasts in the People's Democratic Party and National Conference, predicated no doubt on the legal sophistry of their motivated minions, Article 35A is not cast in stone. In truth, it is neither an affirmation of the historical entitlement of the Kashmiri people nor an integral aspect of the princely state of J&K's accession to India, as its champions proclaim. Moreover, it is manifestly unconstitutional.

It is true that by two notifications of 1927 and 1932 the then sovereign of the princely state of Jammu and Kashmir — Dogra ruler Hari Singh — promulgated provisions which defined “state subjects”, vested privileges in them including the exclusive right to own immovable property in the state. The notifications must, however, be viewed in the context of a quasi-independent princely state protecting its inhabitants from the financial onslaught of wealthy residents of other princely states, provinces and members of the colonial establishment. The provisions enshrined in the notifications are an anomaly in a modern-day constitutional republic, which by Article 19(1)(e) guarantees all citizens the right to reside and settle in any part of the territory of India. That the law — more so constitutional law — should sanction exclusivist territorial enclaves in any part of India is arbitrary and subversive of national integration.

In any event, the Instrument of Accession signed by Hari Singh makes no mention of the two notifications. It is trite to state, therefore, that the provisions of the two notifications do not constitute a condition of accession. The retentionist argument is that Article 35A is based on a solemn pact between the Union and the state and thus cannot be altered unilaterally. While it is true that the Article was the outcome of an agreement between Sheikh Abdullah and [Jawaharlal Nehru](#) in 1952, this is not to suggest that the provisions of the Article were to endure in perpetuity. But, the argument goes, the very fact that the pact between Abdullah and Nehru was elevated to the status of a constitutional provision is indicative of its sacrosanct nature.

The argument about the inviolability of Article 35A is untenable. First, while it is undeniable that the Constitution is sovereign in a constitutional republic, Article 35A was introduced into the Constitution by way of an amendment carried out by virtue of a Presidential Order of 1954. The President has no power to amend the Constitution; the constituent power post the dissolution of the Constituent Assembly vests in Parliament by virtue of Article 368. Article 35A is thus void on the face of it. The procedure for the amendment of the Constitution has itself been held to be a part of the basic structure of the Constitution. Article 35A is thus violative of the Constitution's basic structure. The issue is not a “constitutional technicality” as has been argued by one writer in the columns of this newspaper.

Moreover, in as much as the Article seeks to immunise laws relating to the rights of permanent residents of J & K and the deprivation of those rights to other citizens of the republic from judicial review on the touchstone of the Fundamental Rights Part of the Constitution, the Article again falls patently foul of the basic structure doctrine. This is an issue of substantive constitutional rights and not a “constitutional technicality”.

The retentionists argue finally that the provisions of Article 35A are not just an issue of law but are embedded in Kashmiri psyche. The abolition of the Article, they say, poses an existential

threat to Kashmiris. Implicit in this emotive argument are two premises: First, that every piece of land that comprised united J&K at the time of its accession to India is to be protected from foreign acquisition. Second, that every Kashmiri is zealous about the rights of his fellow Kashmiri with respect to immovable property and other exclusive privileges first enshrined in the 1927 and 1932 notifications and thereafter protected by Article 35A and section 6 of the J&K Constitution.

The first premise is rendered false by how the entire political establishment in the Valley, out of political opportunism sedulously, cultivates Pakistan and condones its continuing transgressions in PoK. The sanctity of Kashmiri land can hardly be embedded in Kashmiri psyche when the entire political class in the Valley is willing to do business with a rank usurper of a large part of Kashmiri territory. This usurpation has been followed by the colonisation of PoK by Pakistani Punjabis. Add to this the deafening silence of the political class of the Valley on the issue of the handing over of control of Gilgit Baltistan to China for the CPEC and what emerges is a picture of its feeble allegiance to Kashmiri territory.

The falsity of the second premise stands rudely exposed by the ethnic cleansing of Kashmiri Pandits by the Sunni Muslim population that took place in J&K from 1989 to 2003. The blood-curdling message delivered by the latter to the former on January 19, 1990 — Ralive, Tsaliv ya Galive (either convert to Islam, leave the land, or die) undoubtedly reverberates in Kashmiri Pandit ears to this date. The argument for the retention of Article 35A on the ground that it is deep-rooted in Kashmiri psyche is specious to say the least.

Article 35A is a constitutional aberration. It is detrimental to the integration of the Kashmiri people with the rest of India. Sixty-five years after its enactment, the time is ripe to consign the Article to the dustbins of history.

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