

PERILS OF HISTORICAL AMNESIA: ON ARTICLE 35A

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The irony of today's India is that while our politics is looking towards our history more often than ever before, we are also becoming comfortable with its constant manipulation. The controversial [Article 35A of the Constitution](#), which is currently being challenged in the Supreme Court, is a case in point. Its critics have argued that the Article affords Jammu and Kashmir undue powers, particularly by preventing non-State residents to own land in the State. The media has largely gone along with this explanation, often portraying the debate as a question of "special status" of Jammu and Kashmir and the Article as some sort of unusual concession to the State. In fact, the fundamental purpose of Article 35A, when it was introduced in 1954 as part of a Presidential Order, was the exact opposite: instead of giving the state a "special status", it was designed to take autonomy away from it.

The Article was introduced in May 1954 as part of a larger Presidential Order package, which made several additions to the Constitution (not just Article 35A). The overall gist of this Order was to give the Government of India enormously more powers over the State than it had enjoyed before. For the first time, India's fundamental rights and directive principles were applicable to Jammu and Kashmir and the State's finances were integrated with India. Importantly, the Order also extended the Indian Supreme Court's jurisdiction over certain aspects of Jammu and Kashmir.

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Just as crucially, the Order had come about only after the Jammu and Kashmir government had agreed to it and passed a similar legislation in its own Constituent Assembly, making it clear that these powers were Jammu and Kashmir's to give, not India's to take. In fact, at the time of its introduction, the Order was celebrated in India as a great step towards bringing Jammu and Kashmir closer into the Union of India. Even the Hindu right-wing leaders had hailed it as a "commendable step". No eyebrows were raised over the minor issue of Article 35A, which made up a very small component of the Order.

Of course, the larger problem is that after decades of confusion and purposeful obfuscation, we tend to forget that initially Kashmir was conceived as a State with "special status". The controversial Instrument of Accession signed by Maharaja Hari Singh in 1947 which brought the State into the Union of India gave New Delhi control only over Kashmir's defence, foreign policy and communications. On all other matters, the State government retained powers. On the spectrum of autonomy, Jammu and Kashmir lay somewhere between, say, Bihar, a fully integrated State of India, and Bhutan, which enjoyed limited sovereignty under the protection of India. India's tenuous grasp over Jammu and Kashmir was further complicated by New Delhi's international commitment to hold a plebiscite in the State to decide its eventual fate.

It is because of this weak India-Kashmir constitutional link that Sheikh Abdullah became "Prime Minister" of Kashmir; the State had its own Constituent Assembly and flag; there were customs checks between India and the State; the Supreme Court did not have jurisdiction over key issues in the State; Kashmir militia was constituted as a separate force; and Srinagar tried to send its own trade commissioners to foreign countries. With the coming into effect of the Indian Constitution in January 1950, New Delhi's powers over Jammu and Kashmir were defined more

clearly through a Presidential Order (a predecessor of 1954 Order). However, just in the areas of defence, foreign affairs and communications was Jammu and Kashmir put on the same footing as the rest of India. On issues of commerce, audit, judiciary, elections and finance, there were considerable modifications. India's fundamental rights and directive principles were not applicable in Jammu and Kashmir at all.

Only in 1952, after the international clamour for an immediate plebiscite had somewhat subsided, did Jawaharlal Nehru invite Abdullah to discuss how India and Jammu and Kashmir could be more closely integrated. The result was the 1952 Delhi Agreement which, contrary to popular belief, still fell short of the 1954 Presidential Order. For instance, the 1952 agreement did not finalise financial integration and required the fundamental rights and citizenship to be granted to the State's residents via the State Legislature.

Before the Delhi Agreement could be implemented, the situation was altered radically because of three factors. First, any plans for an immediate Plebiscite were abandoned in 1954, which strengthened New Delhi's hand. Second, in 1953, Nehru faced a nationwide campaign from the Hindu right-wing demanding greater integration of Kashmir. And finally, and perhaps most importantly, in August 1953, Abdullah was arrested and replaced by Bakshi Ghulam Mohammed, who was far more amenable to integration with India.

So, in January 1954, New Delhi negotiated a new agreement with Bakshi, which was passed by the Kashmir Constituent Assembly in February, and eventually introduced through Presidential Order in May. However, it still left the State with enormous autonomy. Foremost, all "residuary powers" rested with the State legislature. The State government could detain people who did not enjoy the right to appeal to the Supreme Court. It also retained its controversial land reforms measures and the final authority over any alteration of the State's boundaries. Among its lesser known provisions at the time was Article 35A, a holdover from the colonial era.

It took another 70 years of successive governments steadily chipping away at Jammu and Kashmir's autonomy to bring it to today, when the only meaningful "special status" that it enjoys is Article 35A. Almost all of State's other autonomous powers have been subsumed by New Delhi. Today's debate over the Article should be seen as part of this larger decades-long process of the State's integration into India, sometimes through legal means and sometimes through outright fiat.

To be sure, the whole project of federal nation-building requires constant negotiation between the nation state and its components. Arguably, India's efforts to bring Kashmir into its fold can be told as part of such a story. However, such efforts need to have an underpinning of at least some kind transparent democratic process. Should Article 35A be removed, it must be removed as an expression of the will of the people, through a political process which includes the people of Jammu and Kashmir in the discussion. Or, in the very least, it has to be remembered that the Article is not some special concession to Jammu and Kashmir but the last vestige of a broken promise that India had made to it decades ago.

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