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History of Permanent Residents of the State of Jammu and Kashmir

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1. Introduction

Before August 2019, the State of Jammu and Kashmir (hereinafter referred to as the State of J&K) was the most privileged State of 'Indian Union'¹. It enjoyed the special status under Article 370 of our Constitution. Due to this whole of the Indian Constitution was not applicable to this State and Parliament's jurisdiction over it was limited. It was also mentioned in this Article that the Parliament could not have extended this jurisdiction without the consent of the Government of the State. Article 370 was the result of 'Instrument of Accession'² signed by the then ruler of the State and accepted by the then Governor-General of the 'Dominion of India'³. Under it, only three subjects- Defence, Communications and External Affairs- were surrendered by the State to India.

It was evident from the original provisions of Article 370 that the State of J&K enjoyed wide autonomy in making laws for its people with respect to the subjects other than those mentioned above. Initially, citizenship was beyond the legislative capacity of the Parliament and the Indian Government accepted the view that the State Legislature could be given power to define and regulate the rights and privileges of the permanent residents of the State⁴. Later, in 1954, when the Constituent Assembly of J&K ratified the State's accession to India, the Government of India declared to grant the common Indian citizenship to permanent residents. Earlier, permanent residents were called the 'State Subjects'.

2. Historical Background

Before Indian independence, the State of J&K was ruled under monarchical form of government. Monarchy was the basic feature of all the erstwhile Indian States outside British India. Almost all these States accepted the suzerainty of British Crown which was implemented through the British Government. In consideration of this loyalty, monarchs were assured of a minimum level of sovereignty within their respective States. As was usual, all important powers of the government were vested in the monarch and he used them arbitrarily. Welfare of people was not an ideal for monarchy.

In the middle of 19th century, the State of J&K was ruled by a Dogra ruler named Maharaja Gulab Singh. Maharaja Hari Singh, who acceded his State to India, was a successor of this dynasty. Almost all the rulers of the State followed a policy to exclude Kashmiris, Baltis and Ladakhis from military and civil services of the State. Because of this exclusionary policy, the rulers of the State 'established a sort of Dogra imperialism in the State in which the Dogras were elevated to the position of the masters and all non-Dogra communities and classes were given the place of inferiors'⁵.

Due to step-motherly treatment and giving preference to western educated men from Punjab and other places in services, there started an agitation in the State with the slogan 'State for State's People'. The agitation started during the reign of Maharaja Pratap Singh, who died in 1925. After him, his nephew Hari Singh ascended the throne in the same year. The agitation became so strong within two years that Maharaja Hari Singh had to issue an order in that behalf. The order issued on January 31, 1927 provided that all the 'Hereditary State Subjects'⁶ would be preferred to outsiders in Government services. The term 'Hereditary State Subject' was held to include all persons born and residing within the State before the commencement of the reign of the late Maharaja Gulab Singh and also persons who settled therein before 1885 A.D. for permanently residing.

The term 'Hereditary State Subject' was substituted for 'State Subject' by a 'Notification 1-L/84'⁷ dated April 20, 1927. The notification clearly defined the term 'State Subject' in three classes. The State Subjects of Class I were persons who were included in the earlier definition of 'Hereditary state subject'. All persons other than those belonging to Class I who settled within the State before the close of Samvat year 1968 (1911 A.D.) for permanently residing therein and had acquired immovable property were grouped in Class II. In Class III were included all persons other than those belonging to Classes I and II permanently residing within the State, who had acquired under 'rayatnama' any immovable property therein or who might had thereafter acquired any such property under an 'ijazatnama'. The State Subjects of Class IV included companies of public nature registered in the State. It is notable that this definition of the term 'State Subject' was, later, recognised and accepted under the 1957 Constitution of the State while defining 'Permanent Residents'.

3. Provisions relating to Permanent Residents

As per un-amended Article 370, the provisions of Indian Constitution could only have applied to the State of J&K by issuing order of the President, and, in fact, so many orders have been issued from time to time. Part II, concerning citizenship, and Part III, concerning fundamental rights, of the Indian Constitution were applied in the State of J&K by the *Constitution (Application to Jammu & Kashmir) order, 1954*⁸. Both the parts were modified in its application to the State and after modification of Part III a new article came into being, widely known as Article 35-A.

Article 35-A⁹ was included in the Constitution to save the existing or future laws, relating to special rights and privileges of permanent residents of the State of J&K from being declared invalid for violating any of the provisions of Part III. It provided that notwithstanding anything contained in this Constitution, no law of the State of J&K, defining permanent residents or conferring on such residents special rights and privileges with respect to employment under the State Government, acquisition of immovable property in the State, settlement in the State or right to scholarships, should be void on the ground that same was inconsistent with any of the rights of Part III.

When the Constitution for the State of J&K was adopted in 1956, a whole Part III was created therein for providing elaborate provisions concerning permanent residents. This Part consisted of six sections from 6 to 10. Section 6 defined the term 'permanent resident' by including almost all classes of State Subjects included in the earlier Notification 1-L/84 dated April 20, 1927. Cut-off date for earlier Class III State Subjects was now May 14, 1954. All persons of classes I to II who migrated to Pakistan but returned to the State under a permit of resettlement were declared permanent residents under Section 6. Power to make any law defining the permanent residents of the State was entrusted by Section 8 to the State Legislature. Section 9 provided the procedure for Bills relating to permanent residents. Section 10 declared that the permanent residents of the State would have all the rights guaranteed to them under the Constitution of India.

4. Status of Women as Permanent Residents

No express provisions as such were made regarding women's status as permanent residents in the Constitution of the State. Same was the position of Indian Constitution as applied to the State of J&K. For it, we have to see the four Notes appended to the Notification 1-L/84 dated April 20, 1927. Notes II and III were directly related to women's status as State Subject. Note II¹⁰ provided that the descendants of the persons who had secured the status of any Class of the State Subjects would be entitled to become the State Subjects of the same Class. It simply means that all the daughters of any class of the State Subjects were entitled to be treated as State Subjects by birth of their father's Class.

Status of a wife or widow as the State Subject was narrated to Note III.¹¹ According to it, the wife or a widow of a State Subject of any Class acquired the status of her husband as State Subject of the same Class as her husband, so long as she resided in the State and did not leave the State for permanent residence outside the State.

Note III of the Notification, however, was being interpreted to hold that on marriage with a non-resident, even the daughter of a permanent resident would lose her status as a permanent resident of the State. The result of this interpretation was that such a female was not entitled to hold any property or to get scholarship, employment, etc., in the State if she married a non-permanent resident. It created a lot of confusion and resentment amongst such females.

The Jammu and Kashmir High Court, initially, refused, in *Prakash v. Mst. Sahani* (1965)¹², to strike down such an interpretation and accepted the view that a female lost her status as a permanent resident of the State by marrying a non-state subject. However, in *State of Jammu and Kashmir v. Dr. Sushila Sawhney* (1979)¹³ a Full Bench of the High Court by its decision dated October 7, 2002 reversed the earlier position and held that the interpretation was grave discrimination against daughters of permanent residents. This decision was lauded by female and human rights activists as most fair and just.

Dissatisfied with the Full Bench decision of the High Court, the State Government filed a special leave petition in the Supreme Court. But when the Supreme Court did not stay the operation of the decision challenged, the State Government later on withdrew it. However, the State Government headed by late Mufti Mohd. Sayed did not stop here and introduced, as its last resort, the *Jammu and Kashmir Permanent Resident (Disqualification) Bill, 2004*¹⁴ in the State Legislature to set at naught the basis of the full Bench decision. When hue and cry were made calling the Bill an assault on women's rights, it could not be got approved from the Legislative Council and was finally defeated.

5. Conclusions

The special rights and privileges granted to the Permanent Residents of the State of J&K were necessary to avoid the exploitation of the State residents by outsiders, who could in the absence of these provisions buy property in the State and deprive the locals of various economic benefits. Because of this, Article 35-A was created in the Indian Constitution in 1954 to approve the system of special status of hereditary State subjects. However, later, Articles 35-A and 370 became the target of critics in India and it was demanded that the special status of the State be revoked.

The present Union Government, headed by PM Narendra Modi, has scrapped, on August 5, 2019, the special status of the State of J&K by making several amendments in the Indian Constitution. By issuing two Presidential Orders (C.O. 272 and C.O. 273) back to back under Article 370, the whole of the Indian Constitution has been made applicable to the State immediately. Since Article 370 was the basis of special status of the State, it lost all the benefits of this status thereafter. It means that the special rights and privileges of the permanent residents of the State under Article 35-A have also been abrogated. In addition, the Union Government snatched the statehood of the State of J&K and bifurcated it into two Union Territories (UTs) of 'Jammu and Kashmir' and 'Ladakh'.

This sudden move of the Central Government is being termed as unilateral and against the principle of federalism. Whole of the legal procedure adopted to abrogate the special status of the State, is in question before a Constitution Bench of the Supreme Court, and only final decision of this Court will decide the future of the earlier State of J&K. However, the Supreme Court has not granted interim stay against the Central Government and proper functioning of the apex Court is affected due to COVID-19 pandemic.

References:

1. Art.1 of the Indian Constitution provides that India shall be a 'Union of States'.
2. It was signed by the Maharaja Hari Singh on October 26, 1947 and accepted by Lord Mountbatten.
3. After independence, British India was divided into two Dominions of India and Pakistan.
4. Justice A. S. Anand, *The Constitution of Jammu and Kashmir: Its Development & Comments* 176 (Lexis Nexis, Gurgaon, 8thedn., 2016).
5. Id, p.12.
6. Id, p.184.
7. Ibid, p.184.
8. A .G. Noorani, *ARTICLE 370: A Constitutional History of Jammu and Kashmir* 265 (Oxford University press, New Delhi, 1stedn., 2014).
9. Id, p.268.
10. Justice A. S. Anand, *The Constitution of Jammu and Kashmir: Its Development & Comments* 185 (Lexis Nexis, Gurgaon, 8th edn., 2016).
11. Ibid, p.185.
12. Id, p.188.
13. Ibid, p.188.
14. Ibid, p.188.

