

ARTICLE 35-A: A QUAGMIRE OF VICTIMIZATION FOR CERTAIN GROUPS IN THE STATE OF JAMMU AND KASHMIR

Dr. Seema Nargotra*

Abstract

The true functioning of a democracy is measured in the upholding of the guarantee of the civil liberties or human rights of its citizens. But in the State of Jammu and Kashmir, this guarantee remains elusive for certain groups of people for the last so many decades. These groups are the West Pakistan refugees, the Valmikis, the Gorkhas and the women married outside the State of Jammu and Kashmir. These groups have been deprived of the basic rights in the State of Jammu and Kashmir. The State of Jammu and Kashmir draws justification for such deprivations of these groups from Article 35-A of the Constitution of India which allows the State to confer special privileges on the 'permanent residents' of the State. Those belonging to these groups do not fall in the definition of the 'permanent residents' of the State of Jammu and Kashmir and hence are not issued the Permanent Resident Certificates (PRC). Thus they remain deprived of the 'special privileges' guaranteed under Article 35-A which are actually the basic rights. Traversing through the legal infirmity besetting Article 35-A, this paper, which is based on a preliminary investigation done for an ICSSR project on these groups, attempts to take a look at the marginalization and victimization being faced by these groups.

1. Introduction

Any democracy loses its essence if its citizens' lives are fraught with deprivations of their minimal rights. Such citizens become marginalized from the mainstream of the society. The people, who are marginalized from a group or community are known as 'marginalized groups'. These marginalized groups become less important, forgotten and do not have legal rights just like the other major groups of the society. Regarding their position in the society they are towards the periphery in the society. So in other words they are leftovers who are not provided with legal rights with respect to their survival, education, residence, jobs, status etc. and become the subjects of discrimination. In developing countries, the more marginalized groups exist. The most vulnerable marginalized groups in almost every society are the

*Sr. Assistant Professor, Department of Law, University of Jammu.

women, people with disabilities, dalits, aged people, children, minorities, etc. The position becomes worse when these marginalized groups are subjected to victimization leading to their overall backwardness. This is true about the West Pakistan refugees, the Valmiki, the Gorkhas of the State of Jammu and Kashmir and the women of Jammu and Kashmir married outside the State. The victimization and marginalization of these sections of people in the State is attributable to the non-grant of 'permanent resident' status by the State of Jammu and Kashmir to the people belonging to these groups.

2. The Permanent Resident Status and Article 35-A of the Constitution of India

2.1. Permanent Residents of the State of Jammu and Kashmir

The Constitution of Jammu and Kashmir defines the 'permanent residents' of the State of Jammu and Kashmir. The Constitution of Jammu and Kashmir came into force on 26 January 1957. Prior to it, the permanent residents were known as 'state subjects' during the time of the Maharaja. It amended the existing definition of 'state subjects' of the State enunciated during the time of the Maharaja and substituted it with the new definition of 'permanent residents' incorporated under Section 6 of the Constitution of Jammu and Kashmir. Section 6 was inserted in the Constitution of Jammu and Kashmir in pursuance to Article 35-A added in the Constitution of India by the Constitution (Application to Jammu and Kashmir) Order, 1954 passed in exercise of the power under Article 370 of the Constitution of India.¹

¹ Article 370 states:

370. Temporary Provision with respect to the State of Jammu and Kashmir

(1) Notwithstanding anything contained in this Constitution—

(a) the provisions of Article 238 shall not apply now in relation to the state of Jammu and Kashmir;

(b) the power of Parliament to make laws for the said state shall be limited to—

(i) those matters in the Union list and the Concurrent list which, in consultation with the Government of the State, are declared by the President to correspond to matters specified in the Instrument of Accession governing the accession of the State to the Dominion of India as the matters with respect to which the Dominion Legislature may make laws for that State; and

(ii) Such other matters in the said Lists as, with the concurrence of the Government of the State, the President may by order specify.

Explanation: For the purpose of this Article, the Government of the State means the person for the time being recognized by the President on the recommendation of the Legislative Assembly of the State as the Sadr-i-

Section 6 which deals with the definition of “permanent residents” of the State runs as under:

6. Permanent residents.—(1) Every person who is, or is deemed to be a citizen of India under the provisions of the Constitution of India shall be a permanent resident of the State, if on the fourteenth day of May, 1954—

(a) he was a State subject of Class I or Class II; or

(b) having lawfully acquired immovable property in the State, he has been ordinarily resident in the State for not less than ten years prior to that date;

(2) Any person who before the fourteenth day of May, 1954 was a State subject of Class I or of Class II and who having migrated after the first day of March, 1947 to the territory now included in Pakistan, returns to the State under a permit for resettlement in the State or for permanent return issued by or under the authority of any law made by the State Legislature shall on such return be a permanent resident of the State.

Riyasat (now Governor) of Jammu and Kashmir, acting on the advice of the Council of Ministers of the State for the time being in office

(c) the provisions of Article 1 and of this Article shall apply in relation to that State;

(d) such of the other provisions of this Constitution shall apply in relation to that State subject to such exceptions and modifications as the President may by order specify:

Provided that no such order which relates to the matters specified in the Instrument of Accession of the State referred to in paragraph (i) of sub-clause (b) shall be issued except in consultation with the Government of the State:

Provided further that no such order which relates to matters other than those referred to in the last preceding proviso shall be issued except with the concurrence of that Government.

(2) If the concurrence of the Government of the State referred to in paragraph (ii) of sub-clause (b) of clause (1) or in the second provision to sub-clause (d) of that clause be given before the Constituent Assembly for the purpose of framing the Constitution of the State is convened, it shall be placed before such Assembly for such decision as it may take thereon.

(3) Notwithstanding anything in the foregoing provisions of this Article, the President may, by public notification, declare that this Article shall cease to be operative or shall be operative only with such exceptions and modifications and from such date as he may specify:

Provided that the recommendation of the Constituent Assembly of the State referred to in clause (2) shall be necessary before the President issues such a notification.

(3) In this section, the expression 'State subject of Class I or of Class II' shall have the same meaning as in State Notification No. 1-L/84 dated twentieth April, 1927, read with State Notification No. 13/L dated twenty seventh June, 1932.

Further reference for definition of a "State Subject" is made towards the Notification No. 1-L/84 dated 20 April 1927 and State Notification No. 13/L dated 27 Jun, 1932.

State Subjects of the State of Jammu and Kashmir

In January 1927, the then Ruler of the State Maharaja Hari Singh issued a Circular Order defining 'Hereditary State Subject'² of the State of Jammu and Kashmir. Creating preference for the State Subjects over outsiders, the order stated that in future, in case of every new entrant into the State service, the authority empowered to make the appointment should certify that he has satisfied himself after due enquiries that the person appointed is a Hereditary State Subject'. The order then defined the term 'Hereditary State Subject' as under:

For the purpose of this order the term 'hereditary State Subject' will be held to mean and include all persons born and residing within the State before the commencement of the reign of His Highness the late Maharaja Gulab Singh Sahib Bahadur and also persons who settled therein before the commencement of Samvat 1942³ and have since been permanently residing therein.

In April 1927, another Notification dated 20.04.1927⁴ was issued by the Maharaja that redefined the term 'State Subject' and substituted the above mentioned Circular Order by necessary implication and. The term 'hereditary State Subject' was replaced by 'State Subject'. The new definition provided for three classes of State Subjects. The Maharaja's Notification dated 20.04.1927 reads as follows:

² Maharaja's Private Secretary's Circular Order No. PS-2354 dated 31 January, 1927.

³ 1885 A.D.

⁴ Maharaja's Notification No. 1-L/84 dated 20th April, 1927.

Notification dated 20th April, 1927 No. 1-L/84.—The following definition of the term ‘State subject’ has been sanctioned by His Highness the Maharaja Bahadur (vide Private Secretary’s Letter No. 2354 dated 31st January, 1927 to the Revenue Member of the Council) and is hereby promulgated for general information.

The term ‘State subject’ means and includes:

Class I.—All persons born and residing within the State before the commencement of the reign of His Highness the late Maharaja Gulab Singh Sahib Bahadur, and also persons who settled therein before the commencement of samvat year 1942⁵ and have since been permanently residing therein.

Class II.—All persons other than those belonging to Class I who settled within the State before the close of samvat year 1968⁶ and have since permanently resided and acquired immovable property therein.

Class III.—All persons other than those belonging to Class I and Class II permanently residing within the State, who have acquired under ‘*rayatnama*’ any immovable property therein or who may hereafter acquire such property under an ‘*ijazatnama*’ and may execute ‘*rayatnama*’ after ten years’ continuous residence therein.

Class IV.—Companies which have been registered as such within the State and which being companies in which the Government are financially interested or as to economic benefit to the State or to the financial stability of which the Government are satisfied, have by a special order of His Highness been declared to be State subjects.

⁵ *Supra* note 3.

⁶ 1911 A.D.

Note I.—In matters of grant of State scholarship, State lands, for agricultural and house building purposes and recruitment to State service, State subject of Class I should receive preference over other classes and those of Class II, over Class III, subject however, to the order dated 31st January, 1927 of His Highness the Maharaja Bahadur regarding employment of hereditary State subjects in government service.

Note II.—the descendants of the persons who have secured the status of any class of the State subject will be entitled to become the State subjects of the same class. For example, if A is declared a State subject of Class II, his sons and grandsons will ipso facto acquire the status of the same Class II and not of Class I.

Note III.—The wife or a widow of the State subject of any class shall acquire the status of the husband as State subject of the same class as her Husband, so long as she resides in the State and does not leave the State for permanent residence outside the State.

Note IV.—For the purpose of the interpretation of the term ‘State subject’ either with reference to any law for the time being in force or otherwise, the definition given in this notification as amended up to date shall be read as if such amended definition existed in this notification as originally issued.

Another Notification dated 27.06.1932⁷ was issued by the Maharaja for clarifying the status of emigrants from J&K to foreign territories and for prescribing the conditions for the acquisition of State Subject by the the foreign nationals in J&K. The Notification provided as under:

⁷ Maharaja's Notification No. 13-L/1989 dated 27th June 1932.

Notification No. 13-L/1989: (Issued by the order of His Highness the Maharaja Bahadur dated Srinagar, the 27th June, 1932, 14th March, 1989, published in the Government Gazette dated 24th March, 1989). It states:

Whereas it is necessary to determine the status of J&K State subjects in foreign State as to the position of their nationals in the State, it is hereby commanded and notified for the public information as follows:

1. That all emigrants from J&K State to foreign territories shall be considered State subjects and also the descendants of these emigrants born abroad for two generations:

Provided that, these nationals of Jammu and Kashmir State shall not be entitled to claim the internal rights granted to subjects of this State by laws, unless they fulfill the conditions laid down by those laws and rules for the specific purposes mentioned therein.

2. The foreign nationals residing in the State of Jammu and Kashmir shall not acquire the nationality of Jammu and Kashmir State until after the age of 18 on purchasing immovable property under permission of an '*ijazatnama*' after ten years' continuous residence in J&K State as laid down in Notification No. 1-L of 1984 dated 20th April, 1927.

3. Certificates of nationality of J&K State may, on application, be granted by Minister-in-charge of the Political Department in accordance with the provisions of Section 1 of this Notification.

Section 8 of the Constitution of Jammu and Kashmir empowers the State Legislature to make any law defining the classes of persons who are, or shall be, permanent residents of the State. For making any such law, the Bill for the purpose is required to be passed by either House of the State Legislature by a majority of two-thirds of the total membership of that House.

2.2. Article 35-A of the Constitution of India

The Constitution (Application to Jammu and Kashmir) Order, 1954, *inter alia*, introduced Article 35-A for the protection of the special privileges of the people of Jammu and Kashmir. Article 35-A reads as follows:

35-A. Saving of laws with respect to permanent residents and their rights.—

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 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, if such law is for :

- (a) defining the classes of persons who are, or shall be, permanent residents of the State of Jammu and Kashmir; or
- (b) conferring on such permanent residents any special rights and privileges or imposing upon other persons any restrictions as respects—
 - (i) employment under the State Government;
 - (ii) acquisition of immovable property in the State;
 - (iii) settlement in the State; or
 - (iv) right to scholarships and such other forms of aid as the State Government may provide.

It was in furtherance of Article 35-A that the definition of 'permanent residents' was provided in the Constitution of Jammu and Kashmir. Thus as per Article 35-A, only the permanent residents of the State of Jammu and Kashmir are entitled to the above mentioned rights. This has played havoc with the generations of some population groups in the State of Jammu and Kashmir whose tales of woes remain endless due to victimization being faced by them because of Article 35-A.

3. The Population Groups of Jammu and Kashmir that are Victims of Article 35-A

These population groups are the West Pakistan Refugees, the Valmikis, the Gorkhas and the women of Jammu and Kashmir married outside the State.

3.1. The West Pakistan Refugees (WPRs)

The 'West Pakistan Refugees' (WPRs) migrated from West Pakistan (Punjab) to the State of Jammu and Kashmir during partition of India in the year 1947 and have been living in the State for the last more than 70 years. But even seven decades later, they are still identified as 'refugees' and 'Pakistanis' and denied the basic rights in the State. Those who migrated from Pakistan to other parts of India were rehabilitated and as the rightful citizens of India, enjoy every right and privilege that the Constitution of India confers on all Indians. From a few thousands at the time of migration, their population has now grown to about a lakh. They do not have the 'permanent resident status' in Jammu and Kashmir, as such the WPRs cannot own property in the State nor get a job in the State Government. Their children are not entitled to scholarships availed by the children of the permanent residents nor can they get admissions in any state-run professional colleges. They remain deprived of the benefits of various social welfare schemes launched by the State Government as well as the Central Government. Local political representation is wholly denied to them. They cannot contest or cast their vote in State Assembly elections. They cannot participate in the elections of local village panchayats and other self-governing bodies of the districts.

3.2. The Valmikis or the Safai Karamcharis

The Valmikis or the Safai Karamcharis were brought in the State by the government of Jammu and Kashmir in 1957. Around two hundred Valmiki families were brought from Punjab to Jammu and Kashmir, following a State cabinet decision, specifically to be employed as Safai Karamcharis (sweepers) as an arrangement in view of a prolonged strike by Jammu municipal workers. These families agreed to work in the State after being promised by the Government of J&K that the 'permanent resident' clause would be relaxed in their favour. However, their plight is that even after more than six decades, they are 'permanent residents' of Jammu and Kashmir only to the extent of being Safai Karamcharis by way of a provision to that effect inserted in the State Civil Service Regulations.⁸ The

⁸ Rule 35-B of the Jammu and Kashmir Civil Service Regulations.

strength of each family has now increased, raising their number to few thousands in the State but the increase means the increase only of the Safai Karamcharis for the State. The children of many have done graduation/ post graduation but are not eligible to apply for government jobs. Their children cannot get admission to government-run professional institutes. They can only be appointed as Safai Karamcharis. They are not at par even with the local Safai Karamcharis already working in Jammu Municipality who qualify for further promotions. But they can be employed only as sweepers. Like WPRs, Safai Karamcharis also can vote only for Lok Sabha elections, but not for State Assembly or local bodies' elections. The residential colony allotted to Safai Karamcharis has also not been regularized till date.

3.3. The Women of Jammu and Kashmir State Married Outside the State

Another section that is facing deprivations in the State is the women of the State who also have been subjected to discrimination in the matter of 'permanent resident' status. Laws prevalent in the State of Jammu and Kashmir clearly violate the principle of gender equality. Men of Jammu and Kashmir State who marry outside the State can bring home their wives who become entitled to the Permanent Resident Certificate (PRC) on marriage. Children born from these women also inherit permanent resident status. However, a man from another State marrying a woman from J&K State cannot get PRC. Earlier, rather such women used to lose 'permanent resident status' on marrying outside the State. The PRC of the daughters of the State bore the remark "valid till marriage" which lost its validity on marriage to a non-permanent resident. However, after a long legal battle, in the year 2002, the women of the State won in the J&K High Court⁹ the right to retain their PRC or permanent resident status even after marriage to a non-permanent resident man. Attempts have been made by the State Legislature to do away with this judgment by introducing Bills to such effect in the State Legislature in the years 2004 and 2010. Though these Bills could not be passed and made into laws and the 2002 judgment stands but the discrimination to such women still continues as their children are still not considered eligible for PRC by the State government, which means they shall remain deprived of all the rights available to the permanent residents.

⁹ *State of Jammu and Kashmir and Ors. v. Dr. Susheela Sawhney*, AIR 2003 J&K..

6. Conclusion

From above discussion it is clear that the West Pakistan Refugees, the Valmikis, the Gorkhas and the women married outside the State of Jammu and Kashmir have all been subjected to the gravest deprivations on account of Article 35-A of the Constitution of India. Their fate has been tied to this Article of the Constitution of India. They cannot claim any of the rights enlisted under this Article because they are not covered under the definition of 'permanent residents'. This Article itself suffers from unconstitutionality as it was added to the Constitution of India by bypassing the constitutional procedure of amendment. Any new Article can be added in the Constitution of India only by the Parliament of India by following the procedure prescribed for amendment under Article 368 of the Constitution of India. However, Article 35-A was added by a Presidential order which raises a question mark on its validity. The Article is not traceable even in the main body of the Constitution of India. It is in Appendix I of the Constitution of India.¹⁰ The Article is presently under challenge before the Supreme Court of India.¹¹

A perusal of Article 35-A shows that it includes very basic rights of citizens without which survival and dignified life are not possible. So humane existence becomes impossible for those who are living in the State but are not the permanent residents of the State. Even the Maharaja's Notifications of 1927 and 1932 had created scope for outsiders to acquire the property in the State and hence to get the State Subject. However, the new definition of 'permanent residents' under Section 6 of the Constitution of Jammu and Kashmir did not make any such provision. Though the Constitution of Jammu and Kashmir has the provision for redefining the 'permanent residents' by the State Legislature¹² but no such attempt till date has been made by the legislature of the State of Jammu and Kashmir to include and thus

¹⁰ *The Constitution of India*, Appendix I, para 2 (4) (j).

¹¹ *We the Citizens v. Union of India*, W.P (c) no. 722/2014.

¹² Section 8 of the Constitution of Jammu and Kashmir provides that nothing shall derogate from the power of the State Legislature to make any law defining the classes of persons who are, or shall be, permanent residents of the State. Under section 9, any such Bill is required to be passed by both the Houses of the State Legislature by a majority of not less than two-thirds of the total membership of each House.

provide respite to the people belonging to these groups. Section 10 of the Constitution of Jammu and Kashmir guarantees to the permanent residents of the State all the rights provided under the Constitution of India whereas the people belonging to these groups remain deprived of many of those rights too for the reason of not being the permanent residents of the State. The State of Jammu and Kashmir is thus required to take necessary steps to pull these hapless people out of this quagmire and to devise measures by way of necessary amendments as well as by executive actions to empower them so as to put an end to their victimization.
