

# Interrogating the Citizenship Question in India: Debating Article 35A and Article 370

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## Abstract

*Debating on citizenship ---not just meaning the right to carry a specific passport but encapsulating the relationship between the individual, state and society has become a major point of discussions both within the domain of academia as well as outside. Throughout the history, the concept has been defined variously and there exists no fixed definition. The paper would concentrate on the debate by focusing on citizenship provisions in the Constitution of India with particular focus on Article 35A and Art.370 of the Constitution of India and critically look into the positions taken by the Government of India and the political party leaders in Jammu and Kashmir. The provisions have been debated upon centering on the issue of violation of the Constitution of India and the fundamental rights as promised to the citizens of India by the supreme law of the land. As history is dynamic it is essential to engage in a constructive dialogue so that inclusive citizenship can be realized. The paper would delineate the major arguments in the debate and try to propose some guiding premises along the lines of which a revision could be worked out whereby particularities are protected but the universality of citizenship is also promoted.*

**Keywords: citizenship, rights, Art. 35A, Art. 370, gender inequality, denial of rights, Permanent Residency, Supreme Court, differentiated citizenship, dialogue, democratic practice.**

## 1. Introduction

When the PIL filed by a little known NGO, 'We the People' (2014), on Article 35A of the Constitution of India came for hearing in the Supreme Court of India it generated a lot of heat not just within the academics but also among the common man. The issue of citizenship has caught the attention of the scholars throughout the world since the 1990s as globalization challenged the old notion of nation states and in India the emergence and strengthening of

Rightist groups who had been demanding a fresh look into Article 370 of the Constitution of India, has brought the issue into discussion.

Debating on citizenship ---not just meaning the right to carry a specific passport but encapsulating the relationship between the individual, state and society has become a major point of discussions both within the domain of academia as well as outside. The reason behind this as some scholars(Stewart:1995)have pointed out in the West is the collapse of Soviet Union and shift from state centred social change and the second reason is ---how to effect social integration amidst the changing state – market relations. With globalization not only the other nations have also entered the debating fora but certain other questions and issues have got tagged to the ongoing debate. Nations small and large have all been affected by the debate---not just on citizenship issues in the traditional bent but citizenship rights and claims pickled with dynamics of gender, language, ethnicity, religion, caste etc

Citizenship as an idea connotes not just a legal status but a normative ideal. It embodies not just a set of particular rights and duties but ascribes an integrative value that attributes the individual to be a member of the political community. This ascription bestows on the individual a significant marker of what would be a significant part of her/his identity. Usually any discussion on citizenship takes as its starting point the formulation of citizenship by T. H. Marshall who propounded a universalistic notion of citizenship. T.H. Marshall (1950, 1975, 1981), has defined citizenship as ‘a status bestowed on those who are full members of a community’ (1950:14), which includes civil, political and social rights and obligations. Marshall’s definition links up the idea of citizenship with the community thus making it a multilevel construct thereby opening up a lot of dimensions which, in the contemporary period becomes all the more relevant as Davis(1997) opines, when neo-liberal states redefine and reprivatize their tasks and obligations. It also enables us to raise the question of the relationship between ‘the community’ and the state and how this affects people’s citizenship.

Within the renewed discussions on citizenship, Mann (1987) for one has given a new conceptualization proposing a fruitful understanding of it if viewed from the repertoire of ruling class strategies. This position has been criticized by Bryan Turner (1990) who would rather view it from a two-fold matrix of public/private and active/passive. Davis(1997) however, points out that Turner’s typology, is completely Euro- or, rather, West centric (Yuval-Davis,1991a), his

'universal' typology being based on the development of citizenship in four Western countries—France, the USA, England and Germany. Even more astonishing perhaps, is the fact that Turner's typology is gender blind (Yuval-Davis, 1991a; Walby, 1994), although the two dimensions he considers are ones which have often been used in order to describe gender differences in general and difference in relation to women's citizenship in particular (Pateman, 1988; Grant and Newland, 1991). As Roche (1987) describes it, the problem lies in the conceptualization of the concept in a state centric manner. In the liberal tradition individual citizens are presumed to have equal status, equal rights and duties, etc., so that principles of inequality deriving from gender, ethnic, class or other contexts are not supposed to be of relevance to the status of citizenship as such. The citizens are therefore constructed not as 'members of the community' but as strangers to each other, although they are sharing a complex set of assumptions about and expectations of each other which, when not fulfilled, can be enforceable by the state. Therefore, he suggests for a definition away from a state centric discourse. In fact, as one scans through the diverse positions on citizenship it is observed that the concept has undergone changes with changes in historical epochs and a very prominent influence of liberal ideas and as Brubaker (1992) opines it is the influence of the French Revolution that has shaped the concept in its present dominant form of understanding, a formal legalistic status. The other conception is that of citizens are members of a political community with shared rights and obligations, which to Stewart (1995) could be termed as democratic citizenship. However, the positions have been challenged by the communitarians for its state centric conception, the feminists and the scholars who argue for rights based on group differentiation. Young (1989) proposed for a Differentiated Citizenship where members are included not just as individuals within the political community but also through the group.

An extensive study on citizenship by Derek Heater (1990) points out that throughout the history, the concept has been defined variously and there exists no fixed definition. However, one can definitely agree to the three common elements that the concept embodies (Cohen 1999; Kymlicka and Norman 2000; Carens 2000). The first is citizenship as legal status, defined by civil, political and social rights. Here, the citizen is the legal person free to act according to the law and having the right to claim the law's protection. It need not mean that the citizen takes part in the law's formulation, nor does it require that rights be uniform between citizens. The second considers citizens specifically as political agents, actively participating in a society's political

institutions. The third refers to citizenship as membership in a political community that furnishes a distinct source of identity. Of the three, the identity dimension is the most debated. The paper would concentrate on the debate by focusing on citizenship provisions in the Constitution of India with particular focus on Article 35A and Art. 370 of the Constitution of India and critically look into the positions taken by the Government of India and the political party leaders in Jammu and Kashmir.

## **2. What is it all about? Interrogating the Issue**

The Constitution of India incorporates the provisions related to Citizenship in the Article 5-11, in the Part III of the Constitution, the chapter on Fundamental Rights and Part IVA enshrining the Fundamental Duties. Citizenship rights have also been conferred from time to time on the expatriates and immigrants through constitutional amendments. There are certain special provisions related to citizenship for certain regions of India like Jammu and Kashmir, Mizoram, Nagaland etc. Presently the debate is centered around Article 35A meant for the state of Jammu and Kashmir. The issue centres around the special preferential rights guaranteed to the people of the state during the time of accession to the state of India.

Prior to 1947, Jammu and Kashmir was a princely state under the British Paramountcy. The people of the princely states were "state subjects", not British colonial subjects (Robinson 2013). In the case of Jammu and Kashmir, the political movements in the state in the early 20th century led to the emergence of "hereditary state subject" as a political identity for the State's peoples, and the legal provisions for the recognition of the status were enacted by the Maharaja of Jammu and Kashmir between 1912 and 1932. The 1927 Hereditary State Subject Order, passed by the Maharaja due to the pressure of the Pandit community which had launched a "Kashmir for the Kashmiri" movement, granted to the state subjects the right to government office and the right to land use and ownership, which were not available to non-state subjects (Dasgupta 1968,2012; Robinson 2013).

Following the accession of Jammu and Kashmir to the Indian Union on 26 October 1947, The Maharaja ceded control over defence, external affairs and communications (the 'ceded subjects') to the Government of India . The Article 370 of the Constitution of India and the concomitant Constitutional Order of 1950 formalised this relationship. Discussions for furthering the

relationship between the State and the Union continued, culminating in the 1952 Delhi Agreement, whereby the governments of the State and the Union agreed that Indian citizenship would be extended to all the residents of the state but the state would be empowered to legislate over the rights and privileges of the state subjects, who would now be called permanent residents(Constantin &Kosler 2014).

In his statement to the Lok Sabha on the Delhi agreement, Nehru has said:“The question of citizenship arose obviously. Full citizenship applies there. But our friends from Kashmir were very apprehensive about one or two matters. For a long time past, in the Maharaja's time, there had been laws there preventing any outsider, that is, any person from outside Kashmir, from acquiring or holding land in Kashmir. If I mention it, in the old days the Maharaja was very much afraid of a large number of Englishmen coming and settling down there, because the climate is delectable, and acquiring property. So although most of their rights were taken away from the Maharaja under the British rule, the Maharaja stuck to this that nobody from outside should acquire land there. And that continues. So the present Government of Kashmir is very anxious to preserve that right because they are afraid, and I think rightly afraid, that Kashmir would be overrun by people whose sole qualification might be the possession of too much money and nothing else, who might buy up, and get the delectable places. Now they want to vary the old Maharaja’s laws to liberalise it, but nevertheless to have checks on the acquisition of lands by persons from outside. However, we agree that this should be cleared up. The old state’s subjects definition gave certain privileges regarding this acquisition of land, the services, and other minor things, I think, State scholarships and the rest.

So, we agreed and noted this down: 'The State legislature shall have power to define and regulate the rights and privileges of the permanent residents of the State, more especially in regard to the acquisition of immovable property, appointments to services and like matters. Till then the existing State law should apply.'( Cited in Noorani 2011)

Following the adoption of the provisions of the Delhi Agreement by the Constituent Assembly of Jammu and Kashmir, the President of India issued The Constitution (Application to Jammu and Kashmir) Order, 1954, through which Indian citizenship was extended to the residents of the state, and simultaneously the Article 35A was inserted into the Indian constitution enabling the State legislature to define the privileges of the permanent residents(Constantin &Kosler 2014).

Subsequently, the Constitution (Application to Jammu and Kashmir) Order, 1954 was issued by President Rajendra Prasad under Article 370, with the advice of the Union Government headed by Jawaharlal Nehru. It was enacted as a subsequent to the '1952 Delhi agreement', reached between Nehru and the then Prime Minister of Jammu and Kashmir Sheikh Abdullah, which dealt with the extension of Indian citizenship to the Jammu and Kashmir "state subjects".(Noorani 2011)

The state is empowered, both in the Instrument of Accession and the Article 370, to decree exceptions to any extension of the Indian Constitution to the state, other than in the matter of ceded subjects (Noorani 2011). So Article 35A is seen as an exception allowed by the Article 370, clause(1)(d).

"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:

(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,

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." The Constitution (Application to Jammu and Kashmir )Order 1954

The Jammu and Kashmir Constitution, which was adopted on November 17, 1956, defined a Permanent Resident (PR) of the state as a person who was a state subject on May 14, 1954, or

who has been a resident of the state for 10 years, and has “lawfully acquired immovable property in the state”. The Jammu and Kashmir state legislature can alter the definition of PR through a law passed with two-thirds majority. Jammu and Kashmir Constituent Assembly incorporated in Jammu and Kashmir Constitution discriminatory provisions under Section-51 (Qualifications for membership of the Legislature. - A person shall not be qualified to be chosen to fill a seat in the Legislature unless he is a Permanent Resident of the State), Section- 127 (Transitional provisions. - Until other provision is made in this behalf under this Constitution, all the laws in force immediately before the commencement of this Constitution and applicable to any public service or any post which continues to exist after the commencement of this Constitution, as service or post under the State, shall continue in force so far-as consistent with the provisions of this Constitution) and Section-140 (The elections to the Legislative Assembly shall be on the basis of adult suffrage ; that is to say, every person who is a permanent resident of the State and who is not less than Eighteen years of age on such date ...), etc. No person who is not a Permanent Resident of Jammu and Kashmir can own property in Jammu and Kashmir. No person who is not a Permanent Resident of Jammu and Kashmir can obtain job within Jammu and Kashmir Government. No person who is not a Permanent Resident of Jammu and Kashmir can join any professional college run by government of Jammu and Kashmir or get any form of government aid out of government funds.( Constitution of Jammu and Kashmir,1956)

Let us look into the reasons behind the debate. ‘We the Citizens’, a little known NGO filed a plea in 2014 challenging the provision. We the Citizens have contended that Jammu and Kashmir’s autonomous status under Articles 370 and 35A was discriminatory in nature for non-residents of the State in matters of Government jobs and real estate purchases.

Article 370(1)(b)(ii) and Article 370(1)(d) of the Constitution state that the concurrence of the state government is needed when making decisions under the Union List (comprising items on which the Centre has exclusive power to legislate) and the Concurrent List (made up of items on which both the Centre and states have jurisdiction) apart from the subjects under the Instrument of Accession. Such concurrence is also needed for the extension of Articles of the Constitution of India to the state of Jammu and Kashmir. The power of extending laws to the state of Jammu and Kashmir was to be exercised through orders issued by the president of India. Article 370(2) states that when the Constituent Assembly is convened, the concurrence given by the state

government shall be placed before it and it can make decisions regarding the same. This indicates that this was an interim measure to determine legislative and executive relations with the state till the Constituent Assembly had been formed. Article 370(3) states that the president can declare Article 370 to be inoperative, but only with the recommendation of the Constituent Assembly.( Kumar 2005, Noorani 2011, Tillin 2016) The Supreme Court in PremNathKaul versus State of Jammu and Kashmir(1959 AIR 749, 1959 SCR Supl. (2) 270)had clarified that the framers of the Constitution wanted the Constituent Assembly to finally determine the relationship between India and the state.

Article 35A of the Constitution of India enables Jammu and Kashmir to make a distinction between permanent and non-permanent residents in relation to acquisition of immovable property, settlement in the state and employment, among others. However, it has been argued that the insertion of a constitutional article by an order of the president is void as it was not based on the procedure for amendment to the Constitution. The provisions were inserted into the body of the Constitution without any discussion in the Parliament (Noorani 2011).

The power of the president to modify Articles of the Constitution under Article 370(1)(d) in relation to their application to Jammu and Kashmir was discussed by the Supreme Court in PuranlalLakhanpal versus The President of India(1961 AIR 1519, 1962 SCR (1) 688). The petitioner challenged the Constitution (Application to Jammu and Kashmir) Order, 1954, issued by the president under Article 370(1)(d) through which Article 81(1) of the Constitution of India was modified in relation to Jammu and Kashmir, whereby direct elections from parliamentary constituencies in the state were substituted with an indirect election process (presidential appointments). The petitioner argued that the power of the president to modify constitutional provisions in relation to their application in the state did not include the power to amend the Constitution, nor the power to make radical alterations to the Constitution.

The constitutional bench of the Supreme Court rejected this contention by reasoning that since the object of Article 370 is to provide special status to Jammu and Kashmir, the powers of the president under the relevant Article should be interpreted in the “widest possible amplitude”. It, therefore, dismissed the petition and held, “We are therefore of opinion that in the context of the Constitution we must give the widest effect to the meaning of the word ‘modification’ used in Art. 370(1) and in that sense, it includes an amendment. There is no reason to limit the word



modifications as used in Art. 370(1) only to such modifications as do not make any ‘radical transformation’.”

Similarly, in *State Bank of India versus Santosh Gupta*(2016) the Supreme Court reiterated that “the word modification must be given the widest meaning and would include all amendments which either limit or restrict or extend or enlarge the provisions of the Constitution of India”.

The provision has been contentious for its exclusionary nature especially with serious ramifications on the status of women, the Valmiki community, West Pakistan Refugees and the Gorkha community who have been staying there for years.

### **3. Looking at the Debate on Citizenship in India**

As the Article 35A was added to the Constitution by the executive head without any discussion in the Parliament, questions have been raised about the manner of its enactment. It was never presented before Parliament, and the parliamentary route of lawmaking was bypassed although four representatives from Kashmir were part of the Constituent Assembly involved in the drafting of the Constitution and in the draft J&K was never accorded any special status in the Constitution. Article 370 was only a ‘temporary provision’ to bring normality in Jammu and Kashmir and strengthen democracy in the State. Questions have been raised about the provision’s continuity which as some critics point out is detrimental to the spirit of national integration.

Moreover the provisions related to the issuance of PRC are another area of contention. It has been pointed out that it violates Article 14, 19 and 21 of the Constitution of India, namely the right of equality before the law of all citizens.(see the Constitution of India)

#### **3.1 What it means for Women?**

Backed by Article 35-A Section 6 as adopted and strictly enforced by the State Government reads: (I) “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 of 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 this date” and (II) “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 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”.(Constitution of Jammu and Kashmir,1956)

As for Sections 8 and 9, the former gives the State Legislature the right to define Permanent Residents and the latter empowers the State Legislature to alter the definition of Permanent Residents. Initially as one can see in the laws made by the king and the subsequent government did not contain anything to differentiate between man and women. Infact all the laws framed by Maharaja Hari Singh or subsequent Government were gender neutral. They defined the Permanent resident not Male permanent resident or female resident. But later on notwithstanding anything in PRC act the concept of “Valid Till Marriage” got introduced in it without any legal sanction as one can see again in the certificates issued to the residents by the authority.

Therefore the situation as it stands out is when women belonging to the state of Jammu-Kashmir marry outsiders, they cannot settle in the state even if the circumstances so demand. A man from another state marrying J&K a woman cannot get PRC, hence none of the associated benefits, which means he cannot buy land, cannot apply for a government job, his children cannot study in state-run professional colleges and institutes. This means if a woman marries outside the state, she is virtually forced to leave the state and settle elsewhere. Earlier, such women used to completely lose the ‘permanent resident status’. But still her off springs and spouse don’t get PRC which is not there in case of male. This is a clear case of gender bias and denial of equal rights to women as guaranteed by the Constitution of India. Therefore, a question arises---Can a state government being a part of the country deny certain fundamental rights to its citizens violating the soul of the Constitution and create differences among citizens?

Up to 2002, the Revenue Department was issuing Permanent Resident Certificates (PRCs) to the female residents of Jammu and Kashmir with the endorsement as “Valid Till Marriage”. This became the ground for a petition before the State High Court whereby selection of a doctor was challenged on the plea that she was married to a non- state subject. The judgment of single Judge

whereby selection was quashed was challenged in the Division Bench of J&K High Court and keeping in view the sensitive nature of the case and the legal issues, a Full Bench comprising Justice V Jhanji, Justice T Doabia and Justice M Jan was constituted.

The reference before the Full Bench was: “Whether the daughter of a permanent resident of the State of Jammu and Kashmir marrying a non-permanent resident loses her status as a permanent resident of State, to hold, inherit and acquire immovable property in the State?”

In view of the majority opinion, the Full Bench in a case titled Jammu and Kashmir Versus DrSushilaSawhney and Others (2002)held that a daughter of a permanent resident marrying a non-permanent resident will not lose the status of permanent resident of State of Jammu and Kashmir. Though the State Government initially filed Special Leave Petition (SLP) in the Supreme Court against the verdict of Full Bench of J&K High Court but later withdrew the same after making an opinion that it will carry out necessary amendments in the Act governing issuance of PRCs.

The PDP-led coalition government, in March 2004 tried to bypass the High Court’s landmark judgment. It moved an official Bill after the tough stand of Hon’ble Supreme Court which was passed in a record 6 minutes. But the Bill was declared “defeated” in the Legislative Council. The main reason was that the bill had created a storm in Jammu and at the national level as anti-women, reactionary and out-dated. But the defeat of the Bill did not deter the coalition government. Instead of implementing the High Court verdict, officials in the Revenue Department continued to endorse “valid till marriage” on the State Subject Certificates issued to unmarried daughters of State Subjects (Chowdhury,2014). In Hari Om vs. State of J&K & others (PIL No. 1002/2004 & CMP No. 1089/2004), the Double Bench comprising Justices V.K. Jhanji and Y.P. Nargotra, in its interim judgment on Sept. 24, 2004, ruled: “In the meantime, respondents (State of J&K & others) are directed not to make any endorsement of ‘valid till marriage’ on the State Subject Certificate issued to unmarried daughters of State Subjects”. The State Government did not implement the interim order, and dismissed the judgment with contempt. On Jan. 27, 2005, Commissioner/Secretary to the Government, Revenue Department, issued circular No Rev (LB) 87/74 asking the State Subject Certificate issuing authorities to make endorsement: “The certificate may be reissued after marriage to indicate if the lady has

married a State Subject or non-StateSubject". The petitioner again knocked at the doors of the High Court and sought contempt proceedings against the J&K Government, via PIL (COA (PIL) No. 2/2005). The matter went to the Double Bench comprising Justices V.K. Jhanji and ParmodKohli. On July 11, 2005, the Bench stayed implementation of the impugned anti-women circular and issued notice to the J&K Government. This had its impact on the J&K Government and on Aug. 2, 2005, it withdrew the circular vide No. Rev/PRC/04-WP. On Aug. 8, 2005, Justices V.K. Jhanji and Y.P. Nargotra ruled: "In view of circular dated 2nd of August, 2005, passed by respondents (read J&K Government), the grievance of the petitioner (read this writer) stands redressed and, therefore, this Public Interest Litigation as well as the contempt petition are disposed of having been rendered in-fructuous. Rule, if any, issued is discharged." A lady, who has been married to a non-state subject, approached the office of Governor Office after Jammu and Kashmir Service Selection Board (JKSSB) refused to recommend her name to the education department for being allowed to join asTeacher. According to her application, she had got selected as teacher and when she approached SSRB for her recommendation letter, SSRB refused saying that the same cannot be issued since she had married a non-state subject and her state subject certificate was not valid anymore. Peeved at this, the lady approached the office of Governor, pleading him to intervene for getting her issue resolved. The Governor immediately wrote to the state government advising the issue be resolved immediately in the light of the judgment in the case of Dr. SushilaSwahney wherein High Court had said that a woman does not lose her state subject on marrying a non-state subject. But the judgment had remained silent on issue of children of female state subject married to a non-state subject.

The committee has been constituted to examine the case of lady in details besides laying down clear cut guidelines and rules for woman who get married outside the state to non-state subjects.

Following the much-publicized judgment of the Full Bench of J&K High Court in a case titled Jammu and Kashmir Versus DrSushilaSawhney and Others the Subordinate Revenue Officers, who were authorized to issue Permanent Resident Certificates (PRCs), started facing certain difficulties in the absence of clear guidelines and clarifications on certain aspects.After going through the legal points raised by these officers, the Department of Revenue took up the matter with the Department of Law, Justice and Parliamentary Affairs and accordingly, the opinion of

Advocate General was obtained, who suggested framing of an expert committee to thrash out the issues arisen after the judgment. The Revenue Department vide Government Order No.67-Rev(PRC) dated June 1, 2016 constituted a committee to thrash out the issues projected by the Subordinate Revenue Officers and to remove the difficulties being faced by them in implementing the law on the subject. The committee headed by Commissioner/ Secretary to Government, Revenue Department was explicitly told to submit its report to the Government within a period of two months—by August 1, 2016.

Eventhough the judgement was unambiguous and needs to be implemented but the political mood in the state seems to be otherwise and the problem seems to be that intervention by the centre is required but the central government cannot intervene because of Article 35-A.

### **3.2 What it means for the Valmikis, Gorkhas and West Pakistan Refugees?**

In 1957, around 200 Valmiki families were brought from Punjab to Jammu-Kashmir, following a cabinet decision, specifically to be employed as SafaiKaramcharis (sweepers). These families agreed to work in the state after being promised that the ‘permanent resident’ clause would be relaxed in their favour. After a lapse of five decades, family strength of each family has increased and number of employees has gone up. However, their plight is that they are ‘permanent residents’ of Jammu-Kashmir only to the extent of being SafaiKaramcharis. Their children have studied up to graduation level but are not eligible to apply for Government jobs. Their children cannot get admission to government-run professional institutes. The educated youth from these Valmiki families are only eligible to be appointed as safaikaramcharisonly. The educated Safai-Karamcharis already working in Jammu Municipality now qualify for further promotions. But as they can only be employed as sweepers, there is no hope. These Safai-Karamcharis can vote for Lok Sabha elections, but not for State Assembly or municipality elections. The colony that was allotted to SafaiKaramcharis to live in (Valmiki Colony, Gandhi Nagar, Jammu) has not been regularized till date.

Similarly around two hundred Gorkhas who worked in the army of Raja Ranjit Singh and Raja Gulab Singh had settled down in the valley are faced with the same situation like the *Valmikis*. The people who have been residing for more than two centuries, are they less Kashmiri?

Similar is the plight of West Pakistan Refugees (WPR) who have failed to acquire permanent residentship although in other parts of India it was quite easy for the refugees who migrated to India post partition. Similarly, those who migrated from West Pakistan to the Indian state of Jammu Kashmir during Partition in 1947 have been living there since last 68 years. Around 5,764 families consisting of 47,215 persons migrated from West Pakistan to different areas of Jammu Division. No land was allotted to them by the State Government. These refugees were able to occupy some land, which was later allowed to be retained by them without conferring upon them the title of land because of their non-permanent resident status. This means they can stay on this land, but cannot sell it or buy any other property.

But over six decades later, they are still identified as 'refugees' and forced to live in 'camps'. Even their third generation is tagged as 'refugees' and denied rights and privileges that should have been immediately granted to those who were forced to migrate from Pakistan. West Pakistan Refugees (WPR) are mostly from the deprived sections and more than 80% of them belong to the Scheduled Castes. The J&K law for them means – they can be tillers, labourers, tenants but not land-owners and land-lords. WPR families can't avail the benefits of various social welfare schemes launched by the State Government. No other benefits of any kind have been granted to them. Their children are not entitled to scholarships and freeships available to PRC holders. Members of WPR families cannot get admissions in any state-run professional colleges. They are not even eligible to cast their vote for State Assembly elections. They have no participation in local village panchayats and other self-governing bodies up to the district level.

In October 2015, the High Court of Jammu and Kashmir has ruled that the Article 370 cannot be "abrogated, repealed or even amended." It explained that the clause (3) of the Article conferred power to the State's Constituent Assembly to recommend to the President on the matter of the repeal of the Article. Since the Constituent Assembly did not make such a recommendation before its dissolution in 1957, the Article 370 has taken on the features of a "permanent provision" despite being titled a temporary provision in the Constitution. In December 2016, the Supreme Court of India set aside a judgement of the High Court of Jammu and Kashmir which stated that Jammu and Kashmir had "absolute sovereign power" on account of Article 370. The Supreme Court held that the state of Jammu and Kashmir has "no vestige" of sovereignty outside the Constitution of India and its own Constitution is subordinate to the Indian Constitution. The

Court upheld the applicability of SARFAESI Act to Jammu and Kashmir as it was under the Union list of subjects for which the Indian Parliament is empowered to enact laws for the whole of India, including Jammu and Kashmir.

As a result of the discriminatory nature of the law there have been continued demands for a relook into the provisions as the above discussions suggest. However, it can be seen that there exists a strong sentiment among the political parties regarding the special status accorded to the state. Kashmiri politicians of all shades react violently to any mention dialogue on both Article 370 and Art 35 A.

In 2014, as part of Bharatiya Janata Party manifesto for the 2014 general election, the party pledged for integrating the state of Jammu and Kashmir into the Union of India.(BJP Electoral Manifesto 2014).Subsequently there has been a renewed debate on the issue of the special status and provisions that the state enjoys and the need for integration of India.

Arguing from the position of a defendant, it can be observed that the text of the agreement points to not a merger but accession which means that debate on according of special status to the state is a toothless one. Secondly, many other states like Nagaland(371A) and Mizoram(Art 371G) also enjoy certain preferential policies for historical reasons and preferential policies favoring the local people in matters of education and employment exist in other states of India as well. On the other hand as it has emerged from the litigations and the mood among the peeved individuals who are facing discrimination due to their gender or community or otherwise, a basic point needs to be raised--- how do we situate the Constitution of Jammu and Kashmir within the Constitution of India? Second can the fundamental rights guaranteed by the Constitution of India be violated in the name of regional identity protection? Third, can certain provisions inserted as temporary provisions responding to certain historical moments be taken as permanent provisions even when the situation ----historically, politically, socially and economically has undergone change?

#### **4. Conclusion**

Taking note of the fact that preferential policies exist in India why are we suddenly singling out the state of Jammu and Kashmir? It is argued that Article 35A is not only a constitutional or legal issue; it has larger ramifications stretching over socioeconomic and political domain. Stretching the arguments to a deeper domain how would one situate their position within the larger

discourse of citizenship? Citizenship debate is a reflection of the political agenda of the citizens - --their felt need to address the state which to them do not regard as important as it brings in the question of the self-understanding of the citizens themselves. It encapsulates a struggle that is continuous for the members to shape their fate in terms of opportunities, entitlements and space. It also revolves around the question of extent---How the boundaries of membership within a polity and between polities to be defined?(norms of inclusion/exclusion). Not only this it also encompasses the question ---How the benefits and burden of membership should be allocated in the form of rights and responsibilities? How the identities of members should be comprehended and accommodated?

Derek Heater (2004) points out that the main issue in the debate is the question of bridging the two concepts of citizenship focusing on the relationship between the citizen and the citizen and the relationship between the citizen and the state. There has been always a tension as Kabeer (2005) points out between universality and particularity. Truly so, as the above discussion suggest that there exists a strong sentiment and a rigid stand on the norms of inclusion /exclusion. Although as contemporary studies on citizenship indicate the changing idea of citizenship is a result of globalization. Can the question--- Who belongs and who does not belong, be etched out permanently? Therefore, insistence on having remained on the same spot is a basic denial of history, which always implies movement. In this case it holds true and there is a need to sensitively interrogate the issue.

The above position is no doubt a very common argument and a valid position to say but while deeply probing the issue one notices a paradox as well. One of the paradoxes of our time is the upsurge of strong obsessions with the idea of belonging to a world that pretends to be globalizing. At the same time notions of *autochthony* (literally meaning "born from the soil") emerging in different parts of the globe play a particular role in this respect. Some sort of primordial form of belonging with equally radical forms of exclusion as its reverse is noticeable. Against these tendencies autochthony can become a dangerous rival to national citizenship, drastically undermining earlier ideals of national unity and the equality of all national citizens, as more and more localized groups may start demanding particularistic norms of inclusion/exclusion thereby undermining not just national citizenship but the federal structure itself.



On the other hand, it can also be seen that in some cases autochthony slogans demand a purification of citizenship and an exclusion of outsiders thereby trying vehemently to coincide with national citizenship. In such cases, autochthony always demands exclusion. Yet, the exact definition of who belongs and who is excluded can change dramatically and abruptly. The haunting uncertainties this discourse evokes in everyday practice seem to give autochthony discourse great emotional appeal and, therefore, strong mobilizing impact in highly different circumstances which is evident in today's perspective. Deep reading of the debate reflects the requirement of a serious analysis keeping in mind the genuine concerns and claims of the aggrieved categories, at the same time it is essential to probe deeper realities about the position of the state political parties' demands to protect the particularity and the demands of political parties at the national level to do away with the particular position.

We could try to resolve the crisis by adopting Iris Young's vision of, a differentiated citizenship, where there is a heterogeneous public, the participants within which act from their "situated positions" and attempt to construct a dialogue across differences. One of the conditions to this is that the dialogue requires participants to be 'public-spirited' — open to the claims of others and not single-mindedly self-interested. Unlike interest group pluralism, which does not require justifying one's interest as right or as compatible with social justice, participants are supposed to use deliberation to come to a decision that they determine to be best or more just (Young 1989, 267). While welcoming Young's conception of the democratic public, one may doubt whether it is possible given the political, social and economic inequalities, the political actors associated with the policies and institutions associated with a differentiated model of citizenship would either motivate or enable citizens to engage in such dialogue.

Stephen Macedo (1990), William Galston (1991), and Eamonn Callan (1997), among others, have all emphasized the importance of public reasonableness. This virtue is defined as the ability to listen to others and formulate one's own position in a way that is sensitive to, and respectful of, the different experiences and identities of fellow citizens, acknowledging that these differences may affect political views. But how and where does one develop this and related virtue(s)?

Moreover, as Carens (2000 p193) feels that the danger of [...] differentiated citizenship is that the emphasis [it] place[s] on the recognition and institutionalization of difference could undermine

the conditions that make a sense of common identification and thus mutuality possible.”This is one of the major arguments in the debate as the issue has been continuously linked to the broader goal of national integration in India. Even if we argue for a dialogue between the majority and the minority, is the majority willing to listen? With increasing democratization, we think it would be possible to manage the situation. Democratization acts as a challenge to rigid positions. As a set of procedures, democracy can secure legitimacy in the absence of more substantive commonalities between citizens and achieve social integration. Since it is not wedded to particular cultural premises, it can be responsive to changes in the cultural composition of the citizenry and generate a common political culture (Habermas 2001a, 73–74). Citizenship has to be seen as a valuable status, associated not only with civil and political rights, but also with the fulfilment of fundamental social and cultural rights (Habermas 1998, 118–119).

Habermas and other postnationalists seem to put more emphasis on democratic practices but for it what is required in the state of Jammu and Kashmir is the extension of voting and political participation rights in the local government and state government. The dominance of the identity discourse within the citizenship debate has dislocated the rights based discourse, the impact of which can be seen in the conceptualization of an astatist concept of citizenship whereby the citizens are strong in guarding their space in their group or community and deciding on the terms of inclusion/exclusion away from any common dialogic platform. This is often used by the vested interests. This ethnic chauvinism as is displayed by the state level political parties in Jammu and Kashmir regarding Art 35A or Art 370 at the mere hint of a debate can be probably deduced as a fierce way of defending their hegemony over the valley politics and keeping the reigns of control in their hands.

Should we not encourage or try to encourage the *voices of difference*? Arguing from the position of Balibar(1988, 2005) who while commenting on the citizenship discourse in France pointed out that it is essential to look beyond the notion of pluralism and identity and focus on collective individualization and recognition of collective responsibility and solidarity, which he understands as enlightened citizenship. The citizen does not live alone or grows alone--- activities would be informed by this realisation of the ideal of a shared identity. Therefore, it is the need of the hour to look beyond the established norms of citizenship and recognize the dynamism within history that gives birth to new conditions, new claims, and new norms thereby requiring new

conceptualizations. Zillah Eisenstein's approach to questions of difference is to ask whether we can construct an 'understanding of human rights which is both universal and specific' (1993:6). Black feminists like Patricia Hill Collins (1990) and Italian feminists like Raphaela Lambertini and Elizabetta Dominini (see Yuval-Davis, 1994, 1997) have focused on the transversal politics of coalition building, in which the specific positioning of political actors is recognized and considered. This approach is based on the epistemological recognition that each positioning produces specific situated knowledge which cannot be but an unfinished knowledge, and therefore dialogue among those differentially positioned should take place in order to reach a common perspective. Of course, in 'real politics', unlike in grass-roots social movements, there is often no time for extensive continuous dialogue. But as they argue transversal dialogue could well have a lot of potential in cracking the old order and bringing change. While being empathetic to the differential positionings of the partners in the dialogue, transversal dialogue should be based on the principle of remaining centre in one's own experiences thus enabling the participants to arrive at a different perspective from that of hegemonic tunnel vision. The boundaries of the dialogue would be determined, as Hill Collins has argued (1990), by the message rather than its messengers. The result of the dialogue might still be differential projects for people and groupings positioned differently, but their solidarity would be based on a common knowledge sustained by a compatible value system. The dialogue, therefore, is never boundless. Probably the path needs to emerge from the fact that what is required is a sincere political will coupled with a vibrant dialogue between the stakeholders and a strong entrenched democratic practice.

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