

CRITICAL ANALYSIS OF FUNDAMENTAL RIGHTS OF MARGINALIZED SECTIONS IN JAMMU & KASHMIR WITH SPECIAL REFERENCE TO CONSTITUTIONAL ORDER OF 1954 AS AN IMPLICATION OF ARTICLE 370

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ABSTRACT

Article 370 has been much discussed in the political arena of India, but it has been rarely dealt with in legal academics. As a part of constitution of India, it is important that this article should be carefully scrutinised and the various intricacies attached to it should be understood. Whether the article has something unconstitutional in it or its implementation and understanding of the article by the political forces is flawed? This paper endeavours to assess various issues related to implementation of article 370 and its impact on the fundamental rights of people in the state. Whether to protect fundamental rights of Indian citizens in general and marginalized sections in particular, removal of article 370 is necessary; or the remedies can be provided even without that? Whether drafting of the article is problematic or the elitist, male chauvinistic and feudalistic mindset of the ruling class of the state is responsible?

INTRODUCTION

"I have cherished the ideal of a democratic and free society in which all persons live together in harmony and with equal opportunities. It is an ideal which I hope to live for and to achieve. But if need be, it is an ideal for which I am prepared to die".²

— Nelson Mandela

Human rights are very sacrosanct in all democracies of the world. The concept of right originated from 'Magna Carta' movement in 1215 in England.³ After that Monarch of many

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² Nelson Mandela, Speaking in his address to the sabotage trial in 1964, Fergal Keane, 'Obituary: Nelson Mandela', BBC TV Program, 5 December 2013. Available at <http://www.bbc.com/news/world-africa-22892784> (Visited at 15th November, 2014).

³ *Halsbury's laws of India*, constitutional law-I, 48 (Lexis Nexis Butterworths, New Delhi, Vol 34, 2007).

countries had to accede right to their subjects. In 1689 further Bill of rights⁴ consolidated these rights. In 1789 in France 'Declaration of Rights of Man and Citizen'⁵ declared these rights as natural, inalienable and sacred rights of every man by birth. Following this rights movement of France, Americans also added bill of rights in their constitution.⁶ To secure the rights of common people United Nations General Assembly on 10th December, 1948 adopted a Universal Declaration of Human Rights.⁷ In India too constitution framers regarded basic human rights as a necessary precondition for the progress of citizens as well as of the country.⁸ Part III of Constitution of India provides fundamental rights to citizens of India, which are very much similar to the universal declaration of human rights. Initially there were seven fundamental rights under the constitution of India, viz. right to equality,⁹ right to freedom,¹⁰ right against exploitation,¹¹ right to freedom of religion,¹² cultural and educational rights,¹³ right to property and right to constitutional remedies.¹⁴ But in 1977 by 44th amendment right to property was abolished from constitution of India. In April 2010 a new article 21-A¹⁵ was added to the constitution of India, which declared right to education as a fundamental right. All these rights are secured by the right to constitutional remedies, which was regarded as the soul of the constitution by the chairman of drafting committee Dr. B. R. Ambedkar.¹⁶

But all these fundamental rights are not fully applicable in the state of Jammu and Kashmir. Article 370¹⁷ of the constitution provides that provisions of constitution of India will apply to the state of Jammu and Kashmir, with some exceptions and modifications.

⁴ Bill of Rights [1688]. Available at <http://www.legislation.gov.uk/aep/WillandMarSess2/1/2/introduction> (Visited at 14th November, 2014).

⁵ French Declaration des Droits de l'Homme et du Citoyen, 1789. Encyclopedia Britannica. Available at <http://www.britannica.com/EBchecked/topic/503563/Declaration-of-the-Rights-of-Man-and-of-the-Citizen> (Visited at 14th November, 2014).

⁶ Constitution of the United States, 1787. Available at <http://www.whitehouse.gov/our-government/the-constitution> (Visited at 14th November, 2014)

⁷ Universal Declaration of Human Rights, 1948. Available at <http://www.un.org/en/documents/udhr/> (Visited at 15th November, 2014).

⁸ *Supra* note 1.

⁹ Articles 14 to 18, Constitution of India, 1950.

¹⁰ Articles 19 to 22, Constitution of India, 1950.

¹¹ Articles 23 to 24, Constitution of India, 1950.

¹² Articles 25 to 27, Constitution of India, 1950.

¹³ Articles 28 to 30, Constitution of India, 1950.

¹⁴ Articles 31 (repealed), Constitution of India, 1950.

¹⁵ 86th Amendment, Constitution of India, 1950.

¹⁶ Articles 32, Constitution of India, 1950.

¹⁷ Article 370, Constitution of India, 1950.

Hence it is very important to analyse that with what kind of exceptions and modifications fundamental rights enshrined in constitution applies to the state of Jammu and Kashmir; and what kind of impact these have on the lives of people. It is pertinent to discuss that by what kind of documents these exceptions and modifications were made and what kind of impact these had on the rights of marginalised groups of society, such as women, schedule tribes, schedule castes and religious minorities. Whether this impact was progressive in nature or it was regressive. It is very interesting to study whether these exceptions and modifications were ever subjected to judicial review or not. If yes, then what was judicial response towards such modifications? Aim of this study is to study impact of Constitutional order of 1954 on the condition of *fundamental rights* in the state of J&K. This paper also focuses on analyzing the impact of 'exceptions and modifications' introduced by article 370 of constitution of India on the *rights* of marginalised groups in the state of J&K. The researcher will analyse whether minimal rights to marginalised groups are due to inherent drawbacks of article 370 or it is due to the choice of ruling class in the state. The paper will also try to find out the ways to secure the rights of marginalised groups in the state.

Jammu and Kashmir is a much discussed area in the intellectual community of India as well as in the scholars and research organizations of other countries and of United Nations. There is a lot of material available on the topic. There are many websites which are solely devoted to the research on Jammu and Kashmir; such as www.jammukashmirnow.org, www.jammu-kashmir.com/, www.jammuregionalmuslims.wordpress.com/ and www.kashmirforum.org/ etc. There are many national and international reports on the rights of marginalised sections in the state. Some of these reports are 137th and 179th reports of parliamentary committees specially made to analyse the condition of fundamental rights in the state. Emma Nickolsen report of 2007 which was presented in United Nations is solely concentrated on rights of people in the state. There are many research organizations which are working on the issues related to J&K such as Shayama Prasad Mukherjee Jammu-Kashmir Study Centre, Vivekanand International Foundation, India Policy Foundation etc. There are several books available on this topic such as *Jammu and Kashmir a victim*,¹⁸ *Daughters of the Vitasta, A History of Kashmiri Women*,¹⁹ *Irene Petrie, Missionary to Kashmir*.²⁰ This is an area which is

¹⁸ Daya Sagar, *Jammu and Kashmir: A victim of personal ambitions of some and mishandling by the core Indian leadership* (Ocean Books, New Delhi, 2014).

¹⁹ P. N. Bazaz, *Daughters of the Vitasta, A History of Kashmiri Women* (Pamposh, New Delhi, 1959).

²⁰ Carus Wilson, *Irene Petrie, Missionary to Kashmir: Hodder and Stoughton* (Morgan and Scott, London, 1912).

widely covered by all news papers of the state and other national level daily newspapers of the country. There is no dearth of special reports in newspapers and special articles in magazines on this issue. Issues of rights of women in the state and rights of West Pakistan refugees are widely discussed political questions. Hence many statements and speeches of national level political parties are also covering this area. For example discrimination against women and bad condition of West-Pak refugees was discussed by Sh. Narendra Modi in his speeches during his campaigns in *Lok Sabha* elections 2014 as well as in state assembly elections 2014. Some prominent Supreme Court judgments are also available at this topic for example *Bachan Lal Kalgotra v. State Of Jammu & Kashmir*²¹ is a judgement on the rights of West Pakistan refugees and *State of Jammu and Kashmir v. Dr. Susheela Sawhney*²² is J&K High Court decision on rights of women. There are some Apex court judgments on the validity of article 370, for example *Prem Nath Kaul v. State of J&K*,²³ *Sampat Prakash v. State of J&K*,²⁴ *Mohd. Maqbool Damnoo v. State of J&K*.²⁵ On the whole a sufficient literature is available on this topic for the purpose of research.

ANALYSIS OF INTERPRETATIONAL LIMITS OF ARTICLE 370

At the time of drafting and adopting of constitution of India all other states except state of Jammu & Kashmir had been fully integrated with the union of India, but a large part of J&K was under illegal occupation of Pakistan, due to this scenario Constitution of India was made fully applicable in parts of all other erstwhile princely states except J&K. For J&K a temporary provision was made under article 370. This article provides that the constitution of India can apply to state of J&K with some exception and modifications. Bare provision of this article goes as under...

Article 370 in the Constitution of India 1950.

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

(1) Notwithstanding anything in this Constitution,

²¹ AIR 1987 SC 1169.

²² AIR 2003 J K 83, 2003 (1) JKJ 35.

²³ AIR 1959 SC 749.

²⁴ AIR 1970 SC 1118.

²⁵ AIR 1972 SC 963.

(a) the provisions of Article 238 shall not apply 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 purposes of this article, the Government of the State means the person for the time being recognised by the President as the Maharaja of Jammu and Kashmir acting on the advice of the Council of Ministers for the time being in office under the Maharajas Proclamation dated the fifth day of March, 1948 ;

(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 proviso 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

ANALYSIS OF INTERPRETATIONAL LIMITS OF ARTICLE 370

Clause (1) sub clause (d) of article 370 provides that the constitutions of India may be extended, by the president of India, to J&K with the concurrence of the state government, with some exceptions and modifications. Here word 'exception' means that with regard to J&K some changes can be made in the constitution of India, which may not follow the rule or which may be totally against the accepted rules and norms. Hence, *any provision, regarding rights, can be altered to such an extent which may totally eliminate the rights guaranteed by the constitution of India.*

Whereas expression 'modification' means, that basic essence of provision will be retained, but its application may be altered to the extent of deviation only, and not to the extent of contradiction.

It shows that the provisions of the constitution of India may apply in following three ways:

- (a). Without any changes, i.e. Original provision will apply with full application as in other states.
- (b). With modifications, i.e. Original Provision with less rigidity or more rigidity may apply.
- (c). With exceptions, i.e. with such changes which may result in contradiction to the constitution of India, or which may go against the very essence of the Constitution. Here going against the essence may be for the advancement of the rights of people, or it may be regressive.

Under the name of 'exceptions' even such changes can be made which may be against the basic structure of Indian constitution. It shows that state government shall have all the possibilities in its hand, and nothing can be done without the concurrence of the state government. Here it becomes interesting to analyse that what kind of exceptions and modification have been actually made in the provisions related rights of the people. Whether these are progressive or regressive?

EXCEPTIONS AND MODIFICATIONS THROUGH CONSTITUTIONAL ORDER 1954²⁶

Constitution of India was adopted in 1950, in which article 370 provides that provisions of Indian constitution may apply with some exceptions and modifications in the state of J&K. A separate constitution of Jammu and Kashmir was adopted 1956, but even before that certain exceptions and modifications were introduced with respect to the state of Jammu and Kashmir, through some constitutional orders. In these orders, constitutional order of 1954 has made some exceptions and modifications in fundamental rights when these apply to the state of J&K. Following is an article wise analysis of these modifications.

In this constitutional order amendments related to part III of Indian constitution are listed in ten clauses i.e. clauses (a) to (j).

Clause (a) i.e. First Clause provides as under:

“(a) In article 13, references to the commencement of the Constitution shall be construed as references to the commencement of this Order.”

Analysis of this Clause: It shows that along with laws made by British Indian Government, Government of Indian dominion, Government of Maharaja Hari Singh, Laws made by Sheikh Abdulla’s government will also remain in force even after the application of fundamental rights to the state of Jammu and Kashmir to the extent they do not breach fundamental rights. It is important because of two reasons.

(i) Between November 1947 to September 1954, Sheikh was Prime Minister of Government of J&K,²⁷ which was not a post with democratic mandate, it was merely a nominated post. And Sheikh made many laws during this period.

(ii) It becomes more important because this Presidential order also altered fundamental right to property in the state, rights of schedule tribes and rights of minorities.

It means that property related laws, schedule tribe related laws and minority related laws made by Sheikh Abdulla’s unelected government will remain in force even if they breach any

²⁶ APPENDIX I to THE CONSTITUTION (APPLICATION TO JAMMU AND KASHMIR) ORDER, 1954, C.O. 48.

²⁷ A. S. Anand, *The Constitution of Jammu and Kashmir, its Development & Comments*, (Universal Law Publishing Co., 6th edn., 2010).

one or more of fundamental rights, given to the non obstante clauses introduced by this constitutional order.

This kind of curtailment of fundamental rights should have been done, if needed, only through an elected representative body.

Clause (b) i.e. Second Clause: ***omitted***.

Clause (c) i.e. Third Clause provides:

“(c) In clause (3) of article 16, the reference to the State shall be construed as not including a reference to the State of Jammu and Kashmir.”

By this clause right of parliament of India for declaring residence within the state as a requirement for any class or classes of employment in the state, has been abolished. Due to this clause this power has come in the hands of state government, and state government has now made residential qualification as a necessary requirement in almost all of the state services.²⁸

Clause (d) i.e. Fourth Clause provides:

(d) In article 19, for a period of [twenty-five years] from the commencement of this Order:-

(i) In clauses (3) and (4), after the words "in the interests of", the words "the security of the State or" shall be inserted;

(ii) In clause (5), for the words "or for the protection of the interests of any Scheduled Tribe", the words "or in the interests of the security of the State" shall be substituted; and

(iii) The following new clause shall be added, namely:-

“(7) The words "reasonable restrictions" occurring in clauses (2), (3), (4) and (5) shall be construed as meaning such restrictions as the appropriate Legislature deems reasonable.”

²⁸ JAMMU & KASHMIR PUBLIC SERVICE COMMISSION, Resham Garh Colony, Bakshi Nagar, Jammu. Available at www.jkpsc.nic.in. (Visited on 29th November, 2014).

This Clause suggested some changes in Article 19, for a period of twenty five years, i.e. up to 1979, but it shows the priorities of the state government, which are continuously being reflected even in those developments which took place after 1979. Here right to “assemble peacefully and without arms”, given by article 19 (1) (b), which was initially subject to reasonable restrictions on the grounds of “public order”, for J&K it was made subject to reasonable restrictions on the grounds of “the security of the state” or Public order. In Indian constitution in 1963 by 16th amendment an additional ground for restrictions was added i.e. “sovereignty and integrity of India”, but it was never extended to J&K; no corresponding modification was made in the constitutional order of 1954.

Similarly, right to form associations or unions provided in Clause 19 (1) (c), which was initially subject to reasonable restrictions on the grounds of “public order” or “morality”, was made subject to reasonable restrictions on the grounds of “the security of the state” or Public order or “morality”. Here also additional ground of “sovereignty and integrity of India” was added in Indian constitution, but it was never extended to J&K.

In both clause (b) and clause (c) of article 19, ground of “sovereignty and integrity of India” was not extended to the state, it clearly shows that for government of J&K sovereignty and integrity is not a priority, only the security of state is priority.

Further 19 (1) (d) which provides a right to move freely throughout the territory of India and 19 (1) (e) which provides a right to reside and settle in any part of India; have been made subject reasonable restrictions on the grounds “either in the interest of general public” or “for the protection of interest of any schedule tribe”.

But in this constitutional order of 1954, in clause (5), *for the words "or for the protection of the interests of any Scheduled Tribe", the words "or in the interests of the security of the State" has been substituted.*

Here it provides that in the interest of preserving secluded habitats of scheduled tribes or for the protection of their life style, legislature of J&K is not ready to restrict the right to free movement. But by imposing restrictions on the right to free movement on the pretext of “interest of the state”, movement of any person, either state subject or otherwise, can be restricted. Moreover the term “in the interest of the state is very wide and vague; anything and everything can be included in this term. *In fact right to free movement has been made subject to the pleasure of the state legislature.*

Further, for the purpose of application to the state of J&K a new clause (7) has been inserted in article 19. This new clause reads as under:

‘(7) The words "reasonable restrictions" occurring in clauses (2), (3), (4) and (5) shall be construed as meaning such restrictions as the appropriate Legislature deems reasonable.’

By inserting this clause, jurisdiction of the judiciary has been usurped. Now reasonableness, or otherwise, of restrictions imposed on fundamental rights will not remain subject to judicial interpretation. It has been made dependent on the subjective satisfaction of the ‘appropriate legislature.’

Clause (e) i.e. Fifth Clause provides:

“(e) In clauses (4) and (7) of article 22, for the word "Parliament", the words "the Legislature of the State" shall be substituted.”

Analysis of this clause: This clause provides that in relation to preventive detention, laws made by parliament of India will not be applicable in the state of Jammu and Kashmir. On this subject only state legislature is empowered to make laws.

Clause (f) i.e. Sixth Clause is related to Article 31, which has been omitted from constitution of India, hence this researcher did not go into the depth of the original text of this clause.

But in the restatement with reference to the exceptions and modifications, with which constitution of India applies to the state of J&K in Article 30 clause (1A) has been omitted.

Clause 30 (1A) provided that if any law is passed, which requires the compulsory acquisition of any property related to any minority educational institution, then compensation will be provided at the prevailing market rate, so that the functioning of that minority educational institution should not be hampered due to the acquisition.

After omitting this clause now government of J&K can provide even nominal compensation. Now the government of the state is not under any compulsory duty for providing compensation at the market rates. This provision has a direct bearing on the fundamental rights of religious and linguistic minority communities residing in the state.

Clause (g) i.e. Seventh Clause is about article 31A, which provides details which are pertaining to the local conditions of the state.

Clause (h) i.e. Eighth Clause provides:

[(h) In article 32, clause (3) shall be omitted.]

Article 32 (3) provided that parliament by law can also empower any court other than the Supreme Court to issue directions order or writs, including writs in the nature of *habeas corpus*, *mandamus*, *prohibition*, *quo warranto* and *certiorari* for the enforcement of any one or more fundamental rights.

Parliament so far has not empowered any other court to issue writs for fundamental rights, but in future if parliament makes any specific constitutional court, as was discussed in *V. Vasanthakumar v. The Secretary to Government*²⁹ then due to this clause that the new court will have no jurisdiction in Jammu and Kashmir.

Clause (i) i.e. Ninth Clause provides:

Further clause (i) provides that preventive detention laws passed by the state prior to 1954 will remain in force after the commencement of constitution in the state of J&K for a period of twenty five years, even if these laws are violating of fundamental rights provided by the constitution.

Clause (j) i.e. Tenth Clause provides:

That for the purpose of state of Jammu and Kashmir an additional article i.e. article 35A will be added in constitution of India. Article 35A reads as thus:

"35A. 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;

²⁹Writ Petition (Civil) No.139 of 2014.

- (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."

ANALYSIS OF ARTICLE 35A

Article 35A provides that state government can make laws to declare conditions for bestowing permanent resident-ship on the citizens of the state. Government can discriminate among permanent resident of J&K and residents of other states, with respect to service in state, property and settlement.

Generally other states do this kind of discrimination only for some specific areas; in order to protect the interest of tribal people of hilly or forest areas. But here government of J&K is doing this discrimination to create separate interest of the all people of J&K. This is actually an effort to stop intermingling of state residents with other people of the country. Unity and integrity is a two way process, where domiciles of state 'A' go to other states and domiciles of other states come to state 'A'. In Jammu and Kashmir due to article 35A, coming and settling down of the domiciles of other states have become totally impossible. This provision and laws made under this provision are totally against the ideals enshrined in the preamble of the constitution of India. Here, the great question is whether exceptions and modifications mentioned in article 370 can be of such nature which may go against the very constitution of India and ideals enshrined in its preamble?

MODIFICATIONS OF FUNDAMENTAL RIGHTS THROUGH CONSTITUTION OF J&K³⁰

Separate Constitution of Jammu and Kashmir, which was adopted in November 1956, has further narrowed down the scope of fundamental rights. Not even a single additional right has been given in the fundamental rights chapter of this constitution.

³⁰ Constitution of Jammu and Kashmir, 1956.

Section 10, which provides fundamental rights in the state provides as thus;

“10. *Rights of the permanent residents:-*The permanent, residents of the State shall have all the rights guaranteed to them under the Constitution of India.”

This provision clearly shows that only permanent residents of the state will have all fundamental rights in the state; citizens of other parts of India have no ensured fundamental rights in the state. Further, this section says that all the rights guaranteed in the constitution of India will be given, means no additional fundamental right.

Here an appropriate question is that if people of the state have not been given any additional right and fundamental rights given by the constitution of India also applies in limited aspect in the state due constitutional order of 1954, then how this separate constitution is useful for the people of the state?

If we look at the definition of ‘permanent resident’ then sections 6 and section 7 explain that who can be called permanent resident. These sections read as thus:

PART III

PERMANENT RESIDENTS

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 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 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.

(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 the twentieth

April, 1927, read with State Notification No. 13/L dated the twenty seventh June, 1932.

7. Construction of references to State Subjects in existing laws:-Unless the context otherwise requires, all references in any existing law to hereditary State Subjects or to State Subject of Class I or of Class II or of Class III shall be construed as references to permanent residents of the State.

ANALYSIS OF SECTIONS 6 AND 7

Here sub-clause (2) of section 6 provides that any person, who is a state subject on or before 14th May 1954 i.e. before enforcement of constitutional order of 1954, will be a state subject. It gives an impression that as if 'state subjects' have been decided in independent India. But sub-clause (3) of section 6 provides that state subject will be defined according to the notifications of 1927 and 1932. It means those persons will be considered as 'state subject' who were considered 'state subjects' when J&K was a separate colonial state. Though practically princely state of J&K was a colony of Britain, but it was a sovereign state with respect to its internal matters such as citizenship. So a separate constitution of Jammu and Kashmir, which was drafted in independent and united India, has adopted definition of permanent resident which was applied in that time when it was a separate colonised state of Britain. This provision has hampered smooth intermingling of people of the state with other parts of the country. Hence, according to this researcher this provision of state subject is against the unity and integrity of the country.

CUMBERSOME PROCEDURE TO AMEND THIS PROVISION OF STATE SUBJECT

Sections 8 and of the Constitution of Jammu and Kashmir provides for a very tough procedure to amend this provision. Sections 8 and 9 read as thus:

8. Legislature to define permanent residents:-Nothing in the foregoing provisions of this part 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. .

9. Special provision for Bills relating to permanent residents:-A Bill making provision for any of the following matters, namely-

- (a) Defining or altering the definition of the classes of persons who are, or shall be, permanent residents of the State;
- (b) Conferring on permanent residents any special rights or privileges;
- (c) Regulating or modifying any special rights or privileges enjoyed by permanent residents; shall be deemed to be passed by either House of the Legislature only if it is passed by a majority of not less than two-thirds of the total membership of that House.

ANALYSIS OF SECTIONS 8 AND 9

The state legislature needs a majority of two thirds of the total membership of both the houses to amend the definition of state subjects or to make changes in the special rights of permanent residents. At present no person who is domicile of any other part of India, can become domicile of J&K. One can run a business in the state or can do a central government service in J&K for 20 years or even more, but he cannot claim state subject status in the state. Even those children of central government employees who took birth in J&K and have completed their whole education in the state cannot claim state subject status. These rules are the toughest in the country. And to change these rules a very tough procedure is required to be followed, which makes it practically impossible.

Further Constitution of Jammu and Kashmir provides some rights to women and children in its part IV, Directive Principle of State Policy (DPSP). These rights are in the nature of directives to state for ensuring good childhood to the children. For women it provides direction to state for ensuring equal pay, maternity benefits, helps to widows and protection from hooliganism etc.. But similar to DPSP of Indian constitution DPSP of J&K constitution is also not justiciable. These are not enforceable by any court of law. It is pertinent to discuss that how these modifications have affected fundamental rights of marginalised groups such as women, children, religious minorities, backward classes, scheduled castes and schedule tribes.

IMPACT ON THE RIGHTS OF WOMEN AND CHILDREN

Though fundamental rights are important for every citizen, but when some special rights are created for marginalized groups of society, then they become the most important tool for their empowerment. In J&K marginalized groups of society such as women, religious minorities,

backward and depressed classes do not have special rights; rather, in some cases they do not have even equal rights. There is a big need for analyzing that what kind of rights are not given to these marginalized sections of society in the state of J&K which are available to people belonging to marginalized sections in other parts of India.

RIGHTS OF WOMEN

³¹Constitution of India provides equal rights to men and women in all fields of life, such as social, political, economic as well as property rights etc. But in J&K women do not have equal rights. Especially in the laws related to state subject women of the state do not have equal rights.³² These laws are motivated by medieval thinking, and are based on the patriarchal society.

These laws are based on notifications of 1927³³ and 1932³⁴ which define different classes of state subjects, but in these notifications nowhere it is mentioned that women will have less rights. It is only through some shrewd administrative manipulation that domicile certificates of women were started being stamped as 'valid only till marriage', then after marriage women had to apply again for the domicile certificate. And if they had married to some outsider then they were not given state subject certificate. By implication, these women automatically lost their several rights such as - acquiring property in the state, applying for state services, voting rights and the right to contest elections for the legislative assembly.³⁵

This administrative anomaly was corrected by the J&K high court when in 2002, in the case of '*State of J&K v. Dr. Susheela Sawhney*'³⁶ it was held that there was no provision in existing laws, which deals with the status of those women who marry outsiders. Hence discriminatory rules were struck down and women were given equal rights. The High Court declared that there was no provision in the existing laws dealing with the status of a female permanent resident who marries a non-resident person. The provision of women losing their status of permanent resident after marrying outside the state, therefore, did not have any legal basis. This decision was declared historic as it corrected an administrative anomaly and brought relief to women who married outside the state.

³¹ Articles 14 to 16, Constitution of India, 1950.

³² Women are issued State-Subject certificates which are valid till marriage. As mentioned in Jagmohan, *My Frozen Turbulence in Kashmir*, 233 (Allied Publishers Pvt.Ltd., New Delhi, 1995)

³³ State Notification No 1-L/84, dated Apr. 20, 1927.

³⁴ State Notification No 13/L, dated Jun. 27, 1932.

³⁵ AIR 2003 J K 83, 2003 (1) JKJ 35.

³⁶ *Ibid.*

The high court held in its decision “The daughter of a permanent resident of the State of J&K will not lose status as a permanent resident of the State of Jammu and Kashmir on her marriage with a person, who is not a permanent resident of the State of J&K”.

Justice Jhanji relied on *Domicile and Matrimonial Proceedings Act, 1973* in reaching at the decision. This Act abolished the wife’s dependent domicile (dependent on her husband’s domicile), and it provided for giving mother’s domicile to the children, who do not live with their father.

³⁷Second Judge T. S. Doabia J. quoted *inter alia* Convention on the Nationality of Married Women³⁸ ratified by the General Assembly of the United Nations (UN). It is relevant to mention here articles 1 and 2 of this convention, which speak as thus:

1. Each Contracting State agrees that neither the celebration nor the dissolution of a marriage between one of its nationals and an alien, nor the change of nationality by the husband during the marriage, shall automatically, affect the nationality of the wife.
2. Each Contracting State agrees that neither the voluntary acquisition of the nationality of another State nor the renunciation of its nationality by one of its nationals shall prevent the retention of the nationality of the wife of such national.

These provisions of this convention are in line with Article 15 of the Universal Declaration of Human Rights which calls for giving equal rights to the women all over the world. Keeping in view all these provisions of international conventions high court gave equal rights to men and women state subjects.

But this relief proved to be partial only, because women marrying outside the state are still being discriminated against with respect to their spouses and children. Men of the state can marry any women outside the state as well as outside the country, and their outsider wives immediately get state subject and their children born out of these outsider wives also get state subject automatically. They enjoy all rights which other state born state subjects are enjoying.

But if a woman of state marries an outsider then she and her husband cannot settle in the state. An outsider husband never gets state subject status and children born to that woman from outsider husband also do not get state subject. These children cannot get admission in

³⁷ *Ibid.*

³⁸ Convention on the Nationality of Married Women, New York, 20th February 1957.

the state added schools and state run institutes of higher and professional education. This kind of discriminating provisions makes it practically impossible if these women decide to settle in the state.

State government instead of removing this disability tried to restore earlier discriminatory rules by making new laws. In 2004 Peoples Democratic Party (PDP) and in 2010 National Conference government (NC), presented *J&K Permanent Residents (Disqualification) Bill, 2004* and *J&K Permanent Residents (Disqualification) Bill, 2010*, respectively to undo what high court judgment has corrected. But at both times these bills could not pass due to many reasons. But disabilities for outsider husbands and children are still present.

All these discriminations against women can be officially practiced in the state because the National Commission for women is not empowered to look into the condition of women in Jammu and Kashmir, as it has no jurisdiction in the state.

RIGHTS OF CHILDREN

Children are future of any society; their future should never be compromised because of any political reason. But in state of J&K even fundamental rights of children are not protected. Article 21A provides right to education as a fundamental right for all children of India. But the state of Jammu and Kashmir has not extended right to education to the state. The *Right of Children to Free and Compulsory Education Act 2009* is applicable to the whole of India except the state of Jammu and Kashmir. And state government has not made any equally comprehensive law for the children in the state. Though DPSP of state constitution speak about free education up to university level, but in the absence of any act of compulsory education; hence, state government is under no duty to ensure education for all.

IMPACT ON THE RIGHTS OF SCHEDULED TRIBES AND SCHEDULE CASTES

Schedule tribes and Schedule castes are the most deprived groups of society due to many socio-historic factors. Constitutional framers as well as all political parties have always tried to protect and promote the interests of these groups with many special legislations and affirmative actions. Hence it is important to analyse that whether article 370 has some impact on the rights of S.C.s and S.T.s in the state?

IMPACT ON THE RIGHTS OF SCHEDULED TRIBES

Scheduled tribes are those communities who are living in geographically secluded areas since time immemorial.³⁹ They have developed a unique lifestyle. To preserve their lifestyle and for their advancement Constitution of India has given them some rights. Tribal communities, like Gujjar, Bakarwal, Pahadi, Bot, Balti, Barokpa and Gaddi etc., which are primarily nomads⁴⁰ are constantly struggling to protect their lifestyle and habitat in the absence of any law for their protection in J&K. *The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006* is applicable in whole India except the state of Jammu and Kashmir. And the government of the state has not made any such corresponding laws in the state. There is nothing to insure even these inherent rights of tribal communities in J&K, because the *National Commission for Scheduled Tribes*⁴¹ has no jurisdiction in the state and state itself has not provided for any such commission with similar powers. It seems that government of J&K is concerned only about Kashmiri identity, and it wants to destroy all other identities in the state.

IMPACT ON THE RIGHTS OF SCHEDULED CASTES (SC) AND RESERVATION POLICY IN THE STATE

Position of scheduled castes in the state is very bad like other parts of the country. Social upliftment of scheduled caste and scheduled tribe is still merely a lip service in J&K.

Caste based discrimination is prevalent in the state. This discrimination is mainly social but at times it takes violent turn also. Due to article 370 central laws for protecting *dalits* such as *Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989* are not applicable in the J&K. And state government has not made any law of this kind. In the absence of laws to prevent atrocities against the scheduled castes and scheduled tribes, *dalits* of the state are continuously being subjected to caste prejudices and atrocities from upper caste people.

³⁹ Government of India, *The report of the advisory committee on the revision of the lists of scheduled castes and scheduled tribes* (Department of Social Security, 1965). Para 11.

⁴⁰P.S. Slathia, Parveen Kumar and S.K. Gupta, "Constraints of Nomadic Tribes of Jammu and Kashmir in Livestock Rearing" 5 *IJR* 9 (2013).

⁴¹ Article 338A, Constitution of India, 1950.

⁴²Here picture cannot be complete without mentioning a 2012 incident of *Rasoo*h village in *Kathua* district. Where in 2012 water of 'dalit wells' became contaminated due to flood as it was near the river bed. Many children of *dalit* community were falling ill due to consumption of this water. Due to agitations and demonstrations by *dalit* community deputy commissioner Zahida Khan visited the village. When she asked these poor people to get water from other four wells of the village, she was told that upper caste people do not allow *dalits* to get water from these wells. Though in front of deputy commissioner upper caste people denied any ban on *dalits* to get water from their wells, but next day when *dalit* women went to get water from the well they were stopped by upper caste women and even beaten up by upper caste men. This atrocious act was done in spite of the fact that there were three more wells for upper caste villagers but even then they did not allow *dalits* to get water even from one well. When police started guarding this well to help *dalits* to get water from this well then somebody threw garbage in this well to pollute the water of this well, so that *dalits* could not get water out of this well.

This kind of atrocities on schedule caste people is going on without any check from the side of state government. In the absence of any act like *Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989* there is nothing to emancipate these *dalits* from this ordeal of life in the state of Jammu and Kashmir. National Commission for Schedule Caste also has no jurisdiction in Jammu and Kashmir, because the state legislative assembly has not extended its jurisdiction to the state. And state government has not made any institution of similar nature in the state.

Even affirmative actions are minimal in the state. Article 15 and article 16 of constitution provides that as an affirmative action state can provide reservations to scheduled castes, scheduled tribes and other backward classes in admission to professional colleges and government services respectively. Reservation policy was implemented in all parts of India soon after the independence. But it was in only 2004, when the J&K legislative assembly passed a proper law to declare its reservation policy.⁴³ But this law also does not provide separate reservation category wise to SCs, STs and OBCs. They are together given reservation of 25%.⁴⁴ Said law talks that reservation to SC and ST will be given in the

⁴² Marvi Slathia, "The 'untouchables': The unbreakable caste barriers", *Kashmir Times*, Apr. 5, 2013. Available at <http://www.kashmirtimes.in/newsdet.aspx?q=14701> (Visited on 22nd October, 2014).

⁴³ Jammu and Kashmir Reservation Act, 2004. Act No XIV of 2004.

⁴⁴ *Ibid.*

proportion of their population in the state.⁴⁵ It means if SCs and STs will control their population to achieve the goals of family planning then they will be penalised for their good effort, by reducing their reservation.

In other parts of India reservation for SCs is 15%, for STs 7.5% and for OBCs is 27%. But in the state of sJ&K formula of reservation is as under:⁴⁶

<i>Reservation Category</i>	<i>%age reservation</i>	<i>Remarks</i>
<i>Scheduled Caste (SC)</i>	<i>08</i>	<i>The Vacancies are referred to the Commission on the basis of a roster maintained by the concerned administrative Departments. The reservation for physically challenged is horizontal in nature and are notified in accordance with the conditions contained in the letter of reference of vacancies by the Government.</i>
<i>Scheduled Tribe (ST)</i>	<i>10</i>	
<i>Resident of Backward Area (RBA)</i>	<i>20</i>	
<i>Actual Line of Control (ALC)</i>	<i>3</i>	
<i>Other Social Caste</i>	<i>2</i>	
<i>Physically Challenged</i>	<i>3</i>	

It shows that depressed classes have been given a less percentage of reservation as compared with union government or with other states of the country. Discrepancy regarding rights of depressed classes is present in the field of reservation to state assembly also. For the fourth consecutive elections there is no rotation in reserved seats of schedule castes seats in the state assembly.⁴⁷ This has become possible due to liberty given by article 370. It seems a deliberate effort to restrict the influence of *dalit* politicians, only to some particular areas.

IMPACT ON THE RIGHTS OF RELIGIOUS MINORITIES

⁴⁵ *Ibid.*

⁴⁶ JAMMU & KASHMIR PUBLIC SERVICE COMMISSION, Resham Garh Colony, Bakshi Nagar, Jammu. Available at www.jkpsc.nic.in. (Visited on 29th November, 2014).

⁴⁷ Sanjeev Pragal, "No rotation in 7 SC reserve seats for 4th consecutive Assembly poll Govt fails to set up Commission to change segments" *Daily Excelsior*, Jun. 6, 2014.

Condition of religious minorities is very bad, especially in Kashmir region of the state. Mass exodus of Kashmiri Pandits, who were the aborigines of the Kashmir, from Kashmir valley itself is well known to the world. When Kashmiri terrorists, through local newspapers and inflammatory speeches played from mosques, openly threatened Pandits to leave the valley otherwise their children will be killed then, 59442⁴⁸ families of Kashmiri Pandits had to leave the valley. Even after 25 year of this mass exodus of aborigines state government is not able to get them back. Today only less than 5000 pandits have been left in the valley which is a number less than the 'critical mass' to sustain a culture.⁴⁹

In fact, religious minorities were never a priority for state legislature of J&K. Even rights guaranteed to minorities in the constitution of India, have not been ensured to the minorities of the state.

Though Kashmiri Pandit Community has faced untold hardships, but the state government has not given them minority status so far. The parliamentary committee on minorities has also recommended the state government to provide minority status to Kashmiri Pandit community.⁵⁰ Even then Chairman of National Commission on Minorities (N.C.M.) Sh. Wajahat Habibullah has also advice J&K government to give minority status to Kashmiri Pandits.⁵¹ But there are many people in the ruling class of the state who do not want to provide minority status to Kashmiri Hindus.⁵² But parliamentary panel and N. C. M. cannot do anything directly because due to article 370 jurisdiction of N. C. M. does not extend to J&K unless ratified by the state legislative assembly. Since 1992 J&K state legislative assembly has not ratified National Commission for Minorities Act 1992, hence it does not

⁴⁸ Col. Tejpal Tikkoo, *Kashmir: Its Aborigines and their Exodus* (Lancer International Incorporated, New Delhi, 2012).

⁴⁹ Vijay K. Sazawal, *Conflict, Human Rights and the Rule of Law in Kashmir*, (A Presentation at a meeting organized by the Interfaith International on the sidelines of the ninth session of the United Nations (UN) Human Rights Council in Geneva. 19th September 2008). Available at <http://www.kashmirforum.org/conflict-human-rights-and-the-rule.html>. (Visited on 15th November, 2014).

⁵⁰ Editorial, "Parliamentary panel asks J-K government to examine demand for minority status to Kashmiri Pandits" *The Economic Times*, Feb. 20, 2014.

"The Committee feels that the state government has a special status in the Indian Constitution. The Government of Jammu and Kashmir should look into the demand of the Kashmiri Pandits for conferring on them minority status keeping in mind their pitiable condition,"

Available at http://articles.economictimes.indiatimes.com/2014-02-20/news/47527438_1_kashmiri-pandits-minority-status-kashmir-government (visited on 14th November, 2014).

⁵¹ Aditi Tandon, "Declare Kashmiri Pandits a minority: Habibullah", *The Tribune*, Mar. 21, 2011. Available at <http://www.tribuneindia.com/2011/20110322/j&k.htm#1>. (Visited on 29th October, 2014).

⁵² Daya Sagar, "Why Minority Status For KP's Is Not Tenable", *Kashmir Observer*, Apr. 02, 2014.

As per State Government the migrants belong to Hindu religion and as such do not qualify for grant of minority status. No denials on the contents of the report have come from the official channels so far.

Available at <http://www.kashmirobsrver.net/news/opinion/why-minority-status-kps-not-tenable>. (visited at 14th November, 2014).

apply to the state.⁵³ But on the other hand article 370 empowers state legislative assembly to grant the status of minority to any community without even asking from central government. But the 137th report of parliamentary committee on minorities has noted that state assembly and state government are not willing to grant minority status to Kashmiri Pandits just because of the reason that they are Hindus by religion.⁵⁴

Not only Pandits but *Sikh* who are minority, according to the union of India and in all other states, are not considered minority in the state of Jammu and Kashmir. Sikh organizations are continuously demanding minority status in the state.⁵⁵ But state legislative assembly and state government never accepted this genuine demand of the *Sikh* community. Now in state assembly elections of November-December 2014 People's Democratic Party (P. D. P.) has given an election promise to *Sikh* community that if P. D. P. comes in power then it will give minority status to *Sikh* community in the state.⁵⁶ It is an election promise to get *Sikh* votes; whether it will be fulfilled or not is a question, the answer to which is still in the womb of future.

Only recognized minority in the state is Christian. Christian missionaries are known to run several convent schools. But Christian missionaries are also not safe in Jammu and Kashmir. Recently Muslim fundamentalist *Mufties* of the state issued *Fatwa* against Christian schools in valley.⁵⁷

Constitution of India, under article 30 (1), provides right to religious minorities to open educational institutions of their own choice. To ensure this right article 30 clause (1A) provides that if state want to acquire property of any minority educational institution then compensation will be given always on market rates.

⁵³ National Commission for Minorities Act, 1992, Act 19 of 1992.

⁵⁴ Editorial, "Parl Panel asks Govt to examine minority status for KPs", *Daily Excelsior*, Feb. 21, 2014. The panel said it was informed by the Union Home Ministry that the State Government's stand was that the migrants belong to Hindu religion and as such does not qualify for grant of minority status. However, the State Government feels that the issue of granting minority status to the Kashmiri Pandit community needs to be examined "from all angles". Available at <http://www.dailyexcelsior.com/parl-panel-asks-govt-to-examine-minority-status-for-kps/>. (Visited on 15th November 2014).

⁵⁵ K. T. News Service, "ASPCC demands minority status for Sikhs", *Kashmir Times*, Dec. 18, 2012. Available at <http://kashmirtimes.com/newsdet.aspx?q=9481>. (Visited at 14th November, 2014).

⁵⁶ P.T.I. , "Sikh organization praises PDP for making minority status a poll issue", *The Economic Times*, Nov. 30, 2014. Available at http://economictimes.indiatimes.com/articleshow/45325386.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst. (Visited at 30th November, 2014).

⁵⁷ M Saleem Pandit, "Fatwa' announced against Christian schools in Kashmir, 3 priests asked to leave valley", *The Times of India*, Jan. 19, 2012. Available at <http://timesofindia.indiatimes.com/india/Fatwa-announced-against-Christian-schools-in-Kashmir-3-priests-asked-to-leave-valley/articleshow/11555784.cms>. (Visited on 14th November 2014).

But through restatement about constitutional order of 1954, article 30 (1A) does not apply to the state of J&K. It means that if state government wants to acquire property of any minority educational institution, then the state can do this even by paying nominal value to the institution. A waiver of this kind of protection amounts to sabotage the working of such institutions; without this protection fundamental right provided in article 30 (1) becomes meaningless.

Even *Shia* Muslims of Ladakh are totally ignored by the state government. *Shias* are not allowed for leading any *Tazia* procession in the city center of Srinagar, because Sunni Muslims do not like it. So in the name of maintaining law and order for the last 20 years *Shia* have not been allowed to lead a *Tazia* procession in *Lal Chowk* area of Srinagar. Instead of preventing Sunni Community from disrupting *Tazia* processions state government always starts crackdown on *Shia* community if they plan to lead a procession in the main city.⁵⁸ After Kashmiri Pandits *Shia* community in *Ladakh* as well as Kashmir are the next vulnerable groups.⁵⁹

IMPACT ON THE RIGHTS OF REFUGEES AND THEIR THIRD GENERATION DECEDENTS

During partition around 47 *lac* people came to Indian side from Pakistani side.⁶⁰ Most of them came from west *Punjab*, *Sindh* and Pakistan occupied Jammu and Kashmir.⁶¹ Several *Lacs* of displaced people came from Pakistan occupied Jammu and Kashmir and from Pakistan to Indian state of Jammu and Kashmir. All refugees who came from Pakistan to Indian states other than J&K have been granted citizenship by the government of India. But those who migrated to the Indian state of J&K were categorized in two categories.

- i. Refugees who came to Indian state of J&K from Pakistan occupied Jammu and Kashmir.
- ii. Refugees who came to the Indian state of J&K from Pakistani side.

⁵⁸ Syed Yasir, "Curfew in Srinagar; Tear gassing, cane-charge on Tazia processions Dozens injured, scores detained", *Kashmir Times*, Nov. 13, 2014. Available at <http://www.kashmirtimes.in/newsdet.aspx?q=25251>. (Visited at 15th November, 2014).

⁵⁹ Saba Firdaus, "Are Kashmiri Shias the next Pandits?", *Tehalka News*, Nov. 14, 2013. Available at <http://www.tehalka.com/are-kashmiri-shias-the-next-pandits/> (Visited on 23rd November, 2014).

⁶⁰ H. M. Seervai, *Partition of India Legend and Reality* 174 (Universal Law Publication Co., New Delhi, 2nd edn., 1994).

⁶¹ *Ibid.*

Out of these first category was called Displaced People (D.P.s) and second category was called *Sharnarthies*. D.P.s have been given Permanent Resident Certificates (P.R.C.) by the state government. Means D.P.s were given status of state subject. But *Sharnarthies* were not given the state subject of P.R.C.s. All this happened due to Article 35A of the constitution of India, which was added by Constitutional Order of 1954, only for the purpose of J&K. Article 35A provides that State legislative assembly will have right to make any law regarding the state subject status. Constituent assembly of the state drafted a constitution for the state which was implemented in 1956. In this constitution, it was provided that only those persons and their decedents will be granted state subject who were living in the state as a natural resident for ten years before 25th May 1954, means those who were state subjects in 1944, at the time of princely state of J&K. And these *Sharnarthies* who have come from Punjab state of Pakistan were not state subject in 1944, so they were not given P.R.C.s. Since 1947 up to 2014 in these 67 years two generations have born to these west Pakistan refugees, and their population is now around 12 *lac* who are mainly living in Jammu and Kathua districts of the state.⁶² Out of these around 9 *lac* are those who have taken birth at the soil of Jammu and Kashmir. But even then they have not been given permanent resident status. This is a gross violation of basic human rights of these decedents of *sharnarthies*. In all countries of the world born citizens automatically get citizenship. But here in J&K due to article 35A, these poor people have been deprived of their rights.⁶³

Due to this apathy of state government these people are compelled to live in rented houses, because they have no right to purchase their own houses in the state.⁶⁴ They cannot vote even for *Panchayat* elections or for state assembly elections. They have no right to get any government job in the state; even their children cannot get education in state funded schools.

This matter was raised in the Supreme Court in the case of *Bachan Lal Kalgotra v. State of Jammu & Kashmir*.⁶⁵ In this case petitioner Bachan Lal Kalgotra was Chairman of the Action Committee of West Pakistani Refugees; he himself was also a *Sharnarathi*. He moved the apex court and sought orders from the state government to grant his community permanent resident certificate, who up to then were living without any basic amenities or rights for past

⁶² Editorial, "India: West Pakistan refugees stateless even after 65 years of Independence" *Minority Voices Newsroom*, Jun. 20, 2013. Available at : <http://www.minorityvoices.org/news.php/en/1497/india-west-pakistan-refugees-stateless-even-after-65-years-of-independence#sthash.1eScIhby.dpuf>. (Visited on 30th November, 2014).

⁶³ *Ibid.*

⁶⁴ AIR 1987 SC 1169.

⁶⁵ *Ibid.*

40 years. Justice O. Chinappa Reddy while writing judgement for division bench consisting himself and S. Natrajan J. accepted that petitioner and his community have been deprived of their genuine rights, but he expressed court's inability to provide them relief. O. C. Reddy J. held,

The net result is that persons in the position of the petitioner, though citizens of India and entitled to the various Fundamental Rights guaranteed by the Constitution, are not in a position to enjoy many of those rights within the State of Jammu & Kashmir though they are domiciled in that State for nearly 40 years.....

In the circumstances, in view of the peculiar Constitutional position obtaining in the State of Jammu & Kashmir, we do not see what possible relief we can give to the petitioner and those situate like him. All that we can say is that the position of the petitioner and those like him is anomalous and it is up to the Legislature of the State of Jammu Kashmir to take action to amend legislations, such as, the Jammu & Kashmir Representation of the People Act, the Land Alienation Act, the Village Panchayat Act, etc. so as to make persons like the petitioner who have migrated from West Pakistan in 1947 and who have settled down in the State of Jammu & Kashmir since then, eligible to be included in the electoral roll, to acquire land, to be elected to the Panchayat, etc. etc. This can be done by suitably amending the legislations without having to amend the Jammu & Kashmir Constitution. In regard to providing employment opportunities under the State Government, it can be done by the Government by amending the Jammu & Kashmir Civil Services, Classification of Control and Appeal Rules. In regard to admission to higher technical educational institutions also, the Government may make these persons eligible by issuing appropriate executive directions *without even having to introduce any legislation*.

Though the apex court gave reason of special constitutional status of the state and did not give any binding orders to the state government on this issue but court clearly mentioned that providing domicile right is a work which can be done by a simple legislative process and in case of giving them right to employment simple executive orders are needed. There is no need of making amendment in Constitution of Jammu and Kashmir. Hence, in case of providing rights to West Pakistan refugees only need is the *will power* of the state legislature and state government. Apex court agreed that given to the fact that these people constitute seven to eight percent of the total population of the state their grievances are justifiable. The

court held that it is the duty of both union as well as state government to improve their condition and to protect their fundamental rights. But due to article 370 and Constitutional Order of 1954 which makes article 35A non justiciable court did not provide any relief and for the misfortune of petitioners. The petition was dismissed.

They have right to vote for parliamentary elections. But for state assembly elections, they still do not have any right have any right to vote. Even last election of November- December 2014 were without them. Thought few months before the elections Chief Minister Omar Abdulla mulled the idea of giving voting rights to these *Sharnarthies*.⁶⁶ But he discarded the idea because of fierce opposition from *Hurriyat* Conference which is a well known separatist Muslim fundamentalist group in the state.⁶⁷ If we analyse this attitude of Muslim fundamentalist groups in the state and response of two major political parties of the state to this issue i.e. National Conference (NC) and Peoples Democratic Party (PDP), then it is clear that reason of this apathy is that these refugees are Hindus and Sikhs. In a recent talk on article 370 hosted by Vivekanand Foundation General (Retired) S. K. Sinha said that after the Tibetan uprising in 1959, a large number of Tibetan Muslims were settled in Kashmir and granted voting rights by Sheikh Abdullah while he denied the same rights to Hindu refugees from West Pakistan.⁶⁸

All this breach of fundamental rights of these Indians is because of article 35A inserted by constitutional order of 1954, which in turn is protected by article 370. This is one more glaring example, that article 370 has always been used by ruling classes to advance a communal agenda in the state and to deprive people of the state of their democratic rights.

JUDICIAL REVIEW OF THESE EXCEPTIONS AND MODIFICATIONS

⁶⁶ PTI, "Pakistani refugees can get rights in Jammu and Kashmir without scrapping Article 370: National Conference" *The Economic Times*, May 29, 2104. Available at http://articles.economictimes.indiatimes.com/2014-05-29/news/50182186_1_jammu-and-kashmir-article-370-refugees. (Visited at 14th November, 2014).

⁶⁷ Srinagar Reporter, "Geelani Flays Plans To Settle Refugees In Jammu", *Kashmir Observer*, Jun. 05, 2014. Available at <http://www.kashmirobsrver.net/news/top-news/geelani-flays-plans-settle-refugees-jammu>. (Visited at 14th November 2014).

⁶⁸ Editorial, "Vimarsha: Article 370 and Resolution of Kashmir Problem", *Vivekanand International Foundation*, Nov. 20, 2014. Available at: <http://www.vifindia.org/event/report/2014/november/25/vimarsha-article-370-and-resolution-of-kashmir-problem#sthash.xz1f63Pu.dpuf>. (Visited on 27th November 2014).

There is a minimal judicial review of these modifications. Except *State of J&K v. Dr. Susheela Sawhney* case in no other case judiciary turned these modifications down. In most of the cases the Supreme Court has checked the validity of state laws and executive actions in the light of article 370. Apex court has always avoided checking constitutional validity or relevance of article 370 *per se*.

In *P. L. Lakhanpal v. The State Of Jammu And Kashmir*⁶⁹ Supreme Court in a constitutional bench of seven judges, headed by B. P. Sinha clearly held that the constitution of India does not apply fully in J&K. The court held as thus:

The Constitution does not apply to the State of Jammu and Kashmir in its entirety. On the 14th May, 1954, the President of India in exercise of the powers conferred by clause (1) of article 370 of the Constitution made and promulgated with the concurrence of the Government of the State of Jammu and Kashmir....

Similarly, in *Prem Nath Kaul v. State of Jammu and Kashmir*⁷⁰ apex court in constitutional bench of five judges, headed by Justice P. B. Gajendragadkar, displayed much faith in the sanctity of article 370. The court held as under:

Constitution makers attached great importance to the final decision of the Constituent Assembly, and the continuance of the exercise of the powers conferred on the Parliament and the President by the relevant temporary provisions of Art. 370(1) is made conditional on the final approval by the said Constituent Assembly in the said matters.

Further, in another constitutional bench, headed by Chief Justice S. M. Sikri in *Mohd. Maqbool Damnoo v. State of Jammu and Kashmir*⁷¹ apex court held:

It seems to us that the essential feature of art. 370, sub- clauses (b) and (d) is the necessity of concurrence of the State Government or the consultation of the State Government. What the State Government is at a particular time has to be determined in the context of the Constitution of Jammu and Kashmir.

Further in *Khazan Chand v. State of Jammu and Kashmir*⁷² in a division bench of D Madon and P Bhagwati J.J., Supreme Court held

⁶⁹ AIR 1956 197, 1955 SCR (2)1101.

⁷⁰ AIR 1959, 749, 1959 SCR Supl. (2) 270.

⁷¹ AIR 1972, 963, 1972 SCR (2)1014.

The Constitution of India, however, does not apply in its entirety to the State of Jammu and Kashmir because that State holds a special position in the constitutional set up of our country. Article 370 of the Constitution of India makes special provisions with respect to the State of Jammu and Kashmir. Under Sub-clause (c) of Clause (1) of Article 370 the provisions of Articles 1 and 370 apply in relation to the State of Jammu and Kashmir and under sub-clause (d) of Clause (1) of Article 370 such of the other provisions of the Constitution apply in relation to that State subject to such exceptions and modifications as the President may specify by an order issued with the concurrence of the Government of that State.

In *Bachan Lal Kalgotra v. State of Jammu & Kashmir*⁷³ division bench of the Supreme Court held that discriminatory laws made by legislature of J&K cannot be challenged in court due to article 370. The court held as thus:

It is to be noticed here that these provisions are not open to challenge as inconsistent with the rights guaranteed by Part III of the Constitution of India because of "the Constitution (Application to Jammu & Kashmir) Order, 1954" issued by the President of India under Art. 370(1) (d) of the Constitution by which Art. 35(A) was added to the Constitution in relation to the State of Jammu & Kashmir.

These cases show that the Supreme Court has always upheld the validity of article 370. It never questioned discriminatory provisions made due to article 370; rather the court validated discriminatory state laws in the light of special status given by this article.

Supreme Court always tried to discourage pleas challenging validity of article 370; one such case was dismissed in July 2014 itself.⁷⁴ But in August 2014 Apex Court has made an exceptional step in admitting a case challenging continuous application of temporary status of article 370 even after making of separate constitution of the state.⁷⁵ The case is still pending so nothing can be commented on the possible results.

⁷² AIR 1984 SC 762, 1984, (1984) 2 SCC 456.

⁷³ AIR 1987, 1169, 1987 SCR (2) 369.

⁷⁴ IANS, "In, Supreme Court dismisses plea challenging validity of Article 370" *India Today*, Jul. 11, 2014. Available at www.indiatoday.intoday.in/story/article-370-supreme-court-dismisses-plea-special-status-to-j&k/1/370910.html. (Visited on 16th November, 2014).

⁷⁵ GK News Network, "Supreme Court admits plea challenging Article 370 Issues notice to Government of India" *Greater Kashmir*, Aug. 20, 2014. Available at <http://www.greeterkashmir.com/news/2014/aug/20/supreme-court-admits-plea-challenging-article-370-29.asp>. (Visited on 17th November, 2014).

REASON FOR EROSION OF RIGHTS: POLITICAL AGENDA OR ARTICLE 370?

Article 370 in its bare provision provides only for exceptions and modifications. It is on the state government that to which direction these alterations will lead. Whether these changes will lead to provide more advanced rights according to international treaties and convention, or these will lead to depriving the people even from those rights which are expressly guaranteed by the constitution of India.

Article 370 is very neutral in its scope. This article only provides larger autonomy to the state government. It does not provide any direction to the state government that how this autonomy will be used.

According to this researcher so far state government has used this autonomy to deprive the people of fundamental rights. Even the rights of marginalized groups in society have been negatively affected by these exceptions and modifications. The state government has used this autonomy to keep the state as a separate area dominated by Muslims of Kashmir region. This intention is very clear from the analysis of different treatments given to Hindu refugees from West Pakistan and Muslim refugees of Tibet. The former have not been given voting rights in the state so far whereas later have been given voting rights.

Hence, to remove such anomalies and to provide more rights to the people political will is needed. These situations can be rectified without altering article 370. In the case of *Bachan Lal Kalgotra v. State Of Jammu & Kashmir*⁷⁶ Supreme Court has categorically said that rights can be provided to West Pakistan refugees without touching article 370. Apex court has suggested some legislative changes and some executive actions to provide equal rights to the refugees in the state. But the state legislative assembly or the state government has so far not made any effort in this direction. It clearly shows that state government is misusing its autonomy to keep those people deprived of rights which are not important from its aim of retaining a secluded state with a special kind of demographic setup.

One argument is raised that under article 371 there are special provisions for 10 states, then what is the problem with temporary provisions regarding J&K. Here it should be noted that under article 371 provisions related to Maharashtra, Gujarat, Andhra Pradesh are related to

⁷⁶ AIR 1987 SC 1169.

the development of such areas of the state which have their own regional interdependence and are far away from the state capitals. Whereas provisions related to Nagaland, Assam, Manipur, Mizoram are for protecting social and religious customs of tribal people. Provisions related to Sikkim are for introducing Sikkim into union of India. For Goa exceptionally small size of legislative assembly has been provided. For Arunachal Pradesh governor has been given special responsibility for law and order because of China factor. There is no provision which can authorize state legislature to make such laws *in general* which can be discriminatory on the basis of sex or religion. There is no mention of any 'exceptions or modifications' in article 371.

Whereas in article 370, state assembly and state government has been given free hand to make any law, which may be even against the express provisions of constitution of India. Provisions made through article 371 has protected rights of tribal people, whereas because of modifications made through article 370 no right of tribal communities is getting protection, rather they have been kept out of the jurisdiction of National Commission for STs. Article 371 has been used to provide more rights to people and article 370 has been used to curtail the rights of people.

CONCLUSION AND SUGGESTIONS

Fundamental rights in the state of Jammu and Kashmir are different from constitution of India. There are many exceptions and modifications in part III introduced by the constitutional order of 1954. Some of these exceptions and modifications have either directly reduced the fundamental rights or have postponed the time of implementation of fundamental rights in the state of Jammu and Kashmir. In some cases even judicial review has been kept out directly or indirectly. On the whole nature of these changes is regressive. Article 370 is impartial in its core nature; it talks about 'exceptions and modification' but does not explain that what would be the nature of the changes. The impugned article imposes no restrictions or limitations on the nature and extent of these changes. It is totally in the hands of the state legislature and president of India that they can make any progressive or regressive amendments in the constitution of India with regard to J&K. But unfortunately, whatever changes have been introduced in Part III when it applies to the state, through constitutional order of 1954, are very regressive in nature.

It is clearly visible that these exceptions and modifications are aimed at keeping people of J&K aloof from the people of other parts of the country. These changes suit the separatist tendencies of regional leaders of Kashmir division, whereas Part III of the constitution of India was made for securing fundamental rights of the people of the state and people of India. Though constitutional order 1954 had introduced many other changes also which put impact on center state relations, for example, in case of J&K residuary powers of legislation are with the state government and not with union government, but part III of the constitution of India has nothing to do with the power equation of union and state. Part III is purely for the fundamental rights of people, so regressive changes in that part are totally against the democratic principle. Further article 35A directly excludes judicial review by a non obstante clause. On the whole fundamental rights in the state have been curtailed to a great extent, which have direct bearing especially on the rights of marginalized groups of the state. Rights of schedule tribes, schedule castes, women and religious minorities have been slashed down in the J&K. This researcher is of the opinion that this scenario is against the basic structure of the constitution of India, so it should be changed and fundamental rights should be made fully applicable in J&K also.

The amendments introduced in part III of Constitution of India, as it applies to J&K by the constitutional order 1954, have made fundamental rights weak. The said order has omitted article 30 (1A) which has a negative impact on the educational institutions established by religious minorities.

Constitutional Order 1954 has added a non obstante clause, though the introduction of article 35A. This article provides that state government can make any law regarding rights and eligibilities of state subjects, but no court will have the power to make judicial review of such laws. Under this article discriminatory laws have been made for the sons of the soil and daughters of soil. In this sense article 35 A has weakened right to equality. It has rather protected inequality on the basis of sex.

It is clear that constitutional order 1954 has weakened fundamental rights guaranteed by part III of the constitution of India.

Article 370 has been used to protect state subject laws which are discriminatory against the women. The rights of religious minorities are also not protected. Special laws of the union which are made to protect the rights of S.C.s, S.T.s and children have not been extended to

the state due to provisions of article 370. It is clear that the state legislative assembly and state government has ignored empowerment of marginalised groups of society; and this has become possible due to article 370. It is clear that exceptions and modifications introduced by Article 370 have a negative impact on the rights of marginalised groups in the state. Due to these exceptions and modification rights of tribes like *Gujjar, Balti and Barokpa* and *Bot* are also negatively hampered. These are tribes are Muslims, even then the state has not made any special effort to provide them protections guaranteed by the constitution of India. *Shia* community also feels neglected. Non Muslim community's rights are also hampered. Women's rights are also curtailed. Only Valley based upper class Muslim Males are the only group whose rights are not curtailed from any angle.

According to Supreme Court Judgement in *Bachan Lal Kalgotra v. State Of Jammu & Kashmir*, West Pakistan refugees can be given equal rights just by making some amendments in related laws and by making some executive orders at the level of state government. Even for providing equal rights to women laws can be passed by state assembly only. Similarly, the rights of children, S.C.s, S.T.s and religious minorities can also be protected if the state legislature extends those union laws to the state which are made for the protection of rights of these marginalised groups of the society. All these remedies to provide rights to these vulnerable marginalised groups can be given by the state assembly and state government without abrogating article 370.

SUGGESTIONS TO CONTROL THE MISUSE OF ARTICLE 370 AND TO PROVIDE RIGHTS TO PEOPLE

There are several options for providing rights to marginalised groups in the state. Some of these options are without touching article 370 and some are by altering or abrogating article 370. This researcher has listed these suggestions hereunder:

Suggestions which can be implemented without amending or abrogating article 370

1. State assembly should make a resolution to end discriminatory laws and should amend all such laws.
2. President with the concurrence of state government can amend constitutional order of 1954, for making all these changes open to judicial review. For this non obstante clause of article 35A should be removed from constitutional order of 1954.

Because when all these laws will become open for judicial review then judiciary will be able to provide relief to people by declaring discriminatory laws as unconstitutional.

3. President of India, with the concurrence of state government, should issue a new constitutional order to extend whole constitution of India to the state of J&K without any exceptions or modifications. Notwithstanding anything in any previous order this new order should be made immediately applicable. It will automatically extend all the union laws to the state which will automatically provide many rights to the marginalised groups. Other discriminations will also be removed one by one through legislative efforts or through judicial review.

Suggestions which will need amendment or abrogation of article 370

Though all fundamental rights and rights of marginalised groups can be extended to the state without altering article 370, but until article 370 is present in the constitution of India in its original form, any state government can again impose discriminations and disabilities on the people of the state. So it is very important to neutralise this disastrous impact of article 370 by making it inoperative or by deleting it from the constitution of India.

Under clause 3 of article 370 president of India on the recommendation of state constituent assembly can issue a notification that article 370 shall cease to be operative or shall be operative with such exceptions and modifications and from such date as he may notify. This provision can be used to amend article 370 and to extend all provisions of constitution of India to the state of J&K without any exceptions or modifications. Further by the same method it can be provided that henceforth parliament of India will have exclusive right to amend article 370 without any reference to constituent assembly or legislative assembly or government of J&K. In this way article 370 can be amended to extend whole constitution of India to the state.

RECOMMENDATION BY RESEARCHER FOR THE AMENDED PROVISIONS OF ARTICLE 370

Amended article 370 may read as under

370. *Permanent provisions regarding state of Jammu and Kashmir*

(1). *Notwithstanding anything in any previous order, all provisions of this constitution shall apply to the state of Jammu and Kashmir.*

(2). *Parliament of India is entitled to make any amendments in this article by method prescribed in article 368 of constitution of India.*

For using this method state constituent assembly should be set up again. State legislative assembly can again set up a fresh constituent assembly by using its residuary powers, because for the purpose of J&K residuary powers are with the state and not with the union.

But for all these suggestions in some cases concurrence of state government is required and in some willingness of state legislative assembly is required.

Suggestions regarding deleting or abrogating article 370

1. Article 370 has not imposed any restrictions on the power of parliament of India to delete this article. Hence parliament of India can easily repeal article 370 by procedure mentioned in article 368 of constitution of India.

But this researcher feels that though abrogating article 370 is possible, but it would be better if instead of deleting, it is made operative differently to extend whole constitution of India to the state. And then after that this article should be made amendable by procedure laid down in article 368 of the constitution of India.