

## PIECING TOGETHER KASHMIR'S AUDACIOUS ROAD MAP

### Context:

- ▶▶ The recent order of the Central Government scrapping Article 370 and Art 35A which grants special status to Jammu and Kashmir.

### Introduction:

- ▶▶ The President has recently exercised his power under Clause 1 of Article 370. The Presidential Order has done away sections under Article 35A, which provides special privileges to "permanent residents" of the state.
- ▶▶ The decision of the Central Government to scrap Art 370 and Art35A, which gives a special status to Jammu & Kashmir, has caused a lot of confusion as to what these two statutes entail.
- ▶▶ Political parties on either side of the debate have voiced their opinion, with some calling tinkering with Article 35A "like setting powder keg on fire", while others have supported the idea calling it a move to unify of the country.

### What is Article 35A?

- ▶▶ This provision of the Constitution allows the Jammu & Kashmir state Assembly to define who is and is not a "permanent resident" of the state.
- ▶▶ This provision of the Constitution gives the legislators from Jammu & Kashmir the exclusive power to determine as to which people in or outside the State will have special rights and privileges granted by the State.
- ▶▶ The provision, inserted through a special Presidential Order, also gives the State Assembly powers to determine the recipients of State grants, the right to purchase land and property in the State, as well as settling permanently in the region.
- ▶▶ Other than this, the Legislative Assembly of Jammu & Kashmir can use the provision to restrict rights of any person not classified under "permanent resident" of the State.

### History of Art 35A:

- ▶▶ Article 35A was incorporated into the Constitution in 1954 by a Presidential order on the advice of the then Prime Minister.
- ▶▶ The controversial Constitution (Application to Jammu and Kashmir) Order of 1954 followed the 1952 Delhi Agreement entered into between Nehru and the then Prime

Minister of Jammu and Kashmir Sheikh Abdullah, which extended Indian citizenship to the 'State subjects' of Jammu and Kashmir.

- ▶▶ The Presidential Order was issued under Article 370 (1) (d) of the Constitution. This provision allows the President to make certain "exceptions and modifications" to the Constitution for the benefit of 'State subjects' of Jammu and Kashmir.
- ▶▶ So, Article 35A was added to the Constitution as a testimony of the special consideration the Indian Government accorded to the 'permanent residents' of Jammu and Kashmir.

### **Can Article 35a Be Amended or Repealed?**

- ▶▶ The repealing of Article 35A could be a legal uphill task for the central government. For any changes to be made to the provision, the constituent Assembly of the state has to consent to it.
- ▶▶ The constituent Assembly of the state, however, ceased to exist in 1957. Thus made seeking nod from the Assembly impossible.
- ▶▶ However, few disagree and say that there is a valid state legislative Assembly in the state, which also has constituent powers, any changes to Article 35A can be done by it.

### **What happens if Article 35A is repealed?**

- ▶▶ The political ramifications of the decision to repeal Article 35A notwithstanding, there are other legal-regulatory challenges that the government could face if this article were to be repealed.
- ▶▶ One of the first is that the jurisdiction of the Supreme Court of India as well as the Election Commission would get limited.
- ▶▶ Other than repealing, one option before the government is to delete Article 370 altogether, which would then automatically strike off Article 35A.
- ▶▶ This would, however, mean that the government would have to have a two-thirds majority in both the lower and upper House of Parliament.

### **Critical side of Article 35A:**

- ▶▶ Article 35A is against the very spirit of oneness of India as it creates a class within a class of Indian citizens.
- ▶▶ It treats non-permanent residents of J&K as second-class citizens.
- ▶▶ Non-permanent residents of J&K are not eligible for employment under the State government and are also debarred from contesting elections.
- ▶▶ Meritorious students are denied scholarships and they cannot even seek redress in any court of law.
- ▶▶ The issues of refugees who migrated to J&K during Partition are still not treated as 'State subjects' under the J&K Constitution.

- ▶▶ It was inserted unconstitutionally, bypassing Article 368 which empowers only Parliament to amend the Constitution.
- ▶▶ The laws enacted in pursuance of Article 35A are ultra vires of the fundamental rights conferred by Part III of the Constitution, especially, and not limited to, Articles 14 (right to equality) and 21 (protection of life).

### What is Article 370?

- ▶▶ Present in part XXI of the Indian Constitution which comprises of Temporary, Transitional and Special Provisions with rest to various states of India.
- ▶▶ Forms the basis of the “Special Status” of J&K.
- ▶▶ Provides for a separate Constitution of J&K. It allows the state constituent Assembly to make its own Constitution, thereby giving it an “autonomous state” power.
- ▶▶ After the accession of the state to India in 1947, Article 370 served as a “mechanism for managing Centre-state relations with specific reference to Jammu & Kashmir.
- ▶▶ Limits the Union Parliament’s power to make laws for J&K to those subjects mentioned in the Instrument of Accession (defense, foreign affairs, and communications).
- ▶▶ It also lends other powers such as the need of “concurrence of the state government” if the central government plans to make amendments to the concurrent list of subjects.
- ▶▶ Specified the mechanism by which the Article shall cease to be operative. That is, on the recommendation of the Constituent Assembly of the State before the President issues such a notification. However, this provision has been amended by the Constitution (Application to Jammu and Kashmir) Order, 2019.

### Is Article 370 a temporary provision?

- ▶▶ The Article was introduced to accommodate the apprehensions of Maharaja Hari Singh who would not have acceded to India without certain concessions.
- ▶▶ Territorial integrity was of paramount importance to India post-independence; thus, such a special provision was inducted in the constitution.
- ▶▶ The provision, however, is part of the “Temporary, Transitional and Special Provisions” of our constitution. Moreover, Article 370 could be interpreted as temporary in the sense that the J&K Constituent Assembly had a right to modify/delete/retain it; it decided to retain it.
- ▶▶ Another interpretation was that accession was temporary until a plebiscite.
- ▶▶ Despite several challenges to the provision on account of it allegedly being a temporary provision, the Supreme Court as well as the high courts have repeatedly upheld that Article 370 is indeed a permanent provision of the Constitution.
- ▶▶ In a judgment delivered in 2018, the top court said that though the article’s title noted it as ‘temporary’, it was very much of a permanent nature.

## Are Article 35A and Article 370 special provisions?

- ▶▶ Despite the popular notion that both Article 35A and Article 370 confer a special-state status to Jammu & Kashmir, most constitutional experts say that there are similar arrangements the Centre has with several other areas.
- ▶▶ There are similar exceptions in many areas across India.
- ▶▶ For example, in many states, including Himachal Pradesh, and the Northeast, no one other than those domiciled in these states can purchase land or property. These states do not have the concept of permanent residents.

## Issues in Revoking:

- ▶▶ Article 370 is the bedrock of the constitutional relationship between Jammu and Kashmir and the rest of India. It has been described as a tunnel through which the Constitution is applied to J&K.
- ▶▶ India has used Article 370 at least 45 times to extend provisions of the Indian Constitution to J&K. This is the only way through which, by mere Presidential Orders, India has almost nullified the effect of J&K's special status.
- ▶▶ By the 1954 order, almost the entire Constitution was extended to J&K including most Constitutional amendments. However, abrogating the article altogether may threaten the peace in the state which is already a hotspot of conflicts and militancy.
- ▶▶ It will completely change the relationship between the state and the rest of India.
- ▶▶ It will also clear the path for abrogating Article 35A which would allow Indian citizens to purchase land and settle permanently in J&K.
- ▶▶ Thus, the move is bound to have a significant impact on the demography, culture, and politics of J&K.

## Way Ahead:

- ▶▶ The new doctrine will have to persuade Jammu and Kashmir that greater integration with India holds promise. Few of the approaches are as:

### 1. Grass-root reach

- ▶▶ Reaching out to the people is seen as being best done by empowering local democracy to its fullest.
- ▶▶ In the past, the devolution of powers to the panchayats and urban local bodies carried little popular appeal with elected members of the Legislative Assembly.
- ▶▶ They saw empowering of local democracy as directly eroding their authority and had a vested interest in centralising power.
- ▶▶ One of the key factors, it may be recalled, behind the Centre's disconnection with the Kashmir state government was its continued unwillingness to hold elections to local

bodies. Since the imposition of Governor's (and now President's) Rule, the State Administrative Council has acted with remarkable alacrity to devolve powers to panchayat raj institutions in the State.

- ▶▶ Implementation of important schemes such as the Mahatma Gandhi National Rural Employment Guarantee Act, the Pradhan Mantri Awas Yojana, the Mid-Day Meal scheme, Integrated Child Development Services and social forestry projects has been devolved to the panchayats.
- ▶▶ The monitoring and supervision of schools and health institutions has also been passed on to the panchayat raj institutions. In addition, panchayats shall also be conducting a quarterly social audit of works and programmes in their area.
- ▶▶ Almost in parallel is the Savonarola-like campaign against corruption where no one powerful or influential is 'untouchable' or beyond the scope of investigation by law enforcement agencies, but directed at the power elite of the State.

## 2. Graft crackdown

- ▶▶ Corruption should be addressed not just at the fringes but at the very core of a rotten system, where a few families are seen to have usurped power and economic benefits — not just in Kashmir but in Jammu as well.
- ▶▶ Indeed, almost every popular survey in Jammu and Kashmir reveals that one of the leading causes of youth angst and alienation was nepotism and corruption among the ruling elite.
- ▶▶ This anti-corruption drive should be accompanied by attempts to fast track development to create institutions of academic and extra-curricular excellence and to generate skilled employment in a manner that the youth are gainfully employed and weaned away from radical thought.
- ▶▶ The new doctrine will also have to persuade the majority of the people of Jammu and Kashmir that greater integration with India will provide them with more opportunities, provide more freedom and space, and strengthen their rights much more than the alternatives proposed by other mainstream parties or separatists.

### Conclusion:

- ▶▶ If the central government succeeds in bringing in greater harmony and enduring peace between New Delhi and Srinagar, it would have performed an extraordinary national service and resolved one of the Delhi's greatest challenges.
- ▶▶ For the moment, however, we have to live with the uncertainty that is germane to all high-risk, almost adventurous undertakings.

**Source: The Hindu**