

## THE JAMMU AND KASHMIR STATE SUBJECTS CONTROVERSY OF 2004

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In 2004, the Jammu and Kashmir Legislative Assembly passed the Jammu and Kashmir Permanent Residents Disqualification Bill (the “Disqualification Bill”), which proposed that women who married nonstate subjects could no longer claim state subject status and would thereby lose both preferential treatment in government hiring and the ability to acquire new property in the State.<sup>1</sup> Various political actors decried the Disqualification Bill’s violation of Kashmiri women’s fundamental rights under the Indian Constitution, while proponents of the Disqualification Bill issued apocalyptic pronouncements about the end of constitutionally guaranteed autonomy for Jammu and Kashmir if the Disqualification Bill failed to pass.<sup>2</sup> Arguments for and against the Disqualification Bill fell largely along the lines of a false and dangerous dichotomy, casting feminism and Kashmiri autonomy as inherent opposites.

This Article seeks to challenge the artificial dichotomy between gender equality and state autonomy that this dispute created, and to provide greater historical context regarding the development of the relevant parts of the Jammu and Kashmir Constitution and their relation to the Indian Constitution. Part I will provide a brief overview of the evolution of the Jammu and Kashmir Constitution and the origins of state subjects law in Jammu and Kashmir. Part II will outline the events leading up to and including the passage of the Disqualification Bill. Part III will argue that the Disqualification Bill controversy reveals the limits of Indian constitutional authority over Jammu

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1. The Jammu and Kashmir Permanent Resident (Disqualification) Bill, 2004, 116 Jammu & Kashmir Gov’t Gazette 2 [hereinafter Disqualification Bill].

2. See Firdous Tak, *All Gang Up on the Bill*, GREATER KASHMIR (Srinagar), Mar. 9, 2004, at 1.

and Kashmir, in both legal and practical terms, and that there is no clear political and legal authority to vindicate women's civil rights in the State.

#### I. THE EVOLUTION OF STATE SUBJECTS LAW AND THE JAMMU AND KASHMIR CONSTITUTION

The current contours of the Indian-administered State of Jammu and Kashmir find their roots largely in the Treaty of Amritsar of 1846, through which an amalgamation of various small territories were gifted to a Dogra lord as a reward for his cooperation with the victorious British in the Anglo-Sikh War. Following the treaty, Jammu and Kashmir was then a sovereign state under the paramountcy of the British crown from 1846 to 1947. In 1927, the Dogra Maharajah Hari Singh promulgated the first of several orders that, when consolidated, defined and divided state subjects into the following classes:

Class I: All persons born and residing within the state before the commencement of the reign of Maharajah Gulab Singh in 1885;

Class II: All persons who settled within the state before 1900 and who have since acquired property and resided permanently;

Class III: All persons who have acquired immovable property under a rayatnama or ijazatnama [royal decree or grant], and have ten years of continuous residence;

Class IV: Companies registered with the state in which the government has a financial interest or which provide economic benefits to the state.<sup>3</sup>

"State subject" is essentially a synonym for "citizen," with the primary distinction being that the term "subject" is used generally to describe permanent residents of a monarchical state.<sup>4</sup> Several notes appended to the end of the order clarify that: (1) there is a hierarchy between different classes for preference in grants of state scholarship, agricultural land and

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3. GHULAM SHAH, STATE SUBJECTSHIP IN JAMMU AND KASHMIR 24 (1988).

4. JOHN SALMOND, JURISPRUDENCE 133 (Glanville L. Williams ed., 6th ed. 1920).

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building, and recruitment into state service; (2) descendants of state subjects who are born abroad shall also be considered to be state subjects; and (3) a wife or widow of a state subject acquires the status of her husband.<sup>5</sup> This law came in response to agitation by Kashmiri Pandits against the importation of foreign civil servants from the Punjab into the Dogra administration, resulting in poor representation of Kashmiri Pandits in the civil service.<sup>6</sup> Kashmiri Pandits therefore advocated for the issuance of a state subjects definition that would offer them advantages in obtaining employment. Such matters were largely irrelevant to Kashmiri Muslims, who were shut out of the employment pool almost entirely, due to their comparative socio-economic disadvantage and the communal nature of Dogra rule.<sup>7</sup> This definition of state subjects was later adopted and subsumed, essentially unchanged, into the term "permanent residents" in the Jammu and Kashmir Constitution.<sup>8</sup>

Jammu and Kashmir is the only territory within the Indian Union that maintains its own state constitution, a result of its unique position at the time of India and Pakistan's creation in 1947. As a predominantly Muslim state with a Hindu ruler, Kashmir's demography and geographic location made accession to either India or Pakistan equally plausible. On August 14, 1947, when British sovereignty over British India lapsed, Maharajah Hari Singh had still not made a decision as to whether Kashmir would accede to India or Pakistan.<sup>9</sup> While the Muslim majority expected accession to Pakistan,<sup>10</sup> the Maharajah executed a standstill agreement with Pakistan, and India requested time to consider an agreement.<sup>11</sup> During this standstill, Pakistani raiders, likely with the support of the Pakistani Army, began advancing on Kashmir in October 1947,

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5. SHAH, *supra* note 3, at 25.

6. MUHAMMAD YUSUF GANAI, KASHMIR'S STRUGGLE FOR INDEPENDENCE (1931-1939) 22-24 (2003).

7. *Id.*

8. J&K CONST. § 6.

9. ALASTAIR LAMB, KASHMIR: A DISPUTED LEGACY 1846-1990, at 121 (1991).

10. *See id.* at 109-41.

11. *See id.* at 121-41.

and a panicked Maharajah invited Indian forces into Kashmir to provide temporary protection.<sup>12</sup>

The Maharajah executed an instrument of accession with the new state of India, designating defense, external affairs, and communications as the exclusive domain of the central state, while all other plenary powers would remain vested within the state government.<sup>13</sup> This left intact the existing state constitution, created pursuant to the Jammu and Kashmir Constitution Act of 1939, which authorized a largely ceremonial legislative body. The representatives for such assembly were selected through a combination of royal appointment and restrictive franchise that excluded most residents. The Maharajah appointed Sheikh Abdullah, the popular leader of the political party National Conference, as the head of an "Emergency Government." Historically, Sheikh Abdullah was not an ally of the monarch. He agitated for democracy throughout the 1930s and 1940s, for which the Maharajah's government had incarcerated him as recently as 1946.<sup>14</sup> The accession of Jammu and Kashmir to India was hotly contested by Pakistan at the United Nations, and would result in a Security Council resolution requiring a plebiscite for the people of Kashmir to decide on the country to which they wished to accede.<sup>15</sup> This plebiscite never came to pass.

The Indian Constitution came into force on January 26, 1950, but the Instrument of Accession specifically outlined in Clause 7 that, "Nothing in this Instrument shall be deemed to commit [the Maharajah of Jammu and Kashmir] in any way to acceptance of any future constitution of India or to fetter [his] discretion to enter into arrangements with the Government of India under any such future constitution."<sup>16</sup> For this reason, the Indian Constitution included Article 370, which limited the power of the Indian parliament to make laws for Jammu and

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12. In a letter accompanying the Instrument of Accession, the Maharajah declared that the people of Kashmir would have the final say regarding the country of accession after the military threat had been resolved. *See id.* However, some Indian legal scholars contest the legality of such action, considering the Instrument of Accession an absolute and irrevocable transfer of power. *See* JUSTICE A.S. ANAND, *THE CONSTITUTION OF JAMMU & KASHMIR: ITS DEVELOPMENT AND COMMENTS* 103-14 (5th ed. 2006).

13. *See id.*

14. LAMB, *supra* note 9, at 186.

15. S.C. Res. 702, U.N. Doc. S/RES/702 (April 21, 1948).

16. SHAH, *supra* note 3, at 127.

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Kashmir.<sup>17</sup> The central state had to confine legislation affecting Jammu and Kashmir to areas enumerated in a list attached to the Instrument of Accession or other matters explicitly concurred to by the State of Jammu and Kashmir.<sup>18</sup>

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17. Article 370 of the Constitution of India (Temporary provisions with respect of the State of Jammu and Kashmir):

(1) Notwithstanding anything in this Constitution:

(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 Maharaja's 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:

(i) 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 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 the 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.

INDIA CONST. art. 370 (internal citations omitted).

18. *Id.*

Article 370(2) also reserved the right for a future state constituent assembly to ratify or reject any agreements executed by the interim government led by the Maharajah or Sheikh Abdullah, and to frame a separate constitution for its government.<sup>19</sup> The Constitution of Jammu and Kashmir was to be revised, and a new constitution created in light of this new relationship with India.

Then, in July 1952, leaders of the Indian government and several Jammu and Kashmir political parties convened in Delhi to resolve outstanding issues and to establish the basic principles on which the constitution would be drafted. Ultimately, Prime Minister Jawaharlal Nehru and Sheikh Abdullah's faction reached agreement on several issues. It was agreed upon that all residents of Jammu and Kashmir would be citizens of India, that this citizenship would have no effect on state subjects law within the State, and the state legislature would be empowered to define and regulate the rights of state subjects.<sup>20</sup>

Among other topics, the Delhi Agreement also touched upon fundamental rights, but the parties did not reach a specific agreement as to whether the fundamental rights of the Indian Constitution applied to Jammu and Kashmir residents.<sup>21</sup> The parties shared the concern that fundamental rights might have the effect of impeding the government's ability to deal "swiftly and effectively" with "people infiltrating for espionage, sabotage, or to create trouble otherwise," and that robust fundamental rights may cause the situation to "deteriorate and go out of hand."<sup>22</sup> While there was general agreement that some form of fundamental rights should apply, either in the Jammu and Kashmir Constitution or the Indian Constitution, "the Kashmir Delegation, while in general agreement, said that they would like to think over this matter as to how best to give effect to it."<sup>23</sup>

Before the Delhi Agreement, the Indian central government promulgated the Constitution (Application to Jammu and

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19. MOHEN KRISHEN TENG, RAM KRISHEN KAUL BHATT & SANTOSH KAUL, 1 KASHMIR: CONSTITUTIONAL HISTORY AND DOCUMENTS 189 (Jay Kay Book House 1999) (1977).

20. SHAH, *supra* note 3, at 131-32.

21. *Id.* at 133.

22. *Id.* at 132-33.

23. *Id.* at 133.

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Kashmir) Order of 1950, essentially codifying the Instrument of Accession and adding some other matters over which the Union Parliament could legislate.<sup>24</sup> The Indian government had identified Sheikh Abdullah as having the legal right to negotiate on behalf of the entire State during the Delhi Agreement, despite the fact that no statewide election with inclusive electoral participation appointed him to that post. However, when Sheikh Abdullah proved troublesome for the Indian government, they dealt with him “swiftly and effectively” by dismissing him from his position as Prime Minister and detaining him “for reasons of security of the state” under the Jammu and Kashmir Preventive Detention Act, namely for conspiring to annex the State with Pakistan in August 1953.<sup>25</sup> Abdullah was held in detention without charge for almost five years, and the Indian government subsequently charged him in 1958 for engaging in conspiracy while detained.<sup>26</sup>

A puppet leader, Bakshi Ghulam Muhammad, took Abdullah’s place as Prime Minister, beginning an era of rapid and unchecked erosion of constitutional autonomy, which did not cease with the end of his rule in 1964.<sup>27</sup> Notably, “Bakshi Ghulam Muhammad would probably not have won a free election, that is to say an election away from the umbrella of the Indian Army, at any point during his ten years of office; and he took good care to avoid this particular risk.”<sup>28</sup> Thus, the ultimate ratification of the Jammu and Kashmir Constitution in 1957 occurred in the shadow of the unconstitutional dismissal and detention of Sheikh Abdullah. Jammu and Kashmir “drifted steadily into Indian orbit” and the state legislature “confirmed, in language that would surely never have been used if Sheikh Abdullah had still been presiding” the legality of Jammu and Kashmir’s accession to India.<sup>29</sup>

The Jammu and Kashmir Constitution, in Section 6 of its final form, defined state subjects identically to the definition under Dogra rule, grafting on the requirement of Indian citi-

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24. ANAND, *supra* note 12, at 135.

25. LAMB, *supra* note 9, at 201-02.

26. P.L. LAKHANPAL, THE KASHMIR CONSPIRACY CASE 1-2 (1959).

27. LAMB, *supra* note 9, at 202.

28. *Id.* at 209.

29. *Id.* at 202-03.

zenship and renaming them permanent residents.<sup>30</sup> Section 8 vests exclusive authority to define permanent residents with the state legislature,<sup>31</sup> and Section 9 requires a two-thirds majority for any change made by the state legislature to the definition of permanent residents.<sup>32</sup> Article 35(a) of the Indian Constitution also protects this right, providing that, notwithstanding anything contained in the Indian Constitution, no law created by the Jammu and Kashmir legislature defining permanent residents or conferring special rights upon permanent residents may be struck down on the grounds that it is inconsistent with "any rights conferred on the other citizens of India."<sup>33</sup>

In light of the circumstances under which the Jammu and Kashmir Constitution was finally ratified (with twenty-five leaders and activists from a popular political party preventively detained), the majority of the population in Kashmir likely regarded the Indian central government's promulgation of the Jammu and Kashmir Constitution (Application to Jammu and Kashmir) Order of 1954<sup>34</sup> as lacking both moral and political authority. That same public perspective prevailed regarding the vast majority of constitutional amendments that followed the Order of 1954. As subsequent orders were ratified by legislatures, none of which were the result of free and fair elections, the political legitimacy and legal validity of the State's governing framework were increasingly undermined.

## II. THE JAMMU AND KASHMIR PERMANENT RESIDENT (DISQUALIFICATION) BILL OF 2004

In October 2002, the Jammu and Kashmir High Court issued a decision in *State of Jammu & Kashmir v. Sawhney* stating that the fundamental rights of the Indian Constitution can be applied in such a way as to invalidate a gender-discriminatory practice with respect to the permanent resident laws of Kashmir, where that practice was pursuant to a high court decision

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30. J&K CONST. § 6.

31. J&K CONST. § 8.

32. J&K CONST. § 9(c).

33. INDIA CONST. app. I(3)(j).

34. INDIA CONST. appx. 1.

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which was wrongly decided.<sup>35</sup> The decision in *Sawhney* was actually a consolidation of several cases that were before the Jammu and Kashmir High Court. Of the eleven cases addressed in *Sawhney*, seven pertained to female physicians seeking employment or education and training in the medical field.<sup>36</sup> Notably, only one case actually pertained to the acquisition of property, specifically a disputed inheritance.<sup>37</sup> Another prominent division occurred via regionalism: eight of the eleven cases arose from the subdivision of Jammu.<sup>38</sup> Finally, using the potentially inaccurate shorthand of names as signifiers of religious heritage, it appears there were only two Muslim complainants.<sup>39</sup> This could suggest that the vast majority of disputes related to the permanent residency of women predominantly concern non-Muslim women and public sector employment. However, it is important to note that this may only reflect the fact that this particular demographic entrusts the just resolution of its affairs to the legal system, while others do not.

The High Court held that the current practice of revoking permanent resident status for women married to non-permanent residents was based on a wrongly-decided case in 1965, *Prakash v. Sahani*.<sup>40</sup> In that case, observing British law and private international law, the High Court noted that a woman takes on the domicile and nationality of her husband.<sup>41</sup> Similarly, the Court argued, a Jammu and Kashmir permanent resident woman who marries a non-permanent resident takes on the status of her husband and is, therefore, no longer a permanent resident.<sup>42</sup> Private international law is simply another name for international conflict of law, that is, the procedure of determining which country's law applies in an international dispute. Accordingly, it is not a decisive factor in determining the nationality or citizenship rights of married women. Additionally, determining nationality by marriage is now a long-outdated practice, and was abolished in Britain as early as

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35. 2003 A.I.R. (J&K) 83.

36. *Id.* ¶¶ 4, 6, 9, 11-14.

37. *Id.* ¶ 5.

38. *Id.* ¶¶ 4, 8-10, 12-14.

39. *Id.* ¶¶ 11, 12.

40. 1965 A.I.R. (J&K) 83.

41. *Id.*

42. SHAH, *supra* note 3, at 36-37.

1973.<sup>43</sup> The *Sawhney* Court accordingly ruled that the laws on which the *Prakash* decision was based no longer apply, and therefore, permanent resident women who marry non-permanent resident men should no longer be divested of their status as permanent residents.<sup>44</sup> The High Court noted, however, that the state legislature would have been empowered to create such a rule defining permanent residents to exclude women who married non-permanent resident men, but that the legislature had not “in its wisdom” yet done so.<sup>45</sup> Therefore, after the *Sawhney* case, permanent resident women would no longer lose their status upon marriage to non-permanent residents, and women’s permanent resident certificates would no longer be stamped with the words “Valid Only Until Marriage.”

The wisdom of the legislature soon came into question; Muzaffar Baig introduced the Disqualification Bill into the Jammu and Kashmir Legislative Assembly on March 6, 2004.<sup>46</sup> At the time, Baig was the Minister of Law and Finance of Jammu and Kashmir and a prominent member of the People’s Democratic Party (PDP), part of the ruling coalition with the Congress Party. The legislative response began several months after the decision issued in October 2002, when the state government, led by a coalition including the Congress Party and the PDP, withdrew its special leave petition to appeal the decision.<sup>47</sup> In Legislative Assembly sessions, PDP office holders justified this decision as necessary to ensure that the final say on the state subject law came not from the Supreme Court of India, but from the state legislature.<sup>48</sup> During a Legislative Assembly session on February 24, 2004, the party president, Mehbooba Mufti, stated, “To repose faith in the state legislature to frame a law in this regard is a judicious decision.”<sup>49</sup> She further argued that to treat state subject men and women differently

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43. *Id.* at 36.

44. *State of Jammu & Kashmir v. Sawhney*, 2003 A.I.R. (J&K) 83.

45. *Id.* ¶¶ 44–46.

46. *Permanent Resident Disqualification Bill Passed*, GREATER KASHMIR (Srinagar), Mar. 6, 2004, at 1, 10.

47. KT News Service, *Mufti Puts Ball in Oppn’s Court*, KASHMIR TIMES (Jammu), Feb. 25, 2004, at 1, 4 [hereinafter *Mufti*].

48. *Id.*

49. KT News Service, *Mehbooba Pleads Women’s Cause*, KASHMIR TIMES (Jammu), Feb. 25, 2004, at 1, 8.

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upon marriage from nonstate subjects is “sheer discrimination and injustice.”<sup>50</sup> She lamented the plight of Kashmiri women who would be denied state subject status, but added, “I’ll support the law if it applies on men the same way.”<sup>51</sup>

The following day, Minister Baig also called for “weeding out the disparity created between the men and women of the state by the State Subject Law of 1927.”<sup>52</sup> Baig called this a “double standard proposition for the female population of Jammu and Kashmir,” and even commented on the “negligent representation of women in the Assembly.”<sup>53</sup> He also said that it was “high time that women were brought at par with their male counterparts.”<sup>54</sup>

Baig, however, introduced the Disqualification Bill to the Legislative Assembly on March 7, 2004, which reads in part: “Notwithstanding anything to the contrary contained in any law . . . a female permanent resident, on her marriage with a person who is not a permanent resident, shall with effect from the date of such marriage cease to be a permanent resident.”<sup>55</sup> The justification for the Disqualification Bill summarizes the holding in the *Sawhney* case, and then states: “It is, therefore, necessary to enact the law on the subject and also to remove the mist in the minds of the people at large. The [Disqualification Bill] seeks to attain the said objective.”<sup>56</sup>

The law was drafted in consultation with several different parties, and a joint meeting of all party legislators convened to develop consensus before the Disqualification Bill was presented for a vote.<sup>57</sup> The Disqualification Bill passed with only a voice vote, and possibly without a quorum.<sup>58</sup> The bill represented a dramatic departure from the PDP’s previous avowals to fashion a gender-neutral state subject law.

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50. *Id.*

51. *Id.*

52. *Mufti, supra* note 47, at 1.

53. *Id.*

54. *Id.* at 1, 4.

55. Disqualification Bill, *supra* note 1, at 2.

56. *Id.*

57. *Permanent Resident Disqualification Bill Passed*, GREATER KASHMIR (Srinagar), Mar. 6, 2004, at 1.

58. *See id.*; Aarti Dhar, *Outcry Against J&K Bill on Women’s Status*, THE HINDU (Chennai), Mar. 7, 2004, <http://www.hindu.com/2004/03/07/stories/2004030706070100.htm>; *Day After, Cong Raps State Unit, to ‘Rectify’ Bill*, INDIAN EXPRESS (Jammu), Mar. 7, 2004, <http://www.indianexpress.com/oldStory/42520>.

PDP faced consternation from its major alliance partner, the Indian National Congress Party, led by Sonia Gandhi.<sup>59</sup> By March 7th, news of the Disqualification Bill's passage had become a national affair, with the Bharatiya Janata Party (BJP) unexpectedly allied with national Indian women's groups, expressing their vehement opposition to the Disqualification Bill.<sup>60</sup> Sonia Gandhi expressed her "anguish" and urged state lawmakers to reconsider the Disqualification Bill or refer it to a select committee.<sup>61</sup>

Using coded language, calling the Disqualification Bill a "fundamentalist piece of legislation," or likening the situation to the "Shah Bano" case,<sup>62</sup> both the right-wing party and women's organizations reflected an assumption that this was an Islamic bill designed to disenfranchise non-Muslim women, such as Kashmiri Pandits or Jammuite Hindus, who supposedly married nonstate subjects at a higher rate. The BJP announced nationwide protests,<sup>63</sup> BJP leader Atal Bihari Vajpayee demanded that the state government "find a way out,"<sup>64</sup> and Minister Baig began his rhetorical shift conflating the preservation of Jammu and Kashmir's status under Article 370 with passage of the discriminatory bill.<sup>65</sup>

When the Disqualification Bill came to the upper house of the Legislative Council on March 11, 2004, Minister Baig argued that the Disqualification Bill, which divests certain Kashmiris of state subject status, "is aimed at safeguarding the interest of the people of Jammu and Kashmir and upholding the special status of the state as guaranteed under Article 370 of the Constitution of India."<sup>66</sup> Additionally, and without any

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59. Firdous Tak, *Coalition in Trouble as PR Bill Puts Cong in a Fix*, GREATER KASHMIR (Srinagar), Mar. 7, 2004, at 1.

60. Dhar, *supra* note 58, at 1.

61. *Sonia Anguished by State Subject Bill, Urges Review*, DAILY EXCELSIOR (Jammu), Mar. 8, 2004, at 1.

62. Dhar, *supra* note 58, at 1.

63. *BJP to Hold Nation-wide Protests*, GREATER KASHMIR (Srinagar), Mar. 9, 2004, at 1.

64. *It Has Sparked Country-Wide Opposition, Find a Way Out: Vajpayee*, GREATER KASHMIR (Srinagar), Mar. 9, 2004, at 1, 10.

65. *All Gang Up on the Bill*, GREATER KASHMIR (Srinagar), Mar. 9, 2004, at 10 (quoting Minister Baig as stating: "[W]e as a party have agreed on the Common Minimum Programme and not only Article 370[.] . . . I must make it clear that PDP as a party is committed to [the] special status of [the] state.").

66. *Insulting the Legislature Would Backfire: Beig*, GREATER KASHMIR (Srinagar), Mar. 12, 2004, at 10.

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proof or historical reference, he unveiled his most emotionally inflammatory argument thus far: that the state subject law was created to protect the ethnic identity of the people of Jammu and Kashmir, now under threat.<sup>67</sup> He asserted that his party was not willing to accept “dictates” and charged his opponents with playing political games for electoral gain.<sup>68</sup> He also remarked that the sudden outcry over the bill, which he argued affected only women of the elite class (*sahibzadis*) stood in contrast to the Indian central government’s apathy towards women in the State who were raped or widowed, presumably at the hands of the Indian military.<sup>69</sup>

The assertion that the state subject law was intended to protect ethnic identity is incorrect. Baig also implied that the opponents of the Disqualification Bill are not genuinely concerned about women’s rights, because the same persons failed to raise any objections to military war crimes against women in Kashmir in the early 1990s. This is a distraction from the actual Disqualification Bill, and Baig failed to draw any connection between the bill he proposed and any respite that it might offer to the widows of Kashmir, whose piteous image he invoked. His derisive reference to *sahibzadis* is curious, as no research has established any patterns of migration or exogamous marriage related to class, gender, or any other factor. Finally, his invocation of international domicile law is inapposite, as domicile refers only to physical presence and intent to reside, factors that are then used in conflict of laws to determine choice of law in an international dispute. Permanent resident law is closer to the concepts of nationality and citizenship and must be regarded through that lens.

Several questions and amendments were raised, including: the motion for the Disqualification Bill itself, a motion to make the Disqualification Bill apply equally to male and female state subjects, and a motion to refer the Disqualification Bill to a select committee.<sup>70</sup> Ultimately, however, six heated hours of debate, including Baig’s impassioned but misleading speech, were all for naught, as the Legislative Council Speaker, Abdul

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67. *Id.*

68. *No Voting on Bill as Council Is Adjourned by Chairman*, DAILY EXCELSIOR (Jammu), Mar. 12, 2004, at 1.

69. *Id.*

70. *Id.*

Rashid Dar, adjourned the session *sine die* without permitting a vote.<sup>71</sup> His reasons for doing so are implied in his summary of the questions before the Legislative Council at the time of voting: "an issue which required an even greater reflection had arisen out of the fact that a Legislative measure which was still in the process of being born has been catapulted into the passion and frenzy of electoral politics."<sup>72</sup>

With the adjournment, the legislature did not address the Disqualification Bill in the upper house until August of the same year. In the interim, the National Conference and the PDP lobbed insults at each other for months, each accusing the other of conspiring to thwart the Disqualification Bill and, therefore, acting as enemies of autonomy. A large portion of the ire was directed at Abdul Rasheed Dar, who was driven to the point of threatening legal action to quell the accusations that both his own party (the National Conference) and the PDP leveled against him.<sup>73</sup>

The Disqualification Bill was then re-introduced in August 2004.<sup>74</sup> This time around, instead of verbal attacks and vocal disruptions, members of the Legislative Assembly catapulted chairs and tables at each other, and disrupted speakers by marching and sloganeering inside the legislative houses.<sup>75</sup> After again drawing national attention and inspiring yet another fracas, the Disqualification Bill failed to garner the necessary two-thirds vote to pass.<sup>76</sup>

### III. THE LIMITS OF CONSTITUTIONAL CIVIL RIGHTS PROTECTIONS FOR WOMEN IN JAMMU AND KASHMIR

The discourse around this controversy created a false and dangerous dichotomy: Proponents argue that the Disqualification Bill is necessary to protect the autonomy of Jammu and

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71. *Id.*

72. *Id.*

73. GK News Service, *LC Chairman to Initiate Legal Action Against Critics*, GREATER KASHMIR (Srinagar), Mar. 18, 2004, at 1.

74. KT News Service, *Discussion on PR Bill Likely Before Voting*, KASHMIR TIMES (Srinagar), Aug. 27, 2004, at 1.

75. Zulfikar Majid, *Dangal in House*, GREATER KASHMIR (Srinagar), Aug. 24, 2004, at 1.

76. Naseer A. Ganai, *Congress Defeats PDP on Bill*, GREATER KASHMIR (Srinagar), Aug. 26, 2004, at 1; KT News Service, *Drama Ends, PR Bill Fails in Assembly*, KASHMIR TIMES (Srinagar), Aug. 28, 2004, at 1.

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Kashmir, and therefore, it should pass, while opponents counter that the Disqualification Bill is unjust and unconstitutional under the Indian Constitution, and should therefore fail. Gender equality must necessarily rely upon the application of the Indian Constitution to the State,<sup>77</sup> while pro-autonomy advocates must either support or, at the very least, condone outright chauvinism.

The Disqualification Bill was an unjust piece of legislation, which would have had the effect of divesting women of important rights in employment, scholarship and property ownership. However, invoking the fundamental rights of the Indian Constitution to strike down the Jammu and Kashmir Legislature's exercise of its authority under Section 8 of the Jammu and Kashmir Constitution would be ineffective politically, and arguably, legally. From a procedural perspective, consent from the Jammu and Kashmir Assembly to the application of the fundamental rights to the State was required under Article 370.<sup>78</sup> Although Delhi had chosen to negotiate with Sheikh Abdullah as a representative of the State, he was precipitously dismissed from his position and detained by the central government at the very time the fundamental rights were ratified by the State, making its consent questionable. Additionally, the notes from the Delhi talks reflect that the Kashmir delegation advocated for its own fundamental rights, and not those of the central Indian state, and no agreement was reached.<sup>79</sup> Even if the fundamental rights of the Indian Constitution did apply to the State, there is no statutory or constitutional basis for the argument that those rights override any provision of the Jammu and Kashmir Constitution, in light of Article 35(a) and Article 370.<sup>80</sup> Article 370 explicitly states that any Indian law outside the enumerated powers of the Indian state must be ratified by the state legislature in order for it to have an effect in the State.<sup>81</sup> This is not the mark of a traditional federal structure where the central, federal power automatically supersedes state power.

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77. See, e.g., Virendra Kumar, *The Jammu and Kashmir Permanent Residents (Disqualification) Bill 2004: A Constitutional Perspective*, 46 J. INDIAN L. INST. 534, 545 (2004).

78. INDIA CONST. art. 370, § 1, cl. (b)(ii).

79. SHAH, *supra* note 3, at 132–34.

80. INDIA CONST. art. 35, cl. (a); INDIA CONST. art. 370, § 1, cl. (b)(ii).

81. INDIA CONST. art. 370, § 1, cl. b(ii).

Putting aside the question of legality, the state subject controversy reflected that fundamental rights, as articulated in the Indian Constitution, do not hold the moral authority that they might have elsewhere in the country. The application of such rights to shape state subjects law was not perceived as a constitutional protection for a marginalized group (women), but rather as a tactic for perpetuating central government domination and the further disenfranchisement of Kashmiris, because the source of these fundamental rights (the Indian Constitution) is viewed as suspect. The Indian Constitution is largely understood by many Kashmiris to be a legal instrument of oppression, its protective guarantees failing when they were most needed.<sup>82</sup> The distrust for protection under Indian law is so profound that the same PDP leaders who opposed the practice of disqualifying permanent resident women reversed their position entirely when they introduced the Disqualification Bill, simply because the authority being used to oppose disqualification had its genesis in the fundamental rights of the Indian Constitution.

By contrast, those communities who were most likely to privilege Indian national identity above regional affiliation and who were more likely to find their interests represented and protected by the Indian central government spoke out against the Disqualification Bill, relying almost exclusively on the primacy of the fundamental rights of India. Thus, the communal and regional divides were rather predictable, with predominantly Hindu residents of Jammu and Kashmiri Pandits characterizing the bill as violating their fundamental rights under the Indian Constitution. For residents who favored the accession of Jammu and Kashmir to India, the application of Indian law to the State is not an act of aggression, but a source of protection.

While the PDP and National Conference were eager to establish their "pro-autonomy" credentials, they could have chosen to rely upon Section 22 of the Jammu and Kashmir Constitution, which requires full equality for women in "social . . . political and legal" matters, and could have been used as a

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82. See generally MEENAKSHI GANGULY, HUMAN RIGHTS WATCH, "EVERYONE LIVES IN FEAR:" PATTERNS OF IMPUNITY IN JAMMU AND KASHMIR (2006) (detailing the extreme violence and impunity in Jammu and Kashmir that has claimed around 50,000 lives since the armed separatist struggle began in 1989).

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means of addressing the state subject controversy.<sup>83</sup> Under the Jammu and Kashmir Constitution itself, the Disqualification Bill would have violated this provision. This section of the law is placed under the heading of "Directive Principles of State Policy," and Section 12 states that these provisions are not enforceable by any court.<sup>84</sup> While this provision would not render the Disqualification Bill automatically invalid, it would have, at the very least, forced legislators to justify their failure to abide by state policy. Ultimately, and unfortunately, the same legitimacy challenges could inure to the invocation of the Jammu and Kashmir Constitution, as its development and ratification were also plagued by a political context that undermined any claim it might have to being a foundational document that actually reflected the will of its people. The Jammu and Kashmir Constitution's policy directives may have inspired the same rancor and resistance.

The state subjects controversy underscored the glaring deficiencies regarding full equality for women under civil law in Jammu and Kashmir. The history of the State's relationship with the Indian central government has hollowed out the moral authority of rights articulated in both the state and central constitutions, leaving no clear source of law to protect the civil right of women to their permanent resident status. Although the Disqualification Bill itself was thwarted, the risk that a similar bill could be reintroduced by a different actor, in a changed political circumstance, remains.

It seemed from the beginning, particularly in light of the PDP's place in a coalition with the Indian Congress Party, that the Disqualification Bill was doomed to fail when it was presented before a wider audience. Congress boasted a prominent female leader in Sonia Gandhi, who had on many occasions championed women's rights in India, and there could have been no doubt that the passage of such a bill would have imperiled a political alliance on which the PDP heavily relied. The question then remains as to what benefits could possibly be generated from this palaver, which could have had far-reaching consequences for the women of the State. Possibly, this effort to "preserve Kashmiri identity" was a mere attempt to imitate a functioning electoral legislative process in Kash-

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83. J&K CONST. § 22.

84. J&K CONST. § 12.

mir. Representations of the dispute undoubtedly reinforced outsiders' perspective that this controversy had consumed Jammu and Kashmir. This perspective, however, privileges the Jammu and Kashmir government as the primary theater of Kashmiri politics, which it is not.

While members of the Jammu and Kashmir Legislature wrangled with each other over the import that the passage of such a bill would have, proponents of the Disqualification Bill purported to be entrusted with the great task of safeguarding their constituents' interest, which belied the negligible electoral participation that led to their positions as "representatives." In 2002, the Indian press feted the most "free and fair elections" that Jammu and Kashmir had ever seen, but the Coalition of Civil Society estimated that only approximately thirty percent of eligible voters in the Valley of Kashmir actually cast their ballots, most of whom were under duress by Indian armed forces and Jammu and Kashmir police to do so.<sup>85</sup> No matter how restrictive a PDP amendment of permanent resident law may be, the fact of the matter remains that the vast majority of Kashmiri voters do not believe that these representatives advocate for their political beliefs or desires. While living in a militarized state, rife with human rights abuses and denial of a transparent, participatory democracy,<sup>86</sup> the people of Jammu and Kashmir, with their long history of political suppression by the Indian government, have reason to challenge the form of Indian rule to which they are subject. The proponents of the regressive Disqualification Bill cynically attempted to translate that disenfranchisement into electoral gains, financial reward, and personal fame. This Article is intended as a record to challenge the impunity with which leaders of the State on all sides manipulated and misrepresented the law and historical facts to the public at the expense of women. Disregarding women's civil right to permanent resident status, simply because the divestment of such a right does not rank as a human rights violation at the hands of the State, reflects simple hypocrisy on the part of those leaders who purported to concern themselves with the specific interests of the people of Jammu & Kashmir. While the turbulent

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85. *Kashmiri Assembly Election: How Free and Fair?*, 38 *ECON. & POL. WKLY.* 101, 101-05 (2003).

86. See GANGULY, *supra* note 82, at 1-11.

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political context for governing structures in the State must be taken into account, the Disqualification Bill controversy reflects the hollowness of civil rights protections for women in Jammu & Kashmir. It also highlights the need for a constitutional system, over which all residents of the State feel true enfranchisement and ownership, for the vindication of women's right to equality before the law.