

Constitutional Validity of the Article 35A

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ABSTRACT

In recent times, there has been an intense debate on the legality of Article 35A of the Constitution, specifically as it concerns Jammu and Kashmir. This Article empowers the state legislature to define “permanent residents” of the state, their special rights and privileges. It was added to the Constitution through a presidential order of 1954 with the concurrence of the state government of the day but According to the Constitutional scheme, legally the question of that Does the President of India have sole power to amend the Constitution through “Order”?. The current article highlights the validity of the Constitution's Article 35A.

1. Introduction

Article 35A is a provision incorporated in the Constitution giving the Jammu and Kashmir Legislature a carte blanche to decide who all are ‘permanent residents’ of the State and confer on them special rights and privileges in public sector jobs, acquisition of property in the State, scholarships and other public aid and welfare.¹ It was added to the constitution through a presidential order of 1954 with the then Jammu and Kashmir government's concurrence².

This Article 35A has not been mentioned in the main text of the Constitution of India but has been mentioned only in Appendix-I THE CONSTITUTION (APPLICATION TO JAMMU AND KASHMIR ORDER,1954 to the Constitution of India. It is the Constitution (Application to Jammu and Kashmir) Order of the President of date 14 May 1954 that is placed as Appendix –I to Constitution of India and only that (Appendix-I) Art 35A is mentioned.³

Through 1927 and 1932 notifications, Dogra ruler of the princely state of J&K, Maharaja Hari Singh imposed a law that defined state subjects and their rights. The law also regulated migrants to the state. J&K joined India through instrument of accession signed by its ruler Hari Singh in October 1947. After J&K's accession, popular leader Sheikh Abdullah took over reins from Dogra ruler. In 1949, he negotiated J&K's political relationship with New Delhi, which led to the inclusion of Article 370 in the Constitution. Article 370 guarantees special status to J&K, restricting Union's legislative powers over three areas: defence, foreign affairs and communications. However, under the 1952 Delhi Agreement between Abdullah and Nehru, several provisions of the Constitution were extended to J&K via presidential order in 1954. Article 35A was inserted then. The Jammu and Kashmir's constitution (Jammu and Kashmir has its own constitution, its own flag and own penal code) was adopted

in 1956. It defines a permanent resident as one who was born or settled in the state before May 14, 1954, or who has been a resident of the state for 10 years and has “lawfully acquired” immovable property in the state. All emigrants from Jammu and Kashmir, including those who migrated to Pakistan, are considered state subjects. The descendants of emigrants are considered state subjects for two generations.

2. The Delhi Agreement states

The Delhi Agreement 1952 (announced on 24 July 1954) regarding the constitutional relationship between the Indian and Kashmir held between Prime Minister Nehru and Sheikh Abdullah⁴. The Delhi agreement established constitutional status to the State of Jammu & Kashmir with Indian Government which became the part of the federal structure of Indian Constitution. It was the agreement between the sovereign bodies which make a relationship on certain grounds. The agreement provided certain immunity to the permanent resident and considered them as the citizen of India but regarding the special rights and privileges to the permanent resident remains to the State legislature. The Article 35A is the fruit of this agreement which empowers State to facilitate its permanent resident as its thinks fit to do.

The Delhi Agreement states:-

1. The Government of India agreed that while the residuary powers of legislature vested in the Centre in respect of all States other than Jammu and Kashmir, in the case of the latter, they vested in the State itself.
2. It was agreed that persons domiciled in Jammu and Kashmir shall be regarded as citizens of India, but the State Legislature was empowered to make laws for conferring special rights and privileges on the State's subjects.

1 The Constitution (Application to Jammu and Kashmir) Order, 1954

2 The Constitution (Application to Jammu and Kashmir) Order, 1954

3 Appendix-I THE CONSTITUTION (APPLICATION TO JAMMU AND KASHMIR ORDER,1954

4 The Delhi Agreement 1952

3. As the President of India commands the same respect in the State as he does in other units of India, Articles 52 to 62 of the Constitution relating to him should be applicable to the State.
4. The Union Government agreed that the State should have its own flag in addition to the Union flag, but it was agreed by the State Government that the State flag would not be a rival of the Union flag.
5. The Sadar-i-Riyasat, equivalent to the Governor of other States, will be elected by the State Legislature itself instead of being nominated by the Union government and the President of India.
6. In view of the peculiar position in which the State was placed, in particular Sheikh Abdullah's land reforms programme, the Fundamental Rights enshrined in the Constitution could not be made applicable to the State. The question that remained to be determined was whether Fundamental Rights should form a part of the State Constitution or the Constitution of India.
7. With regard to the jurisdiction of the Supreme Court of India, it was accepted that for the time being, owing to the existence of the Board of Judicial Advisers in the State, the Supreme Court should have only appellate jurisdiction.
8. The Government of India insisted on the application of Article 352, empowering the President to proclaim a general Emergency in the State. The State government argued that the Union, in the exercise of its powers over Defence, would anyway have full authority to take steps and proclaim Emergency. In order to meet the viewpoint of the State's delegation, the Government of India agreed to the modification of Article 352 in its application to Kashmir by the adding the words, "but in regard to internal disturbance at the request or with the concurrence of the Government of the State", at the end of clause (1).
9. Both parties agreed that the application of Article 356, dealing with suspension of the State Constitution, and Article 360, dealing with financial emergency, was not necessary.

3. Constitutional Validity of Article 35A

Besides giving assent to the Bill passed by the Both Houses (Lok Sabha and Rajya Sabha), President of India has Executive legislative power under article 123 power to make ordinance when either house of the Parliament is not in session⁵. This legislative powers of the President have only six-month effect; in other words, it is the authority to make laws without discussion in the Parliament in urgency for a shorter

⁵Indian Constitution(part 5) article 123

period. It is an exception in the making law not a general rule or a permanent measure.

In the Constitutional scheme, the President of India has no legislative power to amends the Constitution by bypass the democratic process. President's legislative, executive and judicial power is subjective to aid and advice by the Council of Minister (Art 74), but all these powers do not allow to the President to go beyond the spirit of the Constitution.

4. Judicial Approach on Article 35A

A Delhi based NGO "We the Citizens" challenge the constitutionality of Article 35A before the Supreme Court of India. The petitioners have said that the Article 35A went against the fundamental right of equality under Article 14 of the Constitution. Another petition filed by a Jammu and Kashmir native Charu Wali Khanna who challenged the constitutionality of Article 35A which restrict the constitutional right, right to property. According to this Article 35A if a native woman marries a man not holding a permanent resident certificate of Jammu & Kashmir then she would restrict from her property right.

The petitioner claimed that: " article 14 guarantees right to equality but 35A is loaded in favours of males as even after marriage to women from outside, they will not lose right of being permanent residents. even a woman from outside the stat shall become a permanent resident on marrying a male permanent resident of Jammu and Kashmir. but a girl born in Jammu and Kashmir will lose the right on marrying an outsider. The petition states that Article 35A is against the "very spirit of oneness of India" as it creates a "class within a class of Indian citizens." Restricting citizens from other States from getting employment or buying property within Jammu and Kashmir is a violation of fundamental rights under Articles 14, 19 and 21 of the Constitution.

5. Constitutional Issues

- ✓ **Violates Article 14 and 15 :** Article 14 Equality before law The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India⁶ and Article 15 Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth⁷ But 35A is heavily loaded in favour of males because even after marriage to women from outside, they will not lose the right of being permanent residents
- ✓ **Violates Article 16:** There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State⁸, but According to Article 35A Only the residents of Jammu & Kashmir who are having the Permanent Resident Certificate (PRC) are eligible for the employment or appointment in Jammu & Kashmir Government.

⁶ Indian Constitution(part 3) article 14

⁷ Indian Constitution(part 3) article 15

⁸ Indian Constitution(part 3) article 16

- ✓ **Violates Article 19:** Article 19 It guarantees the right to freedom of speech and expression, to move freely throughout the territory of India, to reside and settle in any part of the territory of India, to practise any profession, or to carry on any occupation, trade or business⁹ but Article 35A restricted to all citizen of India except Permanent Resident of Jammu & Kashmir.
 - ✓ **Violates Article 21:** Article 21 It guarantees to Protection of Life and Personal Liberty –No person shall be deprived of his life or personal liberty except according to procedure established by law¹⁰, but Article 35A restricted rights of citizen of india except Permanent Resident of Jammu & Kashmir
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6. Different Between Constitutional Article 35A and Article 370

Well, both the Articles of the constitution i.e. Article 35A and Article 370 concern the State of Jammu and Kashmir, both of them being temporary provisions. The difference is with respect to their subject, where Article 35A protects the rights of the people with respect to employment, property and aids by the state government whereas Article 370 protects and grants special status to the sovereignty of the state giving power to make a separate set of laws to be applied for its governance.

7. Conclusion

By above analysis, we can say that neither the President of India has exclusive power to amend the constitution through bypass the entire Constitutional mechanism nor the Article 370 gives power to the President to insert any Article in any Part of the Constitution. According to the Constitutional scheme, legally the question of that the president cannot make constitutional amendments is settled but 35 A is more than just a legal issue. It is the need of the hour to debate Article 35A because it has not only a constitutional or legal issue, on the contrary, it has larger socioeconomic and political issue. At present, the matter is sub judice before the apex court let's see what will be the decision of the Supreme Court of India on the Constitutionality of Article 35A.

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⁹ Indian Constitution(part 3) article 19

¹⁰ Indian Constitution(part 3) article 21