

The lowdown on Article 35A

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. The provision mandates that no act of the legislature coming under it can be challenged for violating the Constitution or any other law of the land.

Article 35A was incorporated into the Constitution in 1954 by an order of the then President Rajendra Prasad on the advice of the Jawaharlal Nehru Cabinet. 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.

The parliamentary route of lawmaking was bypassed when the President incorporated Article 35A into the Constitution. Article 368 (i) of the Constitution empowers only Parliament to amend the Constitution. So did the President act outside his jurisdiction? Is Article 35A void because the Nehru government did not place it before Parliament for discussion? A five-judge Bench of the Supreme Court in its March 1961 judgment in Puranlal Lakhanpal vs. The President of India discusses the President's powers under Article 370 to 'modify' the Constitution. Though the court observes that the President may modify an existing provision in the Constitution under Article 370, the judgment is silent as to whether the President can, without the Parliament's knowledge, introduce a new Article. This question remains open.

A writ petition filed by NGO We the Citizens challenges the validity of both Article 35A and Article 370. It argues that four representatives from Kashmir were part of the Constituent Assembly involved in the drafting of the Constitution and the State of Jammu and Kashmir was never accorded any special status in the Constitution. Article 370 was only a 'temporary provision' to help bring normality in Jammu and Kashmir and strengthen democracy in that State, it contends. The Constitution-makers did not intend Article 370 to be a tool to bring permanent amendments, like Article 35A, in the Constitution.

The petition said Article 35 A 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.

A second petition filed by Jammu and Kashmir native Charu Wali Khanna has challenged Article 35A for protecting certain provisions of the Jammu and Kashmir Constitution, which restrict the basic right to property if a native woman marries a man not holding a permanent resident certificate. "Her children are denied a permanent resident certificate, thereby considering them illegitimate," the petition said.

Attorney-General K.K. Venugopal has called for a debate in the Supreme Court on the sensitive

subject.

Recently, a Supreme Court Bench, led by Justice Dipak Misra, tagged the Khanna petition with the We the Citizens case, which has been referred to a three-judge Bench. The court has indicated that the validity of Articles 35A and 370 may ultimately be decided by a Constitution Bench.

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