

SHOULD ARTICLE 35A BE SCRAPPED?

Relevant for: Indian Polity & Constitution | Topic: Issues and challenges pertaining to the Federal Structure

Jammu and Kashmir (J&K) was an integral part of the Dominion of India, according to the Instrument of Accession which was signed by Maharaja Hari Singh on October 26, 1947 and subsequently ratified by the Constituent Assembly of J&K.

Article 35A of the Constitution is now being vigorously contested with its constitutional validity being challenged before the Supreme Court. It has managed to create widespread legal and political controversy, despite it not even finding a mention in the regular sequential text of the Constitution. As Article 35A is reflected only in an Appendix of the Constitution, it is often missed by many legal experts.

Article 35A was born through a Presidential Order, the Constitution (Application to Jammu and Kashmir) Order of 1954. Therefore, it was added to the Constitution without undergoing the procedure for constitutional amendments as laid down in Article 368. The Presidential Order was issued in exercise of the power conferred under Article 370 (1) (d) of the Constitution. Whether such power also extends to inserting a new Article in the Constitution is contentious.

The heading of Article 35A reads: "saving of laws with respect to permanent residents and their rights". Article 35A declares that any law enacted by the J&K State Legislature on the issues of permanent residence, or special privileges and rights, or imposition of restrictions, or employment, acquisition of immovable property and settlement in the State, or aid from the State government shall not be void on the ground that it is inconsistent with any rights conferred on other citizens of India. In short, such laws granting special rights to permanent residents would not be deemed a violation of the fundamental rights of other citizens.

The 'classification' created by Article 35A has to be tested on the principle of equality as it treats non-permanent residents of J&K as 'second-class' citizens. Such persons 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 major sufferers are women who marry outside J&K. Though they retain their Permanent Resident Certificate, their children cannot be permanent residents. This restricts their basic right of inheritance. Further, the issues of refugees who migrated to J&K during Partition are still not treated as 'State subjects' under the J&K Constitution.

This matter requires the active participation of all stakeholders. It is necessary to give confidence to the residents of J&K that any alteration in status quo will not take away their rights but will boost J&K's prosperity as it will open doors for more investment, resulting in new opportunities. Article 35A, which was incorporated about six decades ago, now requires a relook, especially given that J&K is now a well-established democratic State.

Former Prime Minister Atal Bihari Vajpayee firmly believed that the issues relating to J&K could be resolved following the principles of *insaniyat* (humanity), *jamhooriyat* (democracy) and *Kashmiriyat* (Kashmiri values). Hopefully, this issue will be resolved using the same principles.

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The challenge to Article 35A rests on two constructs. The first is that it was inserted

unconstitutionally, bypassing Article 368 which empowers only Parliament to amend the Constitution. The second is that 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).

Unlike other princely States that started making choices after the Partition Plan was announced on June 3, 1947, J&K dithered. On August 12, 1947, Maharaja Hari Singh signed a Standstill Agreement with both India and Pakistan. Pakistan did not honour it. It invaded J&K in the third week of October. Confronted with the absorption of his State into Pakistan, the Maharaja signed the Instrument of Accession on October 26, 1947. The schedule attached to the Instrument of Accession specified that the Dominion of India could only make laws relating to Defence, External Affairs, Communications, and ancillary matters.

With the issue of plebiscite under UN auspices still hanging, India moved to consolidate its relationship with the State by enacting Article 370 on October 17, 1949. Article 370 (1) (d) reads as follows: "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." This Article empowers the President of India to extend with requisite exceptions and modifications the other provisions of the Indian Constitution to J&K as may be necessary.

The Delhi Agreement of 1952 followed Article 370. Clause 2 of the agreement stated, "It was agreed between the two Governments that in accordance with Article 5 of the Indian Constitution, persons who have their domicile in Jammu and Kashmir shall be regarded as citizens of India, but the State Legislature was given power to make laws for conferring special rights and privileges on the 'state subjects' in view of the 'State Subject Notifications of 1927 and 1932: the State Legislature was also empowered to make laws for the 'State Subjects' who had gone to Pakistan on account of the communal disturbances of 1947, in the event of their return to Kashmir."

Clause 6 stated: "With regard to the fundamental rights, some basic principles agreed between the parties were enunciated; it was accepted that the people of the State were to have fundamental rights. But in the view of the peculiar position in which the State was placed, the whole chapter relating to 'Fundamental Rights' of the Indian Constitution could not be made applicable to the State." Please note that it said special rights for State subjects and not fundamental rights.

It was pursuant to this agreement that the Constitution (Application to Jammu and Kashmir) Order of 1954 was promulgated by the President of India. It contains Article 35A, which empowers the State Legislature to define permanent residents. That is why Article 35A is not found in the main body of the Constitution; it is in the Presidential Order having exclusive application to J&K. Therefore, striking it down will have implications for other constitutional amendments contained in the 1954 Presidential Order.

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Article 35A says that no law in J&K regarding restrictions imposed on employment under the State government, or acquisition of immoveable property, or settlement in the State, or scholarships and aid given by the State government shall be void on the ground that it is

inconsistent with any fundamental rights in the Constitution.

Though this Article came in through a 1954 Presidential Order, it was in furtherance of the Instrument of Accession which the J&K government had signed with the Indian government. The Instrument of Accession gave only limited rights to the Centre to interfere with the autonomy of J&K. That is why Article 370 was introduced, to recognise the special status of J&K. It said that the power of Parliament to make laws in J&K shall be limited to those matters in the Union List and the Concurrent List which, in consultation with the State government, are declared by the President to correspond to matters specified in the Instrument of Accession.

Land, rights over land, and settlement in the State are the main issues. Land is a State subject. Because of the limited accession of the State of J&K and the relatively greater autonomy given to the State, Article 35A is only a recognition of the conditional accession of J&K into India and the restrictions placed on both Parliament and the Constitution that the normal powers of Parliament to make laws will not apply to J&K. It is Article 370 that restricted the application of certain provisions of the Constitution to J&K. It is pursuant to Article 370 that Article 35A was inserted by way of the 1954 Presidential Order. All that it says is that the laws made by the state regarding settlement and acquisition of property will prevail and not be struck down on the ground that they violate fundamental rights.

Incidentally, Himachal Pradesh and Uttarakhand have laws which say that no outsider can buy land. Strictly speaking, these laws are unconstitutional and violate two fundamental rights — the freedom to reside and settle in any part of the territory of India and the freedom to practise any profession, trade and business. Those laws are void. But because the accession of J&K was conditional to their being given their rights, their sovereignty with regard to matters concerning land and settlement are preserved. Therefore, it cannot be challenged on the ground that it violates fundamental rights or the basic structure of the Constitution because it is pursuant to an original part of the Constitution and pursuant to the limited accession signed with J&K.

Kashmir never acceded fully to India. Therefore, it is a quasi-sovereign State. It is not like any other State. Article 35A follows the Instrument of Accession and the guarantee given to the State of J&K that the State's autonomy will not be disturbed even by the Constitution.

It is for the J&K to decide, according to its laws, on the issue of discrimination against women with regard to property rights. Such a law is discriminatory according to the Indian Constitution, and is repugnant to the issue of gender equality. But under the Instrument of Accession and the autonomy given to the State of J&K, this will also have to be decided according to laws and the Constitution of the State.

As told to Anuradha Raman

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