

ARTICLE 35A AND THE BASIC STRUCTURE

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

Can [Article 35A of the Constitution](#) be struck down? If yes, should it be? These questions — raised in a petition filed in the Supreme Court by a Delhi-based non-governmental organisation, “We the Citizens” — have already attracted widespread attention. The case, there’s little doubt, is freighted with political meaning. But when we look beyond the interests of politics, the issues aren’t especially contentious. As a matter of simple legal construction, it ought to be obvious to the court that the petition deserves a resounding dismissal. Any other verdict, which so much as entertains the notion that Article 35A is expendable, will impinge on basic tenets of constitutional interpretation, and will damage the most solemn promises that lie at the heart of the Indian federation.

Article 35A was inserted into the Constitution as part of a raft of amendments made through a 1954 presidential order, imposed under Article 370. Broadly, it empowers Jammu and Kashmir (J&K) to not only define a class of persons as constituting “permanent residents” of the State but also allows the government to confer on these persons special rights and privileges with respect to matters of public employment, acquisition of immovable property in the State, settlement in different parts of the State, and access to scholarships or other such aids that the State government might provide. The Article further exempts such legislation from being annulled on the ground that they infringe one or the other of the fundamental rights guaranteed by the Constitution. According to the petitioner, this immunity granted to J&K’s laws is discriminatory, and, therefore, Article 35A should be declared unconstitutional.

When the case comes up for hearing this week, a three-judge Bench of the court intends to test the petitioner’s preliminary arguments and consider the question of whether Article 35A infringes the Constitution’s basic structure. The answer to this question, the court believes, will allow it to decide whether to refer the case to a larger bench for further examination. But this exercise is likely to be of little avail. The law on the subject is well settled. Previous Benches have already put their imprimatur on the 1954 presidential order. In any event, even if the court were to look beyond existing precedent, a proper reading of the text of Article 35A, and its constitutional history, will establish that the present petition is meritless; that Article 35A is not amenable to a conventional basic structure challenge.

Should Article 35A be scrapped?

India’s Constitution, as the political scientist Louise Tillin has explained, establishes a form of asymmetric federalism, in which some States enjoy greater autonomy over governance than others. This asymmetry is typified by Article 370 — a provision, as Ms. Tillin writes, which was debated for over five months before forming part of the Constitution as adopted in 1950. In its original form, Article 370 accorded to J&K a set of special privileges, including an exemption from constitutional provisions governing other States. What’s more, in accord with J&K’s Instrument of Accession, it restricted Parliament’s powers to legislate over the State to three core subjects: defence, foreign affairs and communications. Parliament could legislate on other areas only through an express presidential order, made with the prior concurrence of the State government. Where those subjects went beyond the Instrument of Accession, the further sanction of the State’s Constituent Assembly was also mandated. Finally, the Article also granted the President the power to make orders declaring the provision inoperative, but subject to the condition that this authority could be exercised only on the prior recommendation of the State’s Constituent Assembly.

However, with the disbanding of J&K's Constituent Assembly in 1956, the question of suspending Article 370 was rendered moot. In the process, the asymmetry in India's federalism was fortified. That this is the case can also be gleaned from a reading of Article 368, which contains the ordinary powers of constitutional amendment as applicable to other parts of India. One of the provisos to the clause (ironically made through the same presidential order which introduced Article 35A) makes it clear that changes made to the Constitution under Article 368 will not mechanically apply to J&K. For such amendments to apply to the State, specific orders must be made under Article 370, after securing the J&K government's prior assent. What's more, such amendments will also need to be ratified by the State's Constituent Assembly. Indeed, as the Union Home Minister of the time, Gulzari Lal Nanda, put it in the Lok Sabha on December 4, 1964, Article 370 represents the only way of taking the Indian Constitution into J&K: "It is a tunnel," he said, and "it is through this tunnel that a good deal of traffic has already passed and more will."

The [petitioner in the Supreme Court](#) now makes two basic arguments. Article 35A, it claims, could not have been introduced through a process outside the ordinary amending procedure prescribed under Article 368. Even assuming that the President possessed this power, the petitioner asserts, Article 35A infringes the Constitution's basic structure. Both these claims, however, suffer from fundamental flaws.

As we have already seen, Article 370 is as much a part of the Constitution as Article 368. That the framers were deeply cognisant of the fact that the Constitution accorded J&K exceptional status is free of any doubt. It is particularly clear from the address made by N. Gopalaswami Ayyangar, the chief drafter of Article 370, to the Constituent Assembly on October 17, 1949: "Kashmir's conditions are... special and require special treatment," he said— "it is one of our commitments to the people and the Government of Kashmir," that in matters outside the scope of the Instrument of Accession no additions would be made "except with the consent of the Constituent Assembly which may be called in the state for the purpose of framing its Constitution."

That Article 370 is the embodiment of this promise was recognised as early as in 1959 by the Supreme Court in *Prem Nath Kaul v. State of J&K*. A few years later, another Constitution Bench of the court, in *Sampat Prakash v. State of J&K*, further clarified the position. "Art. 370 of the Constitution has never ceased to be operative," it held, "and there can be no challenge on this ground to the validity of the Orders passed by the President in exercise of the powers conferred by this Article." If anything, as A.G. Noorani has argued, there is a fine case to be made that all orders extending India's Constitution to J&K subsequent to 1956, when the State's Constituent Assembly was disbanded, are a nullity. But that the presidential order incorporating Article 35A, on the express recommendation of the State's Constituent Assembly, is without legal authority is an argument that is destined to fail.

It is equally fallacious to suggest that Article 35A can somehow be subject to a basic structure challenge. The canonical rule established in 1973, in *Kesavananda Bharati v. State of Kerala*, that the powers of amendment under Article 368 are not plenary and that the Constitution's basic features cannot be abrogated, was based expressly on an interpretation of the text of Article 368. Its logic doesn't extend reflexively to amendments made under Article 370, a provision, which in and of itself, is essential to maintaining India's federal structure. Besides, more than six decades have elapsed since Article 35A was inserted, and by now vast tracts of properties would have doubtless changed hands. In such cases, where constitutional amendments create vested rights in persons, as the Supreme Court held in *Waman Rao v. Union of India*, an amendment made prior to the decision in *Kesavananda* cannot be susceptible to a basic structure challenge. To hold otherwise would have consequences far more devastating than might immediately be apparent.

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