

Article 35A: Its Existence and Controversies

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Abstract

Article 35A of our Indian Constitution is one of the most debatable articles. It always remains surrounded by controversies. Article 35A gives the special rights to the Jammu and Kashmir's permanent residents while denying certain rights to people from outside the state. Thus, this issue becomes the main matter of concern for many. So, in order to understand its intricacies a detailed evaluation of Article 35A becomes important. Hence, this research paper would primarily focus on the provisions of Article 35A and its related controversies.

Keywords: Article 35A, Rights, Jammu and Kashmir, Controversies, Provisions.

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INTRODUCTION

One thing that has always triggered me into an arena of confusion is that out of 29 states in our country why Indian government has given special status to Jammu and Kashmir. What was the actual story behind it? Now to find the answer to that why I started searching articles and amendments related to Jammu and Kashmir and found out the most controversial article i.e. Article 35-A. I started searching some inputs regarding Article-35 A in Bare Act of Constitution but was unable to find Article 35-A in it. I wondered why Article-35 A has not been even mentioned in Constitution's Bare Act book. And this incident triggered me to go for a deep analysis on Article-35 A and that's why I decided to write a research paper on it.

UNDERSTANDING THE CONCEPT AND EVOLUTION OF ARTICLE 35A

ARTICLE- 35A of Indian constitution reads as follows:

Saving of laws with respect to permanent residents and their rights. Notwithstanding anything contained in this constitution, no existing law in force in the State of Jammu and Kashmir, and no law hereafter enacted by the Legislature of the State:

1. Defining the classes of persons who are, or shall be, permanent residents of the State of Jammu and Kashmir, or

2. Conferring on such permanent residents any special rights and privileges or imposing upon other persons any restrictions as respects
 - i. employment under the State Government;
 - ii. acquisition of immovable property in the State
 - iii. settlement in the State; or
 - iv. right to scholarships and such other forms of aid as the State Government may provide, shall be void on the ground that it is inconsistent with or takes away or abridges any rights conferred on the other citizens of India by any provision of this part"

Article-35A was incorporated into the Indian constitution in 1954 by an 'presidential order' on the advice of Jawahar Lal Nehru Cabinet. This order of 1954 followed the 1952 Delhi Agreement which was entered into between Jawahar Lal Nehru and Sheikh Abdullah (who was then the Prime Minister of Jammu and Kashmir) which extended the Indian citizenship to the 'State subjects' of Jammu and Kashmir.

The presidential order was issued under Article 370 (1) (d) [1] 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 Indian constitution as a testimony of the special consideration the Indian government gave to the 'permanent residents' of Jammu and Kashmir.

Though Jammu and Kashmir are a constituent state of the India, but its constituent position and relation with the central government is quite different from that of other states. The instrument of accession signed by the ruler of Jammu and Kashmir was accepted by the governor-general of India on 27th October 1947. Under this instrument only three things were surrendered by the state to the dominion and it was external affairs, defense and communications. The two specialty of the relationship between the state and the dominion was

- The state of Jammu and Kashmir was conferred with much greater measure of autonomy and power than the other states; and
- The center's jurisdiction was much limited within the state of Jammu and Kashmir than what it was in the other states.

So due to these special features and status being enjoyed by the state of Jammu and Kashmir, not all provisions of the Indian constitution are applicable to the state, only some are applicable, some are not at all applicable and some are applicable in a modified form. The constitutional position of the state has not remained static and with the passage of time it has been growing towards the closer affinity of the state with the Indian union [2], and more and more provisions has been made applicable to the state in due course of time.

CONTROVERSIES RELATED TO ARTICLE 35-A

But there are many controversies related to Article 35-A which is in need to be touched and solved. Just because of the special status given to the State Of Jammu And Kashmir there are many people in the State of Jammu And Kashmir that are its subjects but still they are not able to enjoy the benefits and privileges that are ascertained by state to its permanent resident but not to them. Now in

the case of *Bachan Lal Kalgotra v. State of Jammu and Kashmir and Ors* [3], it was seen that refugees from west Pakistan who all migrated to the State of Jammu and Kashmir in 1947 during the partition of the country and had settled down in the state for almost four decades since they migrated and settled down were denied with many basic rights which other Indian citizens have in other parts of the country such as, right to acquire immovable property in the state, the right to employment under the state, the right to start an industry the right to purchase transport vehicles, right to higher technical education, the right to be elected to the state assembly or a local body etc. So, while these rights were being denied to these people the Jammu and Kashmir legislature enacted a Resettlement act, 1982 by which all these rights were given to the other residents of Jammu and Kashmir who had voluntarily migrated at the time of the partition of the country and their children who may now choose to return to Jammu and Kashmir. The petitioner of this case only demanded that they should also get the same rights that the other permanent residents of state were getting, and all these denials were the repercussions of the definition of a 'permanent resident' under section 6 of the Jammu and Kashmir constitution which says

Permanent residents-(1) Every person who is, or deemed to be, a citizen of India under the provisions of the Constitution of India shall be a permanent resident of the state, if on the Fourteenth day of May 1954.

- he was a state Subject of class 1 or of class 2; or
- having lawfully acquired immovable property in the state, he has been ordinarily resident in the state for not less than ten years prior to that date.

(2) Any person who, before the fourteenth day of May, 1954 was a state subject of class 1 or of class 2 and who having migrated after the first day of march, 1947 to the territory now included in Pakistan, returns to the state under a permit of resettlement in the state or for permanent return issued by or under the authority of any law made by the state legislature shall on such return be a permanent resident of the state.

(3) In this section, the expression “State Subject of Class 1 or of Class 2” shall have the same meaning as in (State notification No. 1-L/84 dated the twentieth April 1927, read with State Notification No. 13/L dated the twenty seventeenth June 1932.).

So in this case the Supreme court held that though these people were residing in the state of Jammu and Kashmir, but are not the permanent residents of the state as defined by section 6 of Jammu and Kashmir constitution, so they do not have the rights and privileges that are given to the permanent resident of the state. So these people are not able to enjoy the special rights and privileges within the state of Jammu and Kashmir even though they had been settled in the state for last 40 years. So, the court said that they do not know what relief they could give to these people as the position of the petitioner is very unusual and it is up to the legislature of the state of Jammu and Kashmir to amend the legislature.

So, on the prima facie only it looks as a gross injustice to those people who even being residing in the state and living for the last four decades are not getting the special rights and privileges which they should get and are also denied to many other basic rights which is not justified. So, what should we call these persons? Should we call them as stateless persons? Of course, they are the citizen of India, but they are not getting the opportunity to enjoy the rights and privileges of the state in which they are living in. Now for that matter their condition is even worse than that of stateless persons.

The sole object of Article 35-A which was added through a presidential order, 1954 was to provide special rights and privileges to the permanent residents of the state of Jammu and Kashmir, employment in the state government, acquisition of immovable property, settlement in the state or scholarships and other forms of aid as per the discretion of the state government.

WHETHER ARTICLE 35A OF INDIAN CONSTITUTION IS VIOLATIVE OF ARTICLE 14 OF INDIAN CONSTITUTION OR NOT

Article 14 of Indian Constitution states equality before law. It further says that the

state shall not deny to any person equality before the law or equal protection of the laws within the territory of India prohibition of discrimination on grounds of religion, race, caste, sex or place of birth. In the case of *Western UP Electric Power and Supply Corporation Limited v. State of Uttar Pradesh* [4] Supreme Court held that “Article 14 of the constitution ensures equality among equals: its aim is to protect persons similarly placed against the discriminatory treatment. It does not however operate against rational classification. A person setting up a grievance of denial of equal treatment by law must establish that between persons similarly circumstanced, some were treated to their prejudice and the differential treatment had no reasonable relation to the object sought to be achieved by the law”. In another case of *Subramanian Swamy v. CBI* [5] it was held that Article 14 declares equality of rights to all the persons within the territory of India and enjoins equal protection to all persons in enjoyment of their rights and liberties without any discrimination or biasness or favoritism is a pledge of protection of equal laws, that is, laws that operate alike on all persons under like circumstances.

Article 14 does not allow class legislation; but it does not forbid reasonable classification of persons, objects and transactions by the legislature for the purpose of achieving specific ends. Now how to know that which classification is reasonable, and which is not. To find whether the given classification is reasonable it needs to fulfil the following two tests which was laid down in the case of *Laxmi Khandasari v. State of Uttar Pradesh* [6]:

- Firstly, the classification must not be arbitrary, artificial or evasive in nature. The classification must be based on the intelligible differentia, which means that distinction, which is real and substantial in nature, which distinguishes group of things compiled together in the class from others left out of it.
- Secondly the differentia adopted as the basis of the classification must also have a reasonable or rational nexus with the object and the purpose which is sought to be achieved by the statute.

So, in the case of *S Seshachalam v. Bar Council of TN* it was held by the court that when there is no reasonable basis for classification, such classification may be declared discriminatory.

So, Article 14 involves two facets, first that the classification must be based on the basis of intelligible differentia and it must have a rational or reasonable relation with the object sought to be achieved and it must be free from any kind of arbitrariness and it must ensure fairness and equality of treatment. But one thing we need to keep in our mind is that if the object of the classification itself is discriminatory, then an explanation that the classification is reasonable and having a rational relation to the object sought to be achieved becomes immaterial.

Article 35-A also tries to make some classification. So interpretation of Article 35-A depicts that the permanent residents of the state of Jammu and Kashmir enjoys some special fundamental rights and privileges within the state and also in any part of territory of India; but the citizens of India not being the permanent resident of the state of Jammu and Kashmir enjoy their fundamental rights in any part of the country but cannot enjoy in the state of Jammu and Kashmir. The same is happening with the refugees from west Pakistan who all had settled down during the partition time. They also being the citizen of India do enjoy the fundamental rights in any part of the territory of India but are deprived of basic rights and privileges within the state of Jammu and Kashmir. Why this gross injustice is taking place with these people? The provisions of the Indian citizenship given in from article 5 to article 11 of part 2 of the constitution of India shall be deemed to have the relation with the state of Jammu and Kashmir as from the date of 26th January, 1950. But the provisions mentioned in the Indian Citizenship given in from article 5 to article 11 do not make any such distinction as it has been discussed above. Thus, the classification created by Article 35A is also based on the Intelligible Differentia. But the differentia on which it is based is artificial and it does not have any rational nexus or relationship with the basic object of the Equality enshrined in the constitution.

Thus the classification that has been created by the Article- 35A does not fulfil the test of reasonable classification as it was being discussed in the case of *Laxmi Khandasari v. State of Uttar Pradesh* [7] as the differentia which was the basis of the classification did not have rational nexus or relationship with the basic object the constitution equality. Thus Article-35A of the Indian Constitution is violative of Article 14 of the Indian Constitution.

WHETHER ARTICLE 35A OF INDIAN CONSTITUTION IS VIOLATIVE OF ARTICLE 19 OF THE INDIAN CONSTITUTION OR NOT?

Article 19 of the Indian constitution says Protection of certain rights regarding freedom of speech etc.

- (1) All citizens shall have the right
 - (a) To freedom of speech and expression;
 - (b) To assemble peaceably and without arms;
 - (c) To form associations or unions;
 - (d) To move freely throughout the territory of India;
 - (e) To reside and settle in any part of the territory of India; and
 - (f) Omitted
 - (g) To practice any profession, or to carry on any occupation, trade or business

Now Article 19 clause 5 says that Nothing in sub clauses (d) and (e) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the state from making any law imposing, reasonable restrictions on the exercise of any of the rights conferred by the said sub clauses either in the interests of the general public or for the protection of the interests of any Scheduled Tribe.

But as we can see in the case of Jammu and Kashmir it is just opposite. Article 19 clause (1), sub clause (d) and (e) empowers the rights to the citizens of India to move freely throughout the territory of India and to reside and settle in any part of the territory of India. But being the citizen of India, we cannot reside and settle in the state of Jammu and Kashmir. Article 19 clause (1), sub clause (g) empowers the rights to the citizens of India to practice any

profession, or to carry on any occupation, trade or business. But though being the citizen of India, I cannot apply for the government jobs in the state of Jammu and Kashmir. Also Article 19 clause (5) says that nothing in sub clause (d) and (e) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the state from making any law imposing, reasonable restrictions on the exercise of any of the rights conferred by the said sub clauses either in the interest of the general public or for the protection of the interests of any Scheduled Tribe. But the restriction that the state of Jammu and Kashmir has made is not a reasonable restriction as the refugees from west Pakistan who are residing in the state of Jammu and Kashmir for years are deprived of jobs in the state government sector, are not allowed to participate in the election process and many other basic rights and privileges. Hence the special rights and privileges conferred to the permanent residents of Jammu and Kashmir by Article-35A is clearly violative of Article 19 of the Indian Constitution.

WHETHER ARTICLE 35A IS CONSTITUTIONALLY VALID OR NOT

Indian constitution has always protected certain sections of the society which have suffered injustice historically. In the same way Indian Constitution protects certain states to immune from the constitution under part XXI which says “Temporary, Transitional and Special provisions” given in from Article 369 to 392. In this part, the Indian Constitution also provides some temporary provisions to the State of Jammu and Kashmir. The main aim to provide these states with some special and temporary provision was to protect these state’s sovereignty in some areas. And these are some of the features of our country that makes our country more democratic. Among all these provisions Article 35A is the most debatable article related to the state of Jammu and Kashmir and according to this article a non-permanent resident of the state of Jammu and Kashmir cannot enjoy any government facilities. Now as we know there are two biggest controversy related to Article 35A. Firstly, that it is against the concept of

equality among the Indian Citizens as we have discussed above. Secondly, is the insertion of Article 35A in the Indian Constitution. The Presidential order made under Article 370 clause (1), sub clause (d) which empower the president to make exceptions and modifications regarding the state subjects and it should be consistent with the State Government. Now the main controversy is regarding the presidential order of 1954, Article 35A, Article 370 (1) (d).

Now it poses some very important questions such as:

- whether the president of India has the power to amend the constitution or not?
- Whether Article 35A is constitutionally valid as it came into existence by the bypassing of all constitutional mechanism?

Now to answer all these questions we need to know the history of how Article 35A was incorporated in the Indian Constitution.

Article 35A was the sole provision which was neither discussed in the constituent assembly or in the parliament. This article was incorporated in the Indian Constitution through a Presidential Order passed by Dr. Rajendra Prasad on the advice of Nehru’s cabinet in the year 1954. This Article is related to Jammu and Kashmir and it states about the rights and privileges of the permanent residents of Jammu and Kashmir which excludes any other person who is not a permanent resident of the state from any kind of State’s benefits and this Presidential Order exercises its power from Article 370 (1).

Now another thing which is related to Article 35A is Delhi Agreement, 1952. The Delhi Agreement 1952 is related to the constitutional relationship between the India and the Kashmir and was held between Nehru and Sheikh Abdullah. The Delhi Agreement established the constitutional status to the state of Jammu and Kashmir with the Indian Government, thus making it a part of federal structure of the Indian Constitution. The given agreement provided certain immunity to the Permanent resident of Jammu and Kashmir

and considered them as the citizen of India, but the special rights and privileges to the permanent residents was vested with the State Legislature. So Article 35A empowers the state to help and promote its permanent residents the way it thinks fit and it was agreed in the agreement that the persons domiciled in the state of Jammu and Kashmir shall be regarded as the citizens of India, but the State legislature was empowered to make laws for conferring special rights and privileges on the state's subjects. The union also agreed that the state should have its own flag, but that flag would be subordinate to the Union Flag.

Now the main question is that does the President of India have the sole power to amend the Constitution through an order?

In addition to giving assent to their bill passed by both the houses, President of India also has the sole legislative power to make ordinance when either of the house is not present in the session given in Article 123, but this legislative has a temporary effect only for six months. The authority to make laws in urgent situation without discussion in the parliament is for shorter period only. So, it is not a permanent measure or general rule as such. But when it comes to Constitutional Scheme, the President of India has no legislative power to amend the constitution by bypassing the democratic process. President's legislative, executive and judicial power is subject to advice by the Council of Minister given in Article 74 of Indian Constitution, but all these powers do not allow the president to go beyond the limitation and spirit of Constitution.

And also, in the Article 370 of the Indian Constitution, nowhere it has been mentioned that the President of India has the power to amend the constitution or to insert a new Article in the Constitution. Rather Article 370 of Indian Constitution only says that the President can make any exceptions and modifications and that to consistent with the government of the State. As Article 370 1 (d) states that:

“Such power of the other provisions of this Constitution shall apply in relation to such exceptions and modifications as the President may by order specify.”

If we look on to Article 368, we'll get to know that Article 368 is the only way to amend the constitution and through the president. Article 368 states “Power of the Parliament to amend the Constitution and procedure, therefore” which means that it is the parliament that has the power to amend the constitution. Article 368 (2) states that:

An amendment of this Constitution may be initiated only by the introduction of a bill for the purpose in either House of Parliament, and when the bill is passed in each House by majority of the total membership of that House and by a majority of not less than two-third of the members of that house present and voting, (it shall be presented to the president who shall give his assent to the bill and thereupon) the Constitution shall stand amended in accordance with the terms of Bill”

So, it is quite clear that Article 368 is the only way to amend the constitution by the way of addition, variation or by repealing any of the proviso of the constitution. Thus taking into consideration all the proviso been mentioned under Article 368 and Article 370, and interpreting it in all the manners possible it is very clear that it does not authorize the president i.e. the Executive head of India to add by enacting any new provisions in the Indian Constitution in its relation as well as application to the state of Jammu and Kashmir.

Even in the case of *Puranlal Lakhanpal v. The President of India* [8] it was held that exceptions and modifications term has to be interpreted in the widest manner possible, hence The President of India has the power to ‘modify’ the Constitution under Article 370. However the apex court did not discussed on the Article 35A of the Indian Constitution and did not made it clear whether the president has the sole power to amend the constitution without the parliament. Since this has not been discussed even by the apex court, it is pointing towards an inference that President solely cannot amend the constitution without involving the parliament.

Thus, the way in which Article 35A was incorporated in the Indian Constitution, was

not in accordance with the procedure mentioned in our Constitution, hence it is not Constitutionally Valid.

CONCLUSION

Thus taking into consideration all the above mentioned points and referred cases it is very clear that Article 35A is not constitutionally valid, and it is acting as barrier to the objective of our constitution that is Equality and it is also hampering the true spirit of oneness of our country. Hence since Article 35A is constitutionally not valid it should be scrapped off from our Indian Constitution.

REFERENCES

1. Article 370(1)(d) in The Constitution of India 1949 (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: 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. See, Jagota, Development of Constitutional Relations between Jammu and Kashmir and India: 1950-1960, 2 *JILI*, 519 (1960); AS Anand, *The Constitution of Jammu & Kashmir*, (3rd Edn, 1998).
3. AIR1987SC1169
4. AIR 190 SC 21, 24: (1969) 1 SCC 17
5. (2014) 8 SCC 682
6. AIR 1981 SC 873, 891: (1981) 2 SCC 600
7. AIR 1981 SC 873
8. AIR 1961 SC 1519

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