
ARTICLE 35A – A CONSTITUTIONAL AMBIGUITY

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ABSTRACT

The status of Article 35A in the Constitution of India came into question following the abrogation of Article 370, which led to the dissolution of its by-products, of which Article 35A was one of them. Prior to this, the Article remained shrouded in obscurity within the Annexure of the Constitution and its emergence into the limelight raised questions about its origins and subsequently, its validity with respect to scrutiny through the lens of the well-established legal jurisprudence surrounding the Constitution. This short article does not seek to provide a definitive answer to the question ‘Does Article 35A violate the Basic Structure Doctrine of the Indian Constitution?’, but rather attempts to bring focus to the various contours that would be traced while even attempting to answer it. The article traces the turbulent history behind the introduction of Article 35A, its nature as a subsidiary of Article 370, the Basic Structure doctrine and finally, offers a perspective on the position of Article 35A with respect to the Basic Structure Doctrine, both contextually and in isolation as a legal provision.

Keywords: Status, Obscurity, Limelight, Jurisprudence, Contours, Turbulent, Subsidiary, Contextually, Isolation

INTRODUCTION:

Article 35A has been an enigmatic and intriguing point of debate with respect to the provisions of a complex Constitution. Despite its many peculiarities, Article 35A stands out due to the turbulent background behind its introduction, the technical details surrounding its permanency, the many court decisions that have added to its legitimacy and finally, its unforeseen emergence into the limelight in the eyes of the general public from between the lines of Article 35 and 36 upon the abrogation of Article 370¹. In order to take a deep dive into Article 35A and its Constitutionality, it must first be extrapolated what such a dive would entail. The procedural and technical arguments regarding the Article are in themselves not sufficient in explaining its relation to the basic structure, since the concept of the basic structure is a test not limited to Articles belonging or not belonging to the Constitution, but is rather one that weighs the relevant aspects of any amendment (or any provision thereof that is required to be weighed against it) against what judicial precedent may consider the ‘core’ or ‘spirit’ of the Constitution. This basic structure, being abstract and not clearly defined, implies that the legal provision being weighed against it has to be substantively analysed. Substantive analysis requires understanding several variables that have shaped the relevant legal provision such as its historical background, effect of the legal provision, its relevance today, important features within it and so on and so forth. Analysis of these variables allows for the parsing of information that can be considered necessary to definitively state whether the provision passes the test of the basic structure. At first, however, some procedural arguments against Article 35A will be addressed.

The introduction of Article 35A came about with the Presidential Order of 1954, based on the Delhi agreement of 1952, between Sheikh Abdullah and Jawaharlal Nehru². It carried forward the definition of ‘State Subject’ as mentioned in the State Notification orders of 1927 and 1932³. Accordingly, state subjects or residents were individuals who were termed to be domiciles of the erstwhile kingdom of Jammu and Kashmir upon Independence in 1947, and rather controversially, included emigrants to Pakistan and up to two generations of their descendants⁴. Article 35A, hence, contrary to popular perception, is a mere extension of rights and definitions highlighted in previous state laws. The procedural validity of these State Laws

¹ Parliament of India, *Article 35A of the Constitution – An Overview* (Parliament Member’s Guide, No. 43, 2017) 1

² Ibid 2

³ Ibid 3

⁴ State Notification 1927, Class I

themselves is guaranteed in the Instrument of Accession, signed by Maharaja Hari Singh (king of Jammu and Kashmir at the time), as a conditional acceptance of Indian sovereignty⁵. It must be noted here that the Instrument of Accession was introduced during increasingly turbulent times and a cursory glance at its provisions shows the intention to secure the rights of Jammu and Kashmiri people in the face of an uncertain integration into India.

Subsequent to the signing of the Instrument, framers of the Constitution drafted Article 370 under part XXI, in an attempt to legitimize the intentions of the Instrument and give the State Constituent Assembly the autonomy required to make laws for their own territory, without having them conflict with the provisions of the Indian Constitution⁶. The State Constituent Assembly, having the power to abrogate Article 370, dissolved without doing so thus leading to its permanency⁷. The relation between Article 35A and Article 370 boils down to the Presidential Order of 1954 being a function of the authority provided by Article 370, which stated the ability of the President to extend provisions of the Constitution to the State, “subject to such exceptions and modifications as he may by order specify”⁸. Such authority legitimized the introduction of Article 370, using a method distinct from the normal amendment procedure under Article 368.

The text in Article 35A, furthering the rights of State Subjects guaranteed under the State notifications, immunized the sole authority of permanent residents in acquisition of immovable property, access to government employment, validity in terms of settlement in the state and eligibility for scholarships from the rest of the provisions of the Constitution of India, including Article 14 under Part III⁹. This overriding immunity was further validated by the Supreme Court who accepted the superior status of the Article and its guarantees over the Fundamental Rights mentioned in the Constitution¹⁰.

Two fundamental procedural arguments against Article 35A are thus broken down. Article 35A was not added to the Constitution via ‘surreptitious’ means (as per the Late Arun Jaitley), but rather through the means of Article 370, legitimized by its presence in the original draft. Furthermore, the Supreme Court validated the immunity provided by Article 35A, thereby

⁵ Instrument of Accession, 1947, Para 8

⁶ India Today, ‘10 facts about Article 370 you need to know’, *India Today* (New Delhi, 28 May 2014)

⁷ The Hindu, ‘The Importance of Article 370’, *The Hindu* (New Delhi, 15 October 2015)

⁸ Constitution of India, Article 370, 1 (d), 1949

⁹ Constitution of Indian, Article 35A, 1954

¹⁰ *Sampath Kumar Vs State of Jammu and Kashmir and Anr* [1970] AIR SC 1118

making immaterial the arguments that it's a violation of Article 14, at least on a technical level. So now, it has been established that the details surrounding the introduction of Article 35A are neither murky nor dishonest. Article 35A is thus *not* constitutionally vulnerable. The substantive question is thus whether it *should be considered* a violation of the basic structure. For that, 'basic structure' itself must first be defined.

A CONCEPT THAT IS ANYTHING BUT BASIC:

The 'Basic Structure' doctrine is not concrete. The origins lie with H.R. Khanna who attempted to define it by suggesting that the best representation of it can be seen in Part III of the Indian Constitution (Fundamental Rights) and the Preamble¹¹. An emphasis must be put on the fact that these were merely representations of the concept itself, meant to provide a cohesive explanation for a perfunctory researcher. The Basic Structure doctrine is not beset by boundaries in its definitions and is open to evolution and interpretation, provided that its primary functionality, that of restricting the amending powers of a legislative body to make changes to a Constitution only till the extent that such changes do not comprise upon the fundamental existence of the nation. In India, common law interprets and extends this to suggest changes that violate the rights of citizen, transgress upon their liberties and trample upon the ideals that the makers intended to achieve within the jurisdiction of the Constitution, whether these have been stated explicitly or not.

Such ideals, abstract though they may be, require implementation and integration of them into governmental institutions and this is thus a pragmatic and rational endeavour that contributes to the stability of the country. The nature of this doctrine is such that it is visible in varying degrees in the legal discourses of several diverse countries. The *vires* of any amendment need not be tested as per the text of the Constitution itself or any other explicit mandate¹²; the necessity to have a minimum 'basic structure' requirement is for the continued prosperity of the common citizen – the political class which most greatly benefits from such a threshold. The very conception of a basic structure doctrine suggests the need to look beyond *what already exists*, to *what their purpose is* as a collective. Accordingly, if this doctrine were to be explained succinctly in the Indian context, the basic structure would be that description of the amalgamation of provisions of the Constitution, which the judiciary considers essential to the maintenance and perpetuation of the State and there are no amending powers of the Parliament

¹¹ *Keshavnanda Bharati Vs State of Kerala* (1973) 4 SCC 225 [1973] SC 1461

¹² Theunis Roux, *Principle and Pragmatism in the Constitutional Court of South Africa* [2008] 6

to erode away at this, and in India, these Constitutional provisions have been further interpreted to be time-tested, abstract ideals that uphold and secure the rights of the citizenry.

With each piece in place, with Article 35A substantiated and the basic structure defined (for the purposes of this essay), a meticulous examination into the former can be made.

A BASIC CONUNDRUM:

An argument must be addressed as to whether Article 35A can violate the basic structure in the first place. Article 35A, introduced by way of Presidential Order furthering Article 370, is synonymous to an amendment, given that the President was the only authority that could make Indian laws applicable to the State of Jammu and Kashmir¹³ (with the concurrence of the State Assembly). Accordingly, the argument that Article 35A cannot be tested by the Basic Structure as its Constitutional nature is ambiguous, is ultimately incorrect. This line of argumentation hinges on the Supreme Court decisions that have previously expressed concern at the 'Basic Structure' argument being raised against all manners of legal provisions and legislations, thereby limiting it to Constitutional amendments only¹⁴. Thus Article 35A, comparable only to an amendment is subject to scrutiny on procedural grounds.

Certain assertions made in the Article such as the line, "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" or the line, "conferring on such permanent residents any special rights and privileges or imposing upon other persons any restrictions" are unreasonable and overreaching in the current climate as well as in terms of the ideals considered essential as per the 'Basic Structure'. The basic structure, constituted from the principles enshrined in the Fundamental Rights and Preamble, lays an emphasis on unity and equality in any given situation, subject to certain restrictions. Article 35A cannot be considered a reasonable restriction due to the nature of its enactment or its continuation to this date with no benefits yielded now to national security or fraternity. Article 35A was conceptualized to appease to the leaders of Jammu and Kashmir, as it was an extension of Article 370 (furthering Clause 7 of the Instrument of Accession) and a result of the political turbulence that led to the Delhi Agreement of 1952¹⁵. This political turbulence seldom rears its head the way it did in the years following Independence. Over time, Article 370 (and 35A) have remained a veritable

¹³ Constitution of India, Article 370, [3], 1949

¹⁴ *Indira Gandhi Vs Raj Narain and Anr* [1975] AIR 1590, SCC (2) 159

¹⁵ Das Gupta, Jyoti Bhushan, *Jammu and Kashmir* (first published 1968, Springer 2012) 196-198

German wall that divides the people of India into Jammu and Kashmir and the rest. The Basic Structure doctrine, emphasizing on the integrity and sovereignty of the nation-state, requires deliegitimization of the overriding provisions of Article 35A due to continued irrelevance and disregard for a more stable and unified country.

This essay will not address the ‘ground realities’ tangent thrown up by proponents of Article 370 and 35A. That is not within its ambit, which is to decide whether 35A violates the basic structure doctrine. For the time that it was introduced and the lack of societal and jurisprudential maturity, Article 35A could be considered a necessity. Today, save for procedural arguments, it is not immediately clear why it should be considered a part of the Constitution when it clearly dismisses so many of the ideals represented within it.

CONCLUSION:

Can it definitively be decided whether Article 35A is a violation of the Constitution? The answer (as is the case with all matters pertaining to Jammu and Kashmir) – it’s complicated. On a purely substantive note, if technical details are to be ignored, Article 35A and its provisions violate the basic structure doctrine (at least in India). However, its method and circumstance of introduction and subsequent court legitimize and validate it. Only time will tell if the removal of Article 35A led to the integration of Jammu and Kashmir or its dissolution.