

ARTICLE 35-A

Information compiled by Sanjay Mohan Bhatnagar

Article 35-A

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:**

(a) defining the classes of persons who are, or shall be, permanent residents of the State of Jammu and Kashmir; or

(b) conferring on such permanent residents any special rights and privileges or imposing upon other persons any restrictions as respects—

To be continued

Article 35-A

.... From previous slide

- (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.

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.**

Enactment

- It was added to the Constitution through a Presidential Order, i.e., **The Constitution (Application to Jammu and Kashmir) Order, 1954**
- The Order was issued by the then **President Rajendra Prasad under Article 370**, with the advice of the Union Government headed by **Jawaharlal Nehru**.
- It was enacted as a subsequent to the '**1952 Delhi agreement**', reached between Nehru and **the then Prime Minister of Jammu and Kashmir Sheikh Abdullah**, which dealt with the extension of Indian citizenship to the Jammu and Kashmir "**state subjects**"

Enactment

- The state is empowered, both in the **Instrument of Accession** and the Article 370, to decree exceptions to any extension of the Indian Constitution to the state, other than in the matter of ceded subjects. So Article 35A is seen as an exception allowed by the Article 370, clause(1)(d).
- **Bakshi Ghulam Mohammad of the Jammu and Kashmir National Conference was the Prime Minister of Jammu and Kashmir at the time of the 1954 Presidential order.**
- As the Article 35A **was added** to the Constitution **by the executive head without any discussion in the Parliament.**

Permanent Residents (Summary)

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.

Carte blanche (French for blank or white card) or its Spanish language variant, **carta blanca** refers to a French phrase, meaning "unlimited discretionary power to act or unrestricted authority."

Permanent Residents

The Jammu and Kashmir Constitution, which was adopted on **November 17, 1956**, defined a **Permanent Resident (PR) of the state as a person:**

- 1. Who was a state subject on May 14, 1954, or**
- 2. who has been a resident of the state for 10 years, and has “lawfully acquired immovable property in the state”.**

The Jammu and Kashmir state legislature can alter the definition of PR through a law passed with two-thirds majority.

Permanent Residents

Jammu and Kashmir Constituent Assembly incorporated in Jammu and Kashmir Constitution discriminatory provisions under:

- Section-51 (**Qualifications for membership of the Legislature**. - A person shall not be qualified to be chosen to fill a seat in the Legislature **unless he is a Permanent Resident of the State**),
- Section-140 (The elections to the Legislative Assembly shall be on the basis of adult suffrage ; that is to say, **every person who is a permanent resident of the State** and who is not less than Eighteen years of age on such date ...), etc.

Permanent Residents

- **No person who is not a Permanent Resident of Jammu and Kashmir can own property in Jammu and Kashmir.**
- **No person who is not a Permanent Resident of Jammu and Kashmir can obtain job within Jammu and Kashmir Government.**
- **No person who is not a Permanent Resident of Jammu and Kashmir can join any professional college run by government of Jammu and Kashmir or get any form of government aid out of government funds.**

Why does the subject matter???

- 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** discussed the President's powers under Article 370 to 'modify' the Constitution.

Why does the subject matter???

- 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 challenged 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.

Why does the subject matter???

It argued that 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.

It was further argued that 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.**

Why does the subject matter???

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.

Why does the subject matter???

The Supreme Court will consider whether Article 35A, which gives special status to the State and people of Jammu and Kashmir, is violative of the basic structure of the Constitution.

Doctrine of Basic Structure.....

The phrase 'basic structure' itself cannot be found in the Constitution. The Supreme Court recognised this concept for the first time in the historic Kesavananda Bharati case in 1973.

Ever since the Supreme Court has been the interpreter of the Constitution and the arbiter of all amendments made by Parliament.

Why does the subject matter???

The phrase '**basic structure**' - introduced for the first time by M.K. Nambiar and other counsels while arguing for the petitioners in the Golaknath case, but it was only in 1973 that the concept surfaced in the text of the apex court's verdict.

In Kesavanada verdict:

Each judge laid out separately, what he thought were the basic or essential features of the Constitution. There was no unanimity of opinion within the majority view either.

Basic Structure concept reaffirmed- the Indira Gandhi Election case (1975), the Minerva Mills case (1980) and Waman Rao case (1981).

Interlocutor, someone who informally explains the views of a government and also can relay messages back to a government

Thanks for reading

Compiled by **Sanjay Mohan Bhatnagar**

Mobile: 9340846563

Web-presence: www.mathsacad99.com

Email: mathsacad99@gmail.com

Date: 08-08-2018

Courtesy:

<https://www.thehindu.com/news/national/what-is-article-35a/article19567213.ece>

<http://www.constitutionnet.org/vl/item/basic-structure-indian-constitution>