

# **The Presidential Order of 1954 and Article 35A: A Constitutional Criticism**

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## **Abstract**

India is an independent country that has adopted the principles of Federalism to uphold and cherish the values of democracy, national unity and regional autonomy which is necessary in a diverse country like India. The Supreme Court of India is looked upon as the final interpreter of the Constitution of India. The State of Jammu and Kashmir (hereinafter “The State of J&K”) is one of the 29 states of India and has a historical background of dealing with high militancy and internal insurgency due to various internal and external banned organizations. The State of J&K has been conferred with greater state autonomy and this has been provided under Article 370 of the Indian Constitution which allows special status to the State of J&K. Article 35A was introduced through a Presidential Order called the Constitutional (Application to the Jammu and Kashmir) Order, 1954 into the State constitution of J&K which was adopted in 1956 by exercising the powers under Article 370(1) of the India Constitution. It defines “Permanent Residents” as individuals who were already state subjects by 1954 or have lived there for at least 10 years.

The state was allowed special treatment with regards to employment, scholarships and immovable property. Following the adoption of the provisions of the Delhi Agreement by the State of J&K, the President of India issued The Constitution (Application to Jammu and Kashmir) Order, 1954, through which Indian citizenship was extended to the residents of the state, and simultaneously Article 35A was inserted into the Indian Constitution enabling the State legislature to define the privileges of the permanent residents.

This paper examines the constitutional validity of the Presidential Order of 1954, under which the author brings to light the issues of its violation of due process of law as well as the basic structure of the Constitution of India, following which it also examines constitutionality of Article 35A, inserted by the aforementioned Order, in which the author aims to establish its discriminatory nature due to it being violative of Article 14 of the Constitution of India.

All in all, the author aims to prove that the Order of 1954 is beyond the jurisdiction of the President of India, Article 35A creates “two classes of citizens” and hence violates Article 14 and that the radical changes in the state of J&K have made the order of 1954 redundant.

## **Introduction**

The Presidential Order, 1954 inserting Article 35A is unconstitutional as it was incorporated in the Indian Constitution through Article 370, which is a ‘Temporary Provision’ and does not allow for inclusion of a permanent provision like Article 35A in the Constitution. Further, the Presidential Order, 1954 applies various provisions of the Indian Constitution to the State of J&K, including Article 368 of the Indian Constitution, which lays down the procedure for amending the Constitution. Thus, ousting the application of Article 370 for making any ‘Radical Alterations’ to the Indian Constitution and eventually to the State of J&K. Article 35A is an arbitrary provision which violates various fundamental rights of the residents of J&K and hence violating the ‘Basic Structure Doctrine’.

The legislative intent behind Article 35A of the Constitution of India and Article 6 of the Constitution of J&K establishes that it is to protect the culture, tradition of the state of J&K and to ensure that people who truly are residents of the state are the ones who most benefit from the limited resources and special powers and rights provided to the state of J&K. Article 35 A is also violative of Article 14 as it takes away the status of Permanent Resident from women who have married out of caste and does not have the same consequences on men. Therefore, it is discriminatory and violative of the equality clause. It is established through case law that a daughter of a Permanent Resident will not lose their Permanent Resident status if she marries out of her caste and hence can purchase immovable property in the state of J&K.

## **Constitutionality of the Constitutional (Application to the Jammu and Kashmir) Order, 1954**

### ***Bar created by Article 370 from adding anything permanent due to it being temporary***

Article 370 being of temporary nature cannot add anything permanent to the Constitution. Post-independence all the princely states were invited to send their representatives to India’s constituent assembly where they were formulating the Constitution of India. Some of the states even tried to set up their own assemblies but most of the states failed to do so.

Consequently, most of the states decided to adopt the same Indian Constitution as their own constitution, except the State of J&K because of the special conditions that prevailed there. The representative of J&K requested that only those provisions of the Indian Constitution that corresponded with the Instrument of Accession<sup>1</sup> be applied to the State of J&K and the rest will be decided by the State's Constituent Assembly when formed. This was agreed by the Government of India and therefore Article 370<sup>2</sup> was incorporated in the Constitution, which acted as a bridge between India and the State of J&K. However, this was a "Temporary Provision" which was intended to be removed once the J&K constitution came into place.<sup>3</sup> However, by using a temporary provision of Article 370, they continued to add a new Article of "Permanent Nature" to the Constitution. It was held by the apex court that neither the State of J&K nor its Constitution is sovereign as they are subject to the Constitution of India. Also, the Permanent Residents of J&K are citizens of India and not the subjects of the State of J&K, nor any other state, as the Constitution of India<sup>4</sup> does not recognize dual citizenship.<sup>5</sup> This further means that the Constitution of the State of J&K is subordinate to the Indian Constitution and thus it is incorrect to rely on a temporary provision for inserting an Article of permanent nature, in spite of having Article 368 in place. Moreover, as per Article 370(1) the President can make modifications to the provisions of the Constitution before applying it to the State but once the provisions are applied then he cannot make any further changes to it. Since the Presidential Order, 1954 applied Article 368 to the State; Article 370 was no longer applicable for amending or making modifications to the State of J&K.<sup>6</sup>

### ***Violation of due process of law***

Article 370 of the Indian Constitution recognizes special status of the State of J&K which is why it grants power to the President to apply different provisions of the Indian Constitution to the state of J&K with such exceptions and modifications as the order may specify<sup>7</sup>. Thus, the President has the power to apply or not to apply certain provisions of the Constitution to the State of J&K. However, the power possessed by the President under Article 370 is not unfettered. The "modification" envisaged in Article 370(1) did not mean making an

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<sup>1</sup>Instrument of Accession, 1947

<sup>2</sup>Article 370, Constitution of India Act, 1949

<sup>3</sup>Part XXI, Constitution of India Act, 1949

<sup>4</sup>Article 9, Constitution of India Act, 1949

<sup>5</sup>SBI v. Santosh Gupta, (2016) S.C.C Online S.C. 1493

<sup>6</sup>Sampat Prakash v. State of J&K, A.I.R. 1153 S.C.R. (3) 574

<sup>7</sup>Article 370, Constitution of India Act, 1949

amendment to the Constitution which causes a “radical alteration” to it.<sup>8</sup> Moreover, as held in the case of *In Re Delhi Laws Act*<sup>9</sup> that the word “modification” did not involve any substantial or material alteration. By “radical alteration” it means that the President cannot add anything new to the Constitution under the garb of applying it to the state of J&K, he can make changes to the existing laws for making it applicable to the State but not by going beyond the definition of “modification” as per the well-established rule of law. Article 368 of the Constitution lays down the procedure for adding something new to the Constitution, however the procedure followed by the government was not in consonance with the procedure laid down in law. The reading of Article 370 of the Constitution will show that the President has no power under the Article to amend the Constitution by adding a new Article. Thus, by making radical alteration to the constitution by the way of Presidential Order, the President has exceeded his power vested in him under the said Article.

### ***Violation of Basic Structure of the Constitution***

The Presidential Order of 1954 inserted Article 35A into the Indian Constitution, enabling the State legislature to define the privileges of the ‘Permanent Residents’. Article 35A allows only the permanent residents to own property, obtain government jobs and join professional government run colleges. Article 370 was considered to be a ‘Welfare Legislation’ and the sole purpose of recognizing the special status of J&K through Article 370 was to preserve the ethnicity, culture and the rights of the citizens of the State of J&K. However, Article 35A is violative of Article 14, 19 and 21 of the Indian Constitution as it creates a class of citizens within a class of citizens of India which is unknown to the law of citizenship<sup>10</sup>. Under the Delhi Agreement<sup>11</sup>, the State Legislature was given the power to make laws, conferring special rights and privileges on the ‘State Subjects’ by dividing them into three different classes.<sup>12</sup> Surprisingly, it failed to recognize the rights of the refugees, while it recognized the rights of those who had voluntarily migrated from the state of J&K during partition and came back again thereafter<sup>13</sup>, which is discriminatory on the face of it.

The main purpose of the Article 370 being, preserving the rights of its citizens and protecting them from external intrusion, had been defeated by the inclusion of Article 35A in the

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<sup>8</sup>Puranlal Lakhanpal v. President of India, A.I.R. 1961 S.C. 1519

<sup>9</sup> *In Re Delhi Laws Act*, (1951) S.C.R. 747

<sup>10</sup> *We the Citizens v. Union of India and Anr.*, WP (C) No. 722/14

<sup>11</sup> The Delhi Agreement, 1952

<sup>12</sup> State Subject Notification, 1927

<sup>13</sup> The Resettlement Act, 1982

Constitution and its application to the Constitution of J&K, it makes sense to impose restrictions on the non-residents of the state while giving regard to the special status held by the state but it is ironical to not recognize the rights of its own people who had been living in the state. Moreover, the Doctrine of Basic Structure says that the basic/fundamental features of the Constitution are not amenable. No provision of the Constitution or any part thereof can be amended if it takes away or destroys the ‘basic features’ of the constitution<sup>14</sup>. The Constitutional principles would fall outside the amendatory power of the state. The amending power lies with the Parliament under Article 368 and that too is prohibited in the case where it abrogates the basic values of the Constitution.<sup>15</sup> It has been further held by the Supreme Court of India, that Article 21 read with Article 14 and 19 are considered to be the ‘basic features’ of the Constitution, ergo can’t be breached.<sup>16</sup> Thus, Article 35A inculcated by the Presidential Order, 1954 violates the Basic Structure Doctrine and therefore should be made unconstitutional.

### **Discriminatory nature of Article 35A**

Article 35A of the Indian Constitution violates Article 14 of the Indian Constitution as it is inherently discriminatory and unequal in nature, due to it barring women, who get married outside their caste, religion or State, from purchasing property and availing benefits of inheriting property.

This leads to discrimination based on sex and hence goes against and violates Article 14 of the Indian Constitution which states that the State cannot deny any person equality before the law regardless of religion, caste, sex, race etc.<sup>17</sup> The provision also violates the Constitution of the State of J&K. Section 6 of the Constitution of J&K defines “resident” as every individual that is a citizen of Indian according to the Constitution of India is deemed to be a permanent resident of J&K if on the day of 14th May 1954, he was a state subject of Class – I and Class – II or had legally acquired immovable property in the state of J&K and had been a resident of the state of J&K for not less than 10 years prior to that date. The section additionally mentions that if an individual, before 14<sup>th</sup> May, 1954 was a class – I or class – II state subject, and goes outside the State Territory and returns under a permit of resettlement or in the form of a permanent return to the state under any law of the state legislature will be

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<sup>14</sup>Durga Das Basu, *Introduction to The Constitution of India*, LexisNexis ButterworthsWadhwa, p.182 (2013)

<sup>15</sup>Glanrock Estate (P) Ltd. v. State of T.N., (2010) 10 S.C.C. 96 (100)

<sup>16</sup>I.R. Coelho v. State of T.N., A.I.R. 2007 S.C. 861

<sup>17</sup>Article 14, Constitution of India Act, 1949

also be provided the status of permanent resident ship.<sup>18</sup> Article 35A of the Indian Constitution which has been added as a provision through the Presidential Order of 1954 issued by the President of India under Article 370 allows the state to define permanent resident and in doing so the state has failed to provide a definition that is not unequal in nature as it doesn't factor the same consequence to men who marry outside their caste.

There is also failure by the state in regard to the definition of permanent residents as it allows for interpretation of who is a permanent resident and thereby resulting in women facing discriminatory treatment. It is legally in India through various cases assumed that nationality of an individual is determined through marriage. This has a visible bias towards men as their marriage status has little to no effect on their status of resident. This is due to the fact that a man who marries outside his caste still is allowed the status of a permanent resident whereas a woman who does the same loses her status. This judgement was historically overturned through the case *State of Jammu and Kashmir v. Dr. SusheelaSwahney*<sup>19</sup> where it was held that "a daughter of a permanent resident will not lose the status of permanent resident of the State of Jammu and Kashmir".

Further, in *State of Jammu and Kashmir v. Dr. SusheelaSwahney*<sup>20</sup> it was submitted and upheld that no discrimination can be made on the bases of sex because it violates the Constitution of India and also Constitution of J&K but also the fact that there was a reference in the judgement made to the Preamble of the Constitution of India which ensures equality of status and liberty. Additionally, Section 10 of the Constitution of J & K<sup>21</sup> which explicitly states that the permanent residents will have all rights guaranteed to them under the constitution of India was argued and agreed upon by the court which would imply that the fundamental rights of the Constitution of India which includes Article 14 must be upheld by the state. It also becomes important to recognize that Justices Mahajan and Mukerjee in *State of West Bengal v. Anwar Ali Sarkar*<sup>22</sup> stated that inequality of the law can come from the law itself or it can happen in action, which is to say that the law and the reason behind its creation could be good but in its implementation or the executive action could be discriminatory. This applies to the case before us as Article 35A was created to ensure that the state of J&K has special rights and privileges to be able to define and identify permanent residents and this is

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<sup>18</sup>Section 6, Jammu and Kashmir Constitution, 1956

<sup>19</sup> *State of Jammu and Kashmir v Dr. Susheela Swanhey*, A.I.R. 2003 J K 83

<sup>20</sup>*Id.*

<sup>21</sup>Section 10, Jammu and Kashmir Constitution, 1956

<sup>22</sup> *State of West Bengal v Anwar Ali Sarkar*, 1952 A.I.R S.C. 75

integral due to the political turbulence that exists with the state of J&K and to ensure that there is a smooth and efficient understanding of federalism between India and the State of J&K. But in the process of the interpretation of the definition of permanent resident an entire section of the society (the women) have become discriminated against and are unable to claim or purchase property or even obtain scholarships and employment even though they are just as much of a permanent resident of the state as the men are.