

Article of Discord

The Statesman

August 31 2017

In any book on the Constitution of India, one is unlikely to find Article 35A except, maybe, in the appendix. This is because the article did not enter the Constitution through the Constituent Assembly nor via the usual route of Constitutional Amendments as defined in Article 368, but through the unusual mechanism of a Presidential Order, using the provisions of Article 370 which gave special status and a Constitution to the State of Jammu & Kashmir (J&K) - the only state in India to have its own separate Constitution.

Article 35 is the last article in Part III of our Constitution dealing with fundamental rights, and deals with legislations to give effect to these rights. Article 35A defines and regulates the rights and privileges of the permanent residents of J&K while insulating these from the purview of fundamental rights as applicable to Indian citizens elsewhere. It states that only the permanent residents of the State shall enjoy the rights to seek employment under the State Government, acquire of immovable property within the State, and to get Government scholarships and aid. Normally every citizen of India enjoys these rights everywhere within the country.

Restrictions on purchase of land by outsiders in J&K date back to 1846, when the British had handed over Kashmir to the Dogra kings after the First Anglo Sikh War. A subsequent order of Maharaja Hari Singh and notification I-L/ 84 issued in 1927 restricted the rights to acquire land only to the permanent residents. Post-independence, the Instrument of Accession signed by the Maharaja in October 1947 gave Indian Parliament the authority to enact laws in relation to J&K only in respect of three subjects: foreign affairs, defence and communication. A subsequent agreement between Nehru and Sheikh Abdullah in 1952 known as the Delhi Agreement extended the fundamental rights of Indian Constitution to J&K and recognised the State's citizens as Indian citizens while giving the State legislature the power to define and regulate the rights and privileges of the permanent residents, which was the genesis of Article 35A. The Delhi Agreement also extended the powers of the Supreme Court to J&K. The Constituent Assembly in which Sheikh Abdullah was a member had adopted Article 370 in 1949, which mandated that for extending the provisions of the Indian constitution to J&K in respect of subjects in the Union and Concurrent lists, the state government's prior concurrence would be required along with incorporation of such provisions in the State's own Constitution after their adoption by the Constituent Assembly of Jammu & Kashmir, and that such extension would be effected through Presidential orders. These provisions of Article 370 broadly define the contours of autonomy of J&K and its special status.

Following the Delhi Agreement, a Presidential Order called "The Constitution (Application to Jammu and Kashmir) Order, 1954" was issued by the President of India, extending Indian citizenship to the residents of J&K, and simultaneously inserting Article 35A in the Indian constitution, thereby enabling the State to define and protect the privileges of its permanent residents. Article 35A was thus an asymmetrical provision, like Article 370 or 371, which was added to the Constitution without any discussion in the Parliament. It derived its legitimacy from article 370, which was also used for incorporating Sections

6, 8 and 9 in the J&K Constitution adopted by the Constituent Assembly of the State on 17 November 1956. Section 6 of it defines a permanent resident of the State as one who was ordinarily resident in the State for not less than ten years prior to 14th May 1954, or a returnee migrant who had migrated to Pakistan after 1st March 1947 but returned later under any law of the State. Section 8 gives the State the right to define Permanent Residents, while Section 9 empowers it to alter this definition.

Article 35A was challenged earlier in 2014 by a Delhi-based NGO, 'We the Citizens', on the grounds that it had violated Article 368, and also article 14 which guarantees equality before law, by denying Indian citizens outside J&K any right to own land or vote. The J&K Government had filed a counter-affidavit asking for the plea to be dismissed. Appearing for the Central government, Attorney General KK Venugopal had told the Court that given the "sensitive" nature of the issue, the Centre wanted a "larger debate on it". He also asked for the matter to be referred to a larger bench, given the constitutional issues involved. But it rang alarm bells across the entire valley and raised a storm of protests from various quarters ever since a Supreme Court advocate, Ms Charu Wali khanna, a Kashmiri Pandit married and settled in Delhi, had challenged the article before the Supreme Court. Ms Khanna wanted to build a house in J&K, but found that her marriage to a non-Kashmiri had made her a 'non-permanent resident' in her home state, automatically depriving her of the rights to acquire immovable property, seek employment or aid from the State by virtue of the article 35A and also disenfranchised her in her own state.

The article 35A, read with the aforementioned sections of the J&K Constitution, is discriminatory between male and female permanent residents. If a Kashmiri man marries a non-permanent resident, his children would enjoy the right to his property, but the children of a Kashmiri woman who is a permanent resident but marries a non-Kashmiri would lose such right over her ancestral property, as per a 1965-ruling of the J&K High Court. Though overturned by a full bench of the same High Court in 2002, the judgment left the status of children of such women unclear. It was on this ground that Ms Khanna had challenged the article before the Supreme Court. But there are other sections in the Constitution of J&K that are also equally discriminatory between permanent and non-permanent citizens, like Sections 51 and 140 which respectively empower only a permanent resident to contest legislative seats or even vote in elections to State legislature. Those opposing article 35A say that it was inserted just to maintain the predominance of Muslims in the valley permanently.

Political parties in the valley have warned of a severe backlash in case it is scrapped. Chief Minister Mehbooba Mufti had warned that "no one will be left in the state to hold the national flag" while National Conference leader Farooq Abdullah had said that questioning the validity of Article 35A - "an article of faith" - would be as good as challenging the accession of J&K, warning of an agitation "far stronger" than the Amarnath land row of 2008.

But the real reason behind the inflamed passions is the fear of a demographic change, once the right to settlement within the State is allowed to outsiders. It may be mentioned that such restrictions on fundamental rights of Indian citizens are not unique to J&K alone, they are also applicable in the other so-called "Special Category States of India", by virtue of article 371-A as well as the Fifth and Sixth Schedules to the Constitution of India. This has not caused much problem in those states, and the fear for inundation of the valley by outsiders may be rather unfounded, despite the BJP election manifesto for the J&K assembly elections promising "land at cheap rates for establishment of Sainik colonies in major towns"

for retired soldiers. But a revisit to this article also opens up the possibility for closer scrutiny of Article 370 which was added to the Constitution of India only as “Temporary Provisions with respect to the State of Jammu & Kashmir”. But as I have explained in my book “Special category States of India” (OUP, 2016), the original article 370 has been diluted and eroded so much that scrapping it altogether would not make any real difference to the autonomy of the State whose financial interests are protected by its special category status conferred in 1969. In fact the only autonomy left is article 35A. But other issues might be raised as well.

One of the issues would be the validity of all the constitutional orders issued by the President. As pointed out by Muzameel Zaleel, the Constitution Order of 1954 has been amended 41 times since, and through these amendments, 94 out of 97 entries in the Union List and 260 of the 395 articles of the Indian Constitution have been extended to the state. The legality of these orders may come under scrutiny in case Article 35A is struck down by the Supreme Court.

The issues involved are indeed tricky and contentious, and may raise questions over asymmetrical arrangements in place in other parts of the country as well. Hopefully the Supreme Court would give due consideration to all relevant issues; nevertheless, the Centre would have to tread with caution and prudence, and weigh all options objectively while ignoring jingoism on both sides.