



## Should Article 35A be scrapped?

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*The 'Yes, No, It's complicated' column of The Hindu for 24th August, 2018, looks upon the Article 35 A, its constitutionality and analyzes its impact on the State of Jammu and Kashmir.*

### Background

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- The Article was introduced through a **Presidential Order, of 1954**, which gives the Jammu and Kashmir State Legislature a complete autonomy to decide who the 'permanent residents' of the State are. It (despite its power, this article) is reflected only in an Appendix of the Constitution.
- Under the Article, the J&K State Legislature can enact any legislation on the issues of permanent residence, or special privileges and rights, or imposition of restrictions, or employment, acquisition of immovable property and settlement in the State, or aid from the State government. One of the preconditions of the enactment of the law was that it would not be considered to violate the fundamental rights of the citizens of the Jammu and Kashmir.
- The Presidential Order was issued under **Article 370(1)(d)**, which allows the President to make certain exceptions and modifications to the Constitution of India for the sole benefit of Jammu and Kashmir.

### Implications of the Presidential Order

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- The **Instrument of Accession** signed by Maharaja Hari Singh in 1947 which brought the State into the Union of India gave India control only over the State's **defence, foreign policy and communications**. On all other matters, the State government retained powers.
- However, through the Presidential order, of 1954, India's control over the state was expanded by integrating the State's finances with India and the fundamental rights and directive principles were also extended to the citizens of Jammu and Kashmir.
- The Order also extended the Supreme Court's jurisdiction over certain aspects of Jammu and Kashmir.

### Issues around the Article

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- The Article's addition to the Constitution under **Article 370** (which allows the President to make certain exceptions and modifications to the Constitution for the benefit of Jammu and Kashmir) is in contradiction to the **Article 368** (procedure for constitutional amendments), which empowers only the Parliament to amend the Constitution. Also, its introduction through the Presidential order shows the lack of a comprehensive Parliamentary contemplation.
  - The 'classification' of citizens created by the Article has been considered to be violative of the Fundamental Rights conferred on the citizens especially the Right to equality (Article 14). It has been considered to be discriminatory against the women with regards to property rights.
  - The Article does not consider the non-permanent residents of the state eligible for State government employment and also debars them from contesting elections.

### **Conclusion: Article 35A is a recognition of the conditional accession of J&K into India**

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- The Article is a small part of a larger process of the State's integration into India. The State's limited accession to India makes its legislations regulating land, rights over land and settlement in State different from the similar legislations in the other parts of the country like Himachal Pradesh and Uttarakhand (where buying and selling of land to outsiders is not permitted by law). When the two fundamental rights - the freedom to reside and settle in any part of the territory and the freedom to practice any profession, trade and business gets violated in other states, they cannot be challenged in the case of Jammu and Kashmir, which in a way is a 'quasi-sovereign' state.
- All the issues revolving around the unconstitutionality of the legislation has to be decided according to laws and the Constitution of the State.
- Even the decision to scrape it off should take into account the expression of the will of the people, through a political process which includes the people of Jammu and Kashmir in the discussion.