



# Article 35A and the basic structure

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## Can Article 35A of the Constitution be struck down?

These questions — raised in a petition filed in the Supreme Court by a Delhi-based non-governmental organisation, “We the Citizens” — have already attracted widespread attention.

### **Basic arguments**

- The petitioner in the Supreme Court now makes two basic arguments.
- Article 35A, it claims, could not have been introduced through a process outside the ordinary amending procedure prescribed under Article 368.
- Even assuming that the President possessed this power, the petitioner asserts, Article 35A infringes the Constitution’s basic structure.

### **Both these claims, however, suffer from fundamental flaws.**

- As we have already seen, Article 370 is as much a part of the Constitution as Article 368. That the framers were deeply cognisant of the fact that the Constitution accorded J&K exceptional status is free of any doubt. That Article 370 is the embodiment of this promise was recognised as early as in 1959 by the Supreme Court in *Prem Nath Kaul v. State of J&K*.
- A few years later, another Constitution Bench of the court, in *Sampat Prakash v. State of J&K*, further clarified the position.
- “Art. 370 of the Constitution has never ceased to be operative,” it held, “and there can be no challenge on this ground to the validity of the Orders passed by the President in exercise of the powers conferred by this Article.”

### **Basic structure challenge.**

It is equally fallacious to suggest that Article 35A can somehow be subject to a basic structure challenge.

- The canonical rule established in 1973, in *Kesavananda Bharati v. State of Kerala*, that the powers of amendment under Article 368 are not plenary and that the Constitution’s basic features cannot be abrogated, was based expressly on an interpretation of the text of Article 368.
- Its logic doesn’t extend reflexively to amendments made under Article 370, a provision, which in and of itself, is essential to maintaining India’s federal structure.
- Besides, more than six decades have elapsed since Article 35A was inserted, and by now vast tracts of properties would have doubtless changed hands.
- In such cases, where constitutional amendments create vested rights in persons, as the Supreme Court held in *Waman Rao v. Union of India*, an amendment made prior to the

decision in Kesavananda cannot be susceptible to a basic structure challenge.

- To hold otherwise would have consequences far more devastating than might immediately be apparent.

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