Significance of Art 35A and Art 370

What is the issue?

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- The Supreme Court is hearing petitions challenging the validity of Art 35A.
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- The provisions need an understanding in the context of the solemn promises at the heart of the Indian federation.
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What is Art 35A?

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- Art 35A was inserted as part of the amendments made through a 1954 presidential order, imposed under Article 370.
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- It empowers J&K to define a class of persons as constituting “permanent residents” of the State.
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- Also, it allows the government to confer on these persons, special rights and privileges.
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- These relate to matters of
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i. public employment
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ii. acquisition of immovable property in the State
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iii. settlement in different parts of the State
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iv. access to scholarships
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v. other such aids that the State government might provide

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- It exempts such legislation from being annulled on the ground that they infringe on any of the fundamental rights.
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What is the case?

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- The petition considers this immunity granted to J&K's laws as discriminatory.
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- It also claims that Art 35A could not have been introduced outside the ordinary amending procedure prescribed under Article 368.
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- It thus calls for declaring Art 35A unconstitutional.
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- A three-judge Bench of the court intends to consider if Article 35A infringes the Constitution's basic structure.
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- Based on this, it would decide if the case has to be referred to a larger bench for further examination.
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How are Art 35A and Art 370 justified?

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- The law on the subject is well settled as previous Benches have already shown approval for the 1954 presidential order.
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- Even otherwise, Art 35A is not amenable to a conventional basic structure challenge.
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- This is because India's Constitution establishes a form of asymmetric federalism.
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- Clearly, some States enjoy greater autonomy over governance than others.
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- This asymmetry is typified by Article 370.

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- In its original form, Article 370 accorded to J&K a set of special privileges.
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- This includes an exemption from constitutional provisions governing other States.
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- Also, under J&K's Instrument of Accession, it restricted Parliament's powers to legislate over the State to three core subjects.
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- These are defence, foreign affairs and communications.
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- Parliament could legislate on other areas only through an express presidential order.
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- This should be made with the prior concurrence of the State government.
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- For subjects beyond the Instrument of Accession, the further sanction of the State's Constituent Assembly was also mandated.
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- Finally, the Art 370 also granted the President the power to make orders declaring the provision inoperative.
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- But this authority could be exercised only on the prior recommendation of the State's Constituent Assembly.
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- Even changes made to the Constitution under Article 368 will not mechanically apply to J&K.
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- For such amendments to apply to the State, specific orders must be made under Article 370.
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- This is only after securing the J&K government's prior assent.
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- Moreover, such amendments will also need to be ratified by the State's Constituent Assembly.
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- So evidently, Art 370 represents the only way of taking the Indian Constitution into J&K.
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- Also, Article 370 is as much a part of the Constitution as Article 368, thereby to justify the validity of Art 35A.
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Source: The Hindu

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