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**IS SPECIAL STATUS GIVEN UNDER ARTICLE 370 IN CONSONANCE  
WITH RIGHTS MENTIONED UNDER ARTICLE 35A**

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**ABSTRACT**

The paper deals with two major problems which are firstly, whether the rights which are conferred under Article 35A of the Constitution of India is violative of the Fundamental rights of the citizen. Secondly, the special status given to the state on Jammu and Kashmir by Article 370 was a right step. As after the amendment of the section there were major controversies as to whether the step taken was a right decision or not. The Research paper aims to promote harmony and indiscrimination among people. It discusses the controversies of the time the amendment was made and the history before the implementation. It delivers to the fundamental right violation of the people by giving a special status to the state of Jammu and Kashmir and also its setbacks. The paper lastly, critically analyses the Articles, its impact on the people and recommends certain suggestions to the problem.

**INTRODUCTION**

Jammu and Kashmir is a region located in the northern subcontinents which was administered as a state by India from 1954 - October 2019. Kashmir has always been a disputed state between India and Pakistan since divided as some part of it was given to India and some to Pakistan. A larger part of Kashmir which has been the dispute subject between India, Pakistan and China<sup>1</sup> conferring its power to have a separate constitution, state flag and autonomy over internal administration of the state.<sup>2</sup>

Kashmir being a matter of dispute since independence, due to a long history of political and social disturbances has got special status which was granted under 2 articles of the constitution. Firstly, Article 35A which was enforced by presidential order in the year 1956 which stated the laws with respect to permanent resident and their right. Secondly, Article 370 of the constitution which was a negotiation with the first Prime Minister of the state, Mr. Sheikh Abdullah. It limited the scope of Article 238 and stated shall not be apply in relation to the state

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<sup>1</sup>Encyclopaedia of the United Nations and international agreements.

<sup>2</sup> Article 370 of the Constitution of India.

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of Jammu and Kashmir. Since then Kashmir has been in the limelight of all the citizens as special status given to Kashmir was said to violative of Article 14 by the citizens. It being a temporary provision was nullified by the on 5<sup>th</sup> August, 2019. A Reorganisation Bill was introduced to the parliament by the home minister seeking to divide the State of Jammu and Kashmir into two Union Territories. As per the current scenario the Republic of India has 46% of the state while rest of it belongs to Pakistan.<sup>3</sup>

Both the articles aim to give special status to the state though both are not in consonance with each other. Though both the Articles were added for the benefit of the State of J&K, they got a lot of criticism as it was considered to be the violation of fundamental rights of the people. As Article 370 gave right to the state to make their own rules therefore, it was considered to be the against the integrity and oneness of the nation.

### **STATEMENT OF PROBLEM**

The paper aims to discuss about problems in relation to special status given to the state of Jammu and Kashmir. The two provisions which give special status to the nation firstly, Article 35A which states laws related to 'permanent resident', its history, controversies and the reason for its removal and secondly, Article 370 which prevents implementation of laws in the state of J&K and its history, controversies and removal.

### **LITERATURE REVIEW**

#### ***Anatomy of Article 370 and 35A: Tracing the Past to the Present<sup>4</sup> by VaibhavGoelBhartiya and Shivani Sharma***

The authors talk about how special status given to the state of Jammu and Kashmir have been talked about not only in India but worldwide. It has been the centre of turmoil due to the unequal dispensation. The paper attempts to trace the background and rationale behind the provisions which head to the present day menace. It aims to throw light upon jurisdiction behind the criticised provisions which are mostly overshadowed. The evolution of Article 370 has also been discussed in the article as to how it was evolved and successful it has been till date, controversies related to article have been vividly discussed.

### **Research Gap:**

The article fails to show much light on aspects related to Article 35A the background of the article and rights mentioned under Article 370 of the constitution are in agreement with rights mentioned under Article 35A.

<sup>3</sup> An insight of Article 35A and 370 of Constitution.

<sup>4</sup> Anatomy of Article 370 and 35A: Tracing the Past to the Present by VaibhavGoelBhartiya and Shivani Sharma 10 CPJLJ (2020) 13.

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**Jammu and Kashmir and the politics of Article 370: Seeking legality from the illegitimate<sup>5</sup> by Amitabh Hoskote and Vishakha A Hoskote**

The paper talks about the controversies owing its dispensation within the framework of India being a federal nation. The paper aims to give arguments on four issues firstly, did implementation of Article 370 allowed inequality in India and secondly, did implementation of Article 370 allowed the contentious issue fester thirdly, did the article create inequality within the state of Jammu and Kashmir and lastly, how politic on the Article only seeks limited leverage from it.

**Research Gap:**

The article mentions about how Article 370 was politically affected and contains within four arguments wherein, it fails to mention about how article 370 in light of Article 35A was affected politically as the controversies not only in India but worldwide is of the issue in relation with both the Articles.

**Article 370 and its implementation<sup>6</sup> by TawheedaNabi, SubaiyaNazir and others**

The paper discusses about how the article 370 was introduced, the need of the article. It further aims to discuss about the historical backdrop of the state and the controversies the article went through. It includes arguments given for and against the article.

**Research Gap:**

The Article fails to mention the pros and cons of the implementation of the articles and the after affects.

**An insight of Article 35A and 370 of the Constitution of India<sup>7</sup> by AnantPratap Singh**

The Article talks about the controversies and circumstances illusion regarding Article 35A and the gender biasness of the Article, it is further explained with help of a case study. It also discusses the history, debate and explanation of Article 370.

**Research Gap:**

As the name suggests ‘an insight’, the paper fails to discuss about the advantages and disadvantages and the impacts after implementation of Article 370 and the if the rights mentioned under Article 370 is in consonance with right mentioned in article 35A.

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<sup>5</sup> Jammu and Kashmir and the politics of Article 370: Seeking legality from the illegitimate by Amitabh Hoskote and Vishakha A Hoskote ;Special Issue Volume 3 Issue 1, pp. 813-853.

<sup>6</sup> Article 370 and its implementation<sup>6</sup> by TawheedaNabi, SubaiyaNazir and others; Volume 6 Issue 2- April 2018.

<sup>7</sup> An insight of Article 35A and 370 of the Constitution of India by AnantPratap Singh.

**RESEACH QUESTION**

1. Are rights conferred under Article 35A violative of fundamental rights.
2. Was giving special status to the state of J&K under Article 370 was a right step.

**RESEACH OBJECTIVE**

- To promote harmony among all citizen without any discrimination.
- To deliver the controversies the articles went through and the history they travelled before being implemented.
- Setbacks to the special status given to the state of J&K.
- To know if and how the fundamental rights of the people in being violated by the special status given under both the Articles.



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## **1. ARE RIGHTS CONFERRED UNDER ARTICLE 35A ARE VIOLATIVE OF FUNDAMENTAL RIGHT**

Article 35A was added in the constitution by presidential order by Mr. Rajendra Prasad on the advice of the Prime Minister Jawaharlal Nehru and his cabinet. Before the 1947, Jammu and Kashmir came as a princely state which was not the colonial of the British during their rule. In the year 1927, a Heredity Order was passed by the Maharaja of Kashmir, which granted state subjects with the right to use the land and ownership rights and also the rights granted to the Government Officials. The state was made as a Union territory in the October, 1947 and Maharaja ceded all his powers to the Government of India.

### **Article 35A states that:**

"Saving of laws with respect to permanent residents and their rights. — Notwithstanding anything contained in this Constitution, no existing law in force in the State of Jammu and Kashmir, and no law hereafter enacted by the Legislature of the State:

(a) defining the classes of persons who are, or shall be, permanent residents of the State of Jammu and Kashmir; or

(b) conferring on such permanent residents any special rights and privileges or imposing upon other persons any restrictions as respects—

(i) employment under the State Government;

(ii) acquisition of immovable property in the State;

(iii) settlement in the State; or

(iv) right to scholarships and such other forms of aid as the State Government may provide,

shall be void on the ground that it is inconsistent with or takes away or abridges any rights conferred on the other citizens of India by any provision of this part."<sup>8</sup>

Article states provision which limit all citizens from owning a property in the state of Jammu and Kashmir, defines people who can have conferred the right to permanent resident in respect to Government jobs, immovable property and any scholarship in any other form.

As Kashmir has been the area of dispute between India, Pakistan and China, providing them such special status as to laws who can be residents of the state was important, and was to be continued to preserve special status it being a Union Territory.<sup>9</sup>

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<sup>8</sup> Article 35A; The Constitution of India.

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A Delhi Agreement was entered in the year 1957 by Jawaharlal Nehru and the first Prime Minister of the state of Jammu and Kashmir Sheikh Abdullah by which Indian Citizenship was extended to state subject of Jammu and Kashmir.<sup>10</sup> The order was issued under Article 370 of the constitution which gave power to the head of the state to make certain modifications and exceptions for the advantage of state subjects. Therefore, Article 35A was constituted made special provisions for permanent residents of the state.

### **Controversies on Article 35A**

Article 35A has been talked about for years for its discriminating nature as it imposed hardships on migrant and refugee workers and was said to be violative of Fundamental Rights of the people.

The first writ petition filed<sup>11</sup> against article 35A was by a Delhi based NGO, stating the special status given and the privileges granted by permanent resident is discrimination against the whole Country. As per the writ petition filed by NGO the provision should be declared unconstitutional as to ensure equality amongst all citizens.

It was said that as the text of the Constitution refers to as “we the citizen” adding such a provision on the Constitution is violative of the fundamental rights mentioned in part III as an exceptional clause is made only for the state of Jammu and Kashmir and therefore, is violative of equality before law. As per the requirements of the law any presidential order made is to be presented in the Parliament within 6 months of the order which was never done in this case.

Article 35A was considered to be against integrity and oneness of the entire nation, it results in making different provisions which tends to divide the nation into different classes.

Therefore, the limitations imposed in relation to ownership of immovable property and jobs in the state of Jammu and Kashmir was considered to be violative of Article 14, 19 and 21 of the Constitution.

### **Removal of Article 35A**

One of the key features of the provision was removed in October 2019 after introduction of Article 370 of the constitution . Article 370 of the Constitution being a temporary provision

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<sup>9</sup> RGICS Policy Watch (Volume7, Issue 4).

<sup>10</sup> What is Article 35A? by The Hindu.

<sup>11</sup> Petition filed in the Supreme Court; <https://www.thestatesman.com/india/article-35a-history-debate-gravity-1502669919.html>.

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states that of the no laws mention should be applied to the state. After the provision came into force the clause in article 35 related to the permanent residents was abolished.

Rights conferred under the article are considered to be violative of fundamental rights of the citizen who belong to other parts of the state. As the articles give special clauses as to who can own a property and who can be a 'permanent resident' of the state as no other such restrictions are there for any other state . Therefore this was considered to be the violation of Article 14,19 and 21 which are mentioned in Part III of the Constitution.

## **2. WAS GIVING SPECIAL STATUS TO THE STATE OF J&K UNDER ARTICLE 370 WAS A RIGHT STEP**

Article 370 of the Constitution is a 'temporary provision' which aims to grant special provision to the state of J&K. The article is included in the constitution under the heading "Temporary, Transition and Special Provision".<sup>12</sup> The provision was added in the Constitution by a presidential order in 1954. The article was drafted by Sheikh Abdullah during the later half of 1947 and deemed to become a permanent provision.

### **Article 370 states that:**

#### **1. "Notwithstanding anything contained in this Constitution,—**

(a) the provisions of article 238 shall not apply now in relation to the state of Jammu and Kashmir

(b) the power of Parliament to make laws for the said state shall be limited to—

(i) those matters in the Union List and the Concurrent List which, in consultation with the Government of the State, are declared by the President to correspond to matters specified in the Instrument of Accession governing the accession of the State to the Dominion of India as the matters with respect to which the Dominion Legislature may make laws for that State; and

(ii) such other matters in the said Lists as, with the concurrence of the Government of the State, the President may by order specify."<sup>13</sup>

The article aims to give a special provision to a special status to the state of J&K as it is one of the disputed area between the two countries. The article restricts implementation of any laws to be done in the state, such an order can only be passed by the President being the head of the

<sup>12</sup> Part XXI of the Constitution of India.

<sup>13</sup> Article 370 Clause (1): Constitution of India.

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country. The article gave freedom to the state of Jammu and Kashmir to have its own flag, the provision gave them freedom to make their own laws relating to the ownership of land and also different fundamental rights could be formed alone for the state. They considered themselves to be a free nation in itself, wherein, the power to control foreign affair and defence of nation lies in the hands of the central government.

### **Controversies of Article 370**

The article came to physical domain for political motives. The right wing parties considered that the article is not benefiting anyone not even the state and therefore, demanded to repeal it. On the other hand it would raise anti-national sentiments in Kashmir valley. It was believed that the sooner the article is repealed it will be better for the people of Jammu and Kashmir. In the recent times it was argued that there is a need to scrap out the provision from the Constitution as to bring Kashmir on to the same level as India.

### **Should the article be removed?**

Article 370 which is overriding from the year 1954 on presidential order as a temporary provision which nullified all the provisions from affecting the state of Jammu and Kashmir. Being a temporary provision was considered by many as violation of their fundamental right specifically article 14 as it gives special status to only one state and allows the state to have different laws of the state.

Giving special status to the state just because it was is a disputed land since years is not a right step as it affects the mindset of other states and it gives a sense of insecurity to the people of the state. It can be considered as breach of trust of people on Indian Judiciary as equality before law which is the main protocol of the constitution is being over powered.

### **CRITICAL ANALYSIS**

Jammu and Kashmir having a history of conflicts is still the most talked about state is the most disputed state. The major conflict between both India and Pakistan has to do with who has the possession over that piece of land as during partition Kashmir too was divided into two parts. The state being a part of India is completely different in relation to culture. It also has a different flag of its own as they consider themselves to be an independent nation without any restrictions. The power was given to the nation by the constitution to make their own laws without any restriction. The state consists different laws related to ownership of property and even Fundamental Rights.

The provisions which grants there rights to the state are firstly, Article 35A which was incorporated stating that no person has a right of permanent ownership over any property. It

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stated that Article in relation the 'permanent resident' states that no person who is not a citizen of Jammu and Kashmir can own a immovable property or have a government job that is job given by the state government. The article went through several disagreements and criticism as the article was mentioned the Constitution of India. As the text of the Constitution states all the articles in relation with 'We the Citizens' which means the text applies to all the citizens of India. Therefore, the exception made for particularly Jammu and Kashmir was considered to be a violation of the fundamental rights of the people.

The other provision of the constitution is Article 370 which given special status to the people of Jammu and Kashmir, as the provision stated under the Constitution are not to be implemented there. As the state had been provided a right through which it was an independent nation in India itself. Such a provision was considered to be against the belief of oneness in the nation.

### **Are the rights mentioned under Article 370 is in consonance with the rights mentioned in Article 35A?**

As talked about earlier Article 35A talks about the permanent residents of the state of Jammu and Kashmir at the same time Article 370 says that Constitution does not apply to the state. The two articles seem contradicting each other. It has also been a major concern as to will Article 35A be implemented after the introduction of Article 370, The introduction of Article 370 came with removal of clause (a) of Article 35 to avoid any future conflicts.

The special status given to the state was not appreciated as people considered it to be violation of their right. It came as an sense of inequality and unrest to the society.

The main aim of the Constitution being to uphold equality before law to all the citizens. The basic aim is to have the confidence of the people that they are protected in the everyone is equal in the eyes of law. Introduction of such provisions to the Constitution brings a sense of doubt and insecurity among the citizens. It is the duty of all citizen to abide by the rules given as the text mention 'we the citizen' it is necessarily to be followed by all the citizens of the nation.

Making an exception and giving special status to any one state exclusively was not fair for the other states. As the rights granted to Jammu and Kashmir were extreme to a level that they considered themselves it be another nation. Both the articles being contradictory are not in consonance with each other.

There were both positive and negative aspects to the introduction of there provisions. The article gave special status and exclusive rights to the permanent residents of Jammu and Kashmir which came as a sense of security and leadership with itself. As it was after this they started considering themselves as another nation. The negative aspect of it was that after

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introduction of the articles the citizens of India except the State of Jammu and Kashmir felt that it was violative of their fundamental rights.

### **CONCLUSION AND RECOMMENDATIONS**

Every step taken by the legislature to introduce any provision for goodwill of any group comes with a positive and a negative aspect to it. Every topic in itself we it for a public good does have a negative affect attached to it. Similarly introduction of Article 35A and 370 both have negative and positive effects to it. The group in favour the provisions were made is always the positive side. Granting special status to the state of Jammu and Kashmir was considered to be violation of fundamental rights of citizens of other states of India.

I firmly believe that special status given to J&K was not the right thing to do and somewhere or the other it was violation of their fundamental rights. As Article 13(2) of the Constitution says that any law made by the state which takes away or abridges the rights mentioned in Part III in considered to be unconstitutional or void. The articles which give special status to the state of Jammu and Kashmir are said to be violative of the their fundamental right (Article 12, 19 and 21) not only this but as the constitution mentions 'we the people' and then the clauses made are exceptionally made for one particular state is contradictory, and the rights mentioned under article both the articles are not in consonance.

Therefore it is recommended that;

- Such provisions relating to one particular state if mentioned in the Constitution can be considered as violation as text as it is says that it is for all the citizens of India.
- Such provision made for the state should not be made just because it has been a region under the matter of dispute, they should not be granted special rights.
- As considered a s violation of fundamental right of the people should not be made to promote equality among all its citizens.
- To promote regional harmony the provisions made should be applicable to all states
- The main aim of the Constitution being equality before law and no discrimination, it should be upheld.