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JUDICIAL APPROACH TO ARTICLE 370

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ABSTRACT

This research paper examines the judicial perspective on Article 370 of the Indian Constitution, focusing on its historical context, legal implications, and recent developments. Article 370 granted special status to the state of Jammu and Kashmir (J&K), allowing it temporary autonomy over internal affairs. However, over time, Article 370 became a contentious issue, with debates surrounding its relevance, legality, and impact on the integration of J&K with the Indian Union. The paper analyzes key judicial decisions, including the Supreme Court's ruling on the abrogation of Article 370 and the reorganization of J&K into Union Territories. It explores the constitutional principles, precedents, and legal arguments that have shaped the judiciary's approach to Article 370, highlighting the balance between upholding constitutional values and addressing complex political and historical realities. Through a comprehensive examination of judicial opinions and legal frameworks, this paper provides insights into the evolving jurisprudence surrounding Article 370 and its significance in Indian constitutional law.

INTRODUCTION

Article 370 of the Indian Constitution has been a subject of considerable debate, discussion, and legal scrutiny since its inception. Enacted to address the unique circumstances surrounding the accession of Jammu and Kashmir (J&K) into the Indian Union, Article 370 granted the state temporary autonomy over internal affairs while retaining its special status within the constitutional framework. However, over the years, Article 370 became a focal point of contention, sparking discussions on its relevance, legality, and implications for the integration of J&K with the rest of India.

This research paper delves into the judicial approach to Article 370, examining the historical evolution, legal interpretations, and recent judicial pronouncements on this constitutional provision. By analyzing landmark court decisions, including the Supreme Court's ruling on the abrogation of Article 370 and the subsequent reorganization of J&K into Union Territories, this paper seeks to elucidate the judiciary's role in shaping the discourse surrounding Article 370.

Through a comprehensive exploration of judicial opinions, legal arguments, and constitutional principles, this paper aims to provide a nuanced understanding of the complexities inherent in the interpretation and application of Article 370. It seeks to shed light on the intricate balance between safeguarding constitutional values, ensuring national unity, and addressing the unique political, historical, and socio-economic realities of J&K.

By elucidating the judicial perspective on Article 370, this research contributes to the ongoing dialogue on federalism, constitutionalism, and governance in India. It underscores the significance of the judiciary in upholding the rule of law, protecting fundamental rights, and navigating complex constitutional issues in a diverse and dynamic democracy like India.

THE DOCTRINE OF SEPARATION OF POWER

In *Puranlal Lakhanpal v. President of India*, the Supreme Court noted in its ruling that the purpose of instituting Art. 370 was to acknowledge J&K's special status and to give the President the authority to enforce the Indian Constitution in J&K with the necessary exceptions and modifications as thought appropriate. The learned judge, however, interpreted that power as extending to the abrogation of a certain provision of the Constitution entirely, when it comes to the applicability in J&K.

Analysis of this case: -

The only problem with this interpretation is that in saying that the President has the power to repeal a certain provision of the Constitution in its application to any area of India, the learned judge is allowing for the President to alter that specific or any other provision of the Constitution, which power is in fact denied the President and assigned to the Parliament (under the Constitutional scheme and according to the doctrine of Separation of Power).

Because the UOI forbids the creation of watertight compartments for the functions of the three organs, the theory of the division of powers is not adhered to in its entirety there. This encourages the Constitutional framework to function smoothly, with certain functions overlapping. That does not imply, however, that the Indian Constitution permits the executive to usurp the legislative branch's authority through nefarious interpretation of provisional Art.s like as 370 and others. The Delhi Laws¹ decision appropriately acknowledged the concept of constitutional limitation and trust that was implied in the scheme. Numerous additional incidents have highlighted the importance of maintaining power separation².

It is important to remember that in the cases of *Indira Gandhi v. Raj Narain*³ and *S.R. Bommai Vs. UOI*, which will be covered later in this chapter, the theory of separation of powers was expressly declared to be one of the fundamental elements of the Constitution. The learned bench ruled in the well-known case of *Keshavananda Bharti v. State of Kerala* that the parliament is paramount and that it has the authority to amend any provision of the constitution, including the fundamental rights, but not the fundamental framework.

CAN ARTICLE 370 EFFACE THE ENTIRE CONSTITUTION OF INDIA?

Coming back to the other parts of the judgment in the case of *Puranlal Lakhanpal v. President of India*, the learned judge said that the President is empowered under Art. 370 to efface any provision of the Constitution. The judgment presented one problem. With this kind of an interpretation, it was tantamount to saying that the Parliament is redundant; the work of amending the Constitution can be done by the President as far as J&K is concerned.

Then why was Art. 368 expressly mentioned by the founding fathers? Why did Ambedkar state that a majority vote in Parliament would be required to modify the Indian Constitution? J&K would not be covered by Art. 368 because the Constituent Assembly did not specify that Art. 370 was an exemption. The judge with expertise in this matter has construed the phrase "exceptions and modifications" to encompass the authority to completely nullify any Art. of the Constitution when it comes to the State of J&K. He makes no effort to clarify the reasoning behind or the precise language he finds proclaimed in any section of the Indian Constitution.

These fundamental questions cannot find an answer if one refers to the case of *Puranlal Lakhanpal v. President of India*. Therefore, this judgment is controversial.

¹ Delhi Laws case AIR 1951 SC 332

² Chandra Mohan v. State of U.P., AIR 1966 SC 1987

³ Indira Gandhi v. Raj Narain AIR 1975 SC 2299

POWER OF THE PRESIDENT TO AMEND THE CONSTITUTION OF INDIA

The Constituent Assembly expressly declared that only Parliament can amend the Constitution of India. They also made it a point during the debates to give reasons for the same, i.e. the Constitution of India should not become a play thing. However, the learned judge in the *Puranlal Lakhanpal v. President of India* case holds that the President has unrestricted authority to change any Art. of the Indian Constitution (within the authority granted by Art. 370). If he decides not to apply the provision to J&K, then not only is J&K impacted, but the scope and extent of the provision are also changed. The President does not have this authority and was not granted it. It would have been feasible to interpret the President's authority to grant it such broad amplitude if Art. 368 had not been included to the Indian Constitution. Art. 370 did not grant the President the authority to change the Constitution, and Art. 368 prevents the President from doing so.

The Supreme Court vide its judgment in *Sampat Prakash Vs. State of J&K and Anr.*⁴

Continuing with the idea that Art. 370 of the Constitution has always been enforceable, there is no way to question the legality of orders issued by the President while he is using the authority granted by this Art. The learned appointed authority declared that the provisions of the Overall Provisions Act apply to the interpretation of all of the Constitution's Art.s, including Art. 370⁵, in accordance with Art. 367. The General Clauses Act, 1897, Section 21, is used by the Court in this instance.

Analysis of this case:

Segment 21 of the Overall Statements Act states that when a Focal Demonstration of Guideline presents the ability to issue warnings, orders, rules, or bye-regulations, that power also includes the ability to add to, correct, change, or cancel any notices, requests, rules, or bye-regulations that have been issued. This power can be exercised in the same manner and is subject to the same assent and conditions (if any).

This provision of the General Clauses Act, clearly, is made to explain delegated legislation. The Power of the President under Art. 370 does not come under the category of delegated legislation, therefore there is no question of applying Section 21 of the General Clauses Act, 1897 to interpret the amplitude of the president's power to issue orders amending the Constitution of India.

Furthermore, in the case of *M.A.H. Farook vs Kalikrishna Dass* (1973)

Since Art. 367 has not been changed and it has not been stated that the General Clauses Act, as amended or modified under any Art. other than Art. 372, will also apply to the interpretation of the accordance with the General Clauses Act, 1897, the Court declared that the Clauses Act has not been updated for the interpretation of the Constitution.⁶

Although the *Sampat Prakash* case (*supra*) uses the General Clauses Act to interpret the President's power to change the Indian Constitution as broadly as feasible, the President's powers under the Indian Constitution do not fall within delegated legislation. In my humble opinion, no Art. of the Constitution is a delegated legislation, but the provisions of the Constitution are collectively the Grund Norm. If we were to hold that the powers under the Constitutional Provisions are powers granted under delegated legislation, then there is no sense in saying that the laws made in India must conform to the Constitution of India. If a power is granted under a provision of the Constitution of J&K, then it is most definitely a power derived from delegated legislation, because it is expressly mentioned in Constituent Assembly Debates that the Constitutions for the Indian States will have to be in conformity and in subordination to the Constitution of India.

The legislative has the authority to enact laws, and the executive branch is responsible for carrying out existing laws through orders, bye-laws, ordinances, etc. Thus, Art. 370 cannot be covered by Section 21 of the General Clauses Act.

⁴ Decided on : Oct-10-1968. Judge : M. Hidayatullah, C.J.,; J.M. Shelat.; V. Bhargava.; G.K. Mitter and; C.A. Vaid.

⁵ *Sampat Prakash Vs. The State of Jammu and Kashmir* AIR1970SC1118; 1970LabIC873; [1969]2SCR365

⁶ Equivalent citations: (1974) 2 MLJ 46, Author: A Varadarajan.

Let us look for instance at the National Food Security Act which was passed by Parliament of India, providing for food grains to be provided to those among the population that are in need of it. The delegated legislation was left to handle the practicalities like the means to achieve the goal, the amount of people to work on the distribution of the food, etc. Since delegated legislation is always handled by the executive, the Executive Orders would deal with the specifications. Thus, the Constitutional provisions cannot be insulted by being categorized in the same space as the inferior legislation of Executive orders, rules and by-laws.

It must be noted that a Presidential Order under Art. 370 is very different from an Ordinance promulgated during recess of Parliament, under Art. 123 of the Constitution of India.

According to Art. 123, if the Parliament is not in session and there is an urgent need for some policy change or a new policy; in order to meet the exigencies of these situations, the President has the power to make temporary laws which will operate for a limited period. These laws must be laid before Parliament at the next session, to see whether the ordinance is maintainable as a law or not. So, the President has the powers to legislate when there is no legislature in session. Even this is one kind of delegated legislation. Therefore, even an Ordinance is subordinate legislation. No provision of the Constitution can ever come in the category of sub-ordinate legislation, because the Constitution is Supreme. All other laws are subordinate to it. E.g., The promulgation of the SEBI Act, etc.

Any action or decision made by the executive branch of the Indian government is considered an executive order, requiring no approval from Parliament, unlike ordinances issued by the President. Hence, the argument suggesting that Art. 370 of the Indian Constitution can be interpreted under Section 21 of the General Clauses Act is invalid. This petition under Art. 32 of the Indian Constitution was filed by Mr. Sampat Prakash, the General Secretary of the All J&K Low-Paid Government Servants Federation.

Teachers and government workers in the province of Jammu convened a large assembly on October 25, 1967, demanding that they be paid dearness allowance at Central rates. The J&K State Revenue Minister pledged to provide dearness allowance at a rate that is half that of Central Government employees. This requirement was not met by the Government. Then, from December 4 to December 10, 1967, workers went on strike, going on a pen-down strike at first and then a general strike. The petitioner spoke at another large gathering on December 5, 1967, which took place during this time. Even the employees of the State's numerous businesses participated in a general strike in support of the cause on December 11, 1967. The petitioner was fired from government employment as a result, which forced him to end the strike. On December 12, 1967, he spoke at another large gathering.

The J&K government made the decision to employ force after realizing that the petitioner was not going to back down. As a result, the petitioner was detained by the Jammu District Magistrate in accordance with Section 3 of the J&K Preventive Detention Act No. 13 of 1964. On March 26, 1968, the petitioner received notification of the reasons for their arrest. The J&K Government granted their request, however the procedure remained unlawful as the petitioner's incarceration was prolonged without consulting the Advisory Board. In addition to the fact that the Maneka Gandhi case's due process norm was not observed in this instance, J&K's history of detention beginning in 1947 indicates that it was not necessary to follow it. The Gopalan case from 1950, which was overturned in the rest of India, is nevertheless followed in Jammu & Kashmir. As a result, if you are imprisoned in any other region of India, you are entitled to some basic rights; however, in J&K, you are not.

The Court held, in the case of Abdul Ghani Vs. The State of Jammu & Kashmir (1970)⁷ that under Art. 370, the President is given the full discretion to apply the Constitution with such exception and modifications as he may, by order specify. The Honorable Court referred to the erroneous judgement of the case of Puranlal Lakhanpal v. President of India⁸ reported in (1962)⁹ and without further ado, arrived at the same flawed verdict that the President of India has also been given power to amend the Constitution of J&K by a Presidential order.

⁷ Abdul Ghani Vs. The State of Jammu & Kashmir AIR1971SC1217; (1970)3SCC525; [1971]3SCR275

⁸ PuranlalLakhanpal v. President of India (1962) 1 SCR 688 = AIR 1961 SC 1519

⁹ Can be found online at LegalCrystal (Law search engine)

DISCRIMINATION AND DENIAL OF HUMAN RIGHTS IN J&K

In the case of Prem Nath Raina (1983)¹⁰ the Honorable Supreme Court held that the Act in issue in that case could not be challenged as ultra vires Art.s 14, 19 and 31 of the Constitution, even if the particular provisions of the Act be discriminatory and impose unreasonable restrictions on their fundamental rights, simply on the premise that the Presidential Order of 1954 had imposed certain provisions on J&K under Art. 370. Therefore, the verdict in effect supported the imposition of Presidential Orders under the power of Art. 370, even to the extent of violation of basic human rights and human dignity of the individual.

The High Court ruled in the *State of J&K v. M.S. Farooqi and Ors.*¹¹ case that the J&K Government Servants' [Prevention of Corruption (Commission) Act, 1962] was invalidated under Art. 14 of the Constitution due to the obvious discrimination between All India Service members posted abroad and those of the same Service posted in J&K. This is because inquiries into allegations of corruption against the former are to be conducted under the Central Act and its rules, while inquiries into allegations of misconduct against the latter are to be conducted under the Commission Act.

The learned Court held that the two statutory laws, namely, the All-India Services (Discipline and Appeal) Rules, 1955, and the J&K Government Servants' (Prevention of Corruption (Commission) Act, 1962, cannot go together due to the unfortunate fact that the J&K Government Servants' (Prevention of Corruption (Commission) Act provides for additional punishments not provided in the All-India Services (Discipline and Appeal) Rules, 1955.

The Honorable Court held that the State Legislation was repugnant and to the extent that it was not in conformity with the Union Parliament Legislation, it had to be read down to that extent.

The learned Court further ruled that the legislative domain and legislative jurisdiction of the Union Parliament were greater than those of the State legislature of J&K. As a result, the preliminary inquiry might be covered by the J&K State Law, but the Union Law had to take precedence over the State Law when it came to the provisions pertaining to the investigation of potential criminal prosecution. As a result, the Court decided that All India Services personnel were not covered by the Commission Act's requirements.

This decision is a turning point in the history of state legislation because it demonstrates that where state laws conflict with federal laws, their provisions—such as those pertaining to PRC, etc.—should be repealed since they are illegal. The J&K Representation of the People Act and Art.s 32, 35-A, and 370 (1) of the Indian Constitution were at issue in the 1987 case *Bachan Lal Kalgotra Vs. State of J&K and ors.* The petitioner proceeded on the basis that the J&K Representation of the People Act was valid but claimed that he and other persons situated like him deserved and should have been granted at least the same rights as were given to the voluntary migrants to Pakistan during the holocaust of 1947, caused by the hypocritical two nation theory, after which more Muslims remained in India than migrated to Pakistan.

The learned Court admitted that the unfortunate people who stood in the position of the petitioner (who being citizens of India itself, migrated from West Pakistan to Jammu & Kashmir in 1947 and settled in Jammu & Kashmir had very anomalous rights within the State. The Honorable Court admitted that those who have the right to participate in elections to Parliament, yet have no rights to participate in State elections, which in itself is an illegal and discriminative manner of treatment of the State towards its own people. The Court also admitted that non-natural persons like companies which have been registered within J&K have been allowed to have the position of Permanent Residents; yet natural legal persons being born and bred in India in the area coming under J&K are not considered permanent residents of J&K within the meaning of Section 6 of the Constitution of J&K, thereby denying basic human rights to these suffering souls.

The Court declared that the State Government of J&K has denied the inherent fundamental rights to the Indian people who are domiciled in that area of India for even 40 years. They are denied those rights which are guaranteed by the Constitution of India. The Court also put on record the well-known fact that those who had migrated to Pakistan in 1947 are given preferential treatment by the State Government. Those Pakistanis are

¹⁰ Prem Nath Raina and Ors. Vs. State of Jammu & Kashmir AIR1983SC920; 1983(2)SCALE58; (1983)4SCC616; [1983]3SCR536

¹¹ State of Jammu and Kashmir Vs. M.S. Farooqi AIR1972SC1738; 1972LabIC900; (1972)1SCC872; [1972]3SCR881

provided with the facility to choose to return to India and reside in the area of J&K, because of the fact that the PRC (Permanent Resident Certificate) is granted to them and deprived to those who migrated from Pakistan in 1947. Thus, human rights of Indians are denied, but an open invitation is being extended to the Pakistanis to come to India and reside in J&K. This seems like a skewed logic to the lay man.

Unfortunately, the Court concluded by giving no relief to the petitioners and those situated like him, on the excuse that it is for the State Legislature of J&K to amend the corrupt laws and practices namely of the PRC under Art. 6 of the Constitution of J&K. My question is that when Clause 3, 4 and 5 of the Art. 368 of the Indian Constitution are over-ruled by judicial activism, even though they are still on the statute book of the Constitution of India till date, then why could judicial activism not be used in this case, despite the blatant violation of Human Rights?

The learned judges, of course should be commended for showing courage to aptly mention the repugnancy of State legislation like the Jammu & Kashmir Representation of the People Act, the Land Alienation Act, the Village Panchayat Act, etc. which warrant immediate repeal because they render ineligible even those domiciled in J&K to be included in the electoral roll, to acquire land, to be elected to the Panchayat, etc. through gross discrimination and corrupt politics.

The case of Prem Nath Raina and ors. Vs. State of J&K and ors. (1983)¹² the Honourable Court took into consideration the Constitution of India - Art. 14, 19, 31, 31A and 32; the J&K Agrarian Reforms Act, 1976 - Sections 7(2) and 2(12); the Constitution (Application to J&K) Order, 1954; Land Reform Law; Urban Ceiling Act.

Here it is necessary to mention that the Objects and Reasons of the Constitution (Seventeenth Amendment) Act, 1964, appended to the Constitution (Nineteenth Amendment) Bill, 1964 which was enacted as Art. 31A of the Constitution provided that:

“a law in respect of acquisition by the State of any estate or of any rights therein or the extinguishment or modification of any such rights shall not be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by Art. 14, Art. 19 or Art. 31. This Art. is applicable to only such tenures as were estates on the 26th January, 1950, when the Constitution came into force. But due to the fact that the expression estate has been defined differently in different States as well as in different parts of the same State, many of the land reform enactments relate to lands which are not included in an estate. Several State Acts relating to land reform have therefore been struck down on the ground that the provisions of those Acts were violative of Arts 14, 19 and 31 of the Constitution and that the protection of Art. 31A was not available to them.”

Moving on to the decision in this particular case, the Honorable Supreme Court noted that section 7(2)(b) of the J&K Agrarian Reforms Act, 1976 creates an anomalous situation, especially when considering the definition of "personal cultivation" in Section 2(12) of the Act, in light of the various anomalies created by State laws that openly support discrimination, primarily aimed at tormenting the people who are on some false ground not granted PRC. The Court gave the State Government of J&K advice on how to make the objectionable clauses in Section 7(2) more reasonable and sensible, as well as how to reword the residence rules.

Judgment¹³

In the court's ruling, the Honorable Chief Justice Y.V. Chandrachud found that Art. 31A shielded the 1976 J&K Agrarian Reforms Act from being challenged under Arts 19 and 31 of the Constitution. He pointed out that as on June 20, 1979, Art. 31 has been superseded by the 44th Amendment and is no longer relevant.

¹² PremNath Raina and Ors. Vs. State of Jammu & Kashmir and Ors. AIR1983SC920; 1983(2)SCALE58; (1983)4SCC616; [1983]3SCR536

¹³ www.legalcystal.com/642043

He stated that Art. 31A makes it impossible for the petitioners to prove that certain Act provisions violate Art. 14 because they are discriminatory, or that certain Act provisions violate Art. 19 because they impose unjustifiable restrictions on fundamental rights.

Note: The State of J&K can now apply Art. 31A with some changes thanks to the Presidential Order, 1954, which was passed by the President in the exercise of his authority under Art. 370 of the Constitution.

PLENARY POWERS OF THE UNION OF INDIA OVER THE STATES

Parliament can alter the boundaries of the States of India. Therefore, the States in the UOI have no Independent International Status. J&K has no independent international status.

In the Supreme Court case of *Maganbhai Ishwarbhai Patel vs UOI and Anr*, decided on 9 January, 1969¹⁴ the five judge bench¹⁵ explained the plenary powers of the Union, when it held¹⁶ that Art. 1 of the Constitution defines the territories thereof as specified in the First Schedule.

J&K cannot enter into international treaties. Only the Indian Parliament can do so, in respect of any matter in J&K or any other State of the Indian Union.

The Supreme Court also noted as follows¹⁷ :

Under Art. 3 of the Constitution of India the boundaries of the existing States of the UOI can be altered by the Parliament of India. The area of any State may be increased or diminish by the Parliament by law. The Parliament has the exclusive power (which power does not lie with the any State Legislature) to legislate in respect of treaties. Parliament can make any law for all or any part of the territory of India in order to implement any settlement, arrangement or show with some other nation or nations or to do any choice made at any worldwide meeting, affiliation or other body. The exercise of the rights, authority, and jurisdiction that the Government of India is able to exercise in accordance with any treaty or agreement are included in the scope of the Union's executive power, as are matters for which Parliament has the authority to pass laws.

What about an Exclusionary Clause?

The Supreme Court has held that an exclusionary clause in any of the Art.s of the Constitution of India should be strictly and, therefore, narrowly construed. Yet, the Constitution itself must be interpreted broadly and not in a pedantic sense; and that construction which is most beneficial, must be adopted.¹⁸

Is the Constitution to be read in the same way as other laws in our nation?¹⁹

Since the Constitution is the foundation for all Indian law, it must be read differently from other laws, according to the ruling in the October 25, 1989, Supreme Court case *Synthetics & Chemicals Ltd. Etc. vs. State Of U.P. and Ors.*²⁰

The erudite Court ruled that individuals tasked with interpreting the Constitution ought to be motivated by a liberal and expansive spirit. It also emphasized that courts are not permitted to manipulate or construe legislation in a way that advances a certain legal or constitutional doctrine. The Court issued a warning, stating that such an attempt does not improve constitutional adjudication; rather, it must aim to establish the law. Instead than attempting to interpret the Constitution in accordance with a notion of what the law ought to be, a judge should view the document as a living, breathing document that must change to reflect the times and

¹⁴ *Maganbhai Ishwarbhai Patel vs UOI* 1969 AIR 783, 1969 SCR (3) 254

¹⁵ Bench: Hidayatullah, M. (Cj), Shah, J.C., Ramaswami, V., Mitter, G.K., Grover, A.N

¹⁶ Author: M Hidayatullah

¹⁷ *Maganbhai Ishwarbhai Patel vs UOI* 1969 AIR 783, 1969 SCR (3) 254

¹⁸ *Synthetics & Chemicals Ltd. Etc vs State Of U.P. And Ors* decided on 25 October, 1989 AIR 1927, 1989 SCR Supl. (1) 623

¹⁹ *The India Cement Ltd. etc. v. The State of Tamil Nadu etc.*, [1990] 1 SCC 12 and *Central Provinces and Berar Sales of Motor Spirit and Lubricants Taxation Act, 1938* [1939] FCR 18 at 37-38, referred to find the answer to this question as given below.

²⁰ The Supreme Court declared that the Constitution of India is the mechanism under which all laws are made

circumstances it must be interpreted for. Therefore, as allowed by the Constitution, the Court interpreted the powers and entry in a way that contributes to the achievement of uncontested national goals.²¹

CAN ANY ARTICLE, INCLUDING ARTICLE 370, OVERRIDE THE CONSTITUTION'S BASIC STRUCTURE?

The non-obstante clause in a statute gives precedence to the provisions covered by the clause over the other provisions in the statute to which it applies, as the Supreme Court of India made clear in the decision in the case of *R.C. Poudyal and Anr. Etc. Etc vs UOI and ors. etc.* on February 10, 1993. Accordingly, the non-obstante clause used in Art. 371-F would give precedence to clauses (a) to (p) of Art. 371-F over other provisions of the Constitution. However, it also must be disregarded that the non-obstante clauses in 371-F are limited to the limits of Parliament's legislative authority as stated in Art. 2 and its amending authority as stated in Art. 368. Consequently, in order to keep Art. 371-F constitutional, the non-obstante provision must be interpreted in a way that complies with the previously mentioned restriction.

In the same way, the interpretation of the provisions under Art. 370 is limited to what can be accomplished by Parliament's legislative authority or its amending authority under Art. 368. It is necessary to avoid building anything that could have such an effect. Accordingly, the Court determined that because of the non-obstante clause in Art. 371-F, clauses (a) through (p) of the aforementioned Art. must be interpreted to allow a departure from other provisions of the Constitution with regard to the matters covered by clauses (a) through (p), so long as the said departure does not have the effect of changing any of the fundamental characteristics of the Constitution.²²

The Supreme Court ruled on January 5, 1972, in the case of *Mohd. Maqbool Damnoo v. State of J&K*. The court held that it is evident that the State Legislature of J&K lacks the authority to alter section 103 of the Constitution directly, nor can it render the High Court's exercise of its jurisdiction under s. 103 illusory.²³ The justices in this case determined that the detention laws were maintainable by drawing on the guidelines established in the ruling in *A. K. Gopalan v. The State of Madras*²⁴, which ironically was deemed unjustifiable and unmaintainable in the *Maneka Gandhi* case^{25, 26}.

In place of *Sadar-i-Riyasat*, a governor will be appointed under the terms of the J&K Constitution (6th Amendment Act) 1965. Art. 367 of the Indian Constitution was amended, but not in a way that would have affected Art. 370(1). Instead, references to the *Sadar-i-Riyasat* of J&K now refer to the state's governor, and any mention of the government of that state now refers to the governor of J&K acting on the advice of his Council of Ministers. It is crucial to investigate how the J&K amending Act might lead to a change in Art. 367 of the Indian Constitution without even bringing the amendment up for discussion in the Indian Parliament in accordance with the due process and proper procedure stipulated by Art. 368.

JUDICIAL REVIEW OF THE APPLICABILITY OF CONSTITUTIONAL PROVISIONS TO J&K

The distinguished Bench concluded that the authority granted to the Supreme Court by Art. 32 is a significant and essential component of the fundamental framework of the Indian Constitution in the case of *I.R. Coelho (Dead) by Lrs (V/s.) State of Tamil Nadu & Ors*, heard before the Supreme Court²⁷ on January 11, 2007. Additionally, the Court ruled that no act of Parliament could abolish or otherwise diminish its jurisdiction unless it did so by unlawfully undermining the core tenets of the constitutional framework.²⁸

The Honorable court held in *Sakal Papers (P) Ltd. v. UOI and Ors.* that, whilst taking into account the nature and content of basic rights, the court must exercise caution and refrain from reading the wording literally in

²¹ *M.P.V. Sundararamier & Co. v. State of A.P.*, [1958] SCR 1422 at pages 1480-82, relied on

²² *S.P. Gupta v. UOI*, [1982] 2 S.C.R. 365 referred to

²³ *Prem Chand Garg v. Excise Commissioner U.P.*, [1963] Suppl. 1 S.C.R. 885 referred to by the Court in this case.

²⁴ *A. K. Gopalan v. The State of Madras*, [1950] S.C.R. 8.8

²⁵ *Maneka Gandhi V/s. UOI*: 1978 AIR 597 1978 SCR (2) 621 (1978 SCC (1) 248)

²⁶ *Mohd. Maqbool Damnoo vs State Of Jammu and Kashmir* (1972) AIR 963, 1972 SCR (2)1014.

²⁷ Bench: Y.K. Sabharwal Singh, S.H. Kapadia Thakker, P.K. Balasubramanyan Jain

²⁸ See the case of *Fertilizer Corporation Kamgar Union (Regd.), Sindri & Ors. v. UOI and Ors.* [(1981) 1 SCC 568], *State of Rajasthan v. UOI & Ors.* [(1977) 3 SCC 592], *M. Krishna Swami v. UOI & Ors.* [(1992) 4 SCC 605], *Daryao & Ors. v. The State of U.P. & Ors.* [(1962) 1 SCR 574] and *L. Chandra Kumar*

order to reduce its scope. The Court's interpretation of the Constitution must allow citizens to fully benefit from the rights that it guarantees.²⁹

AMENDMENT OF THE CONSTITUTION OF INDIA

The learned Bench noted in the case of *Sajjan Singh v. State of Rajasthan*³⁰ that the general intent of Art. 368 of the Indian Constitution is that the process outlined in the Art.'s main body must be adhered to if Parliament wishes to change any part of the document that isn't covered by a proviso.³¹ As of right now, Art. 370 is outside the scope of Art. 368's proviso. It is common knowledge that a law may be amended to incorporate the addition of new provisions in lieu of one or more existing ones, as well as the removal of existing provisions in appropriate cases. Similar to this, an amendment pertaining to the power granted by Art. 368 of the Constitution may involve changing or modifying particular provisions, or it may even include making certain laws inapplicable in specific circumstances.

Therefore, even to restrict the applicability of the fundamental rights to J&K, the respective provision/Art. of Part III needs to be amended. Then only can it be considered inapplicable to J&K or applicable with modifications, etc.

The Supreme Court went on to say that the Constitution makes no mention of them and that there is no question that the Honorable Court would be willing to revisit previous rulings in the interest of the general welfare when it came to issues pertaining to constitutional decisions that significantly affect citizens' fundamental rights.

Can the mechanism of 368 be used to amend Art. 370?

The Supreme Court of India in the Writ Petition (civil) 135 of 1970 *Kesavananda Bharati Sripadagalvaru and Ors (V/S) State of Kerala and Anr*³² the learned Bench³³ gave the following opinion:

“The Chief Justice came to the conclusion that as far as interpretation or construction is concerned, there is no escape from the simple conclusion that Art. 368 provides for the amendment of the provisions contained in the Fundamental Rights under Part III without imposing on Parliament an obligation to adopt the procedure prescribed by the proviso. The learned Chief Justice explained that the power to amend in the context was a very wide power and it could not be controlled by the literal dictionary meaning of the word amend. He expressed his agreement with the reasoning of Patanjali Sastri, J. regarding the applicability of Art. 13(2) to Constitution Amendment Acts passed under Art. 368. The Supreme Court asked a rhetorical question as to how the Constitution could be so amended so as to depart from the democratic form of Government, as long as the words sovereign democratic republic are present in the Constitution? The Court also posed the question as to whether any of the rights enumerated in Art.s 14 to 19, 21, 25, 31 and 32 be taken away, as long as the words Justice, social, economic and political etc., are present in the Constitution?”

IMPORTANCE OF DIRECTIVE PRINCIPLES OF STATE POLICY

The Indian Constitution's Part IV contains Directive Principles of State Policy, which are not applicable in Jammu & Kashmir. This is a grave constitutional infringement that would not have been feasible if the unlawful Presidential Orders issued in accordance with Art. 370 had not been passed. The learned Bench underlined the significance of the Directive Principles in the framework of our Constitution and said that they can never be over-emphasized in *Minerva Mills Ltd. & Ors vs. UOI & Ors. (1980)*³⁴. The Court observed that those criteria reflect the lofty ideal that the Constitution seeks to achieve, and in actuality, Mandate criteria of State Strategy play a key role in national governance.

²⁹ Sakal Papers (P) Ltd. v. UOI and Ors. [AIR 1967 SC 305]

³⁰ Bench: Gajendragadkar, P.B. (Cj), Wanchoo, K.N., Hidayatullah, M., Dayal, Raghubar, Mudholkar, J.R

³¹ *Sajjan Singh vs State of Rajasthan* : 1965 AIR 845, 1965 SCR (1) 933.

³² Date of judgment: 24/04/1973

³³ BENCH: S.M. Sikri & A.N. Grover & A.N. Ray & D.G. Palekar & H.R. Khanna & J.M. Shelat & K.K. Mathew & K.S. Hegde & M.H. Beg & P. Jaganmohan Reddy & S.N. Dwivedi & Y.V.Chandrachud

³⁴ Bench: Chandrachud, Y.V. ((Cj), Bhagwati, P.N., Gupta, A.C., Untwalia, N.L., Kailasam, P.S

It has been said that fundamental rights are transcendental, alienable, and primordial; in the Kesavananda Bharati case, it was argued that they are the ark of the Constitution. They hold a special position in the life of societies that are civilized. The Preface's tenets serve as the foundation for the construction of the Indian Constitution. Our Constitution's Part IV contains mandate standards of State Strategy that specify the communist objective to be achieved. This was necessary because we had made plans to form a Communist State, which carried with it the commitment to achieve our kin equity social, financial, and political.³⁵

IMPORTANCE OF THE GOLDEN TRIANGLE

The three articles i.e. Art. 14, 19 and 21 are called as the Golden Triangle of Fundamental Rights that cannot be denied to the people. This golden triangle holds a special place in the Constitution of India. On account of *Minerva Plants Ltd. & Ors vs. Association Of India and Ors. (1980)* the learned Seat made sense of that Art.s 14 and 19 give no whimsical freedoms. They present freedoms which are rudimentary for the legitimate and compelling working of a vote based system. These privileges are generally so respected, as is obvious from the All inclusive Announcement of Common liberties. Assuming that Art.s 14 and 19 are placed out of activity as to the main part of regulations which the lawmaking bodies are enabled to pass, Art. 32 will be depleted of its life-blood.³⁶

Since in this case it is stressed that Parliament cannot in exercise of its constitutionally conferred power, so amend the Constitution as to alter its basic structure or to change its identity; therefore, it is absolutely impossible for the Presidential Orders issued under Art. 370 to stand valid, because they are far inferior to Parliament and yet they violate the basic structure of the Constitution in a multitude of ways.

A learned bench³⁷ in the case of *Waman Rao v. UOI (UOI) and Ors. (1980)* explained that Art. 14, which upholds the fundamental principle of the rule of law, forbids the State from denying any individual within the borders of India equal protection under the law or equality before the law. Art. 19 grants citizens freedoms such as the right to free speech and expression, the right to peaceful assembly, the right to organize associations, the freedom to travel around India's territory, the right to live and work anywhere in the country, and the freedom to pursue any career path or engage in any kind of activity. The purpose of the Preamble will remain an unrealized dream in the absence of the liberties granted by Art. 19, which give life significance.³⁸

Note:- This case established that a provision of the Constitution or any clause under that provision or order made by virtue of that provision, could be quashed as void/ultra vires on the ground that it goes against democracy, which is a basic feature of the Constitution or it goes against Rule of Law. Chandrachud J., held that the clause was bad because it violated the Rule of Law and was an outright negation of the principle of equality which is a basic feature of the Constitution (pp. 663- 665).

The Prelude was involved by the High Court as a guide to development in *Behram Khurshed Pasikaka v. The Bombay State*. In the wake of alluding to Part III, Mahajan, C.J., held that the Court was of the assessment that the freedoms portrayed as crucial privileges are a vital result of the statement in the prelude that individuals of India have seriously made plans to comprise India into a sovereign popularity based republic and to get to every one of its residents equity, social, monetary and political; freedom of thought, articulation, conviction, confidence and love; balance of status and of chance. The Court held that the major privileges have not been placed in the Constitution just for individual advantages, however at last they come into activity in thinking about individual freedoms.

It is necessary to note at this juncture that Art. 370 has been used as an instrument to mutilate even the Preamble of the Constitution of India.

³⁵ Minerva Mills Ltd. & Ors vs UOI & Ors.: 1980 AIR 1789, 1981 SCR (1) 206

³⁶ Minerva Mills Ltd. & Ors vs UOI & Ors.: 1980 AIR 1789, 1981 SCR (1) 206.

³⁷ Bench: Y Chandrachud, A Sen, P Bhagwati, V Tulzapurkar, V K Iyer

³⁸ Waman Rao vs UOI (UOI) And Ors. Equivalent citations: (1981) 2 SCC 362, 1981 2 SCR 1.

DISTRIBUTION OF POWER BETWEEN THE UNION OF INDIA AND THE STATES

In the case of *Rai Sahib Ram Jawaya Kapur and ors. Vs. The State of Punjab (1955)*, the Supreme Court stated that it is probably impractical to approach a comprehensive meaning of what chief capability means and infers, albeit, usually the leader power implies the buildup of administrative capabilities that stay after authoritative and legal capabilities are removed.³⁹

In the landmark judgment of *S.R. Bommai Vs. UOI (1994)*, the Supreme Court noted that, The two spinal issues before the Constituent Assembly were

1. firstly, what powers should be allotted to the Indian States? And
2. secondly how could a national supreme Government be formed without completely denying power to the Indian States?

The Preface broadcasts depicted India as a Sovereign, Communist, Common, Vote-based Republic, which the Court also noted. It guarantees freedom of thought, expression, belief, and worship in addition to equality of status and opportunity. It is crucial to maintain the integrity and unity of the country. To maintain the country's unity and integrity, our Founding Fathers divided up responsibilities and powers between the Union and the States while still favoring a strong central government. It becomes evident from even a cursory reading of the Constitution. According to Art. 2, Parliament is required to admit new states into the Association or set up new states under whatever terms and conditions it deems appropriate. According to Art. 3, Parliament may regulate the division of domain from one State to another, the joining of two or more States or parts of States, the joining of any region to a portion of a State, the enlargement or reduction of a State's territory, the alteration of a State's borders, or the changing of a State's name. The proviso to Art. 3 states that, if the proposal impacts the territory, borders, or names of any State, it may not be introduced in either House of Parliament unless the President recommends it and only after referring the bill to that State's Legislature for further consideration. After considerable debate, the Constituent Assembly determined that ideas alone, not agreement or consent, are necessary. Changes to the fundamental framework of the government were not deemed prudent by our founding fathers. Rather, to assign legislative responsibilities, they modified the GoI Act, 1935. Nonetheless, a few topics of shared interest were added to the Union List, giving the Union more power to direct and expedite the country's economic growth.

Scheme of Distribution of Powers:

That's what the Court noticed, The plan for the dissemination of abilities between the Association and the States was to a great extent kept up with according to the Public authority of India Act 1935, then again, actually a portion of the subjects of normal interest were moved from the Common Rundown to the Association Rundown in this manner reinforcing the managerial control of the Association. It is in this context that this Court in *State of West Bengal v. UOI* observed : (SCR p. 397). The exercise of powers, legislative and executive, in allotted fields is hedged in by numerous restrictions, so that the powers of the States are not co-ordinate with the Union and are not in many respects independent.

The case of *India Union v. H.S. Dhillon (SCC p. 789, para. 15)* brought attention to the fact that, although the residuary power was not granted to the Association Assembly or the common councils under the Public Authority of India Act, 1935, it was granted to the Association under the Indian Constitution by virtue of Art. 248, as well as Passage 97 in Rundown 1 of the VIIth Timetable. This plan is very different from the US plan for the distribution of skills, where the US retains residual powers.

As previously mentioned in the *S. R. Bommai (V/S) UOI* case, it can also be seen that the primary authority of each State should be conducted in a way that does not impede or prejudice the Association's leader power's activity. According to this ruling, the State Government cannot carry out a project (for which it depends on the Union for funding) until it has received final approval from the Union Government. This indicates that the Association retains control over matters on which the State can enact.

³⁹ *Rai Sahib Ram Jawaya Kapur And Ors. vs The State of Punjab: AIR 1955 SC 549, 1955 2 SCR 225.*

Apart from these limitations, Art. 368 gives Parliament the power to change the Constitution with a certain majority vote. If the changes are approved by the legislative bodies of at least half of the States, the authority extends to amending items pertaining to the head of state as well as the States' authoritative authorities. This Art. allows Parliament to modify the Constitution in a way that restricts the authority of the states. If past performance is any indication, a strong focal government should have no trouble obtaining the necessary majority as well as support from a section of the councils.

These restrictions, along with others mentioned in the Bommai case and a plethora of others, show that the Indian Constitution cannot be considered truly federal in the sense that lawyers in the United States would understand it.

CONCLUSION AND SUGGESTIONS

In December 2023, the Indian government's decision to repeal Article 370, which granted special status to Jammu and Kashmir (J&K), was supported by five senior judges of the High Court. This decision marked a significant legal and constitutional development. Article 370 was initially introduced to address the unique circumstances surrounding J&K's accession to the Indian Union. It granted the state temporary autonomy over internal affairs but restricted the power of the Indian Parliament in certain areas. However, over time, Article 370 became a contentious issue, with critics arguing that it fuelled separatist sentiments and hindered the state's integration with the rest of India.

The government's decision to abrogate Article 370 in August 2019 was met with mixed reactions. While some welcomed it as a step towards national unity and economic development, others raised concerns about its legality and potential impact on the stability of the region. Following the repeal of Article 370, J&K was reorganized into two Union Territories, J&K and Ladakh, with the region no longer having its own constitution or flag. The Supreme Court's ruling on the matter upheld the government's decision to revoke Article 370 and ordered the prompt restoration of J&K's statehood. The Court also validated the reorganization of the region into Union Territories. It emphasized that J&K's special status was intended to be temporary and had served its purpose. The Court highlighted the historical context of J&K's accession to India and the gradual integration process that followed. The Court addressed the legality of the Presidential Orders, CO 272 and CO 273, which invalidated Article 370 and extended the Indian Constitution to J&K. It concluded that the President had the authority to issue these orders and that they were justified in the context of ongoing integration efforts. The Court also examined the validity of the Reorganization Act and determined that it was in line with constitutional provisions regarding the creation of Union Territories.

Regarding the sovereignty of J&K, the Court emphasized that the state had never enjoyed full sovereignty and had always been subject to the authority of the Indian Union. It cited historical documents and legal precedents to support this argument. The Court also addressed procedural issues related to the President's proclamations and concluded that they were legally valid.

In conclusion, the Supreme Court's ruling on the abrogation of Article 370 and the reorganization of J&K into Union Territories represents a significant milestone in India's constitutional history. It reaffirms the primacy of the Indian Constitution and the authority of the Union government while addressing longstanding issues related to J&K's special status. Moving forward, it will be important to focus on reconciliation, development, and democratic governance in the region to ensure a peaceful and prosperous future for its people.

The ruling, authored predominantly by Chief Justice D.Y. Chandrachud and supported by Justices B.R. Surya Kant and Gavai, along with other members of the Constitution Bench, emphasized the temporary nature of Article 370, originally intended as a measure to facilitate J&K's integration into the Indian Union post-independence. The judges highlighted the historical context of J&K's accession and the subsequent evolution of its relationship with the Union. Arguments surrounding Article 370's abrogation centred on its perceived role in exacerbating separatist sentiments and impeding the region's full integration with the rest of India. Critics pointed to the bifurcation of legal and administrative systems and the contentious provisions such as Article 35A, which granted special privileges to J&K residents, as evidence of the divisive impact of Article 370.

The government's decision to revoke Article 370 in August 2019 aimed to address these concerns and bring J&K into full alignment with the Indian constitutional framework. However, the move was met with both praise and criticism. While some lauded it as a necessary step towards national unity and economic development, others questioned its legality and potential ramifications for regional stability. The Supreme Court's validation of the government's actions underscored the constitutional authority of the Union government to modify the status of J&K. The Court emphasized the transitory nature of Article 370 and its historical context, which necessitated its eventual repeal to facilitate the region's integration into the Indian Union. The ruling also addressed procedural issues surrounding the Presidential Orders and the Reorganization Act, affirming their legality and constitutionality. The Court's directives regarding the restoration of J&K's statehood and the conduct of elections underscored the importance of democratic governance and political representation in the region.

Looking ahead, the focus should be on fostering reconciliation, promoting economic development, and ensuring the full participation of all stakeholders in the democratic process. The Supreme Court's ruling provides a legal and constitutional framework for addressing the complex issues surrounding J&K's status and lays the foundation for a peaceful and prosperous future for the region.

