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AUGUST 15, 2019

THEME: ARTICLE 370 (JAMMU AND KASHMIR)

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CENTRE FOR PUBLIC LAW AT ILS LAW COLLEGE, PUNE

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A. MESSAGE FROM THE EDITOR

Date: August 15, 2019

Thursday

Dear All,

I am very happy to present this issue dedicated to Article 370 on the auspicious occasion of 73rd independence day of India. This issue will enable the readers to have a look on landmark decisions pronounced by Supreme Court and High Court on Article 370 and also expose them to some opinion pieces on the matter. We have also included articles on doctrine of desuetude as well interface of public law and international law to cover the debate from the point of view of contrarians.

On behalf of faculty and students, and on our personal behalf, we pay tribute to the scholarship of Prof Dr. Shamnad Basheer on his sad and untimely demise. More than a scholar, Dr. Shamnad Basheer was a human being with a golden heart. His contributions to uplift the students of marginalized section would always be cherished. Particularly, the disabled student community pursuing law or aspiring to pursue law would feel itself to be orphaned with the sudden exit of Prof. Shamnad from the realm of academia.

Wishing you all a very happy independence day!

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B. OBITUARY

Doyen of India's Intellectual Property Rights Bids Good bye[1]

May your guiding light keep shining upon us

Prof. Dr. Shamnad Basheer

(14 May 1976 - 8 August 2019)

[1] https://www.deccanherald.com/state/top-karnataka-stories/doyen-of-indias-ip-rights-bids-goodbye-753540.html

C. CONSTITUTIONAL INTERPRETALOGY

~Dr. Sanjay Jain,
Associate Professor and Faculty Coordinator, Centre for Public Law
ILS Law College, Pune

Constitutional Interpretology

Having very anxiously observed the debate in Lok Sabha on abrogation of Article 370, I am appalled by the cherry peaking reliance on history by opposition party. It was particularly disappointing and lamenting to see senior opposition members one after another displaying dampening spirit in not appreciating the contribution of Sardar Patel for the maintenance of territorial integrity of this great country. The commitment to "the family" prevailed over all other considerations and demonstrated the sycophancy with singing phrases in the glory of Nehru on their part. The intolerance on their part to hear the alternative history was striking. How can one change the history, if it is a recorded fact that Dr. Ambedkar had serious reservations about Article 370 (the then Article 306 A) ; how can we change the history, if it is a fact that in his indulgence for Kashmir, Nehru decided to push great craftsman Sardar Patel aside; how can one change the history, if the Congress party is guilty of misusing the amending power to abort the judgement of Allahabad High Court, declaring the election of the then PM Indira Gandhi to be illegal and passing dreadful 42nd Constitutional Amendment so as to diabolically disrupt the constitutional ethos.

NCP feeling sorry about absence of Faruq Abdulla merely adds insult to injury. As was informed by the home Minister neither he is detained nor arrested. His absence from the Lok Sabha is his voluntary decision and speaks volume about how he is alienated from the sentiments of public of Kashmir. Opposition would have sounded ethical had it paid tribute to the sacrifice to son of Soil Mr. Shyama Prasad Mukharji as well. In my opinion, invocation of doctrine of popular will on part of Congress party is simply like crocodile shading the tears. Thus, having ripped apart their rhetoric as mere sophistry let me now turn to Constitutional and legal aspects,
it is important to read first the text of the Constitutional order enacted by Honorable President of India as part of Article 35 A under Article 370 (1) clauses (b), (c) and (d).

It reads:
THE CONSTITUTION (APPLICATION TO JAMMU AND KASHMIR) ORDER, 2019
C.O. 272

In exercise of the powers conferred by clause (1) of article 370 of the Constitution, the President, with the concurrence of the Government of State of Jammu and Kashmir, is pleased to make the following Order:-

1. (1) This Order may be called the Constitution (Application to Jammu and Kashmir) Order, 2019.
(2) It shall come into force at once, and shall thereupon supersede the Constitution (Application to Jammu and Kashmir) Order, 1954 as amended from time to time.
2. All the provisions of the Constitution, as amended from time to time, shall apply in relation to the State of Jammu and Kashmir and the exceptions and modifications subject to which they shall so apply shall be as follows:-
To article 367, there shall be added the following clause, namely:-
"(4) For the purposes of this Constitution as it applies in relation to the State of Jammu and Kashmir-
(a) references to this Constitution or to the provisions thereof shall be construed as references to the Constitution or the provisions thereof as applied in relation to the said State;
(b) references to the person for the time being recognized by the President on the recommendation of the Legislative Assembly of the State as the Sadar-i-Riyasat of Jammu and Kashmir, acting on the advice of the Council of Ministers of the State for the time being in office, shall be construed as references to the Governor of Jammu and Kashmir;
(c) references to the Government of the said State shall be construed as including references to the Governor of Jammu and Kashmir acting on the advice of his Council of Ministers; and
(d) in proviso to clause (3) of article 370 of this Constitution, the expression "Constituent Assembly of the State referred to in clause (2)" shall read "Legislative Assembly of the State".

A close look on this order demonstrates that President of India has amended Article 367 to repeal part of Article370. By clause one of this constitutional order, all the previous constitutional orders which popularly referred to as article 35 A since 1954 have been repealed. The careful look on the language also shows that the constitution of J and K is also dispensed with. In order to exercise his power under Article 370 (3) , the Hon President has also amended the proviso to this clause to substitute the expression ,"Constituent Assembly of the State" with "Legislative Assembly of the State".

Similarly, the order broadened the meaning the expression 'Government of State' to include in it the 'Governor'. It is to be noted that President has the power under clause (3) of Article 370 to either fully or partially abrogate the provisions of Article 370. He was supposed to exercise this power prior to the enactment of constitutional order of 5th August 2019 with the concurrence of the constituent assembly of J and K. However, with coming into force of this Constitutional order, which amended the aforementioned condition, he is now empowered to exercise his power of abrogation of Article 370 with the concurrence of the State Govt. Since presently, the J and K state being under the President's rule and its government and legislative assembly having been dissolved,

and the power of the same being assumed by the Parliament under Article 356(1 b) of Indian Constitution, it is constitutionally competent for the Parliament to act as the Legislative assembly and State government of J and K, because that what is the mandate of Article 356(1b) is. It is not uncommon for the parliament to assume such power and in the past too Congress has done so on numerous times. Therefore it is futile and in vain to doubt the constitutional legitimacy of the Parliament to speak on behalf of State of J and K. Under Indian federal set up , which is not the replica of American federalism, the paramountcy given to the Parliament in respect of Center –State relation is self-evident.

The important question is therefore whether President has the competence to enact the Constitutional Order as a part Article 35 A and effect amendment in Constitution of India by amending Article 367? Should the government not have followed the Amending Procedure under Article 368 for doing so? Should Article 147 of J & K Constitution not have prevailed over the legislative power of the Parliament exercised by it under Article 356(1)(b) of Constitution of India? A superficial reading of the Constitution would compel only a negative answer. However, a careful and reflective analysis of the Constitution guards against such an abrupt response.

The design of Constitution of India is meant for a constitution of deeply divided society and therefore as a conscious and deliberate choice its framers decided to be inconclusive on certain matters and therefore they allocated them in that part of Constitution, headed as 'temporary, special and transitional provisions'. One of the provisions in this part is Article 370 and therefore explicitly it is either a temporary or a transitional special provision. Such provisions have temporal dimension, i.e. their continuance in the constitution is contingent. Question arises who is the best judge to decide whether the contingency necessitating their continuance exist or not? In my modest opinion Executive is the best judge of this matter as nature of the enquiry is political and therefore the issue has to be seen from the lens of what I call 'Constitutional Interpretology".

Each constitution must have its own rules and principles to interpret itself during certain expediencies lacking International or comparative constitutional law parallels. It is therefore possible to argue that by exercising its executive powers which is vested under Article 53 of constitution in the President of India, and also manifested in clause 3 of Article 370, President can by issuing Public notification abrogate relevant parts of Article 370 (clauses 2 and 3), which reflect Constitution within constitution. In this connection reference is also made to Article 363:

"Bar to interference by courts in disputes arising out of certain treaties, agreements, etc.
(1) Notwithstanding anything in this Constitution but subject to the provisions of Article 143, neither the Supreme Court nor any other court shall have jurisdiction in any dispute arising out of any provision of a treaty, agreement, covenant, engagement,

sanad or other similar instrument which was entered into or executed before the commencement of this Constitution by any Ruler of an Indian State and to which the Government was a party and which has or has been continued in operation after such commencement, or in any dispute in respect of any right accruing under or any liability or obligation arising out of any of the provisions of this Constitution relating to any such treaty, agreement, covenant, engagement, sanad or other similar instrument.
(2) In this article
(a) Indian State means any territory recognised before the commencement of this Constitution by His Majesty or the Government of the Dominion of India as being such a State; and
(b) Ruler includes the Prince, Chief or other person recognised before such commencement by His Majesty or the Government of the Dominion of India as the Ruler of any Indian State."

It is also to be noted that attempts on part of certain scholars to equate J & K post the enactment of the constitutional order of 5th August 2019 as independent country is ludicrous because Constitution of India is explicit in its assertion of J & K being the integral part of India and it is futile and legally frail strategy to use the provisions of J & K Constitution as having paramountcy over Constitution of India. As far as enactment of various Constitutional orders as part of Article 35 A by President of India is concerned, their validity has not to be doubted by the Courts. In fact, article 35 A can be said to be integrally connected with Article 370 to enable the President to modify or apply the various provisions of Constitution of India in respect of J and K. Since under article 370 (1) sub clauses (b), (c) and (d), Honorable President was empowered with the concurrence of State Govt. of J and K not only to modify the terms of the accession but also to provide competency to the Parliament and central government to make laws and take executive action on variety of matters. He exercised this power on numerous occasions prior to constitutional order of yesterday and its exercise being political in nature, is not open for judicial review. At any rate, there is nothing as such in Article 370, which would have prevented the President from amending it or modifying it. It is important to remember that with the adoption of Article 35 A, both state of J and K and govt. of India seriously watered down the significance of instrument of accession. Therefore, invocation of the same as a bar against modification of article 370 is constitutionally inconsequential.

In my opinion, since the power of the President as explained in aforementioned paragraph being specific and particular vis-à-vis J and K, its exercise is not subject to Article 368, rather it is subject to Article 370 itself. One does not amend the Constitution to take a specific decision affecting only a particular class. In terms of Astrophysics, Article 370 is like a black hole, once you are into it, the only option to come out of it is to destroy the same and this logic is also applicable to Article 35 A.

It would not be erroneous to say that Kashmir was in the Black hole under these

provisions and its full constitutional absorption would not have been completed without the abrogation of both these articles. Talking about the interpretology, I would submit that there are certain constitutional movements, which are sui generis i.e. their validity is self-generating and any insistence to link the same with the any other provisions of the constitution is misleading and misplaced. Let me draw the attention in this connection to American founding of the constitution. The present American constitution is a byproduct of second American founding which is popularly known as Philadelphia convention. However, if the Philadelphia convention terms were to be tested qua the first American founding which is popularly known as continental convention (1777), then we would reach the politically untenable conclusion that entire US constitution is Unconstitutional. But it is too entrenched a proposition to even doubt that the validity of Philadelphia convention was sui-generis and so is that of Constitution of US. The same logic has to be applied to the regime of Article 35 A in India.

So far as testing the validity of this constitutional order with doctrine of Basic structure of Constitution is concerned, the argument is too hilarious to deserve even the semblance of consideration. In constitutional echelons, basic structure is not constitutive of temporary or transitional provisions requiring intervention by the Court. Arguments pertaining to Constituent assembly of J and K are farfetched. It is inconceivable that govt. of India would authorize the constituent assembly of J and K to superimpose the constitution of J and K over and above the Constitution of India. In fact, had it been the case, first thing Constituent assembly of J and K would have done to repeal clause 3 of Article 370 empowering the President of India to abrogate it. Long after the dissolution of the Constituent Assembly of J and K, the clause remained in the Statute book (precisely till 5th August 2019) and to imply from this clause permanence for the station of Article 370 in the Constitution is to openly violate the famous Constitutional axiom, " *expressio unius est exclusio alterius*: to express one thing is to exclude another".

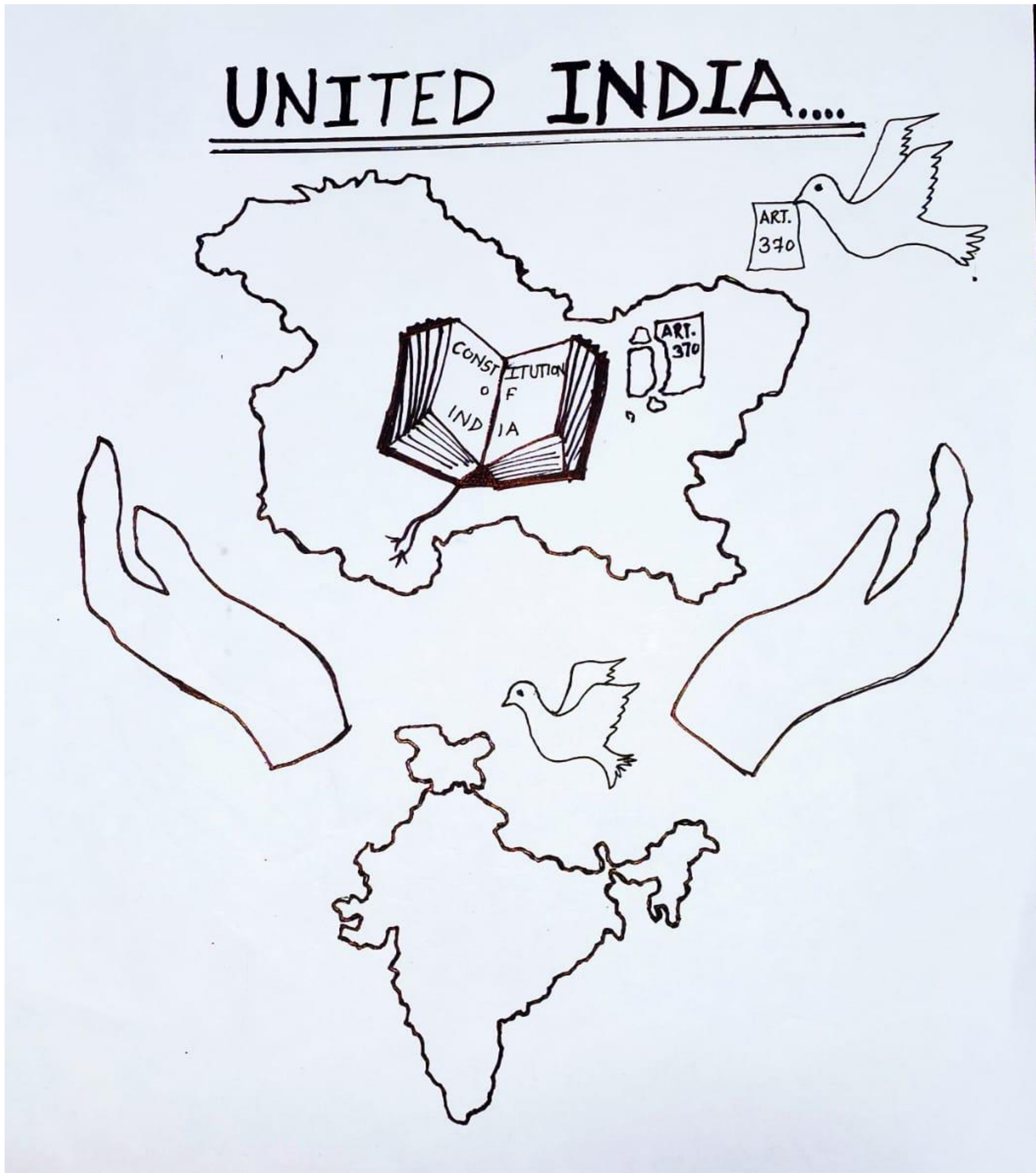
At any rate, Parliament of India has the status of Constituent assembly and can exercise power and also can authorize the President through the mechanism of Article 35 A, whose validity is sui generis, in other words, parliament as constituent assembly for J and K, enjoys legitimacy under the principle of sui-generis. In this connection I would like to draw attention to another important doctrine, the Parliament does not bind its successors', although this doctrine originates in the UK, its modified application in India is well established. Insertion of Article 35 A was an action of earlier government backed by the then Parliament, but the same does not commit either the future government or Parliament about the same and particularly if the provision in the question is a temporary provision, the authority of the Parliament and Govt. would be completely unfettered to any previous commitment.

So far as, adherence to the International law by way of the treaty with the then ruler of

the Kashmir is concerned, the arguments are extremely mute. Moreover, International Law itself validates deviation from the terms of any previous international treaty by the State party under the doctrine of rebus sic stantibus (where there has been a fundamental change of circumstances, a party may withdraw from or terminate the treaty in question). Moreover, so far as foreign policy is concerned it is always shaped by prioritizing the National interests. It is too well known a cliché to hold that for the promotion of National interest and to deal with expediency, a state has to be at times indulged in even hypocrisy and double standard. Besides, India being the dualist State , international commitments by Executive do not become the part of Indian Legal order lest its incorporation through Article 253 of Constitution of India. Similarly the arguments based on plebiscites and referendums are too ineffective to draw any attention, leave alone instruments of Judicial review. Right from Aristotle all right thinking philosophers are categorical in their views that referendums and plebiscites are recipe for anarchy, it is ludicrous to capture the political complexities and nuances in the disjunctives yes or no, BREXIT is the most recent example of how bizarre the referendums may be? I would therefore pause by advising all those, bickering with Government and contesting the constitutional validity of the present constitutional order to be wary of identifying Indian Constitution in its bare provisions. I am reminded by the memorable scholarship of Professor Upendra Baxi who rightly advices us to keep in mind comparative constitutionalism and the Judicial exegesis of the Constitution of India as integral part of Constitution of India along with its bare text. It is childish to read constitutional law of India to the exclusion of its intricate interfaces with international law and Politics. As an academic, it is cozy to be contrarian to the decision of the establishments, but this time the decision of the government is too compellingly within the vires of the Constitution to deserve any criticism.

D. CARTOON AREA

~ *Artistic work of*: Shweta Tambade, II B.A. LL.B



E. PUBLIC LAW IN THE NEWS

~ *Compiled by*:
Adithi Rao, IV B.A. LL.B. (High Court and Supreme Court Rulings)
Varad S. Kolhe, V B.A. LL.B. (Bills and Legislations)

1) SUPREME COURT

a) **Right to privacy not absolute:**
Ritesh Sinha vs. State of UP (02/08/2019) - In an important judgment, the Supreme Court observed that the fundamental right to privacy under Article 20(3) is not an absolute right and that it must bow down to compelling public interest. The issue was whether a Judicial Magistrate can order a person to give a sample of his voice for the purpose of investigation of a crime. Relying on its own judgments in in Modern Dental College and Research Centre and others vs. State of Madhya Pradesh and others, Gobind vs. State of Madhya Pradesh and another and the nin-judge bench judgment in the *Puttuswamy* judgment, the Court reiterated the limitations of the right to privacy.

b) **Alternate remedy no bar to writ petition :**
Maharashtra Chess Association vs. Union of India (29/07/2019) - The Supreme Court recently held that mere existence of alternate remedy does not extinguish the writ jurisdiction of a High Court under Article 226 of the Constitution of India. In this case, there was a private agreement between the parties conferring exclusive jurisdiction to entertain disputes to courts of Chennai. It was argued by the defendant that as the Madras High Court judgment had adequate jurisdiction to grant relief, the jurisdiction of Bombay High Court cannot be invoked. Delivering the two-judge bench judgment, Justice D.Y. Chandrachud observed that the High Court must consider a variety of factors in facts and circumstances of the case in its own discretion and mere availability of alternate remedy cannot act as a bar to its jurisdiction.

c) **Kathi David Raju v. State of Andhra Pradesh and Anr.** (05/08/2019) - In a case where the Andhra Pradesh High Court allowed conducting of a DNA test on a person alleged of creating a false caste certificate, the Supreme Court held that such test cannot be conducted without carrying substantial investigation by police authorities. The investigation was yet to be completed and the orders permitting the DNA test also mentioned the same. The Court observed that the police authorities though having the right to conduct such test in appropriate circumstances; it is too early to ask for such a test without having material evidence against the alleged in the first place.

d) **Union of India and Ors. v. Junu Gayary** (26/07/2019) - The Supreme Court upheld a Gauhati High Court judgment which directed the Central Bureau of Investigation (CBI) to register a case of "custodial murder" against the Indian Army and also enhanced compensation payable to the widow of the deceased. The deceased was picked up and taken away by army personnel of the 8th Madras Military Regiment and the army informed his family about his death under an encounter after a few days. The Court observed that as the deceased was in the custody of the Indian army from the time of him getting picked up till the time of production of the dead body and hence found a prima facie case against the appellants.

e) **Bikram Chatterji & Ors. v. Union of India & Ors.** (23/07/2019) - In a judgment providing relief to a large number of homebuyers, the Supreme Court cancelled the registration of Amrapali group under Real Estate (Regulation and Development) Act 2016 and handed over the construction of projects to the National National Building Construction Corporation (NBCC). A number of petitions are pending before the Court in the issue of the Amrapali group seeking possession of approximately 42,000 flats booked in the Amrapali Group projects. The Court helped the homebuyers by holding that banks and financial institutions have to recover dues (which amount to around Rs. 3400 crores) from the Amrapali group through assets other than the projects property.

f) **State of J&K decriminalized Adultery**
Col. Rajnish Bhandari vs. Union of India (02/08/2019) - Before the take-down of Article 370 of the Constitution of India by the Parliament, the Supreme Court decriminalized adultery in the state of J&K. Under the Ranbir Penal Code (RPC) which is the counterpart of the Indian Penal Code (IPC) in the erstwhile J&K laws, Section 497 criminalized adultery and the difference between the two is that RPC hold the woman as an abettor in adultery while IPC doesn't. The Court held Section 497 of RPC to be unconstitutional confirming its judgment in the case of Joseph Shine v. Union of India which decriminalized adultery under IPC.

2) HIGH COURTS

Bombay

Environmental clearance for costal project set aside
Worli Koliwada Nakhwa and Anr. v. Municipal Corporation of Greater Mumbai and Ors. (16/07/2019) - The Bombay High Court set aside various clearance permits from various authorities for the construction of the southern part of the planned coastal project in Mumbai. Amongst other issues, the Court observed that the National Green Tribunal held it compulsory to obtain environmental clearance

certificate and to conduct environmental impact assessment for the northern part of the project. Therefore, the judgment was bound to be followed for the southern part as well. In the batch of petitions including from affected fishermen in the area, the Court concluded that the authorities can't proceed with the project unless required environmental clearance certificate is obtained in lieu of the latest environmental impact assessment notification and also permissions under the Wildlife (Protection) Act, 1972.

Chattisgarh

Petition challenging the constitutional validity of NIA Act, 2008
Jhumar Qyami v. Union of India & Ors. (30/07/2019) : The Chattisgarh High Court issued notice to the Central Government seeking response for a writ petition filed against the constitutionality of the National Investigations Agency Act (NIA), 2008. The NIA Act was enacted to empower the central government to take over cases involving national security and affecting sovereignty in India. The petition challenged the NIA Act on multiple grounds including factors such as the better understanding of state police officers towards local circumstances and situations and provisions of CrPC empowering police officers to conduct investigations thereby the Act contravening provisions of CrPC. The Court posted the matter for next hearing on September 24, 2019.

Karnataka

Good and Safe Roads are Fundamental Rights of Citizens: A divison bench of the Karnataka High Court ruled that bad condition of roads and footpaths having potholes on roads is a violation of Fundamental rights of citizens guaranteed under Article 21 of Constitution of India. The Supreme court observed that the scope of Article 21 has been expanded over the years. If the citizens are to enjoy Fundamental Rights good and safe streets are to be treated as something which is needed to live a dignified life. If potholes were there on the streets, life of citizens was exposed to danger Therefore if a citizen suffers any injury or loss of life they can seek compensation from Bruhat Bengaluru Mahanagara Palika (BBMP) as it is a statutory body and its constitutional duty to maintain roads and footpaths.

Kerala

Code of canon constitutional : Anoop M.S v state of Kerala and Ors.: The Kerala High court in a division bench dismissed a Public Interest Litigation (PIL) challenging the Pope's authority over churches property in India. Firstly the bench expressed its dissatisfaction that the litigant was not an aggrieved party, who belonged to the particular denomination. The courts perception was that the motive of the PIL was extraneous and perhaps cheap publicity. Secondly the court observed that a religious denomination had Fundamental right Under Article 26(d) of the

Constitution of India to administer properties and manage its own affairs in accordance with law and as long as administration of property of churches is done in accordance with applicable laws in India, in matters of internal administration and policy the courts intervention would not be warranted. Lastly the courts refused to examine the petitioner's argument that the church's property was public trust and alienation can be done only with the permission of jurisdictional civil court as per Section 92 of the Civil Procedure Code (CPC) by stating that it was not the appropriate forum for the same. The petitioner has to approach the civil court and not High court by way of a PIL. Therefore declared the petition to be frivolous and imposed a serious cost of Rs. 25,000.

3) Bills and Legislations

a) Public Premises (Eviction of Unauthorized Occupants) Amendment Bill, 2019[2]

b) Jammu Kashmir Reservation Second Amendment Bill, 2019[3]

c) Supreme Court (Number of Judges) Amendment Bill, 2019[4]

d) The Repealing and Amending Bill, 2019[5]

e) The Right to Information Amendment Bill, 2019[6]

f) The Transgender Persons (Protection of Rights) Bill, 2019[7]

g) The Arbitration and Conciliation Amendment Bill, 2019[8]

h) The Unlawful Activities (Prevention) Amendment Bill, 2019[9]

i) The Muslim Women (Protection of Rights on Marriage) Bill, 2019[10]

j) The Indian Medical Council Amendment Bill, 2019[11]

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[2] https://www.prsindia.org/billtrack/public-premises-eviction-unauthorised-occupants-amendment-bill-2019

[3] https://www.prsindia.org/billtrack/jammu-and-kashmir-reservation-second-amendment-bill-2019

[4] https://www.prsindia.org/billtrack/supreme-court-number-judges-amendment-bill-2019

[5] https://www.prsindia.org/billtrack/repealing-and-amending-bill-2019

[6] https://www.prsindia.org/billtrack/right-information-amendment-bill-2019

[7] https://www.prsindia.org/billtrack/transgender-persons-protection-rights-bill-2019

[8] https://www.prsindia.org/billtrack/arbitration-and-conciliation-amendment-bill-2019

[9] https://www.prsindia.org/billtrack/unlawful-activities-prevention-amendment-bill-2019

[10] https://www.prsindia.org/billtrack/muslim-women-protection-rights-marriage-bill-2019

[11] https://www.prsindia.org/billtrack/indian-medical-council-amendment-bill-2019

F. CASES ACROSS THE POND

~ *Compiled by*: Nihar Chitre , IV B.A. LL.B.

Federal Court of Malaysia: JRI Resources SDN BHD v. Kuwait Finance House (Malaysia) Berhad[12] (decided on 19-04-2019)

The fundamental question put forward before the court was whether Sections 56 and 57 of the Central Bank of Malaysia Act, 2009 were unconstitutional by reason of contravening Part IX of the Federal Constitution for vesting judicial power in the SAC. The main issue was whether the impugned provisions violated the doctrine of separation of powers.

The Court referred to *Semenyih Jaya SdnBhd v. Pentadbir Tanah Daerah Hulu Langat*[13] and observed that the doctrine of separation of powers was sacrosanct in the constitutional framework and was a part of the basic structure of the Federal Constitution. At the same time, the court acknowledged that the doctrine recognises, that wherever necessary, one branch of the government should be allowed to exercise part of the powers of another branch and also the delegation of power by one branch of the government to another. The Court also relied on *Tan Sri Abdul Khalid Ibrahim v. Bank Islam Malaysia Berhad*[14] wherein it was explained that it was necessary to designate the SAC to ascertain the acceptable Shariah position

.

Lastly, the Court referred to Lord Reed's remarks at the 32nd Sultan Azlan Shah Law 28 Lecture, 2018, where he said, ***"Neither the separation of powers nor the principle of judicial independence means that the courts have to be isolated from the other branches of the State".***

The Court decided that the challenged provisions did not encroach or trespass onto the judicial power and hence did not infringe the doctrine of separation of powers.

Supreme Court of the United States[15] - American Legion v. American Humanist Association[16] (decided on 20-06-2019):

[12]2019 SCC OnLine MYFC 1

[13] (2017) 4 AMR 123

[14] (2010) 4 CLJ 388

[15]For further reading, https://www.scconline.com/blog/post/2019/07/18/us-sc-bladensburg-cross-world-war-i-memorial-does-not-violate-establishment-clause-of-the-us-constitution-not-a-religious-symbol-but-a-historical-landmark/

[16]*588 US 2019*

In this case, the constitutionality of a memorial built on public land in Maryland to honour fallen soldiers in World War-I was challenged. The memorial was in the form of a 40-foot cross known as Blandensberg Peace Cross. In 2014, the American Humanist Association (AHA) complained to District Court of Maryland alleging that the Cross' presence on public land and maintenance of the memorial violated the Establishment Clause of the First Amendment to the US Constitution which stated that "***Congress shall make no law respecting an establishment of religion***". AHA sought declaratory and injunctive relief claiming removal or demolition of the Cross, or removal of the arms from the Cross so that it forms a non-religious slab. The American Legion intervened to defend the Cross and pleaded that the Cross's history, setting, and secular elements did not impermissibly endorse religion.

The District Court held that the existence of Cross satisfied the Lemon Test.[17]

The Supreme Court, by a majority of 7:2 held that the meaning of the Cross was not limited only to its historical context and that the 94-year-old cross was a 'historic landmark' destruction of which would be disrespectful. It was opined that though the Cross was "undoubtedly a Christian symbol", but the monument had come to express "a symbolic resting place for ancestors who never returned home a place for the community to gather and honour all veterans and their sacrifices for this Nation, and a historical landmark".

International Court of Justice: India v. Pakistan (decided on 17-07-2019)

India instituted proceedings against Pakistan before the ICJ on 08-05-2017 on grounds of violation of the Vienna Convention on Consular Relations in relation to Mr Kulbhushan Sudhir Jadhav who has been in the custody of Pakistani authorities for well over two years. Jadhav was accused of performing acts of espionage and terrorism on behalf of India and was sentenced to death by a Military Court of Pakistan in 2017. India contended that Pakistan breached Article 36 of Vienna Convention:

(i.) By not informing India, without delay, of the detention of Jadhav;
(ii.) By not informing Jadhav of his rights under Article 36;
(iii.) By denying consular officers of India access to Jadhav

Claims made by India were as follows:

[17]The lemon test was enunciated in the case of *Alton J. Lemon v. David H. Kurtzman*. Under the said test, while determining if a particular law violates the 1st Amendment of the US Constitution, a Court must-see if: (i) the statute has a secular purpose; (ii) the 'principal or primary effect' of the statute must be one that 'neither advances nor inhibits religion'; and (iii) the statute does not foster 'excessive government entanglement with religion'.

(i.) Relief by way of immediate suspension of death sentence
(ii.) Relief by way of restitutio in integrum by declaring the sentence of the military court arrived at, in brazen defiance of Vienna Convention rights under Article 36
(iii.) Restraint and annulment of the decision of the Pakistani Military Court
(iv.) If Pakistan fails to annul its decision, then ICJ to declare it illegal and violative of International Law.

The court concluded that the Convention is applicable in the present case, regardless of the allegations that Mr Jadhav was engaged in espionage activities.

Further, by a majority of fifteen votes to one, it was decided:

(i.) By not informing Jadhav without delay of his rights under Article 36, paragraph 1 (b), of the Vienna Convention on Consular Relations, Pakistan breached the obligations incumbent upon it under that provision.
(ii.) India was deprived of the right to render the assistance provided for by the Vienna Convention to the individual concerned; Pakistan breached the obligations incumbent upon it under Article 36, paragraph 1 (b), of Vienna Convention on Consular Relations.
(iii.) Pakistan deprived India the right to communicate with and have access to Jadhav to visit him in detention and arrange legal representation.
(iv.) Pakistan is under obligation to inform Jadhav without delay his rights to consular access under Article 36 of VCCR.
(v.) Effective review and reconsideration of the conviction and sentence of Jadhav.

Supreme Court of Canada – R. v. Stillman[18] (decided 26-07-2019)

The Supreme Court of Canada ruled that military members accused of serious offences under military law do not have the constitutional right to a civilian jury trial.

Several military members were accused of serious crimes, like sexual assault and forgery. They wanted to be tried by a jury.

The accused military members argued that the *National Defence Act* breached their constitutional right to be tried by a jury. They said this was guaranteed under section 11(f) of the *Canadian Charter of Rights and Freedoms*, which is a part of Canada's Constitution. Section 11(f) says people charged with crimes have the right to be tried by a jury if they could go to jail for five years or more. But there is an exception: the right does not apply to crimes under military law tried before military courts. This is called

[18]https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/17891/index.do

the "military exception." The accused military members argued that this exception applied only to "pure" military crimes, like spying or mutiny. They said it didn't apply to civilian crimes that any Canadian (military member or not) could be charged with. The military prosecutors, on the other hand, said the exception applied to *all* service offences, including civilian crimes by military members.

G. JUDICIAL PRECEDENTS ON ARTICLE 370

~ *Compiled by*:

Saranya Mishra, Former Student Coordinator, Centre For Public Law
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Tabulation of cases on Article 370 decided by Supreme Court

#	Name of the case	Date of judgement/order	Discussion in context of Article 370	Relevant Para(s)
1.	Abdul Ghani v. State of J&K (1970) 3 SCC 525	18 December 190	The case deals with Jammu and Kashmir Preventive Detention Act, 1964. It was filled by a person in detention, who contended that the order of detention passed under the said Act was illegal and based his arguments on Article 370 and 35(c). The petition was dismissed.	Paras 2 and 3
2.	Mohd. MaqboolDamnoo v. State of J&K (1972) 1 SCC 536	5 January 1972	The case challenged the detention of the petitioner under the Jammu and Kashmir Preventive Detention Act, 1964. It is vital for its discussion on Explanation to Article 370.	Paras 7, 20-30
3.	Ishwar Das Malhotra v. Union of India (1972) 1 SCC 646	8 February 1972	The case deals with extension of application of the Delhi Special Police Establishment Act, 1946 to the State of J&K, which was inconsistent with J&K Code of Criminal Procedure and J&K Police Act. Such extension of application was vide a notification assented to by the President. The court conclusively	Paras 7, 8, 13 and 14

			held that Article 372A has no application in State of J&K and that Parliament had no jurisdiction to extend the application of Delhi Union Territory Act to State of J&K.	
4.	J&K v. M.S. Farooqi (1972) 1 SCC 872	March 17 1972	The case deals with application of Jammu and Kashmir Government Servants Prevention of Corruption (Commission) Act, 1962, in background of countervailing Union legislature i.e. All Services Act, 1951. The court referred to Article 370 to derive at its judgement that J&K State Act must yield to the Indian Act in respect of law on Entry 70, List I, i.e "Union Public Services; All India Services; Union Public Services Commission".	Paras 7 and 8
5.	Khazan Chand v. State of J & K (1984) 2 SCC 456	9 February 1984	The case deals with recovery of arrears of sales tax accrued under the J&K General Sales Tax Act, 1962. The case merely mentions Article 370.	Para 7
6.	CWT v. Karan Singh (Dr) 1993 Supp (4) SCC 500	4 February 1993	The case deals with valuation and taxability of "tax on capital value of assets" under the Wealth Tax Act, contending that the said Act is *ultra vires* the power of Parliament. The application of the said Act was held to be 'perfectly constitutional'. The case merely mentions Article 370.	Para 2

7.	East India Hotels Ltd. v. State of J & K 1994 Supp (2) SCC 580	12 July 1994	The case tests the legislative competence of J&K State Legislature to enact Jammu & Kashmir Hotel (Amenities and Services) Tariff Taxation Act, 1980. In this context it observes that J&K State has legislative power with respect to residuary subject matters (based on Presidential Order, made under Article 370(1) called the Constitution (Application to Jammu & Kashmir) Order, 1954) and makes reference to Section 5 of the Jammu & Kashmir Constitution.	Para 6
8.	J&K National Panthers Party v. Union of India (2011) 1 SCC 228	9 November 2010	The case deals with J&K Representation of the People Act, 1957. The case merely mentions Article 370.	Para 13
9.	SBI v. Santosh Gupta (2017) 2 SCC 538	16 December 2016	The case deals with applicability of Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 in State of J&K, given the contradiction with Section 140 of the Transfer of Property Act of Jammu & Kashmir, 1920. The Court held that the SARFAESI Act can be validly applied to the State of J&K.	Paras 6-19, 13-27
10	SIDBI v. Emosons	29 August 2017	The issue raised in this case was whether the Securitisation and	Para 2

	Organics Ltd. (2018) 12 SCC 75		Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESIi Act) would be applicable in the State of Jammu and Kashmir. The question was decided in affirmative by placing reliance on the case of SBI v. Santosh Gupta.[19]	

Tabulation of cases on Article 370 decided by High Courts

#	Name of the case	Court	Date of judgement/order
1.	Majid Gulzar v. State of J&K 2018 SCC OnLine J&K 672	Jammu & Kashmir HC	26 September 2018
2.	Farooq Ahmad Bhat v. State of J&K 2018 SCC OnLine J&K 609	Jammu & Kashmir HC	7 September 2018
3.	Raj Kumar v. State of J&K 2018 SCC OnLine J&K 386	Jammu & Kashmir HC	4 July 2018
4.	Tilak Raj v. Union of India 2017 SCC OnLine J&K 197	Jammu & Kashmir HC	31 July 2017
5.	Kumari Vijayalakshmi Jha v. Union of India 2017 SCC OnLine Del 7884	Delhi HC	11 April 2017
6.	Surinder Singh v. State of J&K	Jammu &	9 March 2016

[19] (2017) 2 SCC 538

	2016 SCC OnLine J&K 65	Kashmir HC	
7.	Bhupinder Singh Sodhi v. Union of India 2015 SCC OnLine J&K 126	Jammu & Kashmir HC	16 July 2015
8.	IDBI Band Ltd. v. Asian Natural Resources (India)) Ltd. 2015 SCC OnLineBom 98	Bombay HC	12 January 2015
9.	D. Suryanarayana v. Govt. of India 2014 SCC OnLine AP 175	Telangana HC	5 March 2014
10.	Sarvesh Sharma v. State of Uttarakhand 2011 SCC OnLineUtt 1672	Uttranchal HC	22 September 2011
11.	KSRTC Staff and Workers Federation v. State of Karnataka 2010 SCC OnLineKar 1074	Karnataka HC	6 October 2010
12.	Bishwa Nath v. State of J & K 2008 SCC OnLine J&K 98	Jammu & Kashmir HC	12 February 2008
13.	J. Papa Rao v. Government of Andhra Pradesh 2004 SCC OnLine AP 261	Telangana HC	18 March 2004
14.	State of Jammu and Kashmir v. Dr. Susheela Swahney 2002 SCC OnLine J&K 34	Jammu & Kashmir HC	7 October 2002

15.	Commissioner of Wealth-Tax v. GhulamMohi-ud-din Mutto 2000 SCC OnLine J&K 80	Jammu & Kashmir HC	3 October 2000
16.	State of Jammu & Kashmir v. Dr. Karan Singh 1997 SCC OnLine J&K 14	Jammu & Kashmir HC	30 May 1997
17.	Satyapal Anand v. Union of India 1996 SCC OnLine MP 288	Madhya Pradesh HC	31 October 1996
18.	Becharbhai Madhabhai Palsana v. Dilipbhai Sanghani 1993 SCC OnLineGuj 517	Gujarat HC	28 April 1993
19.	J.K. Cigarettes Co. Ltd. v. Union of India 1988 SCC OnLine J&K 40	Jammu & Kashmir HC	8 July 1988
20.	Union of India v. Dileep Singh 1986 SCC OnLine J&K 49	Jammu & Kashmir HC	31 October 1986
21.	DewanIzzatRai Nanda v. DewanIqbalNath Nanda 1980 SCC OnLine Del 245	Delhi HC	18 September 1980
22.	Municipal Board v. State of Rajasthan 1975 SCC OnLine Raj 126	Rajasthan HC	21 April 1975
23.	Ghulam Mohamad Magray v. Ghulam Qadir Bedar 1973 SCC OnLine J&K 14	Jammu & Kashmir HC	25 July 1973

24.	Sohan Singh v. State 1971 SCC OnLine J&K 47	Jammu & Kashmir HC	11 October 1971
25.	S. Mubarik Shah Naqishbandi v. Income-Tax Officer, Salary Circle 1970 SCC OnLine J&K 23	Jammu & Kashmir HC	18 December 1970
26.	State v. Ram Lakhan, 1970 SCC OnLine J&K 35	Jammu & Kashmir HC	27 July 1970
27.	Hindustan Construction Co. Ltd. v. Assessing Authority 1969 SCC OnLine J&K 27	Jammu & Kashmir HC	21 October 1969
28.	Chidya Khan v. State 1969 SCC OnLine J&K 38	Jammu & Kashmir HC	20 June 1969
29.	Karim Bux v. State of Jammu and Kashmir 1968 SCC OnLine J&K 31	Jammu & Kashmir HC	27 September 1968
30.	Mohamad Subhan v. State 1955 SCC OnLine J&K 19	Jammu & Kashmir HC	2 August 1955
31.	Mst. Barkati v. State 1950 SCC OnLine J&K 16	Jammu & Kashmir HC	29 May 1950

H. EXCERPTS FROM CONSTITUENT ASSEMBLE DEBATES ON ART. 370 AND THEREON

Compiled by: Varad S. Kolhe, V B.A. LL.B.

N. Gopalaswamy sponsored Article 370 in India's constituent assembly. His exposition is authoritative, as the Supreme Court has repeatedly declared. He said on October 17, 1949:

"Part of the state is still in the hands of rebels and enemies. We are entangled with the United Nations in regard to Jammu and Kashmir and it is not possible to say now when we shall be free from this entanglement. That can take place only when the Kashmir problem is satisfactorily settled.

"Again, the Government of India have committed themselves to the people of Kashmir in certain respects. They have committed themselves to the position that an opportunity would be given to the people of the state to decide for themselves whether they will remain with the republic or wish to go out of it. We are also committed to ascertaining this will of the people by means of a plebiscite provided that peaceful and normal conditions are restored and the impartiality of the plebiscite could be guaranteed. We have also agreed that the will of the people, through the instrument of a constituent assembly, will determine the constitution of the State as well as the sphere of Union jurisdiction over the state. …

"In some of the clauses of this Article we have provided for the concurrence of the government of the state. The government of the state feel that in view of the commitments already entered into between the state and the Centre, they cannot be regarded as final authorities for the giving of this concurrence, though they are prepared to give it in the interim periods but if they do give this concurrence, this clause provides that concurrence should be placed before the constituent assembly when it meets and the constituent assembly may take whatever decisions it likes on those matters. …

"The provision is made that when the constituent assembly of the state has met and taken its decision both on the constitution for the state and on the range of federal jurisdiction over the state, the president may on the recommendation of the constituent assembly issue an order that this article 306A [i.e. Article 370 in the final draft of the constitution] shall either cease to be operative, or shall be operative only subject to such exceptions and modifications as may be specified by him. But before he issues any order of that kind the recommendation of the constituent assembly will be a condition precedent. …

"When it has come to a decision on the different matters, it will make a recommendation to the president who will either abrogate article 306A or direct that it shall apply with such modifications and exceptions as the constituent assembly may recommend."

10.154.310 (17th October, 1952)

N. Gopalaswami Ayyangar

"The effect of this article is that the Jammu and Kashmir State which is now a part of India will continue to be a part of India, will be a unit of the future Federal Republic of India and the Union Legislature will get jurisdiction to enact laws on matters specified either in the Instrument of Accession or by later addition with the concurrence of the Government of the State. And steps have to be taken for the purpose of convening a Constituent Assembly in due course which will go into the matters I have already referred to. When it has come to a decision on the different matters it will make a recommendation to the President who will either abrogate article 306A or direct that it shall apply with such modifications and exceptions as the Constituent Assembly may recommend. That, Sir, is briefly a description of the effect of this article, and I hope the House will carry it. "

~ Jawaharlal Nehru in the Lok Sabha on June 26, 1952

"And I say with all respect to our constitution that it just does not matter what your constitution says; if the people of Kashmir do not want it, it will not go there. Because what is the alternative? The alternative is compulsion and coercion – presuming of course, that the people of Kashmir do not want it. Are we going to coerce and compel them and thereby justify the very charges that are brought by some misguided people outside this country against us?

"Do not think you are dealing with a part of Uttar Pradesh, Bihar or Gujarat. You are dealing with an area, historically and geographically and in all manner of things, with a certain background. If we bring our local ideas and local prejudices everywhere, we will never consolidate. We have to be men of vision and there has to be a broadminded acceptance of facts in order to integrate really. And real integration comes of the mind and the heart and not of some clause which you may impose on other people."

I. VITAL CONSTITUTIONAL LAW QUESTION

~ *Authored by*:
Saranya Mishra, Former Student Coordinator, Centre For Public Law

Constitutional Desuetude: Jurisprudential Destitution

Desuetude most simply put is loss of power or invalidity of law by virtue of long and continued disuse. While originally a Roman legal concept, founded by Roman jurist Julian,[20] it has like most western concepts and legal notions found its way into legal jurisprudence globally (whether or not accepted globally is a different issue altogether). The doctrine has been in vogue in civil law countries in Europe but not common law[21] countries.[22] The original conception was based on the rule of *tacitus consensus populi*,[23] which means tacit consent of the people (distinguished from express consent, expressed vide representatives i.e. Parliament, in context of abrogating or contending repeal of law). However, desuetude is not triggered merely by lapse of a considerable period and neglect. It is necessary for there to be "*contrary usage, of such character as practically inferring the completely established habit of the community, as to set up a counter law to establish a quasi repeal*".[24]

The doctrine which is largely applied for abrogation or implied repeal of criminal statutes[25] in civil law countries and also international law was sought to be applied to administrative power under the Constitution in Indian context. This was when an argument based on this doctrine was raised by a few scholars with respect to President's use of power under Article 370(3), contending that given the lapse of time and disuse, the power had become defunct or had rather ceased to exist, because of which the President could not have passed such order (for such power had ceased to exist).[26]

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[20]John F. Stinneford, *Death, Desuetude, and Original Meaning*, 56(2) William & Mary Law Review. Available at https://core.ac.uk/download/pdf/73971333.pdf.

[21] Principle was recognised in Scotland for a brief period, but not any more.

[22]Jitendra N. Bhatt, *Dynamics and Dimensions of Doctrine of Desuetude*, (2004) 4 SCC J-21.

[23]John D Ford, Law and Opinion in Scotland during the Seventeenth Century (2007). Available at https://books.google.co.in/books?id=HuzbBAAAQBAJ&dq=desuetude+julian&source=gbs_navlinks_s

[24] Lord Mackay in Brown v. Magistrate of Edinburgh, 1931 SLT 456.

[25]*Desuetude*, 119(7) Harvard Law Review.Available at https://www.jstor.org/stable/4093616?seq=1#page_scan_tab_contents.

[26] "*Article 370(3):*

Notwithstanding anything in the foregoing provisions of this article, the President may, by public notification, declare that this article shall cease to be operative or shall be operative only with such exceptions and modifications and from such date as he may specify:

As for application in India, the Supreme Court at first had rejected the application of this doctrine,[27] but in some cases[28] it appears to have taken note of the same.[29] However it has set a very threshold for its application (largely drawing inspiration from Lord Mackay), thereby making it difficult to infer that it is a part of the jurisprudence of Indian Supreme Court. The essentials of the doctrine of desuetude have been summarised by the Hon'ble Supreme Court in *Monnet Ispat& Energy Ltd. v. Union of India*.[30] It is clear from it that the condition precedent for applicability of the doctrine of desuetude is that:

(i) Statute or legislation has not been in operation for a very considerable period; and

(ii) Contrary practice has been followed over a period of time.

Based on this, the author has the following observations:

a) The application of the doctrine of desuetude in India is accepted in a limited way (with qualifications) only with respect to statute or legislation and not Constitution, nor can "statute and legislation" be construed to mean or include Constitution. Thus the argument of its application to Constitution, let alone Constitutional power falls flat on its face.

   This is also to say that the notion of Constitutional desuetude (which is informal repeal of a constitutional provision as a result of the establishment of a new constitutional convention[31]) is not applicable in India. (Note of caution: Application was never contended and debated until now. However, even then, import of constitutional desuetude is highly unlikely given the exigencies of *inter alia* India's chaotic democracy and federal/political/social utilitarian argument.)

b) Even if one concedes the above debate and presumes application of the doctrine of desuetude to the Constitution (which is clearly not the case), the second condition of contrary practice is not met, because being entrusted with a power does not necessarily imply utilisation, thereby non-use of the power, regardless

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Provided that the recommendation of the Constituent Assembly of the State referred to in clause (2) shall be necessary before the President issues such a notification."

[27]State of Maharashtra v. Narayan ShamraoPuranik, (1982) 3 SCC 519.

[28]Municipal Corporation for City of Pune v. Bharat Forge Co. Ltd., (1995) 3 SCC 434; Cantonment Board, MHOW and Anr.v. M.P. State Road Transport Corporation, (1997) 9 SCC 450 and Monnet Ispat & Energy Ltd. v. Union of India, (2012) 11 SCC 1.

[29]Bibek Debroy and Aparajita Gupta, *Old is Not Always Gold – A Case Study on Repealing Statutes*. Available at: https://www.niti.gov.in/writereaddata/files/document_publication/SOL2.pdf.

[30](2012) 11 SCC 1, Para 201

[31] Richard Albert, *Constitutional Amendment by Constitutional Desuetude*, 62(3) The American Journal of Comparative Law 2014. Available at: https://www.jstor.org/stable/43669515?seq=1#page_scan_tab_contents.

of the period and longevity of inactivity, cannot be regarded as a contrary practice or usage.

Thus to conclude, doctrine of desuetude, whose core identity is repeal or abrogation of laws, which in India is essentially applied for discarding archaic laws, cannot become the vehicle for denying constitutional authority and power to anybody let alone a constitutional figurehead. The author believes that the doctrine of desuetude, with its limited application in India, cannot prevail over a power conferred by the Constitution and abrogate the same, which is also to say that the argument of President lacking the power stipulated under Article 370(3) by virtue of lapse of time and inactivity holds no water, given the way doctrine of desuetude has evolved in India. To supply weight to this stance, author finds harbour in separation of powers and the rule that "one who produces, dispose"to moot that since it is the legislature that enacts the law, only the legislature has the authority to repeal it. Judiciary's role is not repeal or exercising quasi-legislative functions, instead it is only to adjudicate, examine and apply law. While one argument may be that desuetude is a way of keeping up with the changing times and scrap the redundant or unnecessary provisions and by being so is not very different from living tree doctrine which views Constitution from a rather modernised consequentialism, one must bear in mind that desuetude is essentially negative in nature, while the latter has a positive and beneficial connotation. Thus desuetude may be accepted with respect to the Constitution to the extent it does put any stakeholder at disadvantage.

J. INTERSECTION OF PUBLIC LAW

~ *Authored by*: Soham Bhalerao, IV B.A. LL.B.
Ashok Pandey, III B.A. LL.B.

The cessation of the operation of Article 370 came as much a surprise to the legal fraternity as it came to the political scenario of the country. The sudden revocation of the special status and the bifurcation of the state of Jammu and Kashmir into the Union territories of Ladakh and Jammu and Kashmir, and the modus operandi of the same has been an issue of fierce debates, deliberations, analysis and criticisms both on national and international fronts.

Going back to the early days of independence, Maharaja Hari Singh of Kashmir signed the Instrument of Accession on 26th October 1947, whose term 7 read the following:

> *"7. Nothing in this Instrument shall be deemed to be a commitment in any way as to acceptance of any future Constitution of India or to fetter my discretion to enter into agreement with the Governments of India under any such future Constitution"*

While this term was common in the Instrument of Accession of every princely state which acceded to the dominion of India, the State of Jammu and Kashmir after negotiations between Nehru and Sheikh Abdullah, came to the conclusion that it would have its own constitution with the applicability of only two articles of the Constitution of India; Article 1 and Article 370.

It was the very terms of the Instrument of Accession that led to the insertion of Article 370 into the Constitution of India. Article 370 in effect embodied the obligations under the treaty and was supposed to be effective till the constituent assembly of the state framed its own constitution and decided on the scope of applicability of the Indian Constitution to the state. The power of Parliament was restricted to the matters mentioned in the Instrument of Accession and the Parliament could exercise other powers generally granted under the Constitution only in concurrence with the government of the State and that too only with respect to matters in the union list or the concurrent list. In addition to this provision, proviso to Cl. (3) ensured that the effect of the provision can only be abrogated on a recommendation of the Constituent Assembly of Kashmir. Clauses (1) and (2) as explained in the Constituent Assembly of India by N. Gopalaswami Ayyangar was merely to facilitate governance till the Constituent Assembly of Kashmir came to a decision as aforesaid. It acted as a tunnel between the Union parliament and the state of Jammu and Kashmir to the extent that a Presidential Order passed under Article 370(1) (d), in concurrence with the state legislature, actually led to the applicability of different parts of the Constitution on the state, this power having used by the government on numerous occasions to apply many of the major provisions of the Constitution to the state.

The Government's move on August 5th 2019 abrogating Article 370 may well have unintended international consequences and the need to address certain questions of international law is immense. Jammu and Kashmir, prior to its accession to India, was a sovereign state under the rule and governance of Raja Hari Singh. As such the instrument of accession the Raja entered into with the Dominion of India is a treaty governed by international law which imposes obligations on the Republic of India which is in effect a successor state. The Instrument of Accession, granted the right to Dominion of India to take control of and regulate matters relating to defense, foreign affairs and communication. These three subject matters constituted the overall competency of the Dominion Legislature as far as the state of Jammu and Kashmir was concerned.

Considering the above, the manner of abrogation of Article 370 which effectively made all articles of the Indian Constitution applicable to J&K which included the controversial application of the State list as well as the Union and Concurrent lists, may be considered to be a violation of the Instrument of Accession. It is contended that the powers of the Republic over and beyond those which are granted by the Instrument can only be so granted by the Constituent Assembly of Kashmir which was dissolved in 1957.It is argued that since the Constituent Assembly did not recommend the abrogation of the Article, it became a permanent feature of the Constitution determining the federal relation between the Union and the State.

As far as the abrogation of Article 370 goes, prior permission of the Constituent Assembly of the state of Jammu and Kashmir was required under clause (3) of Article 370. Since that body was dissolved in 1957, the government used its powers under Article 370(1) (d) to amend Article 367 of the Constitution of India which added another clause in Article 367 which changed "constituent assembly" to "legislative assembly" in clause (3) of Article 370. And, since the legislative assembly was not in session due to the state emergency imposed, going by the provisions under Article 356 of the Constitution, the Parliament acted on behalf of the legislative assembly and consented to the ceasing of the operation of Article 370. The Constituent Assembly before dissolution had framed a Constitution for the State regulating matters concerning the State legislature, executive, finance among others. Thus it had not extended the application of the Indian Constitution in this regard. Since an extension of power beyond that which was granted by the Instrument of Accession required their consent, the action of the Central Government substituting the need of such consent for its own and leading to enhanced competency of the Parliament maybe argued a violation of the Instrument.

International Law, which governs the Instrument of Accession provides that obligations under a treaty shall be fulfilled in good faith. The obligation of good faith implies that a party must abstain from any act calculated to frustrate the object and purpose of a treaty. The obligation must not be evaded by a mere technical approach by either of the

parties. This is the essence of the oft quoted rule of pacta sunt servanda. If this rule is to be considered an argument as above stating violation of the instrument of accession may be made.

In response to this certain authors have invoked the doctrine of rebus sic stantibus. The doctrine serves as an exception to the rule of pacta sunt servanda that the proponents of the above argument employs. Codified under Article 62 of the Vienna Convention of the Law of Treaties, this principle can be invoked by India as a principle of customary international law even though India is not a signatory to the VCLT. This doctrine states that parties to a treaty need only perform it in good faith so long as circumstances have not fundamentally changed with regard to those existing at the time of the conclusion of a treaty. Such change shall not be foreseen by the parties and may not be invoked as a ground for terminating or withdrawing from the treaty unless:

> *(a) The existence of those circumstances constituted an essential basis of the con sent of the parties to be bound by the treaty; and*
> *(b) The effect of the change is radically to transform the extent of obligations still to be performed under the treaty.*

The advocates of this defence argues that there exist such a fundamental change in circumstance. When the instrument was signed the scope of integration of the territory was undecided. The same was to be decided subsequently in light of the plebiscite and subsequent thereto. It was also in pursuance of the need to hold a plebiscite that Article 370 was inserted. Arguing fundamental change in circumstance, firstly, they say that the special circumstances including the armed attack by Pakistan and the UN resolution which warranted the insertion of the Article does not exist. The experience of the last 60 years of diplomacy shows that a plebiscite as contemplated by the UN resolution cannot happen. Secondly, over the course of sixty years the State of Jammu and Kashmir has remained an integral part of Indian territory with piecemeal extension of most of the important provisions of the Constitution to the State. This was not the circumstance back in 1947 when the instrument was signed.

However, a legal recourse to this gets barred by Article 363 of the Constitution which bars the jurisdiction of the Supreme Court or any other Court when it comes to any dispute arising out of any agreement which was entered into or executed before the commencement of the constitution by any ruler of an Indian state to which the government of India was a party.

A more serious contention could be the bifurcation of the state into two union territories without consultation of the state legislative assembly, as mandated under the proviso of Article 3 of the Constitution. Although a close reading of the Article would make it clear that only "opinion" of the state legislative assembly would be taken which would not be binding of either the President or the Parliament, consultation from the state

regarding any bifurcation is a substantive right which should have been respected. The absence of the legislative assembly makes no difference when it comes to the bifurcation, but, a substantive right of the state has been violated by implementing such a significant change in the political and geographical scenario of the state. The conferring of the Union territory status can also be questioned.

It can also be safely said, that a tactful use of the constitutional provisions, coupled with the timing of the decision, has deprived the citizens of the state of Jammu and Kashmir of their right to self-determination. This right confers upon people the will to choose their own political, cultural, social and economic status. This right does have legal backing in the international arena. Common Article 1(1) of the International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR) provides that "everyone has the right to self-determination and that right is inclusive of the right to determine their own political status and pursue their social, economic and cultural development without interference".

The right to self-determination can also be said to have been embodied under Articles 370(3) and 370(1) (d) of the Constitution. However, both were perverted due to the Presidential order which had a two-fold impact of amending clause (3) to cease the operation of the Article and of taking parliament's consent for the same due to the emergency imposed in the state. With a right such as self-determination being violated, we can also say that this decision has deprived the people of the state their right to a dignified life under Article 21 of the Constitution.

The government of India published a white paper on Jammu and Kashmir in 1948 whose p.3 has the following words of Jawaharlal Nehru, "Nevertheless, in accepting the accession, the Government of India made it clear that they would **regard it as purely provisional** until such time as the **will of the people of the State could be ascertained**. However, it is certain that the modus operandi employed for the decision did not take into account, the will of the people who would be most affected by the decision.

K. APPURTENANT SCHOLARSHIP

~ *Compiled by*: Rajmohan CV, V B.A. LL.B.

1. **ARTICLE 370: A CONSTITUTIONAL HISTORY OF JAMMU AND KASHMIR BY A. G. NOORANI**

   This work by A.G. Noorani is a collection of documents relating to Article 370 of the Constitution of India inserted into the Constitution on 17th Octorber 1949. These documents relate to the five-month long negotiations consequent to which the said Article was inserted. The book helps a reader understand the importance of the provision. Its subsequent erosion, and the constitutional history as also the constitutional relationship of the State of Jammu Kashmir to the Indian Union. The documents cover a time line beginning from 1946 when the accession of the State took place to 2010.

2. **THE PARCHMENT OF KASHMIR: HISTORY, SOCIETY, AND POLITY EDITED BY NYLA ALI KHAN**

   This work edited by Nyla Ali Khan is a collection of essays that describes the difficulties faced by the region most affected by the rivalry of India and Pakistan. It brings to light the resilience of the people of the State as well as the irony whereby in a State once known for its religious harmony and mutual respect for each religion, religion itself is the key to a strategy of divide and rule. This collection ranges from essays relating to the religious history and traditions of Kashmir to the politics that has made Kashmir a battleground for India and Pakistan.

3. **PARADISE AT WAR BY RADHA KUMAR**

   This work details the political history of Kashmir beginning from the description of Kashmir as "sacred geography" in the Puranas and to the modern day Kashmir while describing all the major developments that has taken place in relation to the region. Describing the problems that plague the region and their various causes, the book suggests possible lasting solutions to such present day problems in Kashmir. His analysis ranges from the growth of nationalism in Kashmir and the circumstances of accession to India to the Simla agreement to the growth of insurgency and transformation of insurgency into Islamist jihad to the Lahore agreement and it's undoing after the Kargil War and the problems caused by the impact of 9/11, the application of AFSPA among others. The author in her conclusions highlight that lasting peace in the region can only be made if all the major stakeholders including international actors, the Union and the populace work together.

4. **KASHMIR: A DISPUTED LEGACY 1846-1990 BY ALASTAIR LAMB**

This work analyses the origin of the Kashmir dispute from the time of creation of the State through the sale of Kashmir to the Raja of Jammu by the Britishers till 1990 when India and Pakistan were at the brink of yet another armed conflict for the control and dominion of this region. Elaborating on the history of the Nothern Frontier the author describes how the same may have influenced British policy in Jammu and Kashmir in 1947, which affected the policies of India towards the State. It contains details regarding the constitutional history of the region from October 1947 and also describes the various key events that have occurred in the region from UN intervention to the rise of insurgency.

5. **HINDU RULERS, MUSLIM SUBJECTS BY MRIDU RAI**

This book examines the modern Muslim identity of Kashmir and the manner in which such religious identities can be brought about by politics. The author traces the origins of the present political problems of Kashmir to the time when Kashmir came to be ruled by the Hindu Dogra Kings supported by British imperialism. The author states that the sovereignty of such a Hindu ruler over a subject Muslim populace left out of the power sharing arrangements is the cause of the central political issue involving modern day Kashmir and the creation of the identity of the Kashmiri Muslims.

L. PUBLIC LAW ON OTHER BLOGS

~ *Compiled by*: Rashmi Raghavan, IV B.A. LL.B.

USA

1) Every Democrat in the Senate supports a Constitutional Amendment that would radically curtail Freedom of Speech
https://reason.com/2019/08/12/every-democrat-in-the-senate-supports-a-constitutional-amendment-that-would-radically-curtail-freedom-of-speech/

2) The End of the Free Internet is near
https://reason.com/2019/07/12/the-end-of-the-free-internet-is-near/

3) The Dangers of prosecuting Hate Crimes in an unjust system
https://www.acslaw.org/expertforum/the-dangers-of-prosecuting-hate-crimes-in-an-unjust-system/

INDIA

4) Bifurcation and will of the People
https://www.livelaw.in/columns/bifurcation-and-will-of-the-people-147094

5) What the Karnataka controversy tells us about our parliamentary democracy
https://indconlawphil.wordpress.com/2019/07/16/judicial-supremacy-amid-the-breakdown-of-constitutional-conventions-what-the-karnataka-controversy-tells-us-about-our-parliamentary-democracy/

6) The Supreme Court's problematic order in the Karnataka case
https://indconlawphil.wordpress.com/2019/07/17/postscript-the-supreme-courts-problematic-order-in-the-karnataka-case/

7) The Supreme Court on Voice samples: Part I
https://www.livelaw.in/columns/supreme-court-on-mandatory-voice-samples-146932

8) The Supreme Court on Voice samples: Part II
https://www.livelaw.in/columns/supreme-court-on-mandatory-voice-samples-147013

9) Why Criminalization of Triple Talaq is uncalled for
https://www.livelaw.in/columns/why-criminalization-of-triple-talaq-is-uncalled-for-146897

10) Viability of Pre-Nuptial agreements
https://www.livelaw.in/columns/viability-of-pre-nuptial-agreements-in-india-146762

11) POCSO Amendment and child sex abuse
https://www.livelaw.in/columns/pocso-amendment-child-sex-abuse-deterrance-146682

12) The Akshay Kumar Citizenship Row
https://www.livelaw.in/columns/akshay-kumar-citizenship-row-146652

M. MESMERIZING QUOTES

~ *Compiled by*: Ajay Jaybhay, III B.A. LL.B.

Although territorial integrity is a reasonable principle of international stability, it is not an immutable norm of international relations and must be balanced against other principles, including human rights and self-determination, which are also conditions for international stability."

-Alfred de Zayas

"There is consensus among States, judges of international tribunals and professors of international law that self-determination is not only a principle but also a right that has achieved the status of jus cogens."

-Graham Watson

"In its essence, the right of self determination means individuals and peoples should be in control of their destinies and should be able to live out their identities, whether within the boundaries of existing states or through independence."

-Alfred de Zayas

"Politicians love euphemisms. When they tamper with democracy, they call it 'Socialist Democracy'. When they tamper withfederalism, they call it 'Cooperative Federalism'."

-Retro Grade

"Federalism isn't about states' rights. It's about dividing power to better protect individual liberty."

-Elizabeth Price Foley

N. Contact Us

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