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Avinash Kumar



Avinash Kumar has completed his Ph.D. in International Investment Law from the Dept. of Law & Governance, Central University of South Bihar. His research work is on "International Investment Agreement and State's right to regulate Foreign Investment." He qualified UGC-NET and has been selected for the prestigious ICSSR Doctoral Fellowship. He is an alumnus of the Faculty of Law, University of Delhi. Formerly he has been elected as Students Union President of Law Centre-1, University of Delhi. Moreover, he completed his LL.M. from the University of Delhi (2014-16), dissertation on "Cross-border Merger & Acquisition"; LL.B. from the University of Delhi (2011-14), and B.A. (Hons.) from Maharaja Agrasen College, University of Delhi. He has also obtained P.G. Diploma in IPR from the Indian Society of International Law, New Delhi. He has qualified UGC – NET examination and has been awarded ICSSR – Doctoral Fellowship. He has published six-plus articles and presented 9 plus papers in national and international seminars/conferences. He participated in several workshops on research methodology and teaching and learning.

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SPECIAL TREATMENT: EXPLORING ASPECTS OF ASYMMETRICAL FEDERALISM IN INDIA AND ITS RELEVANCE

AUTHORED BY - PALAK SHARMA

Fourth Year Law Student

O.P. Jindal Global University, Sonapat

Abstract

This paper explores the concept of asymmetric federalism within the Indian constitutional framework, examining both vertical and horizontal dimensions. Vertical asymmetry is demonstrated through articles such as 3, 352, and 356, which grant central authorities substantial power over states, while horizontal asymmetry is illustrated by disparities in the distribution of power and resources among different states and union territories. The paper delves into specific provisions, including Articles 371 and 370, which grant special status to certain states like Jammu & Kashmir and the northeastern states, highlighting how such asymmetry accommodates regional diversity. The judiciary's role in balancing asymmetry and upholding the Constitution's core values is also critically analyzed, particularly in landmark cases involving the reorganization of Jammu & Kashmir and the autonomy of Union Territories. In conclusion, while asymmetric federalism is crucial to managing India's diversity, it requires careful implementation to prevent undermining the fundamental democratic principles of equality and justice.

Keywords: Asymmetric Federalism, Vertical Asymmetry, Horizontal Asymmetry, Indian Constitution, Special Status, Judiciary, Article 370, Article 371, Jammu & Kashmir, Union Territories, Federalism, Supreme Court, Diversity, Autonomy

INTRODUCTION

“According to KC Wheare, the father of federal theories, federalism is the method of dividing the powers so that the central and regional governments are each within the sphere co-ordinate and independent.”¹This demonstrates that the power division shall be equal in dual government. They co-ordinate but are autonomous independently. A constitution may incorporate federal features along with unitary features. This is what makes India a quasi-federal country. The phrase “Federation of India” was first used in “Government of India Act of 1835”². But following the adoption of the constitution of India, the supreme court also noted that India is a loosely federalized nation. In contrast to American federation this is founded on the principle of Indestructible union of indestructible states whereas India is indestructible union of destructible states. This gives a centralized aspect of federal nature in India.

The other side of our constitution has highlighted asymmetrical federalism. It is a federation in which powers are divided among its member states asymmetrically. There happens to be autonomy nature of enjoyment amongst various states despite having the same constitutional status. India has several constituents with desperate demands because of racial, linguistic, cultural or religious distinctions and that is why asymmetric federalism system is employed. This asymmetry is often referred to as special treatment being provided to various states. This widely occurs at vertical as well as horizontal arrangements.

VERTICAL ASYMMETRY

1. “**ARTICLE 3**: The power of the Parliament to alter state and union territory boundaries is discussed in this article. It lays out how to go about doing that. This demonstrates the increased power of the central government and establishes India as an indestructible union of destructible states. Note that the state cannot change the same aspect on its own. Again, the governor of such a state's view is considered, but it is not legally binding”.³
2. “**ARTICLE 352 AND 356**: These articles discuss imposing the president's power in a state and proclaiming a state of emergency. These extraordinary constitutional

¹ Chhavi Priya, ‘Centre State Relations’ (Legal Service India) <[Centre State Relations \(legalserviceindia.com\)](http://legalserviceindia.com)> accessed 27 October 2023

² The Government of India Act 1835

³ The Constitution of India, a3

measures aim to resolve crises or malfunctions in the constitutional mechanism.”⁴ The state is governed by the federal government, and the state legislative assembly may be suspended or abolished... such powers are subject to restrictions which were held in “SR Bommai v Union of India.”⁵ It was also stated that such presidential rule comes under the purview of judicial review of it being mala fide.

For example, Central's too centralized management of the COVID-19 emergency reaction and subsequent vaccination efforts, which are currently adhering to norms based on recommendations by the Apex Court.

3. “**ARTICLE 258**- It grants the parliament the authority to pass laws on subjects that are not expressly the province of the states or that are under the joint authority of the union and the states. These residual powers ensure that the central government can pass laws on matters that were not taken into account when the constitution was written or that benefit the interests of the nation as a whole.”⁶
4. **FUNDS**: “The Centre pays 90% of the cash necessary under a centrally sponsored plan for special category states, compared to 60% for regular category states, with the remaining amounts contributed by state governments.”⁷

HORIZONTAL SYMMETRY:

This asymmetry takes place amongst states. Following are taken into account:

1. “SCHEDULE 4

The provisions of the Indian Constitution pertaining to the distribution of Rajya Sabha seats among States and Union Territories are found in the fourth Schedule”⁸

In the council of states, Uttar Pradesh, for example, has 31 seats, whereas Arunachal Pradesh just has one. *The 1971 census served as a major basis for the Rajya Sabha seat distribution as outlined in schedule 4.* When population dynamics shift over

⁴ The Constitution of India, a352

The Constitution of India, a356

⁵ S.R. Bommai v. Union of India , 1994 (3) SCC 1

⁶ The Constitution of India, a258

⁷ M. Lakshmikanth, ‘The Indian federal structure is largely symmetric albeit with some asymmetric features. Elaborate. Do you think the Constitutional Asymmetry in Indian Federalism has been able to accommodate diversity in India?’ (Insights IAS, 8 January 2022) The Indian federal structure is largely symmetric albeit with some asymmetric features. Elaborate. Do you think the Constitutional Asymmetry in Indian Federalism has been able to accommodate diversity in India? - INSIGHTSIAS (insightsonindia.com)> accessed 27 October 2023

⁸ The Constitution of India, Schedule 4

time, this may result in disparities in representation. This means that both an ambiguous and an asymmetric one exist. Because of this, states with slower population growth may be overrepresented while those with faster growth may be underrepresented. The static allotment does not take shifting demographics into consideration.

As a result, it's important to evaluate and modify the Rajya Sabha seat distribution from time to time to make sure it more accurately reflects the political and demographic realities of the present.

2. **“Part VIII:** This includes provisions pertaining to Union territories, whose federal structures differ from those of the states.”⁹ Although there may be a number of reasons why this structure is required, it does call into question the democratic concepts of representation. While some UTs have legislatures and enjoy more autonomy than others, some do not.

For instance:

- Delhi, the National Capital Territory, is governed by a separate legislature. The Delhi Legislative Assembly, the Indian legislature, and the Indian government both provide the special status. With the exception of land, police, and public order, Delhi has the authority to enact laws on any topic on the state list. *“The Indian Constitution's 69th amendment, which was passed in 1991, made this special arrangement possible. However, this does not imply that the lieutenant governor is the only person with authority in this regard and that the government cannot act.”*¹⁰ The next case was held in the same manner:

“Government of NCT of Delhi v Union of India:

In 2015, Najeer Jung, the LT of Delhi, declared that he was not obligated to provide the CMO with any information pertaining to law enforcement, land, or public order. The Home Ministry backed this as well, stating that the state Anti Corruption Bureau Police Station in Delhi lacks the authority to look into the aforementioned issue involving central government workers. The Indian Supreme Court ruled that the Lieutenant Governor of the National Capital

⁹ The Constitution of India, Part VIII

¹⁰ The Constitution (Sixty-ninth Amendment) Act 1991

Territory of Delhi is obligated to seek guidance and assistance from the elected Delhi government. In ruling this, the Court noted that true power in a democracy must go to the elected representatives and that the Lieutenant Governor cannot meddle in every decision made by the Delhi Government.”¹¹

“Recently, the promulgation of an ordinance to amend the *Government of National Capital Territory of Delhi Act(NCTD) 1991* by Union government has raised concerns about federalism, democracy, bureaucratic accountability, executive law making and judicial review. As per the Delhi Ordinance Bill, it proposes that actions like suspensions and inquiries of the national capital's officials would be under the control of the center.

The Bill also gives the L-G the authority to act alone in a number of areas, including those that the National Capital Civil Services Authority recommends and the calling, proroguing, and dissolution of the Delhi Legislative Assembly. The National Capital Civil Services authority, which is made up of the Delhi chief secretary, chief minister, and principal home secretary, is established under the bill. The authority will advise the Lieutenant Governor (L-G) on official postings and transfers, as well as disciplinary actions. This action overturned the Supreme Court ruling that acknowledged Delhi's elected government's legislative and executive authority over services.”¹²

Such ordinance threatens the independence of the court in addition to being inconsistent with the asymmetrical principle. The National Capital Civil Service Authority's establishment challenges the accepted standards of bureaucratic accountability by granting appointed bureaucrats the power to overturn an elected Chief Minister. The democratic values are undermined by this concentration of power in the hands of bureaucrats, which also lessens the authority of elected officials. By restricting the authority and capacity for decision-making of Delhi's elected government, it goes against federalism. By instituting a system that allows Union-appointed officials and the Lieutenant Governor to override the decisions made by the Chief Minister and the elected government, it weakens the federal structure. So encouraging vertical

¹¹ Government of NCT of Delhi v. Union of India (2018) 8 SCC 501

¹² Government of National Capital Territory of Delhi (NCTD) 1991

Asymmetric Federalism: Examining the Impact of the Delhi Ordinance' (Civils daily) <Asymmetric Federalism: Examining the Impact of the Delhi Ordinance - Civildaily> accessed 27 October 2023

asymmetries in federalism. By giving unelected individuals considerable influence over elected representatives, it threatens democracy by undermining representative government principles and popular will..

This would promote horizontal asymmetry in federal sense because administration of all other union territories is at a very different stance from that of Delhi.

- “Pondicherry (Pondicherry, Mahe, Yanam and Karaikal): It is composed of the four aforementioned areas and has its own legislative. It has a council of ministers and a legislative assembly. Pondicherry, like a full-fledged state, also has the authority to enact laws on a variety of matters.”¹³ Similar to the other states of India, the aforementioned Union Territories with their own legislatures have some autonomy in enacting laws and running their respective governments. The President of India has direct administration over other Union territories, which are governed by the Central Government. This is an issue of dual imbalance. One, although though Chandigarh is the capital of Punjab and Haryana, the union territories are still managed by the federal government. The center now has more power as a result. Unlike Delhi NCT and Pondicherry, they do not have a legislative assembly of their own. This results in an additional layer of asymmetry whereby the other UTs are positioned inferiorly or at a disadvantage..
3. **“SCHEDULE 5 AND SCHEDULE 6”:** The Constitution's fifth and sixth schedules provide for specific provisions for governance in regions inhabited by scheduled tribes or indigenous populations.

The union administration, represented by the governor, has a little more authority to act in the interest of scheduled tribes' socioeconomic development under the fifth schedule, which is in effect in majority tribal districts outside of the northeast. A tribe's advisory council must be established in every state with a scheduled region in order to provide advice on issues relating to the advancement and welfare of scheduled tribes, as well as any other subjects the governor may refer them to. The governor has the authority to impose regulations on the sale of land by scheduled tribes and the activities of money lenders who provide loans to scheduled tribe members, as well as to declare that certain

¹³ The Constitution (Fourteenth Amendment) Act 1962

acts of Parliament or the applicable state legislature are not to be applied in scheduled areas. In sixth schedule areas of north east more extensive power of self-governance were granted to autonomous district councils.

- Fifth schedule (tribal within Indian mainland) Maharashtra, Gujarat, Rajasthan, Himachal Pradesh, Jharkhand, Orissa, Madhya Pradesh, Chhattisgarh, Andhra Pradesh, Telangana. Sixth Schedule (Tribal in the North East) (Assam – Meghalaya – Tripura and Mizoram).”¹⁴

One criticism of Schedule 6 is that it only applies to some tribal territories, leaving out other tribal places around the nation, which might result in differences in the protection and self-governance of indigenous groups. This independence might make progress more difficult. The well-being of tribal groups depends on the careful maintenance of the right balance between autonomy and development. The Honorable Supreme Court acknowledged that tribal areas created under the Sixth Schedule are governed "not by the relevant provisions of the Constitution which apply to other constituent States of the Union of India but by the provisions contained in the Sixth Schedule" in the case of "**Ewanlangki-E-Rymbai v. Jaintia Hills District Council**"¹⁵The Court acknowledged that the Schedule was not separate from the Indian Constitution, even if it did refer to it as a self-contained law. The previous year, in "**Pu Myllai Hlychho v. State of Mizoram**"¹⁶, the appellants had argued that the legislative background of the Sixth Schedule and the consideration that had gone into its creation acted as a "constitution within the constitution.". The Honorable Supreme Court dismissed this claim, ruling that legislative history was insufficient evidence to support a finding that the Sixth Schedule may be visually separated from the rest of the Constitution. This indicates that the legal pluralism argument was rejected in spite of the varied legislative authorities. Rather, it was discovered that the Sixth Schedule was a component of the Constitution. Therefore, it has been decided that the Indian Constitution grants states and other political areas more latitude in enacting laws, and that this latitude at most has the backing of the judiciary and at worst has the standing of an established characteristic of the text.

¹⁴ The Constitution of India, schedule 5
The Constitution of India, schedule 6

¹⁵ Ewanlangki-E-Rymbai v. Jaintia Hills District Council, 2006

¹⁶ Pu Myllai Hlychho v. State of Mizoram, 2003

“A five-judge panel of the Supreme Court of India invalidated the Governmental Order (GO) issued by the erstwhile united state of Andhra Pradesh in January 2000 in the case of **Chebrolu Leela Prasad Rao v. State of Andhra Pradesh**. The contested GO granted applicants from Scheduled Tribes (ST) 100% quota for teaching positions in Andhra Pradesh and Telangana's Scheduled Areas. The Court held unanimously that the fundamental rights outlined in Part III of the Indian Constitution apply to the governor's authority under the Fifth Schedule of the Indian Constitution. In light of these violations of Articles 14, 15(1), and 16 of the Constitution, it was decided that the 100% reserve was unconstitutional.”¹⁷ The judgment is legally unsound. "The granting of differential rights to certain federal sub-units, and the recognition thereby imparted for distinct, territorially concentrated ethnic or national groups is Louise Tillin's definition of asymmetrical federalism.”¹⁸ The idea of asymmetrical federalism has been woven into the scheme of the Indian Constitution.

In evaluating the G.O. in this case, the Court follows the fundamental principle of equality with regard to reservations as outlined in Articles 14 through 16 of the Constitution and decisions like *‘Indra Sawhney’*¹⁹ and *‘N.M. Thomas’*²⁰. Asymmetrical clauses such as the Fifth Schedule permit the implementation of unique governance measures that deviate from the traditional notions of equality.

4. **ARTICLE 371 TO 371 J:** The "special provisions" that apply to certain States primarily give the Governors the authority to carry out certain duties. These states include Goa, Karnataka, Assam, Mizoram, Andhra Pradesh, Nagaland, Sikkim, Maharashtra, Gujarat, Manipur, Arunachal Pradesh, and Goa.”²¹ All of them have one thing in common: whenever governors are required to carry out particular duties, their prerogative to act independently supersedes the appropriate Council of Ministers' consultation procedure.

According to Article 371 of the Indian Constitution, the Governor of Maharashtra is tasked with creating distinct development boards for Vidarbha, Marathwada, and the

¹⁷ Chebrolu Leela Prasad Rao v. State of Andhra Pradesh ,2020 SCC Online SC 383

¹⁸ [https://lawandotherthings.com/asymmetrical-federalism-and-the-100-reservation-judgment/>](https://lawandotherthings.com/asymmetrical-federalism-and-the-100-reservation-judgment/) accessed 27 October 2023

¹⁹ Indra Sawhney v. Union of India AIR 1993 SC 477

²⁰ State of Kerela v. N.M. Thomas 1976 SCR (1) 906

²¹ The Constitution of India, a371-a371 j

entire State, while the Governor of Gujarat is tasked with doing the same for Saurashtra, Kutch, and the remainder of Gujarat.

“A 371 A gives the governor of Nagaland special responsibility for maintaining law and order in the state for as long as, in his opinion, internal disturbances in the Naga Hills – Tuesang area immediately prior to the formation of that state continue.”²²

Similarly, the assent of the respective legislature is required in Nagaland and Mizoram if the law pertains to their religious and social practises, etc. The North East states are distinct from the rest of India, which explains why they are asymmetrical. India and these northeastern states are connected by a narrow stretch of land known as Siliguri.

In contrast to the rest of India, these states were not under direct British rule during the colonial era, and the center's relationship with them has always been less institutionalized since independence. The Centre has traditionally based its policies specifically on the border ties of these states with its bordering nations, including China, Burma, and Bangladesh. The fact that these states have such small populations overall is another factor. *“Dr. B.R. Ambedkar advocated this structure as well, arguing that their distinct customs and traditions called for a particular kind of plan to preserve their way of life.”*²³

The foundation of asymmetrical federalism for the North-East is the preservation of distinct cultures within a democratic framework, in contrast to Article 370, which was perceived as a transitory measure. However, the Naga political groups and the Indian government engaged in deadly confrontation as a result of the insurgency and their quest for self-determination. *“However, Sonam Wangchuk of Ladakh, which regards itself as a tribal area, requested Sixth Schedule Protection in order to safeguard the distinctive customs and way of life of the Ladakhi people.”*²⁴ The current state of affairs in Ladakh serves as a stark reminder of how difficult it is to have India's borderland minority recognized politically. The future of the area is still unclear, particularly in

²² Asymmetric Federalism in India: With special Reference to North East States and Jammu and Kashmir' (Law Bhoomi, 5 April 2021) <Asymmetric Federalism in India: With special Reference to North East States and Jammu and Kashmir (lawbhoomi.com)> accessed 27 October 2023

²³ Asymmetric Federalism in India: With special Reference to North East States and Jammu and Kashmir' (Law Bhoomi, 5 April 2021) <Asymmetric Federalism in India: With special Reference to North East States and Jammu and Kashmir (lawbhoomi.com)> accessed 27 October 2023

Dewangi Sharma, 'Asymmetric Federalism and Negotiated Sovereignty in Nagaland' (2021) Vol XVII <Asymmetric Federalism and Negotiated Sovereignty in Nagaland – ILS Centre for Public Law (wordpress.com)> accessed 27 October 2023

²⁴ Mabel Gergan, 'Tribal Territoriality, Asymmetric Federalism, and Majoritarianism in India's Northern Himalayan Borderlands' (Society for Cultural Anthropology, 16 March 2021) <Tribal Territoriality, Asymmetric Federalism, and Majoritarianism in India's Northern Himalayan Borderlands | Society for Cultural Anthropology (culanth.org)> accessed 27 October 2023

light of the geopolitical tensions between China and India, and the younger Ladakhi population is becoming more critical.

5. **ARTICLE 370**

“Article 370 of the Indian Constitution gave the state of Jammu and Kashmir (J&K) in India a temporary special status. Three domains related to the state of Jammu and Kashmir were given over to the Indian government, as stated in the Instrument of Accession of 1947: communications, defense, and foreign affairs.”²⁵ The President may choose whether sections of the Indian Constitution, with or without change, apply to Jammu and Kashmir under Article 370. In addition, the Indian Parliament need the consent of the Jammu & Kashmir administration before passing legislation in the state, with the exception of those pertaining to communications, defence, foreign affairs, and finance. Legal plurality results from this.

“One may argue that because Article 370 restricts how the state can implement constitutional provisions, it undermines some of the fundamental elements of the document. However, the term "basic features" refers to overarching concepts found throughout the Constitution rather than particular articles, such as democracy, republicanism, and secularism. As a result, Article 370 preserves the essential elements of the Constitution while limiting the application of some of its provisions.”²⁶

Chief Justice of India D.Y. Chandrachud said :

"Article 35A essentially stripped non-residents of their rights and granted special rights and privileges to permanent residents (including those who were hereditary State subjects as in 1927, when J&K was a princely state before joining the Indian Dominion in 1947)."²⁷ These rights included the freedom to own property, the right to equal job opportunities with the state, and the freedom to live and work in Jammu and Kashmir.

J and K enjoyed autonomy up to abrogation, including having their own constitutions, although other union territories or states with special status did not receive this privilege. In terms of states with special and non-special status, there existed an imbalance.

²⁵ The Constitution of India a370

²⁶ Avani Agarwal, ‘Defending Special Status for Jammu and Kashmir – Is the Constitution the Bane or the Boon?’ (The RMLNLU Law Review Blog, 22 February 2019) <Defending Special Status for Jammu and Kashmir – Is the Constitution the Bane or the Boon? – The RMLNLU Law Review Blog> accessed 27 October 2023

²⁷ The Constitution of India, a35 A

Abrogation of Article 370 and Article 35 A

- “On August 5, 2019, the Indian government, in especially the ruling Bharatiya Janata Party (BJP) and Prime Minister Narendra Modi, approved this historic decision. Accordingly, the Constitution (Application to Jammu & Kashmir) Order, 2019, was issued by the President to supersede the 1954 order related to Article 370.
- The Jammu and Kashmir (Reorganisation) Act 2019 was also passed, granting Ladakh Union Territory status without a Legislative Assembly and creating a Union territory with a Legislative Assembly for Jammu & Kashmir.”²⁸

Contentions: There is a contention that was brought up in the case of “**Mohd. Akbar Lone v. Union of India, (writ civil)**”²⁹. The Jammu and Kashmir (reorganization) Act, 2019 was contended to be constitutionally invalid which being ultra vires with article there was a retrogression of state into a union territory whereas principle of non-retrogression is supported in “Navtej Johar v. Union of India”³⁰. The state should not take measures or steps that deliberately lead to retrogression on the enjoyment of rights either under constitution or otherwise. In my opinion, this contention is valid being said that even if centre has power over demarcation of states and union territory but it shall not use such power to degrade the status of the state to union territory. This would result into discretionary asymmetrical federalism in favor of center.

Role of judiciary:

As time has gone on, the Court has not intervened to defend Jammu & Kashmir's distinct constitutional settlement from political interference, but rather has assisted the President in strengthening his position as defender of the spirit of autonomy. That is, it didn't let asymmetrical federalism to exceed at discretionary level which can be understood by the case laws follows:

1. The bench decided in “**Prem Nath Kaul V state of Jammu and Kashmir AIR 1959 SC 749**”³¹ that the "final approval by the said Constituent Assembly is made conditional on the continuance of the exercise of powers conferred on Parliament and the President by the relevant temporary provisions of Article 370(1)."

²⁸ The Jammu and Kashmir (Reorganisation) Act 2019

²⁹ Mohd. Akbar Lone v. Union of India Writ Petition (civil)

³⁰ Navtej Johar v. Union of India 2018 INSC 790

³¹ Prem Nath Kaul v. State of Jammu and Kashmir AIR 1959 SC 749

2. “In **Sampat Prakash v. State of Jammu and Kashmir, AIR 1970 SC 1118**”³² the Supreme Court rejected the argument that ‘modifications made by the President in exercise of powers under the Article, subsequent to the enforcement of the Constitution of the State, would be without the authority of law.’
3. “The petitioner in **Mohd. Maqbool Damnoo v. State of Jammu & Kashmir**”³³, **(1972) 1 SCC 536**, contested the constitutionality of the Sardar-i-riyasat's replacement with a governor. The Supreme Court ruled that the Governor, as the Sardar-iriyasat's heir, has the authority to approve any changes made to Article 370 with the support of the State Government.

As a result, the court's intervention increased the center's authority while denying Jammu and Kashmir any discretionary autonomy because of its unique position.

CONCLUSION

The whole research study has examined asymmetric federalism in relation to India from both a vertical and horizontal perspective. Furthermore, it is noted that certain states do need special status, but it is also clear that granting special status resulted in the other states being viewed as inferior. In India, a quasi-asymmetrical federal nation, the judiciary stepped in to meddle in power dynamics whenever discretionary authority was utilized. In order to accommodate great variety, asymmetrical federalism is required, but it must preserve the fundamental elements of the constitution. Although prejudice still exists in India, it will be more difficult to carry out as long as the fundamental framework remains unaltered and an independent judiciary is available to intervene.

³² Sampat Prakash v. State of Jammu and Kashmir AIR 1970 SC 1118

³³ Mohd. Maqbool Damnoo v. State of Jammu and Kashmir (1972) 1 SCC 536