

**ROLE OF CONTEXTUALISM IN CONSTITUTIONAL
INTERPRETATION: THE EXPANDING CIRCLES FROM AK
GOPALAN TO IN RE ARTICLE 370**

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Reading the text with context integrates the Constitution into the social process and people's expectations. Such a reading has several layers or expanding circles. It is a realistic and comprehensive approach. It brings to the process of constitutional interpretation, the arguments based on history, the intention of constitution makers, purpose, philosophy and competence for desirable social transformation. It draws support from the language of the provision under interpretation, the implications of other relevant provisions of the Constitution, and socio-economic, political and cultural factors. Comparative study of the US, Canadian and Australian experiences have established the contribution of contextualism towards expanding the scope of civil liberties, strengthening federalism and making democracy vibrant. Although the Indian Supreme Court had initially hesitated to tap all the dimensions of contextualism, and sometimes acted in response to political context as in Gopalan or ADM Jabalpur cases, the major thrust of the judicial approach has been profitably applying contextualism in constitutional interpretation. Contextualism was a major plank of judicial reasoning in Re Article 370, which helped in constitutionally integrating Jammu and Kashmir to internalise the constitutional values. The great advantage of contextualism is its flexibility and combination of methods of interpretation. However, unless the core constitutional values and objectives are centre staged in its application, the waves of political context would drift away from the constitutional jurisprudence into the wrong path. Anchoring contextualism to the basic philosophy and goal of the Constitution makes it a dependable and useful tool.

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INTRODUCTION

The idea that the interpretation of a text shall match its context is the essence of contextualism. Etymologically, the word “context” is derived from the Latin verb *texere*, “to weave”, and the related Latin verb *contexere* carries the meaning of “to weave together”, “to interweave”, “to join together” or “to compose.”² Anthropologically, context connotes an environment that surrounds a phenomenon – statement, act, or event – and attracts factors such as economic, political, religious, rural, urban, trans-national, etc., for interaction.³ Philosophically, it is crucial for determining the meaning, truth and value of statements or beliefs; it means that the meaning of any text is not fixed or absolute, but is dependent on the context in which it is expressed or interpreted.⁴ Juridical discourse on contextualism has trodden the path of enquiring into relevant fields of data from which it is able to draw inferences suitable to the issue. According to Madam Justice Wilson of the Canadian Supreme Court, “*The contextual approach attempts to bring into sharp relief the aspect of the right or freedom which is truly at stake in the case as well as the relevant aspects of any values in competition with it... [It] recognizes that a particular right or freedom may have a different value depending on the context.*”⁵ For example, in interpreting the constitutional

² SHORTER OXFORD ENGLISH DICTIONARY (Oxford University Press, 6th ed., 1933).

³ RM Diley, *The problem of Context in Social and Cultural Anthropology*, 22(4) ELSEVIER 437 (2002), <https://www.sciencedirect.com/science/article/abs/pii/S0271530902000198>; RAVINDRA JAIN, *TEXT AND CONTEXT: THE SOCIAL ANTHROPOLOGY OF TRADITION* (Institute for the Study of Human Issues, 1st ed., 1977).

⁴ Tim Black, *Contextualism*, OXFORD BIBLIOGRAPHIES, (Jun. 29, 2011), <https://www.oxfordbibliographies.com/display/document/obo-9780195396577/obo-9780195396577-0159.xml>.

⁵ *Edmonton Journal v. Alberta (Attorney General)*, [1989] S.C.J. No. 124, [1989] 2 S.C.R. 1326, The Court unanimously held that the civil litigation part of the ban, which

guarantee of equality for women, the contemporary state of women's lives shall be a primary topic for judicial consideration. In *Big M Drug Mart*,⁶ Dixon C.J. viewed that in examining the validity of a restriction, factors such as the purpose of the right or freedom in question, the larger objects of the Charter itself, the language chosen to articulate the specific right or freedom, the historical origins of the concepts enshrined and where applicable, the meaning and purpose of other specific rights and freedoms with which it is associated within the text of the Charter shall be considered.

Ratnavel Pandian J., in *Judges Appointment case II (SCARA)* has stated, “*when we give a liberal construction to a word used in a statute particularly in the Constitution, we must first of all take note of the relevant and significant context in which that word is used and then interpret that word in that context with meaningful purpose.*”⁷ According to PN Bhagwati J., “*The words used in a statute [or constitution] cannot be read in isolation; their colour and content are derived from their context and, therefore, every word in a statute must be examined in its context. The context is of great importance in the interpretation of the words used in a statute.*”⁸

The Supreme Court in the *Peerless* case viewed that in order for the textual interpretation to match the contextual, the best form of interpretation, the statute shall be read as a whole and then section by section, clause by clause, phrase by phrase, and finally word by word, and that the purpose, history and background of the law shall be duly considered.⁹ The aftermath of a constitutional amendment brings a new context, as pointed out in the *MPV*

prohibited pre-trial publication of all particulars of pleadings save the names of the parties and the general nature of the claims, was overbroad and could not be justified as a reasonable limit under s. 1.

⁶ R v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295.

⁷ Supreme Court Advocates on Record Association v. Union of India, AIR 1994 SC 268.

⁸ Sankal Chand v. Union of India (AIR 1977 SC 2328); in S R Choudhury v. State of Punjab, (2001) 7 SCC 126, it was observed, “*Constitutional provisions are required to be understood and interpreted with an object-oriented approach. A Constitution must not be construed in a narrow and pedantic sense. The words used may be general in terms but, their full import and true meaning, has to be appreciated considering the true context in which the same are used and the purpose which they seek to achieve.*”

⁹ Reserve Bank of India v. Peerless General Finance and Investment Co. Ltd., AIR 1987 SC 1023 ¶ 33.

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Sundararamier case.¹⁰ VR Krishna Iyer J. gathers support from Holme's thinking that law's life is experience rather than logic,¹¹ to insist on construing the constitutional provisions by taking into consideration the historical background, the felt necessities of the time, and the balancing of the conflicting interests.¹²

Context has larger meanings bringing within expanding concentric circles. The specific factual context of the case, the legal context of the statute or the Constitution (linguistic context), the historical background of the statute, the cultural environment,¹³ the purpose of the Constitution and the impugned legislation, other schemes and provisions of the Constitution and laws, a comparative study of other jurisdictions in case they are relevant and international perspective – all shall enter into the judicial process by way of providing valuable input and insight in constitutional interpretation. The contextual meaning holistically takes into account the whole surrounding context for a text, rather than focusing exclusively on particular aspects of the interpretive backdrop.¹⁴ Contextualism brings these fields into the cognizance of study on the basis of relevance and disconnects them on the ground of irrelevance. Distinguishing the relevant from the irrelevant is an art of the legal profession that helps in contextualisation.

THEORETICAL ASPECTS

Contextualism relies on law-society interaction in a larger sense. Sociological, economic, realist, critical, feminist, and racial schools of law have argued in diverse ways for bringing inputs of society, economy, and

¹⁰ M. P. V. Sundaramier and Co. v State of Andhra Pradesh, AIR 1958 SC 468.

¹¹ OLIVER WENDEL HOLMES, THE COMMON LAW 1 (Little Brown and co., 1st ed., 1861).

¹² State of Kerala v. N M Thomas, AIR 1976 SC 490, ¶ 63.

¹³ REED DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 110 (Little Brown & co., 2nd ed., 1975), contextual interpretation can involve “the totality of relevant factors in the general cultural environment external to the specific language being interpreted that are shared by the users of the language in the particular speech community and taken account of by the particular communication.”

¹⁴ Jonathan Crowe, *The Role of Contextual Meaning in Judicial Interpretation*, 41 FED. L. REV. 417, 422 (2013).

fields of suppression of the vulnerable in the course of determining any legal issues or formulating legal policies.¹⁵ Shalin Sugunasiri points out the legal sceptic's view that the judiciary is neither constrained by legislation nor by precedent, but acts as a purveyor of those political interests that align with their own.¹⁶ They act with what G Leyh calls a hermeneutic insight which means that all human understanding is historically and temporally conditioned, because of which interpretation of the legal text needs to be done in light of contemporary practices, interests and problems.¹⁷ Sugunasiri states that contextualist judges recognize that meanings of words, including legal words, are but conventions of a community of speakers that are contingent and contestable at all points in time.¹⁸ They consider the language of the text, surrounding linguistic context, history, jurisprudential context as gleaned from case law and commentaries, possible impact upon parties to the case and potential impact upon the society at large.¹⁹ This necessitates a dialogical process of decision-making. Linguistic analysis brings to the surface the cultural underpinnings. Politico-legal discourses enlarge the judicial mind. Self-discipline and exposure to the broad purpose of the Constitution and its values provide parameters for judicial accountability and constraints. Sugunasiri remarks that contextualism can be proceeded with by jurists through humility, honesty, analytical clarity, and corrigibility rather than by obscuring life's (and law's) indeterminacies.²⁰ Colleen Sheppard notices that contextualism, as exposed by Justice Bertha Wilson, anchors to pragmatism and gathers from factors that render any section of society vulnerable.²¹ According to David Kaiser, "*Contextualism reveals the problems of trying to distinguish what meanings are 'inside' or 'outside' the face of the text. What a text means depends on its context, and context necessarily includes information "outside"*

¹⁵ See RWM DIAS, JURISPRUDENCE (Butterworths, 5th Ed., 1985); WAYNE MORRISON, JURISPRUDENCE: FROM THE GREEKS TO POST-MODERNISM (Cavendish Publishing Co, London, Special Indian Edition, 2011).

¹⁶ Shalin Sugunasiri, *Contextualism: The Supreme Court's New Standard of Judicial Analysis and Accountability*, 22(1) DALHOUSIE L. J. 126, 167 (1999).

¹⁷ *Legal Education and the Public Life* in G. LEYH, ED., LEGAL HERMENEUTICS: HISTORY, THEORY, AND PRACTICE 283-84 (University of California Press, 1st ed., 1992).

¹⁸ SUGUNASIRI, *supra* note 16, at 17.

¹⁹ *Id.*

²⁰ *Id.* at 182.

²¹ Colleen Sheppard, *Feminist Pragmatism in the Work of Justice Bertha Wilson*, 41 SUP. CT. L. REV.: OSOODE'S ANNUAL CONSTITUTIONAL CASES CONFERENCE 83, (2008).

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*the four corners of the text. In fact, even instances of “direct naming” presuppose a context outside the face of the text.”*²² Michele Zezza argues that interaction between past context and present context, application of external contextual conditions on interpretation, and semantic holism guides the judicial discretion in dealing with intentional vagueness in constitutional provisions.²³

Siddharth makes a critical analysis of contextualism as perceived and practised in India.²⁴ In the background of indeterminacy and fluidity of language structure in which law is couched, he identifies contextualism as a tool for a complete analysis of our life as a phenomenon to improve the means of justice. He states, “... *our interpretations of our contexts is nothing but superimposition of an imagined structure on them that helps us define our bearings in a better and more functional way. The idea of interpretation then is no more a matter of discernment of the inherent.*”²⁵ The empirical factors of society, culture, language, tradition, etc., facilitate contextual inferences. The truth is not absolute but has relativity that varies with context.

He views the truth as the end result of the dialogical pursuit within the society where a constant exchange exists amongst its members. Hence, the probe is not for absolute universal value but for comprehension of relativity and a fair proposition satisfactorily workable in a context. Still, some of the constant and stable values based on experiences of life have to be built on the basis of contextual strength. Human inclination for family, community life, and enduring association makes it imperative that the permanent social constructs shape the identity of the political society and the system of good governance which shall be safeguarded for future generations. Siddharth asks ‘*what*’ and ‘*whom*’ questions to trace the basic

²² David Aram Kaiser, *Entering onto the Path of Inference: Textualism and Contextualism in the Bruton Trilogy*, 44 U.S.F. L. REV. 95, 119 (2009).

²³ Micele Zezza, *The Contextual Dependence in the Interpretation of Constitutional Rights: An Analysis from the Point of View of the Post-Neopositivist Epistemology*, 18 AGE OF HUM. RTS. J., 257 (2022).

²⁴ Siddharth, *Contextual Interpretation and Constitutional Variables*, 1 NUJS L. REV. 517 (2008).

²⁵ *Id.* at 519.

structure theory in the purposive character of the grand Constitution,²⁶ and argues for the application of harmonious construction of Part III and Part IV of the Constitution.

Some of the inferences drawn pertaining to the application of contextualism in the domain of statutory interpretation may be referred to here as they are likely to provide some experiential insights. Jeffrey Barnes²⁷ lists such inferences that the Australian High Court evolved: (i) contextualism is essential and not optional, to be applied in all cases comprehensively without leaving any relevant factor from consideration;²⁸ (ii) context is layered and may be discretely or sequentially considered;²⁹ (iii) contextualism requires close attention to the text;³⁰ (iv) contextual material shall be critically analysed before giving any weight.³¹ On the other hand, he points out some of the limitations of contextualism: (a) contextualism cannot substitute textualism; (b) purposive interpretation better reflects the context; (c) contextualism may not reflect the intention of law-makers; (d) contextualism does not consider individual judicial philosophies.

Some more theoretical inputs for reinforcing the contextualist approach can also be identified. First, significant historical factors had posed challenges to India's new republic.³² For a country exploitatively colonised and impoverished for more than 150 years with colonial policies bereft of civil rights and welfare, recouping indigenous strength was required. The British policy of communal electorate resulted in partition, which took place along with communal riots and insecurity. A huge number of killings including the assassination of Gandhiji also took place. In the background of the integration of more than 560 princely states into the Indian Union, territorial reorganisation of states had to be done keeping in mind the

²⁶ What is to be interpreted? To whom it is to be interpreted? - are the contextual questions that lead us to basic structure theory and public interest litigation according to the author.

²⁷ Jeffrey Barnes, *Contextualism: The Modern Approaches to Statutory Interpretation*, 41(4) UNSW L. J. 1083 (2018).

²⁸ *Independent Commission Against Corruption v Cunneen*, (2015) 256 CLR 1, 28 [57]; *Minister for Immigration and Border Protection v. WZAPN*, (2015) 254 CLR 610.

²⁹ *Victims Compensation Fund Corporation v Brown*, (2003) 77 ALJR 1797.

³⁰ *Project Blue Sky v. Australian Broadcasting Corporation*, (1998) 194 CLR 355.

³¹ *Mansfield v. The Queen*, (2012) 247 CLR 86.

³² ARUN K. THIRUVENGADAM, *THE CONSTITUTION OF INDIA: A CONTEXTUAL ANALYSIS* 5 (Oxford and Portland, 1st ed., 2017).

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interests of national integrity and recognition of the rights of princes to privy purses. The merger of Kashmir with a temporary special position had to be constitutionally accommodated. All these events had an impact on the making of the Constitution by providing for strong federalism, space for preventive detention law, emergency provisions, power of Parliament to reorganise states, etc., Necessarily, constitutional interpretation cannot afford to ignore the imperatives of these contextual factors.

Second, regarding the social reality of multicultural society, caste discrimination, gender discrimination, poverty, illiteracy, and the exploitative intermediary system of land ownership, the thoughtful policy of amelioration of the vulnerable sections had to be incorporated into the Constitution. Policies of non-imposition of majority language upon linguistic minorities, recognition of regional languages, educational rights of minorities and secularism with social reforms, space for reservation to backward classes and special provision for women were the unique policies in response to the social context. For tribals, security of land, and forest, social customs, immunity from exploitations by non-tribals, social justice and self-governance were provided for their integrated development. Abolition of untouchability, bonded labour, reservation for backward classes in public employment and programmes for the development of weaker sections are specific thrusts towards social justice. Owing to the above, a distinct constitutional identity and the spirit of transformative constitutionalism have placed and shaped the Indian constitutional structure on the foundation of the wide context of social transformation. Hence, contextual interpretation has great importance and role in Indian constitutional jurisprudence.

Third, contextualism is a key factor in allowing or disallowing foreign precedents or comparative studies while drawing analogies in constitutional interpretation. When the Indian position is particularistic and unique and does not pose the potentiality of receiving alien ideas, it is appropriate to disconnect with other alternatives as they are out of context.³³

³³ Supriyo v. Union of India, 2023 SCC OnLine SC 1348.

Fourth, textual provisions of definitions start with a threshold clause “*unless the context otherwise requires*” and call for analysing contextual relevance. *Fifth*, there is an approach that contextuality is a matter that occurs in the domain of grant of power or guarantee of rights. For example, the non-availability of the commerce power to regulate the possession of guns in the school zones³⁴ or to enable women who were victims of domestic violence to appeal to federal courts³⁵ has been decided on the basis of non-contextual application of power.

Sixth, contextualism accommodates the strategies of correlating law and social transformation.³⁶ The technological developments, economic challenges, political upheavals such as war, and changes in social perceptions call for appropriate legal responses suitable to the context within the constitutional framework. Contextualism strikes a balance between continuity and change. The model of social transformation – consensus, conflict and integration – has also contextual relevance. The judiciary, because of the changed social context or its own changed composition, may be responding to constitutional issues in a different way. The overruling of *Roe v. Wade*³⁷ in *Dobb’s* case³⁸ after a period of 50 years is to be understood in this light. Changed public opinion about abortion and the recruitment of conservative judges was responsible for such an overruling.

An important feature of contextualism is that it gathers the factors of context from various sources: the language of the provision, other provisions in the same or other Articles, history and social context, structure of the Constitution, purpose and ethos. Hence, it is a primarily pluralistic method of constitutional interpretation.

COMPARATIVE STUDY OF APPLICATION OF CONTEXTUALISM

³⁴ United States v. Lopez, 514 US 549 (1995).

³⁵ United States v. Morrison, 529 US 598 (2000).

³⁶ P. ISHWARA BHAT, LAW AND SOCIAL TRANSFORMATION (Eastern Book Co, 2nd ed., 2022).

³⁷ Roe v. Wade, 410 US 113 (1973).

³⁸ Thomas E. Dobbs, State Health Officer of the Mississippi Department of Health v. Jackson Women’s Health Organization, 597 U.S. 215.

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A. CONTEXTUALISM IN THE UNITED STATES OF AMERICA

The US experience on contextual interpretation began with attention to the linguistic context of the constitutional provision. In *McCulloch v. Maryland*,³⁹ Marshall C.J. contrasted the word “*necessary*” in the Necessary and Proper Clause with the more restrictive word “*absolutely necessary*” in the Import and Export Clause, and held that the context required a liberal understanding of “*necessary*”. Further, the absence of the word “*expressly*” before the word “*delegated*” in the 10th Amendment, unlike the language of the Articles of Confederation, suggested the requirement of fair reading of the Constitution. Accordingly, federal banking was considered a necessary power of the federal government. In the *Dred Scott* case,⁴⁰ the decision that persons of African descent, whether slave or free, could not be deemed citizens and that the Congressional law that had prohibited the continuation of slavery when slaves entered into free states deprived property rights of the slave owner abridging due process protection of property under the Fifth Amendment as influenced by mere contextual procedural meaning and not influenced by the substantive principle of propriety of the law which had enlarged rights of the slaves. Laurence Tribe writes, “*The importance of textual context in interpreting constitutional language has grown with the passage of time, as amendments to the Constitution have increased the need to consider the relationships among various parts of the document’s text.*”⁴¹

Apart from linguistic context the socio-political context in which a litigation is situated also casts influence. *Hirabayashi*⁴² and *Korematsu*⁴³ cases

³⁹ 17 US (4 Wheat.) 316, 414-15 (1819). Article I, Section 8, Clause (18) states, Congress shall have power “To make all Laws which shall be *necessary and proper* for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Office thereof.” Article I Section 10 Clause (2) states, “No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be *absolutely necessary* for executing its Inspection laws...”.

⁴⁰ *Dred Scott v. Sandford*, 60 US (19 Howard) 393 (1857).

⁴¹ LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 39 (Foundation Press, 3rd ed., 2000).

⁴² *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943).

⁴³ *Korematsu v. United States*, 323 U.S. 214, 218–20 (1944).

represent a contextual interpretation of the equal protection clause and due process protection of liberty during the war, which is an aggregation of hardships. The exclusion of US nationals of Japanese origin from the western coast of America was upheld on contextual grounds. In *Korematsu*, the Supreme Court observed, “*Compulsory exclusion of large groups of citizens from their homes, except under circumstances of direst emergency and peril, is inconsistent with our basic governmental institutions. But when under conditions of modern warfare our shores are threatened by hostile forces, the power to protect must be commensurate with the threatened danger.*”⁴⁴ Sean Williamson explains that equal protection scrutiny by the courts is with reference to the context of litigation and not the context of the creation of classification.⁴⁵ According to Louis Brandeis J., “*A statute valid as to one set of facts may be invalid as to another. A statute valid when enacted may become invalid by change in the conditions to which it is applied.*”⁴⁶ Such contemporary contextual analyses persuade the judges to reason about the durational limits of affirmative action policy as in *Bollinger*.⁴⁷ Williamson refers to *Bowers*⁴⁸ and *Lawrence*⁴⁹ to point out that when a litigation’s context has undergone change due to broader social acceptance of the homosexual community and a more liberal attitude to sexuality, such changed context has an impact on judicial interpretation. He gives similar reasons for the change from *Roe*⁵⁰ to *Casey*⁵¹ in relation to pregnant women’s right to abortion vis-à-vis the state’s power of regulation. He also notices judicial caution in *Allan Bakke* case⁵² against the court being swayed by fluctuations of political power.

The difference between a “*contextual*” interpretation of a text and the contextual meaning attributed to the text has been a contentious issue in

⁴⁴ *Korematsu v. United States*, 323 U.S. 214, 219–20 (1944).

⁴⁵ Sean G. Williamson, *Contemporary Contextual Analysis: Accounting for Changed Factual Conditions under the Equal Protection Clause*, 17(2) J. CONST. L. 591-623 (2014).

⁴⁶ *Nashville, C. & St. L. Ry. v. Walters*, 294 U.S. 405, 415 (1935); see *Abie State Bank v. Weaver*, 282 U.S. 765, 772 (1931); see *Home Bldg. & Loan Ass’n v. Blaisdell*, 290 U.S. 398, 442 (1934); *United States v. Carolene Products Co.* 304 U.S. 104 (1938).

⁴⁷ *Grutter v. Bollinger* 539 U.S. 306, 326 (2003).

⁴⁸ *Bowers v. Hardwick* 478 U.S. 186 (1986).

⁴⁹ *Lawrence v. Texas*, 539 U.S. 558 (2003).

⁵⁰ *Roe v. Wade*, 410 U.S. 113 (1973).

⁵¹ *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 US 833 (1992).

⁵² *Regents of the Univ. of Cal. v. Allan Bakke*, 438 U.S. 265, 298–99 (1978).

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recent decades.⁵³ Antonin Scalia tries to resolve it by stating that the only relevant context is the original context in which the Constitution was made.⁵⁴ In a trilogy of cases – *Bruton*,⁵⁵ *Richardson*⁵⁶ and *Gray*⁵⁷ – contextualism was attempted. The Bruton Doctrine states that when a co-defendant makes a confession implicating the guilt of his partner in the murder plot, the influence of such statement upon the minds of the jury in spite of the instruction to the jury to exclude the context of confession in relation to the partner is enough to hold that the right to confrontation requirement of 6th Amendment is violated. A more textualist approach was adopted, the ambit of contextual prejudice was narrowed down and conviction was confirmed in *Richardson*. In *Gray*, *Bruton*'s contextualism was applied.

Initially, the context of civil war reconstruction was kept in mind to limit the scope of the equal protection clause in the *Slaughterhouse* case.⁵⁸ The process of incorporation of the Federal Bill of Rights upon the states under the 14th Amendment involved contextual reasoning about whether a particular right is part of the tradition of ordered liberty. After the New Deal Era, two different tests – the rationality test pertaining to economic matters, and the compelling state interest test pertaining to fundamental liberties – called for contextual analysis. Limiting the scope of separate but equal doctrine on the basis of factual context, and recognising unenumerated rights on the basis of contextual importance for freedoms also reflect contextualism. The overruling of *Roe v. Wade*⁵⁹ in *Dobb's* case⁶⁰

⁵³ William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990); David Aram Kaiser, *Entering onto the Path of Inference: Textualism and Contextualism in the Bruton Trilogy*, 44 U.S.F. L. REV. 95 (2009).

⁵⁴ Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (Princeton Univ. Press, 1st ed., 1997).

⁵⁵ *Bruton v. United States* 391 US 123 (1968).

⁵⁶ *Richardson v. Marsh* 481 US 200 (1987).

⁵⁷ *Gray v. Maryland* 523 U.S. 185 (1998).

⁵⁸ *Slaughterhouse-Cases*, 16 Wall. 83 US 36 (1873).

⁵⁹ *Roe v. Wade*, 410 U.S. 113 (1973).

⁶⁰ *Thomas E. Dobbs, State Health Officer of the Mississippi Department of Health v. Jackson Women's Health Organization*, 597 U.S. 215.

after 50 years is due to a change in judicial composition and social perception about pregnant women's right to abortion.

B. CONTEXTUALISM IN CANADA

Contextualism attained a significant place along with the incorporation of rights and freedoms under the Charter of 1982. In *Morgentaler*,⁶¹ applying the contextualist approach, Justice Wilson referred to the complex circumstances, profound social, psychological and ethical factors that influence the decision of pregnant women opting for abortion and the limited space for compelling state interest in the protection of foetuses, and recognised the right to abortion. In the *Prostitution Reference* case,⁶² she dissented on criminalising soliciting customers by prostitutes on the ground that morality is a matter of contextual variation and all immoral conducts disapproved by society are not criminalised in this imperfect world. In *Big M Drug Mart*, Dickson J. stated that rights have variable meanings which they derive not from their inherent nature, but from the broader sociopolitical contexts in which they are asserted. The issue in the *Edmonton Journal* case⁶³ was whether the publication ban on certain aspects of matrimonial and civil litigation mandated by s. 30 of Alberta's Judicature Act, R.S.A. 1980, b.c. J-1 violated s. 2(b) of the Charter. The Court ruled that the restriction was overbroad and unreasonable.

Wilson J. reasoned,

“It is my view that a right or freedom may have different meanings in different contexts. Security of the person, for example, might mean one thing when addressed to the issue of over-crowding in prisons and something quite different when addressed to the issue of noxious fumes from industrial smokestacks. It seems entirely probable that the value to be attached to it in different contexts for the purpose of balancing under s. 1 might also be different. It is for this reason that I believe that the importance of the right or freedom must be assessed in

⁶¹ R. v. Morgentaler, [1988] S.C.J. No. 1, [1988] 1 S.C.R. 30 (S.C.C.).

⁶² Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.), [1990] S.C.J. No. 52, [1990] 1 S.C.R. 1123, at 1216 (S.C.C.). *see* Sheppard, Colleen.

⁶³ *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326, 64 D.L.R. (4th) 577.

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context rather than in the abstract and that its purpose must be ascertained in context.”⁶⁴

Following this approach, in a subsequent case⁶⁵ it was observed,

“[i]t is now well established that the Charter is to be interpreted in light of the context in which it is being applied ... [and that] the historical, social and economic context in which a Charter claim arises will often be relevant in determining the meaning which ought to be given to Charter rights and is critical in determining whether limitations on those rights can be justified under s. 1.”

Sugunasiri states that contextualism as a new standard for judicial review has added to the living tree approach, purposive interpretation, postmodernism, and pragmatism.⁶⁶

C. CONTEXTUALISM IN AUSTRALIA

Enacted in 1900 and less prone to constitutional amendments due to rigid procedure, the Australian Constitution has been found amenable for contextual interpretation. Narrowly, it connotes a process of reconstructing from a contemporary point of view the meaning the legal text would have held for its framers. In *King v. Jones*,⁶⁷ the word ‘adult’ in section 41 was to be interpreted by the Australian High Court. In 1900, an adult meant a person who attained the age of 21 years. It was argued that the post-1900 developments showed remarkable changes in the capacity of individual persons to make reasonable judgments at the age of 18 years because of their high levels of conceptions of intellectual maturity, social and political participation, contractual capacity, earning and borrowing capacity, criminal accountability, marital and sexual autonomy and so on, and hence citizens within the age group of 18 to 21 years should be entitled to cast their votes in parliamentary and state elections. However, the Commonwealth High Court rejected the contention on the ground that the

⁶⁴ *Id.* at 584.

⁶⁵ *R v. Laba*, [1994] 3 S.C.R. 965.

⁶⁶ Shalin Sugunasiri, *Contextualism: The Supreme Court’s New Standard of Judicial Analysis and Accountability*, 22(1) DALHOUSIE L. J. 126, 183 (1999).

⁶⁷ *King v. Jones*, (1972) 128 CLR 221.

relevant context to be considered for the determination of adults in section 41 is the context of the making of the Constitution and not the context and time of its interpretation. Jonathan Crowe argues that this approach often produces interpretations that seem strained from a contemporary viewpoint and holds that wider contextual interpretation that takes care of overall socio-economic developments shall be preferred.⁶⁸ Continuing the *King v. Jones* approach, in *Re Wakim*,⁶⁹ the High Court held that the law which authorised federal courts to exercise state jurisdiction was invalid as the Commonwealth Constitution was silent about such vestment. McHugh J. viewed that the judiciary cannot amend the Constitution through interpretation. In *Grain Pool of Western Australia*,⁷⁰ Kirby J. construed the word “*patents*” without tying it to the 1900 understanding. According to him, the dead hand of the past shall not govern the present; the Constitution should be interpreted for Australians and not for its Imperial Makers; the implications of federalism which colonial lawmakers contemplated were irrelevant and even rejected in the *Engineers case*;⁷¹ and the language of the Australian Constitution is not unchanged. Thus, context meant contemporary context, and not the context of 1900. In *CIC Insurance Ltd.*, the High Court observed, “[T]he modern approach to statutory interpretation (a) insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise, and (b) uses ‘context’ in its widest sense to include such things as the existing state of the law and the mischief which, by legitimate means such as those just mentioned, one may discern the statute was intended to remedy.”⁷² Looking into the context is not optional but ‘essential’ according to the Court.⁷³ In the *Victim Compensation Fund Corporation case*,⁷⁴ the High Court treated contexts in a multi-layered sense, ranging from a focus on words in the statute, the statutory framework, legislative history and the social context of lawmaking. However, in *Al-Kateb*,⁷⁵ in the matter

⁶⁸ Jonathan Crowe, *The Role of Contextual Meaning in Judicial Interpretation*, 41 FED. L. REV. 417 (2013).

⁶⁹ *Re Wakim*: Ex parte McNally (1999), 198 CLR 511.

⁷⁰ *Grain Pool of Western Australia v. Commonwealth*, (2000) 202 CLR 479.

⁷¹ *Amalgamated Society of Engineers v. Adelaide Steamship Co Ltd.*, (1920) 28 CLR 129.

⁷² *CIC Insurance Ltd v. Bankstown Football Club Ltd*, (1997) 187 CLR 384.

⁷³ *Independent Commission Against Corruption v. Cunneen*, (2015) 256 CLR 1.

⁷⁴ *Victims Compensation Fund Corporation v. Brown*, (2003) 77 ALJR 1797, 1799.

⁷⁵ *Al-Kateb v. Godwin*, (2004) 219 CLR 562.

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of application of international law, the majority took a narrow view of context and declined the application of human rights.

D. CONTEXTUAL INTERPRETATION IN INDIA

As discussed earlier, there are significant contextual factors – historical, social, cultural, economic and political – that wield great influence upon the judiciary in the course of interpreting the Indian Constitution. Problems of insecurity, inherited disadvantages of colonial rule, the need to resolve complex political situations, and the urge for the overall development of human society have expounded the meaning of the Constitution. The Constitution's role as a purposive enterprise, and potentiality for value-based interpretation by bringing the constitutional ideals to the circumstance of the case at hand and linking the context with the pragmatic planning towards desirable constitutional goals make contextual interpretation a dynamic tool. Courts have used linguistic, factual, societal, historical, political, and international contexts in constitutional interpretation. On a variety of matters, ranging from the dissenting judgement of Fazal Ali and Mahajan JJ., in *AK Gopalan* (1950) to *Re Article 370* (2023), the journey of contextual reading has proceeded to enrich constitutional jurisprudence.

Context I: Reservation

The task of ameliorating the weaker sections of society attracts a context-sensitive approach. In *Indra Sawhney*,⁷⁶ B P Jeevan Reddy J., in his leading majority judgement derived from the scheme and context of Article 16 (4), which uses the phrase “*provision for the reservation of appointments or posts*”, all supplemental and ancillary provisions as also lesser types of special provisions like exemptions, concessions and relaxations, consistent with the requirement of maintenance of efficiency of administration as per Art. 335.⁷⁷ For objective identification of socially backward class, the court invokes the social context – caste, occupation, poverty, and social

⁷⁶ *Indra Sawhney v. Union of India*, 1992 Supp (3) SCC 217.

⁷⁷ *Id.* ¶¶ 58, 400.

backwardness, which are so closely intertwined in our society.⁷⁸ In limiting the quantum of reservation, the wise suggestion of Dr Ambedkar that reservation shall be only in a minority of posts is considered relevant to the present context also as it harmonises the claims between backward classes and the society as a whole.⁷⁹ The context of possessing features of social and economic advancement pushes the persons in backward class into a pedestal of creamy layer and disentitles them from reservation.⁸⁰ P B Sawanth J. expressed the need for responding to the context of social realities, *“To interpret it, ignoring the social, political, economic and cultural realities, is to interpret it not as a vibrant document alive to the social situation but as an immutable cold letter of law unconcerned with the realities.”*⁸¹

In another landmark case, *M Nagaraj*,⁸² the Supreme Court considered equity, justice, and efficiency as the context-specific variable factors. The Court said, *“There is no fixed yardstick to identify and measure these three factors, it will depend on the facts and circumstances of each case. These are the limitations on the mode of the exercise of power by the State.”*⁸³ The Court examined the linguistic or textual context of Article 16 and highlighted the need to balance between the right to equality, and provisions enabling the State to provide for affirmative action in such a way that the interests of the reserved classes are balanced against the interests of other segments of society. It is on the basis of this contextualism that the Court insisted on three constitutional requirements, namely, the backwardness of a class, the inadequacy of representation in public employment of that class, and the overall efficiency of the administration for affirmative action under Article 16.⁸⁴ The Court also observed that the content of merit and extent of reservation are context-specific.⁸⁵ In the *Indian Medical Association* case,⁸⁶ the Court applied this context-specific approach to reject the claims of the Army

⁷⁸ *Id.* ¶ 85.

⁷⁹ *Id.* ¶ 94 A.

⁸⁰ *Id.* ¶¶ 86, 121; *“If some of the members are far too advanced socially (which in the context, necessarily means economically and, may also mean educationally) the connecting thread between them and the remaining class snaps. They would be misfits in the class.”*

⁸¹ *Id.* ¶ 369.

⁸² *M. Nagaraj v. Union of India*, (2010) 12 SCC 526.

⁸³ *Id.* ¶ 103.

⁸⁴ *Id.* ¶¶ 111, 122.

⁸⁵ *Id.* ¶ 45.

⁸⁶ *Indian Medical Assn. v. Union of India*, (2011) 7 SCC 179.

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College of Medical Science to be immune from the State's reservation policy and have its admission preferences.

In *Chebrolu Leela Prasad Rao*,⁸⁷ taking support from a precedent in *Prakash Rao*,⁸⁸ the Supreme Court held that when the President, by an order passed under Article 371-D,⁸⁹ has specified any local area for recruitment to posts of any local cadre (or constituted otherwise) under the State Government, the State Government loses its inherent power to regulate service matters. The words “*or constituted otherwise*” ought to be understood in an analogous sense. The judgement states, “*therefore, the phrase ‘constituted otherwise’ is to be understood in that context and purpose which Article 371-D and the Presidential Order seek to achieve.*” Accordingly, 100 per cent reservation in scheduled areas for tribal people by the State was unconstitutional.

The nature and purpose of reservations in the context of local self-government are considerably different from that of higher education and public employment. According to the Supreme Court's decision in *Krishnamurthy*, “*... Article 243-D and Article 243-T form a distinct and independent constitutional basis for affirmative action and the principles that have been evolved in relation to the reservation policies enabled by Articles 15(4) and 16(4) cannot be readily applied in the context of local self-government. Even when made, they need not be for a period corresponding to the period of reservation for the purposes of Articles 15(4) and 16(4), but can be much shorter.*”⁹⁰

While upholding the 103rd constitutional amendment providing for reservation to EWS by inserting Clause (6) to Articles 15 and 16 in *Janhit Abhiyan*,⁹¹ the majority of the apex court observed, “*On a contextual reading, it could reasonably be culled out that the observations, wherever occurring in the decisions*

⁸⁷ *Chebrolu Leela Prasad Rao v. State of A.P.*, (2021) 11 SCC 401.

⁸⁸ *S. Prakasha Rao and Anr. v. Commissioner of Commercial Taxes and Ors.*, (1990) 2 SCC 259.

⁸⁹ Art. 371-D provides for special provisions with respect to the State of Andhra Pradesh or the State of Telangana, authorising the President to make with respect to these States, having regard to the requirement of each State for equitable opportunities and facilities for the people belonging to different parts of the State in the matter of public employment.

⁹⁰ *K. Krishna Murthy (Dr.) and Ors. v. Union of India and Anr.*, (2010) 7 SCC 202.

⁹¹ *Janhit Abhiyan v. Union of India*, (2021) 11 SCC 78, at ¶ 72.

of this Court, to the effect that reservation cannot be availed only on economic criteria, were to convey the principle that to avail the benefit of this affirmative action under Articles 15(4) and/or 15(5) and/or 16(4), as the case may be, the class concerned ought to be carrying some other disadvantage too and not the economic disadvantage alone. The said decisions cannot be read to mean that if any class or section other than those covered by Articles 15(4) and/or 15(5) and/or 16(4) is suffering from disadvantage only due to economic conditions, the State can never take affirmative action qua that class or section.”

That reservation in public employment is context-specific and hence when a State has notified a certain caste or tribe as SC/ST as per the Constitution, such benefits will not be available to migrants from other states is repeatedly pointed out by the Supreme Court in *Marri Chandra Shekhar Rao*,⁹² *Veena*,⁹³ *Milind*⁹⁴ and *Subhas Chandra*⁹⁵ cases. The argument that migration has contextualised their entitlement was rejected in the *Subhas Chandra* case.

Context II: Reasonableness of restriction

The contextual approach to the identification of the reasonableness of restriction is well-established. In *V.G. Row*, the Supreme Court stated, “*the Court should consider not only factors such as the duration and the extent of the restrictions, but also the circumstances under which and the manner in which their imposition has been authorised. It is important in this context to bear in mind that the test of reasonableness, wherever prescribed, should be applied to each, individual statute impugned and no abstract standard, or general pattern of reasonableness can be laid down as applicable to all cases. The nature of the right alleged to have been infringed, the underlying purpose of the restriction imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, should all enter into the judicial verdict.*”⁹⁶ This approach has been followed

⁹² *Marri Chandra Shekhar Rao v. Dean, Seth G. S. Medical College and Ors.*, (1990) 3 SCC 130.

⁹³ *M.C.D. v. Veena and Ors.*, (2001) 6 SCC 571.

⁹⁴ *State of Maharashtra v. Milind and Ors.*, (2001) 1 SCC 4.

⁹⁵ *Subhash Chandra v. Delhi Subordinate Services Selection Board*, (2009) 15 SCC 458.

⁹⁶ *State of Madras v. V. G. Row*, AIR 1952 SC 196, ¶ 15.

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in a number of cases pertaining to freedoms under Article 19.⁹⁷ In *Kausbal Kishor*,⁹⁸ the content and extent of freedom of speech and expression were found to possess various dimensions in different contexts causing hate, public disorder, defamation, a threat to the security of the state, appeal to criminal actions, obstruction to the free flow of information regarding candidates contesting the election, indignity by appealing to prurient interest, an impediment to Parliament's privilege, lowering of judiciary's image etc., calling for proportionate actions.

Context III: Preventive Detention

In *A K Gopalan*, Patanjali Shastri J., while concurring with the majority observed, "... *personal liberty in the context of Part III of the Constitution is something distinct from the freedom to move freely throughout the territory of India.*"⁹⁹ Fazal Ali J., in his dissent interpreted the expression "*throughout the territory of India*" as contextually and juristically connoting personal liberty of movement and held that the juristic conception that personal liberty and freedom of movement connote the same thing is the correct and true conception, and the words used in Art, 19 (1) (d) must be construed according to this universally accepted legal conception.¹⁰⁰ Another dissenting view, by Mahajan J., looked into the context of Article 22 (7) and opted for a narrow interpretation of the Parliament's power to enact laws on preventive detention in view of the right to equality. He observed,

"The wide construction of cl. (7) of Art. 22 brings within the ambit of the clause all the subjects in the legislative list and very seriously abridges the personal liberty of a citizen. This could never have been the intention of the framers of the Constitution. The narrow and restricted interpretation is in accord with the scheme of the article and it also operates on the whole field of the legislative list and within that field it operates by demarcating certain portions out of each subject

⁹⁷ Mohd. Faruk v. State of Madhya Pradesh and Ors., AIR 1970 SC 93; Arun Ghosh v. State of West Bengal AIR 1970 SC 1228, Ram Manohar Lohia's case, AIR 1960 SC 633; Shreya Singhal v. Union of India, (2013) 12 SCC 73.

⁹⁸ Kausbal Kishor v. State of U.P., (2017) 1 SCC 406.

⁹⁹ A K Gopalan v. State of Madras, AIR 1950 SC 27 ¶ 105.

¹⁰⁰ *Id.* ¶ 46.

*which requires severe treatment. If I may say so in conclusion, S. 12 treats the lamb and the leopard in the same class because they happen to be quadrupeds. Such a classification could not have been in the thoughts of the Constitution makers when cl. (7) was introduced in Art. 22.*¹⁰¹

Both the dissenting views were banking upon contextualism as a powerful tool. While the majority did not agree with these contextualist arguments, the entire Bench was unanimous in striking down Section 14 of the Preventive Detention Act, 1950, which had exempted the executive from furnishing information about the grounds of detention to the Advisory Board. This had the consequence of allowing scrutiny of the context of detention and examine its constitutional validity in individual cases. Thus, the Court recognized the role of factual context in testing the validity of detention while the minority was additionally pushing for the application of the text's linguistic context.

Whether the majority view in *A K Gopalan* represents concern for public order and security of the State which a larger political context demanded in a troubled situation soon after the nascent nation's independence which witnessed horrors of communal violence and threats by communists against Jagirdars in the course of implementing welfare legislation is a question examined by political historians like Granville Austin.¹⁰² The facts of the case show that the petitioner, who was a radical leader of the Communist party, was already in prison under a criminal charge and earlier prosecutions against him were not successful. For extending the preventive detention law from time to time the reason attributed was anti-social activities. In *Ram Singh*,¹⁰³ the preventive detention of a person to avert speeches causing communal disaffection was upheld (3: 2) by extending the Gopalan reasoning. In *Krishnan*, non-fixation of the maximum period of preventive detention was held as non-objectionable as the legislature had discretion by virtue of the word "*may*".¹⁰⁴ But when the context was merely

¹⁰¹ *Id.* ¶ 149.

¹⁰² GRANVILLE AUSTIN, *WORKING A DEMOCRATIC CONSTITUTION: A HISTORY OF THE INDIAN EXPERIENCE* 61 (Oxford University Press, 1st ed., 1999).

¹⁰³ *Ram Singh v. State of Delhi*, AIR 1951 SC 270; 1951 SCR 451; see P ISHWARA BHAT, *FUNDAMENTAL RIGHTS: A STUDY OF THEIR INTERRELATIONSHIP* (Eastern Law House, 1st ed., 2004).

¹⁰⁴ *Krishnan v. State of Madras*, AIR 1951 SC 301; 1951 SCR 605.

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relating to freedom of residence¹⁰⁵ or freedom of speech,¹⁰⁶ The *Gopalan* ruling was not applied. In the *Anwar Ali Sarkar* case, which involved the constitutionality of a special law enacted by the state government providing for executive power to select cases of riots to be tried by the special court without providing for reasonable classification, the Supreme Court nullified the law on grounds of the right to equality. As per *Makhan Singh*¹⁰⁷ and *Sadanandan*¹⁰⁸ decisions, preventive detention could be reviewed by the High Courts under Article 226 even in case of suspension of rights under Article 359 during an emergency if the detention is with malafide intention.

The *Habeas Corpus* case¹⁰⁹ decided during the Emergency represents a sharp conflict between legal contextualism and extra-legal contextualism. The lone voice of dissent by H R Khanna J. reflects legal contextualism. He argued that if the suspension of fundamental rights by the Presidential order under Article 359 and amendments to MISA had the effect of making no fundamental right enforceable, still there was a way available to the detainees: invoke the rule of law through Article 372 and get remedy against unlawful detention. According to him, Article 21 is not the sole repository of right to life and personal liberty; nor are they mere gifts of the Constitution as they are anterior to law and the Constitution. International human rights principles and common law principles developed ever since the Magna Carta provided a rule of context, which Article 226 could not exclude. The argument had textual, structural, historical, moral and consequentialist support. The factor of legal context countered the argument of the absence of *locus standi*. The legal argument of the majority was entirely based on the suspension of rights, amendments to MISA blocking the remedy and absence of *locus standi* on the part of petitioners. But the extra-legal contextualism of political chaos, fear of intervention and inconvenience of confrontation were lurking behind judicial observation which were vindicated in post-emergency revelations, judicial

¹⁰⁵ *Shabbir Hussain v. State of UP*, AIR 1952 All 257.

¹⁰⁶ *Supdt. Central Prison v. Ram Manohar Lohia*, AIR 1960 SC 633.

¹⁰⁷ *Makhan Singh v. State of Punjab*, AIR 1964 SC 381.

¹⁰⁸ *Sadanandan v. State of Kerala*, AIR 1966 SC 1925.

¹⁰⁹ *ADM Jabalpur v. Shivakant Shukla*, AIR 1976 SC 1207.

supersessions and transfers and regretful confessions.¹¹⁰ AN Ray CJI observed:

“In period(s) of public danger or apprehension the protective law which gives every man security and confidence in times of tranquillity, has to give way to interests of the State..... While the courts of law are in normal times peculiarly competent to weigh the competing claims of individuals and governments, they are ill equipped to determine whether a given configuration of events threatens the life of the community and thus constitutes an emergency. Neither are they equipped, once an emergency has been recognised particularly a war emergency or emergency on account of security of the country being threatened by internal aggression to measure the degree to which the preservation of the life of the community may require governmental control of the activities of the individual. Jurists do not have the vital sources of information and advice which are available to the executive and the legislature; nor have they the burden of formulating and administering the continuing programme of the government, and the political responsibility of the people, which, although intangibles, are of crucial importance in establishing the context within which such decisions must be made.”¹¹¹

The difference between the legal contextualism of the dissenting judge and the extra-legal contextualism of the majority remained a part of constitutional history.

Whether contextualism could help the commencement of a constitutional amendment, a task which was entrusted to the executive, was a question pondered over in the early 1980s. Specifically, failure to commence and effectuate post-emergency amendment to Article 22 was an issue in *A K Roy* case.¹¹² The Court ruled that the power to issue a notification for bringing into force the provisions of a constitutional amendment is not a constituent power, because, it does not carry with it the power to amend the Constitution in any manner. According to the Court, the non-exercise of power of notification of commencement by the Union Government was a matter to be dealt with by the Parliament to which the executive is responsible. The plea for the issue of a writ of mandamus was declined by leaving it to the executive to decide the type and extent of preparation

¹¹⁰ AUSTIN, *supra* note 102 at 341-343.

¹¹¹ ADM Jabalpur v. Shivakant Shukla, AIR 1976 SC 1207 ¶ 36-37.

¹¹² A. K. Roy v. Union of India, 1982 Cri LJ 340 (SC).

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required. The justifications for the same reflect the pragmatism of looking into the context of separation of powers. The Court upheld the major provisions of NSA and expressed hope about the commencement of the amendment within a reasonable time. The hope remained empty even after 55 years of its enactment. Successive governments found no context as opportune for its commencement. Enactment of Terrorism and Disruptive Activities (Prevention) Act, 1985 and 1987 has also received similar treatment in *Kartar Singh* case¹¹³ in the context of growing instances of terrorism. Today, there is a continuation of preventive detention law but its rigour is mellowed down in the changed context and application of *Maneka* principles.¹¹⁴

Context IV: Freedom of Religion

Religious freedom has several dimensions and has an intricate and unique relation to respecting other Fundamental Rights. It is subject to public order, morality and health and amenable to social reforms including temple entry measures through law. The coexistence of freedom of conscience with the freedom to profess, practise and propagate religion has the effect of recognising the right to spread one's religion without offending another's freedom of conscience. Group right of religious denominations prevails over individual religious freedom. The state's duty not to promote or maintain any specific religion or religious denomination by using revenue generated through tax from the people and the duty of public educational institutions not to impart religious instructions to students in their institutions aim at keeping the State away from religion. But this is not absolute separation as Indian secularism believes in orientation to social reforms and social justice in the domain of religion by projecting equal religious freedom of all or *sarva dharma samabhava*. It is significant that freedom of religion, both individual and institutional, is contextualised in social relations. While its functioning calls for contexts to have an interface with it, the very identification of essential aspects of religion looks to the philosophy, features, religious text, beliefs and practices of individual religions. In brief, the contexts of each religion have a say in shaping the

¹¹³ *Kartar Singh v. State of Punjab*, (1994) 3 SCC 569.

¹¹⁴ *Maneka Gandhi v. Union of India*, AIR 1978 SC 597.

content of religion of specific religious communities. Religious beliefs are embedded in social customs and community practices purged through constitutional morality. Thus, the social environment surrounding each religion shapes its identity. Hence, judicial interpretation of relevant clauses of religious freedom calls for judicial reasoning to traverse the path enlightened by context. In brief, contextualism has a central role to play in the task of constitutional interpretation in this domain.

In practice, the judiciary has invoked the right to equality and the rule of law for the protection of places of worship and has been resolving issues of religious conflicts by application of the law of the land.¹¹⁵ Temple entry issues whether triggered by caste prejudice or gender bias are resolved by the application of other Fundamental Rights and individual dignity.¹¹⁶ The state is asked to gradually phase out from funding religious pilgrimages.¹¹⁷ In addition to using the religious texts, the social contexts of religious practices are reckoned in conducting the essentiality test.¹¹⁸ The historical background of the Sabarimala temple and the ongoing social belief formed an important contextual factor thoroughly examined by the Supreme Court although the ultimate decision of the Court turned on feminist perspective of human rights.¹¹⁹ Mutual balancing between freedom of conscience and freedom of propagation of religion carves out the space for religious tolerance.¹²⁰ In building the pillar of secularism in the mindset of people through a comparative understanding of religions, courts have used the wisdom literature enshrined in our multicultural ethos.¹²¹

Context V: Minority educational rights

The juxtaposition of Article 30 (1) with Article 29 (2), 30 (2) and 28 (3) renders the right of the religious and linguistic minorities to establish and

¹¹⁵ M. Ismail Faruqui v. Union of India, (1994) 6 SCC 1.

¹¹⁶ Sri Venkatramana Devaru v. HRE Commissioner, AIR 1958 SC 255; Indian Young Lawyers Association v. State of Kerala (Sabarimala case), (2019) 11 SCC 1.

¹¹⁷ Praful Goradia v. Union of India, (2011) 2 SCC 568.

¹¹⁸ Commissioner HRE v. Lakshmindra Thirtha Swamier, AIR 1954 SC 282; Bjoce Emmanuel v. State of Kerala (1986) 3 SCC 615.

¹¹⁹ Indian Young Lawyers Association v. State of Kerala, (2019) 11 SCC 1.

¹²⁰ Rev. Stanislaus v. State of Madhya Pradesh, (1977) 1 SCC 677.

¹²¹ Aruna Roy v. Union of India, (2002) 7 SCC 368.

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administer educational institutions of their choice non-absolute.¹²² Further, “*establish*” and “*administer*” inherently presuppose a good quality of education and exclude maladministration in order for the right to be effective. Thus, linguistic or textual context becomes crucial for understanding the extent and content of the right. The historical context, as evident from Constituent Assembly Debates, is that while there shall not be the imposition of majority language upon linguistic minority institutions, minority educational institutions shall enable an atmosphere of harmonious learning by the children irrespective of their communities once they receive grants-in-aid from the government.¹²³ They shall not discriminate in the admission of students on the basis of religion, language etc. Based on these contextual factors, the Supreme Court in the *St. Stephen’s College* case,¹²⁴ required the minority institutions getting grants in aid to make available 50 percent of seats in their institutions to children of non-minority communities.¹²⁵ Partly overruling this principle, in the *TMA Pai Foundation* case,¹²⁶ the Court ruled that as long as the minority educational institution permits the admission of citizens belonging to the non-minority class to a reasonable extent based upon merit, it will not be an infraction of Article 29(2), even though the institution admits students of the minority group of its own choice for whom the institution was meant. What would be a reasonable extent would depend upon variable factors such as the type of institution and the nature of education that is being imparted in the institution. VN Khare J., while concurring observed, “*Looking into the precedents, historical fact and Constituent Assembly debates and also*

¹²² The Ahmedabad St. Xaviers College Society v. State of Gujarat, (1975) 1 SCR 173 at 298, (Dwivedi, J.).

¹²³ Shri K. Santhanam, 10, CONSTI. ASSEMB. DEB., Oct. 06, 1949, <https://www.constitutionofindia.net/constituent-assembly-debate/volume-10/>.

¹²⁴ St. Stephen’s College v. University of Delhi, (1992) 1 SCC 558.

¹²⁵ While treating Art. 29(2) as a facet of equality, the Court gave a contextual interpretation to Arts. 29(2) and 30(1) while rejecting the extreme contentions on both sides, i.e., on behalf of the institutions that Art. 29(2) did not prevent a minority institution to preferably admit only members belonging to the minority community, and the contention on behalf of the State that Art. 29(2) prohibited any preference in favour of a minority community for whose benefit the institution was established.

¹²⁶ T.M.A. Pai Foundation v. State of Karnataka, (2002) 8 SCC 481, at ¶ 149.

interpreting Articles 29(2) and 30(1) contextually and textually, the irresistible conclusion is that Article 30(1) is subject to Article 29(2) of the Constitution.”

Context VI: Constitutional Amendment

Why constitutional amendment is not law for the purpose of Article 13 is explained by contextual interpretation. KK Mathew J. in *Kesavananda* stated, “*When Article 13 (2) said that the State shall not make any ‘law’, the meaning of the expression ‘law’ has to be gathered from the context. Though, analytically, it might be possible to say that the word ‘law’ would include an amendment of the Constitution also, from the context it would be clear that it only meant ordinary law. A word by itself is not crystal clear. It is the context that gives it the colour.*”¹²⁷ In order to argue that the scheme of Constitution as a whole shall be construed and that “*It is not right to construe words in vacuum and then insert the meaning into an article*”,¹²⁸ SM Sikri approvingly cited Greene LJ’s view in *Bidie* case, “*Few words in the English language have a natural or ordinary meaning in the sense that they must be so read that their meaning is entirely independent of their context. The method of construing statutes that I prefer is not to take particular words and attribute to them a sort of prima facie meaning which you may have to displace or modify. It is to read the statute as a whole and ask oneself the question: ‘In this state, in this context, relating to this subject-matter, what is the true meaning of that word?’*”¹²⁹ Similarly, the view of Gwyer C.J. that construction of a grant of power shall be qualified by other provisions of the enactment by understanding the implications of the context was also relied upon.¹³⁰ Hence, the word “amendment” was to be understood in the light of the Preamble.

In the *Second Judges* case,¹³¹ the Supreme Court found that “*A constitutional convention existed that the appointment of judges should be made in conformity with the views of the Chief Justice of India*” and that the Constituent Assembly had conceded the co-equal position of President and the Chief Justice of India in the matter of appointment of judges of the Supreme Court and High

¹²⁷ *Kesavananda v. State of Kerala*, AIR 1973 SC 1461 ¶ 1595; (M.H. Beg J.) ¶ 1845; (Dwivedi J.) ¶ 1914.

¹²⁸ *Id.* ¶ 62.

¹²⁹ *Bidie v. General Accident, Fire and Life Assurance Corporation*, (1948) 2 All ER 995 at p. 998; also *see Powell v. Kempton Park Racecourse Co. Ltd.*, (1899) A.C. 143, 185.

¹³⁰ *The Central Provinces and Berar Act, 1939 F.C.R. 18* at p. 42 (AIR 1939 FC 1).

¹³¹ *Supreme Court Advocates on Record Association v. Union of India*, (1993) 4 SCC 441.

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Courts in order that independence of judiciary, which is a facet of basic structure of the Constitution, shall prevail. Hence, the words “*the Chief Justice shall always be consulted*” occurring in the proviso to Article 124 (2) shall be construed in such a way that concurrence of the Chief Justice for appointment of judges of the Supreme Court (other than Chief Justice of India) and High Courts is mandatory. This contextual interpretation became the core reasoning of the majority in *NJAC* case¹³² and accordingly, the 99th Constitutional Amendment Act was struck down as violative of the basic structure of the Constitution.

Context VII: Federalism, Reorganisation of states and abrogation of Article 370

In the *NCT Delhi* case, where the issue was pertaining to the extent of the Union Government’s power of interference in the matter of control over civil servants in the Delhi Government, D Y Chandrachud J. observed, “*While its (Constitution’s) language is of relevance to the content of its words, the text of the Constitution needs to be understood in the context of the history of the movement for political freedom. Constitutional history embodies events which predate the adoption of the Constitution. Constitutional history also incorporates our experiences in the unfolding of the Constitution over the past sixty-eight years while confronting complex social and political problems.*”¹³³ The approach is in continuation of the stance taken in *S R Bommai* that the President’s power under Article 356 shall be limited to ensuring parliamentary democracy in the States.

The political position of States at the time of independence was fluid because of their varieties, numbers (562 Princely States) and sizes due to multiple historical experiences. The advice of the State Reorganisation Commission to take into consideration the historical, linguistic,

¹³² Supreme Court Advocates-on-Record Assn. v. Union of India, (2016) 5 SCC 1 ; Madan B Lokur J: “Historically, the Chief Justice of India was always consulted in the matter of appointment of judges, and conventionally his concurrence was always taken regardless of whether a recommendation for appointment originated from the Chief Justice of the High Court or the political executive. It is in this light that the discussion in the Constituent Assembly on the issue of appointment of judges to the Supreme Court and the High Courts deserves to be appreciated.” ¶ 591.

¹³³ State (NCT of Delhi) v. Union of India, (2018) 8 SCC 501.

administrative and geographical factors into consideration speaks much about the contextual approach to be adopted by the Union Government. Article 3 confers powers to the Parliament to make laws for the territorial organisation of States after getting views from the affected States although not bound to adhere to those views. In *Babulal Parate*,¹³⁴ where the State Reorganisation Bill providing for State of Maharashtra and State of Gujarat and Union Territory of Bombay was amended subsequent to the reference to the Legislative Assembly of Bombay to provide for a composite State of Bombay, and the matter was not referred to it again, the Supreme Court held that the views expressed by the State Legislature under the proviso to Article 3 are not binding on Parliament and it was not necessary to refer the bill to the State Legislature on each occasion of amendment of the Bill. In *P V Krishnaiah*, the Andhra Pradesh High Court recognised the paramount discretion of the Union Government and Parliament in the matter of territorial reorganisation of the Indian federal structure.¹³⁵ The Supreme Court surveyed the evolution of federal units in response to contextual factors in *In re Article 370*. Contextualism becomes important to settle the issues subsequent to the formation of States under Article 3. In *Kapila Hingorani*, non-payment of salary by the State public undertakings after the bifurcation of Bihar into the State of Bihar and the State of Jharkhand was addressed by resorting to contextual interpretation.¹³⁶ In *Narendra Kumar Tiwari*,¹³⁷ the Supreme Court favoured contextual interpretation of rule regularising daily wage workers who worked for more than ten years in such a way that continuous service prior to the formation of Jharkhand will also be taken into account.

*In re Article 370*¹³⁸ is a landmark case decided by a five-judge Bench of the Supreme Court unanimously. DY Chandrachud CJI delivered the leading judgement on behalf of himself, B R Gavai and Surya Kant JJ. Sanjay Kishan Kaul and Sanjeev Khanna JJ. gave two separate but concurring opinions. The judgments rely on contextualism as a major tool of

¹³⁴ Babulal Parate v. State of Bombay, AIR 1960 SC 51.

¹³⁵ P V Krishnaiah v. State of Andhra Pradesh, AIR 2014 AP 13; Narendra Kumar Tiwari v. State of Jharkhand, (2018) 8 SCC 238.

¹³⁶ Kapil Hingorani v. State of Bihar, (2003) 6 SCC; 2005 AIR SCW 926; 2009 AIR SCW 545.

¹³⁷ Narendra Kumar Tiwari v. State of Jharkhand, (2018) 8 SCC 238.

¹³⁸ Article 370 of the Constitution, In re, 2023 SCC OnLine SC 1647.

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interpretation but combine textual, purposive, structural and pragmatic along with it. They take into account several circles of contexts.

First, the factual context which gave rise to challenge the abrogation of the special status of Jammu and Kashmir was as follows. On June 20th, 2018 the Governor of J&K imposed Governor's rule under section 92 of the J&K Constitution in the background of the fall of the coalition government of PDO and BJP and no alternative government was attempted by political parties. In November 2018, the Legislative Assembly was dissolved since there was no attempt to form an alternative coalition. Prior to the expiry of the six-month period, in December 2018, the President's rule was imposed under Article 356. Both the Houses of Parliament passed resolutions approving the President's rule. Two orders, Constitutional Order (“CO”) 272 under Article 370 (1) (d) and Constitutional Order (“CO”) 273 under Article 370 (3) were issued on August 5th, 2019 and August 6th, 2019 respectively. By CO 272, Article 367(4) was inserted in the Constitution of India, which amended sub-clause (3) Article 370 of the Constitution of India, by replacing the expression ‘Constituent Assembly of the State’ with ‘Legislative Assembly of the State’. It also extended all the provisions of the Constitution of India to J&K supervening the previous piece-meal applications. Subsequently, on August 5th, 2019, Parliament passed a Statutory Resolution regarding the cessation of all clauses of Article 370 except clause (1). It also passed a resolution approving the proposal of reorganising the State of Jammu and Kashmir into two Union Territories: the Union Territory of J&K and the Union Territory of Ladakh.

Thereafter, both the Houses of Parliament passed resolutions recommending to the President under Article 370(3) that all clauses of Article 370 shall cease to operate. On August 6th, 2019, the President of India issued CO 273 under Article 370(3) of the Constitution as amended by CO 272 by which Article 370 ceased to apply with effect from 6 August 2019.¹³⁹ This was followed by the passing of the J&K Reorganisation Bill

¹³⁹ The modified version of article 370 after CO 273 is: “370. All provisions of this Constitution, as amended from time to time, without any modifications or exceptions, shall apply to the State of Jammu and Kashmir notwithstanding anything contrary

2019. The factual context was that all the earlier 271 COs were steps in the application of the Constitution of India into J&K and towards the latter's integration with the Indian polity, and the COs 272 and 273 were the culmination of this integrating process. DY Chandrachud CJI narrated in detail in paragraphs 433 to 465 of his judgement about the gradual way of extending various provisions and parts of the Constitution of India into Jammu and Kashmir through a "*slew of Cos*", and how relating to the division of powers and residuary powers, the relation slowly resembled that of other States vis-à-vis the Union. The learned judge observed, "*The continuous exercise of power under Article 370(1) by the President indicates that the gradual process of constitutional integration was ongoing.*"¹⁴⁰ This is corroborated by a research work of Pradeep Kumar Sharma, which made a critical analysis of all the Presidential COs which made selective application of the Indian Constitution.¹⁴¹ Some of the modifications and exceptions (Article 35-A) were denying some Fundamental Rights and were to be set right. Further, COs 272 and 273 did not reflect mala fide motive nor the exercise of power under Article 356 was deemed mala fide.

Second, there is the linguistic context of Article 370 (3) which is the epicentre of the phenomenal integration of J&K. The said clause states,

"(3) Notwithstanding anything in the preceding clauses 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:

Provided that the recommendation of the Constituent Assembly of the State shall be necessary before the President issues such a notification."

Counsels for petitioners argued (a) that compliance with the proviso was a prerequisite for exercising power under the main clause as the proviso

contained in article 152 or article 308 or any other article of this Constitution or any other provision of the Constitution of Jammu and Kashmir or any law, document, judgement, ordinance, order, by-law, rule, regulation, notification, custom or usage having the force of law in the territory of India, or any other instrument, treaty or agreement as envisaged under article 363 or otherwise."

¹⁴⁰ *Id.* ¶ 465.

¹⁴¹ PRADEEP KUMAR SHARMA, CONSTITUTIONAL IMPLICATIONS IN JAMMU & KASHMIR (Pragati Publications, 1st ed., 2023).

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required that the recommendation was necessary before the President issues such notification; (b) that it was not satisfied in the instant case as the Constituent Assembly of the State did not exist and (c) that its substitute (Legislative Assembly) created through CO 272 was amounting to amendment of Article 370 (3) which could have been done only by exercising power of amendment under Article 368. On behalf of the Union Government, it was argued that the power of abrogating Article 370 was vested with the President and the use of the non-obstante clause made it clear that Clause (3) prevailed over Clauses (1) and (2) and that the role of Constituent Assembly of the State was one of recommendation if it existed. The Proviso was not prescribing a condition precedent and became redundant once the Constituent Assembly of the State was not continuing. To hold otherwise is to make the main provision of Clause (3) unworkable, which was not the intention and spirit of Article 370 because Article 370 was a temporary provision as per the Heading and Marginal Note. Although the Marginal Note is not binding, it is relevant because it points out the drift, spirit and direction of the constitutional provision.

DY Chandrachud CJI, on his behalf and on behalf of Gavai and Suryakant JJ. stated in his judgement, *“The power under Article 370(3) did not cease to exist upon the dissolution of the Constituent Assembly of Jammu and Kashmir. When the Constituent Assembly was dissolved, only the transitional power recognised in the proviso to Article 370(3) which empowered the Constituent Assembly to make its recommendations ceased to exist. It did not affect the power held by the President under Article 370(3).”* The learned judge further observed, *“The President had the power to issue a notification declaring that Article 370(3) ceases to operate without the recommendation of the Constituent Assembly. The continuous exercise of power under Article 370(1) by the President indicates that the gradual process of constitutional integration was ongoing. The declaration issued by the President under Article 370(3) is a culmination of the process of integration and as such is a valid exercise of power. Thus, CO 273 is valid.”* Sanjay Kishan Kaul J. concurred by stating, *“The power of the President under Article 370(3) was unaffected by the dissolution of the Constituent Assembly of Jammu and Kashmir. The President could exercise their power any time after the dissolution of the Constituent Assembly of Jammu and Kashmir, in line with the aim of full integration of the State.”*

Third, the Court considered the situational context in which Article 370 was textually couched. The Heading of Part XXI as it stood originally was “*Temporary and Transitional Provisions*” and after the 13th Constitutional Amendment 1962, remains as “*Temporary, Transitional and Special Provisions.*” The leading judgement elaborately refers to various provisions of this Part which became extinct either by the passage of time, the occurrence of the specified event or formal repeal.¹⁴² The temporary nature of Article 370 was also clear from its marginal note, “*Temporary provisions with respect to the State of Jammu and Kashmir.*” Given the importance of Headings and Marginal Notes in ascertaining the nature of the provision, as recognised in earlier precedents, the Court looked into the situational context to infer that the arrangement was temporary.

Fourth, the context of Article 370’s structure and its relation with other provisions of the Constitution was a matter taken into account by the judiciary. According to the Court, the President had the power to apply all provisions of the Constitution of India to Jammu and Kashmir under Article 370(1)(d), which is similar to the power under Article 370(3). Also, according to the Court, the words “*such of the other provisions of the Constitution*” did not confine to a piecemeal approach as the integrating process was in progress. Article 370 reflects asymmetric federalism as it confines the power of the Union Government to those mentioned in the instrument of Accession (defence, external affairs, and communication), excludes application of the general pattern of the Seventh Schedule, retains indestructible union with India by permanent application of Article 1, allows integration of Jammu and Kashmir with India through progressive extension of constitutional provisions under Article 370 (1) (d). Asymmetric federalism showed peculiar features of the relations between the Union and J&K but did not exhibit sovereignty on the part of J&K. Application of principles of parliamentary democracy, readiness to make FRs fully available to people of J&K, review of power under Article 356 and the objective of keeping national unity speak about the context of Article 370 being related to paramount values of the Constitution. The Court examined the structure of Article 370, its various clauses and their relations with Articles 1, 3 and other provisions of the Constitution.

¹⁴² Article 370 of the Constitution, In re, 2023 SCC OnLine SC 1647 ¶ 302.

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Overarching the values of federalism and national integrity was a structuralist approach employed for a comfortable result.

Fifth, the historical context of Article 370 was a matter extensively argued from both sides of the litigation and analysed in-depth by the judiciary. The leading judgement refers to post-1858 political development in Kashmir, King Hari Singh's signature to Instrument of Accession (initial hesitation but subsequent compulsion of circumstances such as intrusion by Pakistan army and tribal invasion), participation of representatives of J&K in Constituent Assembly of India, speeches by N. Gopalswamy Ayyangar and Mohammed Sheik Abdullah in the Constituent Assembly, Yuvaraj Karan Singh's acceptance of the Constitution of India and formation of Constituent Assembly of J&K. The Court inferred that (i) after the IoA, Jammu and Kashmir had become a part of India and would continue to be a part of the territory of the nation and a unit of the future federal republic; and that (ii) the process of integrating State of Jammu and Kashmir was not complete as it was not yet ripe for the kind of integration which was envisaged for the rest of the States due to the circumstances such as ongoing war, entanglement with UN, delay in establishing Legislature or Constituent Assembly of J&K and the clear intention to constitutionally integrate J&K on par with other States.¹⁴³ Sanjay Kishan Kaul J. traces the ancient history of J&K, the culture of tolerance distinctly called "*Kashmiriyat*" and people's democratic movement.

Regarding the question of whether after the dissolution of the Constituent Assembly of J&K – because of which there is no scope for making recommendations to the President about the cessation of Article 370 – the opportunity of putting an end to Article 370 ceases to continue, DY Chandrachud CJI observed, "*This Court must take into account the inference drawn on an analysis of the historical context of including Article 370 and the text, placement and marginal note of the provision while deciding this issue.*"¹⁴⁴ The learned judge referred to the process of ratification of the Constitution of India by

¹⁴³ *Id.* ¶ 270.

¹⁴⁴ *Id.* ¶ 324; Sanjay Kishan Kaul J: "A combination of factors, such as Article 370's historical context, its text, and its subsequent practice, indicate that Article 370 was intended to be a temporary provision." ¶ 112 (b) of his judgement.

the ruler of the princely State or the Constituent Assembly of that State, if it existed, and stated that the role of the Constituent Assembly of the State was only recommendatory and not normative.¹⁴⁵

Sixth, the interpretation of the text of Article 370 was matched by reference to context. The words “*such exceptions and modifications*” occurring in Article 370 (1) (d) were interpreted in a wider sense than understood in re Delhi Laws case¹⁴⁶ in the light of the competence of the President under Article 370 (3) to abrogate Article 370. Both in *Puranlal Lakhanpal*¹⁴⁷ and *Sampat Prakash*, a wider meaning was given to suit the larger purpose of article 370. The word “*modification*” was considered equivalent to “*change*” in Article 368 (2) and various facets such as change in term, change-in-effect, and greater importance of substance of change in contrast to change in form were considered as relevant to an understanding of “*modification*”.¹⁴⁸

Seventh, the purpose for which power is conferred under Article 370 (3) is shaped or limited by the context of Article 370 that it is temporary. As Sanjay Kishan Kaul J. stated, “*the power of the President to unilaterally de operationalize Article 370 once the Constituent Assembly of the State ceases to exist accords with the vision of the Constituent Assembly of India and the purpose of Article 370 – to ensure full constitutional integration as and when the circumstances permitted the same.*”

Eighth, the Court looked into the larger context of better protection of human rights, removal of discriminatory provisions, harmony and collective development which justify the process of constitutional integration of J&K. Sanjay Kishan Kaul J. spoke of the restoration of “*Kashmiriyat*” tradition and directed the Union Government to constitute a Commission to thoroughly examine the situation, reasons and extent of violation of basic human rights in the Kashmir valley during the last four

¹⁴⁵ *Id.* ¶ 346.

¹⁴⁶ In re Delhi Laws (1951) SCR 747.

¹⁴⁷ *Puranlal Lakhanpal v. President of India I*, 1955 (2) SCR 1101; *Puranlal Lakhanpal v. President of India II*, 1962 (1) SCR 688.

¹⁴⁸ *Sajjan Singh v. State of Rajasthan*, 1964 SCC OnLine SC 25; *Kihoto Hollohan v. Zachilhu*, 1992 Supp (2) SCC 651; *Union of India v. Rajendra N. Shah*, 2021 SCC OnLine SC 474.

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decades in order to elevate the credibility of democratic governance in Kashmir.

Finally, although the Court did not decide the constitutionality of the Union law converting the State of J&K into two Union Territories, in view of assurance by the Union Government on the floor of the parliament about the restoration of the statehood of J&K, DY Chandrachud CJI for the Court expressed, *“In an appropriate case, this Court must construe the scope of powers under Article 3 in light of the consequences highlighted above, the historical context for the creation of federating units, and its impact on the principles of federalism and representative democracy.”*¹⁴⁹

CONCLUSION

Contextualism envisages multilayered interpretation as it goes on responding to various concentric circles formed by factual, linguistic, textual, historical, structural, political and social circumstances. As an important and old rule of interpretation, it has the merit of linking the judicial process with society. It supplements and gathers support from other rules of interpretation but does not supplant them. It is a realistic and comprehensive approach, addressing the issues in relevant fields. It is not doctrinaire or rigid but is flexible albeit systematic. It is not a stand-alone principle but mixes with textualism, historical analysis and purpose scrutiny. It gathers inputs from social, cultural, economic and political factors. Context changes from case to case, but the enduring constitutional values streamline the course of justice.

Although criticised for its lack of independent theory of its own, it is its competence and function of weaving the socio-legal values together that has added to its strength and credibility. But in times of crisis and emergency, unless shaped by human rights values, contextualism is likely to bow its knees to authoritarianism. Constitutionalism ought to dispel types of extra-constitutional authoritarian contexts that were experienced during the emergency. The common experience of democratic nations, viz., US, Canada, Australia and India, is that long historical contexts inter-

¹⁴⁹ Article 370 of the Constitution, In re, 2023 SCC OnLine SC 1647, ¶ 504.

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mingled with text, define the route of judicial reasoning. The expansion of its ambit from *Gopalan* to *In re article 370* has, by and large, served the cause of strengthening the constitutional values, be it federalism, human rights or welfarism.