# Deconstructing Article 371-A: The Naga Exceptionalism

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## Abstract

Article 371-A of the Constitution of India which gives the State of Nagaland an exceptional status, has long been a subject of political debates and has also been the cause of much ire within the legal intellectual community in India.

The principle objective of this paper is to show that despite the special provision, Article 371-A(1)(a) does not confer legislative power to the State of Nagaland for regulation and development of mineral oil and that the power to make a law in that subject rests with the Parliament alone. As such, the Nagaland Petroleum and Natural Gas Regulations, 2012 notified by the Government of Nagaland, lacks Constitutional validity.

This paper also closely examines the Constitutional legality and validity of the Resolution passed by the Nagaland Legislative Assembly in 2010 under the garb of Article 371-A which rendered laws made by the Parliament on petroleum and natural gas inapplicable in Nagaland with retrospective effect. Article 371-A(1)(a) is interpreted by using settled rules of construction and judicial precedents contending that there was a misuse of the special provision enshrined in the Constitution while passing the Resolution in 2010. This paper will present several other sets of arguments to establish that in light of Constitutional principles and a comparative analysis of Article 371-A with other Articles in the Constitution, the said Resolution is *ultravires* the Constitution.

Finally, relying on the public trust doctrine as incorporated in Indian jurisprudence, it is contended that the people of the country have a stake in resources like natural gas and its benefit has to be shared by the whole country and not one State alone. Thus, this paper argues in favour of a suitable interpretation of Article 371-A which denies the absurdity created by denying both the Centre and the State the power to legislate.

**KEYWORDS**: Article 371-A Constitution, Nagaland legislative power, Nagaland Government

## Introduction: Revisiting the History

The State of Nagaland was created in the year 1963 and was given a special status under Article 371-A of the Indian Constitution through the 16 Point Agreement between the Government of India and the Naga People Convention (NPC) in 1960. In particular, Art. 371-A(1)(a)(iv), which states that no Act of Parliament shall affect the ownership and transfer of land and natural resources unless the Nagaland Assembly decides to do so by passing a resolution. It is the interpretation of this particular clause that has caused the Centre and the State to lock horns in the recent past regarding the exploitation of Nagaland's natural resources.

Decades later, on 26th July, 2010, the Nagaland Assembly passed a Resolution in light of the special provision in Art. 371-A(1)(a)(iv) that in respect of ownership and transfer of land and its resources including mineral oil, no Act of Parliament shall apply or deemed to have applied to the State. Furthermore, all previous Central Acts stood cancelled and new modalities were to be framed.

Two years later on 22nd Sept, 2012, the Neiphiu Rio government passed the "Nagaland Petroleum and Natural Gas Regulation, 2012" and welcomed expressions of interest (EoI) from companies to extract oil and natural gas in the State.

The Union Government held the 'Resolution dated 26.07.10' to be unconstitutional and was of the opinion that the "Nagaland Petroleum and Natural Gas Regulation, 2012" lacked "constitutional validity" and that the matter has "serious constitutional and economic implications". On June 2013, the Ministry of Petroleum and Natural Gas wrote a letter to the Nagaland state government saying that Article 371-A "does not confer legislative power" on Nagaland "for regulation and development of mineral oil". So far neither the Centre nor the State government have reached a consensus regarding the matter.

**I. The Constitutional Provisions**

Art. 371-A(1)(a)(iv), viz., "ownership and transfer of land and its resources" posed certain problems. First and foremost, before moving on to the interpretation of Art.371-A(1)(a)(iv), it is essential that one must acknowledge the respective entries in the List I and List II in Schedule VII[1]. The concerned subject matter, i.e. oil and mineral resources falls under Entry 53 of List I. Thus, only the Centre has exclusive power to make laws in context of petroleum and natural gas. It can take under its control the regulation of oilfields and development of mineral oil resources in the country. The subject, i.e. Mines and Mineral Development, pertains to Entry 54 of List I and similarly, the decision-making rests with Parliament.

Entry 23 of List II too deals with the same subject as does Entry 54 of List I, but is subject to the latter on account of the required declaration by Entry 54 which is present in Section .2 of the Mines and Minerals (Regulation and Development) Act, 1957,*hereinafter* MMRD Act, 1957, a Central Act. So long as the Nagaland Legislative Assembly does not 'decide' that any of the Parliamentary laws relating to Entries 53 and 54 of List I should apply to the State, the explicit limitation on the power of a State Legislature in terms of Entry 23 of List II will not apply to the State of Nagaland.

Article 245 of the Constitution is the fountain source of legislative power.[2] According to Art.245 (1), the Parliament has been vested by the Indian Constitution to make laws applicable to the whole of India.[3] Also, if any matter is within the exclusive competence of the Centre i.e., List I, it becomes a prohibited field for the State. The legislative power conferred on the Centre under Art.246 (1) [Union List]

[1] INDIA CONST. art. 246

[2] The State of West Bengal v. Kesoram Industries Ltd. and Ors., (2004) 1 S.C.C. 10.

[3] M.P JAIN, INDIAN CONSTITUTIONAL LAW 557 (5TH ED. 2003).

predominates over the power conferred on the State Legislature under Art.246 (3) [State List].[4]

To the extent to which the Union takes under its 'control' 'the regulation and development of minerals' so much gets withdrawn from the ambit of the power of the State legislature under Entry 23 and accordingly the legislation of the State resting under that Entry would be to the extent of that 'control' be superseded or be rendered ineffective.[5]

Reading together Section 2(d) and 2(e) of the Nagaland (Ownership and transfer of land and its resources) Act, 1990 – 'land and its resources' includes minerals and mineral oils. Hence, natural gas is mineral oil according to Art. 371-A (1)(a)(iv) of the Indian Constitution, which enumerates matters related to "ownership and transfer of land and its resources".

The Nagaland Government via the 'Resolution dated 26.07.10' has bypassed Entry 53 List I and the MMRD Act, 1957 which vests 'mines and minerals' as the occupied field of the Union. Furthermore, it has rendered laws made by the Parliament on petroleum and natural gas, such as the Petroleum and Natural Gas Rules, 1959 and the Oilfields (Regulation and Development) Act, 1948 inapplicable in Nagaland with retrospective effect. They have passed this Resolution under the garb of the special status in Art. 371-A. Two questions arise here, both of which I shall address. Firstly, whether can "the Resolution" dated 27.19.2010 be passed under Article 371-A of the Constitution. Secondly, is "the Resolution" passed on 27.09.2010 *ultra vires* the Constitution?

## II. A Suitable Interpretation

Article 371-A(1)(a)(iv) reads *'Notwithstanding anything in this Constitution, no Act of Parliament in respect of ownership and transfer of land and its resources, shall apply to the State of Nagaland unless the Legislative Assembly of Nagaland by a resolution so decides.'*

The Resolution passed in 2010 was a statutory resolution since it was tabled in pursuance of a provision in the Constitution.[6]Through literal interpretation of Art. 371-A(1)(a)(iv), it can be inferred that the word 'decides' stands for 'acceptance' only and not 'rejection' of the applicability of Central Acts. In other words, it means that an Act of Parliament will be applicable to the state of Nagaland, only when its Legislative Assembly assents to it by passing a Resolution. The State can indeed 'reject' the applicability of a Central Act that falls in any of the areas mentioned in the provisions, but it does not have to pass a resolution in order to do so. This is because, if the word 'decides' in Art.371-A(1)(a)(iv) included a rejection of Central Acts, then according to the Article, it would create an absurdity against the very language of the provision. It is a settled rule of construction that in case of ambiguity, the provision should be so read as would avoid hardship, inconvenience, injustice, absurdity and anomaly.[7] If the grammatical construction leads to some absurdity or some repugnance or inconsistency with the rest of the instrument, it may be departed from,

[4]*Id.* at p. 561
[5]State of Orissa vs. M.A. Tulloch and Co., (1964) 7 S.C.R. 816.
[6]M. N. KAUL AND S. L. SHAKDAR, PRACTICE AND PROCEDURE OF PARLIAMENT, Volume 2, at page 954
[7]Rakesh Wadhawan v. Jagdamba Industrial Corpn., (2002) 5 S.C.C. 440

so as to avoid that absurdity, and inconsistency.[8] But does this mean that every Act of Parliament, to start with, is applicable in the State of Nagaland on its enactment unless the State Legislative Assembly by a resolution decides otherwise? The answer to that is in the negative. The language of Art.371-A does not endorse this elucidation. The State Legislative Assembly of Nagaland can scrutinize every Act of Parliament bearing on the fields of legislation envisaged in Art.371-A(1)(a) and can 'accept' its applicability to the state by passing a resolution to its effect.[9]

**A. The Resolution dated 26.07.10 is unconstitutional**

The Neiphiu Rio government via the "Resolution dated 26.07.10" sought to nullify/reject existing Central Acts like PNG Rules, 1959 and Oilfields Act, 1948 in Nagaland along with the previous decisions taken by the earlier Government and it was done under the garb of Art. 371-A. This is totally outside the scope of the said special provision and hence the Resolution, cannot be passed under Art 371-A.

Another interesting provision in the Constitution which facilitates my line of reasoning would be Article 249 of the Constitution. It states that if the Council of States passes a Resolution that it is necessary in national interest for the Parliament to legislate on a subject in the State List, it may do so long as the Resolution remains in force. Thus, it provides a scope for the Council of States to withdraw its resolution and nullify the Parliament's law. Comparing Article 249 with Art.371-A(1), we see that the latter does not provide for such a power, i.e. to nullify a Parliamentary law by passing a Resolution. If the drafters of the Constitution intended to include such a provision, they would have done so. Hence, the necessary conclusion would be that, once a law of Parliament has been made applicable to the State of Nagaland, it would not be open to the State to pass another Resolution calling for withdrawal of the law from the State. The interpretation of Article 371-A is done in such a way that it provides the state with a right against implementing certain Central Acts in any of the areas mentioned in the provision. However, it does not provide the state government a right to legislate or regulate or reject existing Central Acts aspects of the areas that may fall under Central control.

On the contrary, it can however be urged that due to the non-obstante clause in Art. 371-A, other provisions in the Constitution, limits the power to impose conditions. But it is argued that the non obstante clause in Art. 371-A cannot be construed as taking clause (1) sub-clause (a) indefinitely so as to transgress the basic features of the Constitution.[10]

Assuming that it was within the authority of the State Government to declare the previous actions and decisions of the earlier State Government as null and void, as it purports to do under Art.371-A, thus rejecting and nullifying the existing Central Acts like PNG Rules, 1957 and Oilfields Act, 1948, it would attract the operation of Section 6 of the General Clauses Act, 1897. According to it, even though the Acts have been declared void, the operations which were undertaken during the timeframe when the act was valid, would stand valid even after the validity of law in question ceases to exist, if the operations which were undertaken were within the scope of that law, unless a contrary intention appears from the repealing statute. Section 6 *inter*

[8] STATUTORY INTERPRETATION, JUSTICE G.P. SINGH (2001 Edn.) at p. 113.
[9] State of Nagaland & Anr. v. Rosemary Dzuvichu & Ors., (2012) 4 G.L.T. 744.
[10] R.C. Poudyal v. Union of India, (1993) 1 S.C.R. 891

*alia*provides protection to any right, privilege, obligation or liability acquired or accrued under any enactment repealed.[11]

The Supreme Court in the case of *Commissioner of Income Tax* v. *Shah Sadiq and Sons* elucidated the effect of Section 6 of the General Clauses Act, 1897. It observed that a right which had accrued and had become vested, continued to be capable of being enforced notwithstanding the repeal of the statute under which that right accrued unless the repealing statute took away such right, expressly or by necessary implication.[12] The line of enquiry would be, not whether the new Act expressly keeps alive old rights and liabilities but whether it manifests an intention to destroy them. Section 6 would be applicable unless the new legislation manifests an intention incompatible with or contrary to the provisions of the section.[13] In this case the "Nagaland Petroleum and & Natural Gas Regulations, 2012" does exactly that. It expressly takes away such rights accrued and liabilities incurred under PNG Rules, 1959 and Oilfields Act, 1948. Nevertheless, Section 3 of the NPNGR, 2012 is merely a restatement of the effects of the Resolution dated 26.07.2010, and since the concerned Resolution itself is *ultra vires* the Constitution, it cannot be contested that on account of an express intention to the contrary, the NPNGR, 2012 stands valid.

In other words, the "Nagaland Petroleum and Natural Gas Regulation, 2012" is *ultra vires* the Constitution because, as discussed earlier, the mining of natural resources is a central subject as per Entry 53 List I and that Article 371-A(1)(a) only provided the state government with a right against implementing Central Acts in certain areas but not to make new laws or regulations on the above subjects like Petroleum and natural gas.[14]

It is also worth observing that in the NPNGR, 2012, Section 14 talks about 'Revenue Sharing' instead of 'Royalty', which is mentioned in Section 14 of the PNG Rules, 1959. The immediate consequence of this swapping essentially has the connotation of negating the customary right to ownership of land and resources of the Naga people, which is something enshrined in Article-371-A. 'Royalty' is an acknowledgement of ownership of land and resources, whereas 'Revenue' is government's wealth. In this sense of understanding, 'Royalty' assures an idea of ownership as opposed to 'Revenue' which is Government's income for promoting public welfare etc. Now, if this revenue is shared with a private individual, it would lead to a gross violation of the concerned Government's Financial Rule, and no government shall incorporate such a rule which would violate another rule of its own.

Hence, the NPNGR, 2012 apart from being unconstitutional, does not even reflect the true spirit of the customary rights of the Nagas, something that was purported to be the sole purpose when it was passed by the Nagaland Legislative Assembly.

**B.A lack of legislative competence**

The Supreme Court in the case of *Association of Natural Gas* v. *Union of India*[15]while quoting *Re: Cauvery Water Dispute Tribunal*[16] held that "…*the people*

[11]Md. Makibar Rahman v. Islam Ali, A.I.R. 1994 Gau 4.
[12]Commissioner of Income Tax v. Shah Sadiq and Sons, (1987) 2 S.C.R. 942. *See also, e.g.* State of Orissa v. M.A. Tulloch and Co., (1964) 7 S.C.R. 816.
[13] State Of Punjab v. Mohar Singh, (1955) 1 S.C.R. 893
[14]Babubhai Jashbhai Patel v. Union of India, A.I.R. 1981 AP 283.
[15] Association of Natural Gas v. Union of India, (2004) 4 S.C.C. 489

*of theentire country have a stake in the natural gas and its benefit has to be shared by the whole country. There should be just and reasonable use of natural gas for national development. If one State alone is allowed to extract and use natural gas, then other States will be deprived of its equitable share.*"This position goes on to fortify the stand adopted by the Union and will be a pointer to the conclusion that "natural gas" is included in Entry 53 of List I.[17] Hence, it can be reasonably concluded that only the Parliament has the sole power to legislate on natural gas, and the State Government of Nagaland cannot legislate or frame rules upon a subject such as natural gas.[18]

In legal parlance the term 'land' signifies not only the earth's surface but also applies below and above the surface. It is not only confined to solids but may encompass within its bounds such things as gases and liquids. Entry 25 of List II mentions 'Gas' and 'Gas-works'. This begs the question as to whether 'Gas' includes 'Natural Gas'. The Supreme Court in *Association of Natural Gas* v. *Union of India*[19], has observed that 'Gas' in Entry 25 of List II does not include 'natural gas', but only 'manufactured gas' in 'gas works' which is fundamentally different from 'natural gas' and hence states have no legislative competence to make laws on the subject of 'natural gas' and 'liquefied natural gas' under the said Entry since 'natural gas' is an Union subject covered by Entry 53 of List I and the only the Union has exclusive legislative competence to enact laws on it.

**III. The Public Trust Approach**

Our legal system-based on English Common Law - includes the public trust doctrine as part of its jurisprudence. *M.C. Mehta* v. *Kamal Nath* was a landmark case in Indian environmental law. In the case, the Supreme Court of India held that the public trust doctrine applied in India. The Court observed that this doctrine primarily rests on the principle that certain resources like air, sea, waters and the forests have such a great importance to the people as a whole that it would be wholly unjustified to make them a subject of private ownership.[20] According to Naga custom, all land is privately owned. It is divided between individuals, village councils, range councils and tribal councils, each of whom own the resources above and below the ground. The doctrine enjoins upon the Government to protect the resources for the enjoyment of the general public rather than to permit use for private ownership or commercial purposes. The State is a trustee of all natural resources and is under a legal duty to protect the natural resources. These resources meant for public use should be converted into private ownership. Furthermore, as recommended by the Sarkaria Commission regarding this matter, the development of major minerals and mineral oil resources, and their exploitation require financial investment, technical know-how, technical manpower, etc. of an order which is clearly beyond the reach of a singular State Government. Thus, the State Government would face insurmountable problems of implementation, unless very large financial, technical and other assistance were to be provided by the Union Government over a length of time.

[16] In Re: Cauvery Water Dispute Tribunal, (1993) (Supp.1) S.C.C. 96.
[17] *Supra* note at 15.
[18] *Supra* note at 14
[19] *Supra* note at 15
[20] M.C. Mehta v. Kamal Nath (1997) 1 S.C.C. 388

The natural resources are vested with the Government as a matter of trust in the name of the people of India. Thus, it is the solemn duty of the State to protect the national interest involved in the equitable distribution of natural gas amongst the States[21] Natural gas in raw and liquefied form is a petroleum product and a part of mineral oil resource, which needs to be regulated by the Union.[22]

**Conclusion**

If the Legislative Assembly of Nagaland refuses the continuance of Central Acts like Petroleum and Natural Gas Rules, 1959 and The Oilfields (Regulation and Development) Act in the State of Nagaland, according to Article 371-A(1), then it would result in a vacuum in terms of legislative competence, since the State of Nagaland would also not have the legislative competence to enact laws on a subject that falls under the Union List (Entry 53 and 54). Thus, an interpretation that creates absurdity by denying both the Centre and the State the power to legislate must be avoided and hence an acceptable interpretation would be to narrow down "resources" under Article 371-A to only those resources which the State of Nagaland would have competence to enact laws on, i.e., those resources listed in List II and List III of the Seventh Schedule.

If Nagaland wishes to retain their status quo on issues like mining etc, it can do so. But if it seeks a change, then it has to abide by the Constitution. It cannot seek a change on its own terms, as it has admittedly done so, due to lack of competence.

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[21]Reliance Natural Resources Ltd. v. Reliance Industries Ltd, (2010) 7 S.C.C. 1.
[22]*Supra* note at 15