

**IN THE SUPREME COURT OF INDIA  
(CIVIL ORIGINAL JURISDICTION)  
WRIT PETITION (CIVIL) NO. \_\_\_ OF 2019 (UNDER ARTICLE 32 OF THE  
CONSTITUTION OF INDIA)**

**IN THE MATTER OF:**

RIFAT ARA

. . . Petitioner

**VERSUS**

UNION OF INDIA & Anr.

. . . . Respondents

**[PAPER – BOOK]**

[For Index: Kindly See Inside]

ADVOCATE FOR THE PETITIONER: **MD. IRSHAD HANIF**

## INDEX

Sr.	Particulars of Document	Page No. of part to which it belongs		Remark
		Part I (Contents of paper Book	Part II (Contents of file along	
(i)	(ii)	(iii)	(iv)	(v)
1.	Court Fee			
2.	O/R on Limitation	<b>A</b>	<b>A</b>	
3.	Listing Performa	<b>A1-A2</b>	<b>A1-A2</b>	
4.	Cover Page of Paper Book		<b>A-3</b>	
5.	Index of Record of Proceedings		<b>A-4</b>	
6.	Limitation Report prepared by the Registry		<b>A-5</b>	
7.	Defect List		<b>A-6</b>	
8.	Note Sheet		<b>NS-1 to</b>	
9.	Synopsis & List of Dates.	<b>B –</b>		
10.	WRIT PETITION (CIVIL) UNDER ARTICLE 32 OF THE CONSTITUTION OF INDIA ALONG WITH AFFIDAVIT.	<b>1-</b>		
12.	<b><u>APPENDIX</u></b> Articles 1, 2, 3, 14, 19 and 21 of the Constitution of India Schedule 1 of the Constitution of India			
13.	<b><u>ANNEXURE P-1</u></b> A true and correct copy of the Instrument of Accession of			

	Jammu and Kashmir dated 26.10.1947			
14.	<b><u>ANNEXURE P-2</u></b> A true and correct copy of the Constitution (Application to Jammu and Kashmir) Order, 2019 dated 05.08.2019			
15.	<b><u>ANNEXURE P-3</u></b> A true and correct copy of the Presidential Declaration C.O. 273 dated 06.08.2019			
16.	<b><u>ANNEXURE P-4</u></b> A true and correct copy of the Jammu and Kashmir Reorganization Bill, 2019 dated 06.08.2019			
17.	F/M			
18.	Vakalatnama.			



## SYNOPSIS

1. The Petitioner herein is filing the present Writ Petition under Article 32 of the Indian Constitution to assail the constitutionality of the undemocratic dilution of Article 370 of the Indian Constitution, which acted as the provenance of India's special relationship with Jammu & Kashmir. Article 370 was incorporated into the Constitution of India in pursuit of actualising the terms and conditions enumerated in the Instrument of Accession; subject to which Jammu & Kashmir acceded to India.
  
2. These terms and conditions were contoured into the mould of Constitutional Guarantees to ensure the interests and security of the people residing in Jammu & Kashmir. They were binding in nature and commensurate to a sacred Legal Testimony, which could not be altered/amended without the imprimatur of its inevitable subjects, that is, the people of Jammu & Kashmir through their elected representatives; in whom its ultimate legitimacy and authority dwells.
  
3. In an arbitrary mannerism, the Government of India pulled a legislative blitzkrieg to dilute Article 370 through the promulgation of:
  - (i) The Constitution (Application to Jammu and Kashmir) Order, 2019 [hereinafter referred as Impugned Order];
  - (ii) the subsequent Declaration made by the President under Article 370 (3) of the Constitution vide Notification dated 06.08.2019 bearing GSR 562(E) [hereinafter referred as Impugned Declaration];
  - (iii) The Jammu and Kashmir Reorganization Act, 2019 [hereinafter referred as Impugned Act]

4. In the view of flagrant infringement of Constitutional ethos and subversion of democratic principles, the Petitioner is constrained to approach the Hon'ble Court seeking directions to quash the Impugned Order, Declaration and Act; also, aught consequential actions emanating from them.
5. The Petitioner contends the procedural anomalies exercised in respect of wrenching Jammu & Kashmir's special status are violative of the provisions mentioned in Article 370 and Constitutional Guarantees assured to the State. Furthermore, the people of Jammu & Kashmir perpetuate to breathe into recluse with participation in naught in a venture where their destiny is being moulded.
6. In Entry 15 (now repealed) in Schedule 1, which is complementary to Article 1 of the Constitution of India, provides:  
*“The territory which immediately before the commencement of this Constitution was comprised in the Indian State of Jammu and Kashmir”*

As it is conspicuous from the Constituent Assembly debates, the term 'Indian State of Jammu and Kashmir' was used to not preclude the endeavours pulled by United Nations, initiated in 1948, for settling the dispute and honour it by not including the entire State of Jammu and Kashmir. In 1949, whilst striving for the cessation of hostilities through mediation, the United Nations drew a ceasefire line which sided 35 per cent of the total area of Jammu and Kashmir under the control of Pakistan. Hence, the term 'Indian State of Jammu and Kashmir' was in conformity with the ceasefire line drawn by the United Nations.

7. On 26 January, 1950 the Constitution of India came into force. By this time, more than one-third of Jammu and Kashmir was under illegal occupation of Pakistan. The geographical territory of Jammu and Kashmir was vaguely defined in the Constitution of India. However, it was not ambiguous in nature. The Constituent Assembly of India conferred the authority on the Constituent Assembly of Jammu and Kashmir to deliberate and define its territory and special status with Union of India.
8. Through Article 370 of the Constitution of India, the Constitution of Jammu and Kashmir found its legitimacy. Part II of the Constitution of Jammu and Kashmir provides:

*PART II  
THE STATE*

*(3) The State of Jammu and Kashmir is and shall be an integral part of the Union of India.*

*(4) The territory of the State shall comprise all the territories which on the fifteenth day of August, 1947, were under the sovereignty or suzerainty of the Ruler of the State.*

*(5) The executive and legislative power of the State extends to all matters except those with respect to which Parliament has power to make laws for the State under the provisions of the Constitution of India.*

9. Perusing Para 4 tells that, as per the Constitution of Jammu and Kashmir, the territory of Jammu and Kashmir does not solely comprise of the Indian administered part of the State but includes territory under the occupation of Pakistan (that is, Azad Jammu and Kashmir and Gilgit-Baltistan) and territories ceded to China in 1963 (Shaksam Tract, presently a part of the Xinjiang Uygur autonomous region).

10. Furthermore, Para 3 asserts that the State of Jammu and Kashmir is an integral part of Union of India. Therefore, it was the Constitution of Jammu and Kashmir which defined the geographical territory of the State implying that Constitution of India relied on the Constitution of Jammu and Kashmir in regards to the territorial limits of the State.

11. With the abrogation of the Constitution of Jammu and Kashmir, the constitutionally defined territorial limits have been wrenched from the State. This has jeopardized the territorial certainty, as provided constitutionally, and could imply that Union of India has put to rest its constitutional claim on Pakistan Occupied Kashmir and, also, the territories that were illicitly ceded to China by Pakistan.

12. Under Article 2 of the Constitution of India, the Parliament may by law admit into the Union, or establish, new States on such terms and conditions as it deems fit. The aforementioned Article permits the Parliament to expand the territory of India but no provision in the Constitution of India allows the otherwise, that is, reducing the territory of India. However, the Impugned Act has done exactly what no provision of the Constitution of India permits, that is, reduce the Union's constitutional claim of a territory.

13. The proviso of Article 3 of the Constitution of India confers power on the Parliament to alter boundaries of a State or create a new State. Subsequently, there is an inherent limitation in this procedure to ensure democratic participation. In pursuant of creating/altering a State, it is mandatory for the Parliament to present its proposal to the State Legislative Assembly to know their views. The Parliament is not bound by the suggestions or opinions

enunciated by the State Legislative Assembly but, to bolster the constitutional scheme of federalism, the concerned State's involvement is deemed necessary.

14. As per the procedure prescribed in the Constitution of India, Article 370 could not be amended without the consent of the people of Jammu & Kashmir. Through a sedulous judicial craftsmanship, the Government of India shovelled a perverse route to perspicaciously defeat the Constitutional requisites to amend and render Article 370 ineffective.

15. On poring Article 370, it is palpable that the Constitution of India confers an authority to the President to *alter* and *modify* the applicability of the Constitution of India in relation to the State of Jammu and Kashmir. The text of the said Article asserts that the President could legislate on the normative structure of Jammu & Kashmir's special status. Each speck of it articulates the centrality of the people of Jammu & Kashmir in deciding its destiny. Clause(2) of Article 370 envisions placing all decisions before the Constituent Assembly of the State, who possess the legitimacy in representing the will of the people whom they represent.

16. Perusing Article 370 will enunciate that its provenance could be atomized in the *consent* of the people of Jammu and Kashmir, and nothing could supersede this *consent* in defining their political will. Balancing the said Article's emanation in the consent of its inevitable subjects erects an implied restriction on the President's amending power by rendering it contingent on the consent of the people of Jammu & Kashmir. Albeit the dissolution of

J&K's Constituent Assembly, the *centrality of consent* dwells in the provision; acting in a capacity of an Implied Limitation.

17. Diluting the special status of Jammu and Kashmir, and relegating aught prior Presidential Orders sanctioned under Article 370 Clause(1) ineffective without evoking the consent of the people is a conspicuous infringement of the Implied Limitation inherent in Article 370.

18. The anomalous amendment of Article 367 adds an additional Clause, which comprise of four Sub-Clauses. Sub-Clause(4) stipulates:

*“in proviso to clause (3) of Article 370 of this Constitution, the expression ‘Constituent Assembly of the State referred to in clause (2) shall read ‘legislative Assembly of the State.’”*

In pursuit of subverting the Constituent Assembly bulwark, the Government of India made a substantive Constitution Amendment without amending the Constitution. An amendment to the Constitution can only be made under Article 368 which requires a 2/3<sup>rd</sup> majority in the Parliament, present and voting. The aforementioned procedure prescribed under Article 368 was not even attempted. Hence, it plunges in the Impugned Order in the bucket of unconstitutional waters.

19. Therefore, the Central Government appropriated Article 370 Clause(1) to astutely amend Article 367 to extinguish the prerequisite of eliciting concurrence from the Constituent Assembly to amend Article 370 in order to permit the President to amend it without the involvement of the Constituent Assembly of Jammu & Kashmir.

20. Article 370 Clause(1) Sub-Clause(c) (unamended) states:

*“notwithstanding anything contained in this Constitution, the provisions of Article 1 and this Article shall apply in relation to that State.”*

This provision is certainly significant as it draws certitude to the fact that the President’s power to amend provisions of the Constitution in relation to Jammu & Kashmir does not extend to Article 1 and “this Article” (that is, Article 370). Hence, the Impugned Order cannot amend the said Article.

21. The Impugned Order asserts that the concurrence of the Government of the State of Jammu & Kashmir has been elicited. However, this assertion seems odd on technical grounds. Thenceforth 21 November 2018, the Legislative Assembly of Jammu & Kashmir stands dissolved and President’s Rule was imposed on the State. Consequently, the Impugned Order considers the consent of the Governor equivalent to the consent of the Legislative Assembly; the former is an appointed representative of the Government of India whilst the latter is an elected body of representatives representing the will of the people of Jammu & Kashmir.

22. In effect, the Impugned Order permits the Government of India to take its own consent to amend the constitutional provisions of Article 370. This exercise of juxtaposing proxy consent with the actual consent of the people infringes the constitutional guarantees of democracy and federalism.

23. Under the Indian Constitution, President's Rule is transient in nature. It comes into force when the constitutional machinery turns incapacitated in a State and an elected government stands dissolved. To fill in this lacuna, President's Rule is imposed until a fertile ground is restored for an elected government to be formed.
24. Furthermore, decisions of permanent character- like, changing the status of a State- is taken without the involvement of an elected Legislative Assembly; who, in principle, happen to be the true representatives of the people and absence of their participation and consent is democratically cumbersome.
25. In the view of the foregoing, it is submitted that the Impugned Order, Declaration, and Act is an exposition of disproportionate appropriation of legislative and executive powers by the Central Government; indeed, an apotheosis of colourable exercise of power and, therefore, must be set aside as they violate Articles 14, 19 and 21 of the Constitution of India, whilst synchronously dumping into disarray the federal and democratic structure of the Indian polity.

#### **LIST OF DATES**

- 15.08.1947      India attained independence and, India and Pakistan were created as two independent sovereign countries. The British Rule culminated and all the Princely States were asked to sign an Instrument of Accession to accede to either newfound countries. However, those who did not sign the Instrument of Accession

became independent States. The State of Jammu & Kashmir was amongst those States who chose to not accede with either dominions. Hence, it became an independent State.

26.10.1947 The Sovereign Ruler of Jammu and Kashmir, Maharaja Hari Singh, ratified the Instrument of Accession, acceding to India which was subjected to certain terms and conditions as mentioned in the Instrument. The Instrument specified three areas- i.e. External Affairs, Defence and Communications- where the Dominion Legislature could make laws for the State of Jammu & Kashmir. No further authority was vested in the Dominion Legislature.

27.10.1947 The Governor-General Lord Mountbatten accepted the Instrument of Accession and, the State of Jammu & Kashmir was acceded to India within the ambit of terms and conditions mentioned in the Instrument of Accession.

The Instrument spurred a special relationship between India and the State. As, unlike other Princely States, the State of Jammu & Kashmir was to retain its autonomy except for the areas mentioned in the Instrument and shall repudiate to tow obedience to

any law which could potentially disturb its autonomy.

26.01.1950 The Indian Constitution, drafted by the Constituent Assembly of India, came into existence. In order to actualise the special status conferred on the State of Jammu & Kashmir, this Constitution included a special provision for the State under Article 370. This Article became the bedrock to ensure a special position of the State whilst respecting its autonomy in respect to the terms of the Instrument. It was a comprehensive provision which could be amended solely in the manner prescribed in the same Article.

1950 The President of India issued the Constitution (Application to Jammu & Kashmir) Order, 1950, in consultation with the Government of Jammu & Kashmir. It specified the areas where the Dominion Legislature held the authority to make laws.

1.05.1951 The Maharaja of Jammu & Kashmir issued a Proclamation to constitute a Constituent Assembly, based on adult franchise, to draft the State's Constitution.

1952           The Government of Jammu & Kashmir and Government of India ratified an agreement called the Delhi Agreement. It was pertaining to the power which will be enjoyed by the State Government to protect its special rights and autonomy. In case of Jammu & Kashmir, the residuary power would vest in the State Government and not the Union Parliament.

14.05.1954    The President of India, in concurrence with the Government of Jammu & Kashmir, issued the Constitution (Application to Jammu and Kashmir) Order, 1954. This Presidential Order superseded the 1950 Order and laid down that those provisions of the Constitution which, in addition to Articles 1 and 370, would be applicable to the State of Jammu and Kashmir.

17.11.1956    The Constitution of Jammu & Kashmir was approved and adopted by the Constituent Assembly of Jammu and Kashmir, and it came into force on 26.01.1957. Thereafter, the Constituent Assembly was dissolved.

The Constitution of Jammu & Kashmir articulated that the State is an integral part of India and incarnated the terms and conditions mentioned in the

Instrument of Accession in order to uphold the conferred special status of Jammu & Kashmir.

- 21.12.1965 The terms “Sadar-i-Riyasat” and “Prime Minister” mentioned in the Constitution of Jammu & Kashmir were substituted with terms “Governor” and “Chief Minister” through the Constitution of Jammu and Kashmir (Sixth Amendment) Act, 1965.
- 13.11.1974 The Government of India and the Government of Jammu & Kashmir entered into the Kashmir Accord, 1975 to reassert and clarify that relationship between both the parties was to continue on the lines of Article 370 and reiterated that the residuary powers will vest in the State of Jammu & Kashmir.
- 20.06.2018 Through the power extended to the Governor under Section 92 of the Constitution of Jammu and Kashmir, with the concurrence of the President, issued a proclamation to declare Governor’s Rule in the State of Jammu and Kashmir for period of six months.
- 21.11.2018 Citing horse-trading and perverse political practices as reason, the Governor, under Section 53(2) of the

State Constitution, dissolved the Legislative Assembly of the State.

- 19.12.2018 With the culmination of Governor's Rule in the State, a proclamation was issued under Article 356 to declare President's Rule in the State of Jammu & Kashmir.
- 03.07.2019 The President's Rule was schedule to expire on 02.07.2019. However, the Government of India decided to extend it for further six months, which received a nod from both Houses of the Parliament.
- 01.08.2019 Amarnath Yatra was suspended by the Central Government on the grounds of major terror threats and all the pilgrims and tourists were advised to move out of the State. Consequently, troops in large number were deployed in Jammu and Kashmir.
- 03.08.2019 The Governor of Jammu and Kashmir clearly refused to acknowledge that any proposals were being discussed by the Central Government to amend/abrogate Article 370 or Article 35A. He maintained that troop deployment was spurred in pursuant to intelligence inputs casting feasibility of a major terror threat.

04.08.2019 A situation tantamount to curfew was created in the Kashmir Valley. People were advised to keep inside their houses and not venture out. Subsequently, mainstream political leaders of the State were put under house arrest without putting forth any reasons for the same.

05.08.2019 The President, in exercise of the powers vested in him by Article 370 (1), assented to the Constitution (Application to Jammu and Kashmir) Order, 2019. The aforesaid Order purported concurrence of the Government of Jammu and Kashmir, which was made possible through an amendment in Article 367 (4) of the Indian Constitution through a Presidential Order.

The Central Government could have amended Article 367 as per the procedure prescribed in Article 368. It was an anomaly to actualise a Constitutional Amendment through a Presidential Order without amending the Constitution of India.

05.08.2019 The Jammu and Kashmir Reorganization Bill, 2019 was moved and passed by the Parliament. The

impugned Bill sought to bifurcate the State of Jammu and Kashmir, and create two Union Territories.

The Constitution of India permits the Parliament to create a new State or Union Territory but, as per Article 3 of the Indian Constitution, it is mandatory on the part of the Central Government to elicit the State Legislative Assembly's views on it, regardless of accepting or rejecting them. However, the constitutional requisite was subsided.

06.08.2019 The President issued a notification, in exercise of his powers under Article 370 (3) of the Indian Constitution, to declare that Article 370 shall cease to be operative from the instant date.

09.08.2019 The Jammu and Kashmir Reorganization Bill, 2019 received President's assent and, consequently, the Home Ministry promulgated a notification in the Gazette of India that the aforementioned Act shall become effective from 31.10.2019.

The Petitioner assails the constitutionally anomalous mannerism opted by the Central Government, to substantiate the cessation of Article 370, traduces the terms and conditions of the Instrument of Accession

(dated 27.10.1947) deemed as a fundamental aspect of Indian federalism, a basic feature of the Indian Constitution, withal subverting the democratic values of Indian polity.

\_\_.09.2019 Hence, the present Writ Petition

**IN THE SUPREME COURT OF INDIA**

CIVIL ORIGINAL JURISDICTION

(ORDER XXXVIII, S.C.R, 2013)

UNDER ARTICLE 32 OF THE CONSTITUTION OF INDIA

**WRIT PETITION (CIVIL) No. OF 2019**

**IN THE MATTER OF:-**

Rifat Ara Butt

.... Petitioner

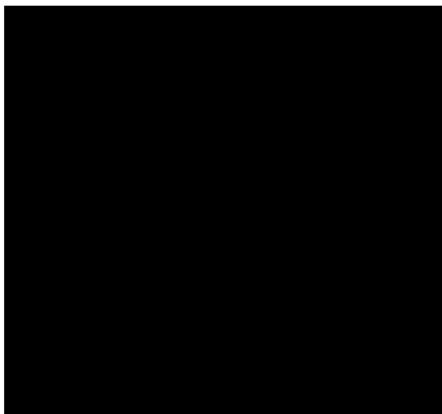
Vs.

Union of India & Anr.

...Respondents

**MEMO OF PARTIES**

Rifat Ara Butt



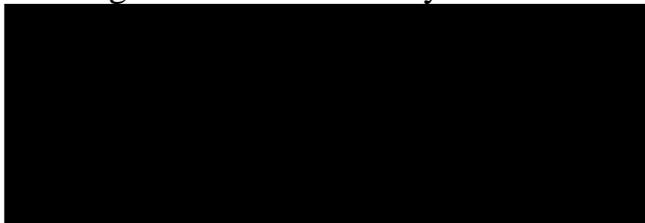
.... Petitioner

Versus

1. Union of India  
Through its Secretary  
Ministry of Home Affairs  
North Block,  
New Delhi-110001

....Respondent No.1

2. State of Jammu and Kashmir  
Through the Chief Secretary



....Respondent No.2

**WRIT PETITION UNDER ARTICLE 32 OF THE CONSTITUTION OF INDIA  
FOR ISSUANCE OF A WRIT, ORDER OR DIRECTIONS TO DECLARE THE  
IMPUNGED ORDER, DECLARATION AND ACT AS UNCONSTITUTIONAL  
BEING VIOLATIVE OF ARTICLES 14, 19 AND 21 OF THE CONSTITUTION OF  
INDIA**

TO,

THE HON'BLE CHIEF JUSTICE OF INDIA AND HIS

COMPANION JUDGES OF THE SUPREME COURT OF INDIA

THE HUMBLE PETITION OF THE PETITIONER ABOVE NAMED

**MOST RESPECTFULLY SHOWETH**

1. The Petitioner is a permanent resident of Jammu and Kashmir. She attained her education in Kashmir and got enrolled in the Jammu and Kashmir Bar Council as an advocate in 1998. After practicing in the Jammu and Kashmir High Court for few years, she was appointed as an Ad Hoc Judge for a period of two years. With the culmination of her stint as a Judge, she went forward to practice as an advocate in the Supreme Court of India. She is also a member of the Supreme Court Bar Association and regularly practices before this Hon'ble Court.
2. The Petitioner has witnessed the upsurge of militancy in late 1980s and turbulent years that befell Jammu and Kashmir. Also, when Article 370 was made inoperative and restrictions were imposed on the State, she witnessed the plight and apprehensions of the people of Jammu and Kashmir. Being an erstwhile Judge, she feels distressed with the current situation and is deeply concerned for the protection and security of life and liberty of the people of Jammu and Kashmir.

3. This is a Writ Petition under Article 32 of the Constitution of India praying for writ or order or direction declaring the Impugned Order, Declaration and Act as unconstitutional on for being violative of Articles 14, 19 and 21 of the Constitution of India withal throwing the constitutional scheme of federalism and democracy into disarray. The Hon'ble Court shall pass such orders, as deemed appropriate, to protect the dignity and liberty of the people of Jammu and Kashmir. The Petition is filed by the Petitioner in her individual capacity.

4. The Petitioner has not approached any other Court for the reliefs claimed in the present Writ Petition. No representation has been filed with any authority since the constitutional validity of the Impugned Order, Declaration and Act under challenge and the reliefs claimed can only be granted by this Hon'ble Court. The Petitioner submits that she has no other efficacious alternative remedy except to approach this Hon'ble Court by the way of this Writ Petition under Article 32 of Constitution of India.

5. On 18.07.1947 the British Parliament passed the Indian Independence Act. Under Section 1(1) of the Act, two independent sovereign countries- India and Pakistan- were to come in existence. Section 7(1)(b) culminated the rule of British Monarch over Indian States and shift it to the Rulers of those States. Through Section 9 of the Act, Section 6 with all its provision of the Government of India Act, 1935 came into force, which provided that:

(i) An Indian State shall be deemed to have acceded to the Dominion if the Governor General has signified his acceptance of an Instrument of Accession executed by the Ruler thereof whereby the Ruler on behalf of the State:-

- (a) Declares that he accedes to the Dominion with the intent that the Governor-General, the Dominion Legislature, the Federal Court and any other Dominion authority established for the purposes of the Dominion authority established for the purposes of the Dominion shall, by virtue of his Instrument of Accession, but subject always to terms thereof, and for the purposes only of the Dominion, exercise in relation to the State such functions as may be vested in them by order under this Act: and
- (b) Assumes the obligation of ensuring that due effect is given within the State to the provisions of this Act so far as they are applicable therein by virtue of the Instrument of Accession; and
- (ii) An Instrument of Accession shall specify the matters which the Ruler accepts as matter with respect to which the Dominion Legislature may make laws for the State, and the limitations, if any, to which the Dominion Legislature may make laws for the State, the limitations, if any, to which the power of the Dominion Legislature to make laws for the State, and the exercise of the executive authority of the Dominion in the State, are respectively to be subject.

Consequently, all the independent Princely States were provided an opportunity to accede with either independent countries by signing the Instrument of Accession or maintain their independence. Except for Junagadh, Hyderabad and Jammu and Kashmir, all independent Princely States had ratified the Instrument of Accession to accede with either Dominions.

6. On 15.08.1947, India attained independence with two sovereign Dominions of India and Pakistan coming into existence. However, Jammu and Kashmir did not accede to either Dominion and, ergo, became an independent State.
7. With apprehension mounting for an aggression, Maharaja Hari Singh offered to sign a Standstill Agreement with India and Pakistan fixated at maintaining the State's independence until he takes a final decision on accession. Pakistan was amicable with this proposal but India refused to enter into a Standstill Agreement. This spurred a revolt backed by Pakistani infiltration to create pressure on the Maharaja to accede with Pakistan. In such hostile conditions, the Maharaja decided to fall in favour of India to secure the State.
8. On 26.10.1947, Maharaja Hari Singh signed the Instrument of Accession with India subjected to certain unconventional conditions. It was sent to Governor General Lord Mountbatten for put a stamp on Jammu and Kashmir's accession to India. In the Schedule of the aforesaid Instrument of Accession, three matters were specified in respect to which the Dominion Legislature could make laws, that is:

#### A. DEFENCE

1. The naval, military and air forces of the Dominion and any other armed forces raised or maintained by the Dominion; any armed forces, including forces raised or maintained by an acceding State, which are attached to, or operating with, any of the armed forces of the Dominion.
2. Naval, military and air force works, administration of cantonment areas.
3. Arms, fire-arms, ammunition.
4. Explosives.

## B. EXTERNAL AFFAIRS

5. External affairs; the implementing of treaties and agreements with other countries; extradition, including the surrender of criminals and accused persons to parts of His Majesty's Dominions outside India.
6. Admission into, and emigration and expulsion from, India, including in relation thereto the regulation of the movements in India of persons who are not British subjects domiciled in India or subjects of any acceding State; pilgrimages to places beyond India.
7. Naturalisation.

## C. COMMUNICATIONS

8. Posts and telegraphs, including telephones, wireless, broadcasting, and other like forms of communication.
9. Federal railways; the regulation of all railways other than minor railways in respect of safety, maximum and minimum rates and fares, station and services terminal charges, interchange of traffic and the responsibility of railway administrations as carriers of goods and passengers; the regulation of minor railways in respect of safety and the responsibility of the administrations of such railways as carriers of goods and passengers.
10. Maritime shipping and navigation, including shipping and navigation on tidal waters; Admiralty jurisdiction.
11. Port quarantine.
12. Major ports, that is to say, the declaration and delimitation of such ports, and the constitution and powers of Port Authorities therein.
13. Aircraft and air navigation; the provision of aerodromes; regulation and organisation of air traffic and of aerodromes.

14. Lighthouses, including lightships, beacons and other provisions for the safety of shipping and aircraft.

15. Carriage of passengers and goods by sea or by air.

16. Extension of the powers and jurisdiction of members of the police force belonging to any unit to railway area outside that unit.

On the following day, i.e. 27.10.1947, Governor General Lord Mountbatten accepted the Instrument of Accession, therefore completing Jammu and Kashmir's accession to India. A true and correct copy of the Instrument of Accession of Jammu and Kashmir dated 26.10.1947 is annexed herewith as

**ANNEXURE P-1**

9. On 20.06.1949, Maharaja Hari Singh promulgated a Proclamation to delegate his power and authority to his son, Yuvraj Karan Singh, who would thenceforth function as the Ruler of the State.

10. On 26.08.1950, the Constitution of India came into force and repealed the Indian Independence Act, 1947 and the Government of India Act, 1935. The aforementioned Constitution included a provision from where the special relationship between India and Jammu and Kashmir flowed, i.e. Article 370. Viewing it from the prism of the Instrument of Accession, Article 370 incarnated all the terms and conditions mentioned in Instrument to ensure the State's autonomy and security. It coherently laid down that the Union Parliament of India could not supersede the State's Constitution in a unilateral fashion.

11. From the power resting in Article 370(1) of the Indian Constitution, the President issued the Constitution (Application of Jammu and Kashmir) Order,

1950. This Order acted as a testimony to the people of Jammu and Kashmir to uphold all the terms and conditions mentioned in the Instrument whilst limiting the Parliament power to make laws in respect to the State. The aforesaid Article provided that:

(1) Notwithstanding anything in this Constitution,—

(a) the provisions of article 238 shall not apply in relation to the State of Jammu and Kashmir;

(b) the power of Parliament to make laws for the said State shall be limited to—

(i) those matters in the Union List and the Concurrent List which, in consultation with the Government of the State, are declared by the President to correspond to matters specified in the Instrument of Accession governing the accession of the State to the Dominion of India as the matters with respect to which the Dominion Legislature may make laws for that State; and

(ii) such other matters in the said Lists as, with the concurrence of the Government of the State, the President may by order specify.

*Explanation.*—For the purposes of this article, the Government of the State means the person for the time being recognised by the President as the Maharaja of Jammu and Kashmir acting on the advice of the Council of Ministers for the time being in office under the Maharaja's Proclamation dated the fifth day of March, 1948;

(c) the provisions of article 1 and of this article shall apply in relation to that State;

(d) such of the other provisions of this Constitution shall apply in relation to that State subject to such exceptions and modifications as the President may by order specify:

Provided that no such order which relates to the matters specified in the Instrument of Accession of the State referred to in paragraph (i) of sub-clause (b) shall be issued except in consultation with the Government of the State:

Provided further that no such order which relates to matters other than those referred to in the last preceding proviso shall be issued except with the concurrence of that Government.

(2) If the concurrence of the Government of the State referred to in paragraph (ii) of sub-clause (b) of clause (1) or in the second proviso to sub-clause (d) of that clause be given before the Constituent Assembly for the purpose of framing the Constitution of the State is convened, it shall be placed before such Assembly for such decision as it may take thereon.

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

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

12. This Article enunciates that its provenance could be atomized in the *consent* of the people Jammu and Kashmir and nothing could supersede this *consent* in defining the State's political destiny. The said Article's emanation in the consent of its inevitable subjects erects an implied restriction on the President's amending power by rendering it contingent on the consent of the people of Jammu & Kashmir. Albeit the dissolution of J&K's Constituent Assembly, the *centrality of consent* dwells in the provision.

13. On 01.05.1951, Yuvraj Karan Singh promulgated a Proclamation to constitute a Constituent Assembly to draft the State Constitution. Furthermore, to modify Article 54 and 55 as it applied to Jammu and Kashmir, the President issued the Constitution (Application to Jammu and Kashmir) Order, 1952. Consequently, the Delhi Agreement of 1952 was signed by the Government of India and the Government of Jammu and Kashmir to reaffirm Indian Dominion's respect of the State's autonomy and special status, rights and privileges, which included acceptance of a separate flag for the State and an elected Sadar-i-Riyasat.
14. Through his power under Article 370(1)(ii) of the Indian Constitution, the President, in concurrence of the Government of Jammu and Kashmir, issued the Constitution (Application to Jammu and Kashmir) Order, 1954. The said Order supersede the 1950 Order and laid down provisions, supplementary to Article 1 and 370, those would be applicable on Jammu and Kashmir.
15. On 17.11.1956, the Constituent Assembly of Jammu and Kashmir approved and adopted the Constitution of Jammu and Kashmir. It came into force on 26.01.1957. The Constitution of Jammu and Kashmir laid down that the Parliament could make laws solely on the matters mentioned in the Indian Constitution but the Legislative powers of the State will rest in the State Legislative Assembly and Legislative Council.
16. The geographical territory of Jammu and Kashmir is vaguely defined in the Constitution of India. However, it was not ambiguous in nature. The

Constituent Assembly of India conferred the authority on the Constituent Assembly of Jammu and Kashmir to deliberate and define its territory.

17. Through Article 370 of the Constitution of India, the Constitution of Jammu and Kashmir found its legitimacy. Part II of the Constitution of Jammu and Kashmir provides:

*PART II  
THE STATE*

*(3) The State of Jammu and Kashmir is and shall be an integral part of the Union of India.*

*(4) The territory of the State shall comprise all the territories which on the fifteenth day of August, 1947, were under the sovereignty or suzerainty of the Ruler of the State.*

*(5) The executive and legislative power of the State extends to all matters except those with respect to which Parliament has power to make laws for the State under the provisions of the Constitution of India.*

18. Therefore, it was the Constitution of Jammu and Kashmir which defined the geographical territory of Jammu and Kashmir implying that Constitution of India relied on the Constitution of Jammu and Kashmir in regards to the territorial limits of the State.

19. The Constitution of Jammu and Kashmir (Sixth Amendment) Act, 1965 was passed by the Indian Parliament. This Act sought to replace the expressions “Sadar-i-Riyasat” and “Prime Minister” in the State Constitution with the terms “Governor” and “Chief Minister”, respectively.

20. On 13.11.1974, the Government of India and the Government of Jammu and Kashmir entered in the Kashmir Accord, 1975. The Accord reaffirmed the

unique relationship of Jammu and Kashmir with Union of India and the residuary powers of legislative matters to be retained by the State.

21. On 20.06.2018, in exercise of his power under Section 92 of the Constitution of Jammu and Kashmir, the Governor, in concurrence of the President, issued a promulgation to declare Governor's Rule in Jammu and Kashmir citing failure of constitutional machinery in the State. Consequently, on 21.11.2018, the Governor dissolved the Legislative Assembly of the State in exercise of his powers under Section 53(2) of the Constitution of Jammu and Kashmir.

22. The proclamation of Governor's Rule was scheduled to expire on 19.12.2018. Iterating the failure of the State to restore its constitutional machinery, the President, in exercise of his powers under Article 356, imposed President's Rule in Jammu and Kashmir. It meant that the President assumed all functions of the State Government and powers vested in the Governor.

23. On 12.06.2019, the Central Government decided to further extend President's Rule in Jammu and Kashmir for another six months. The same came into effect on 03.07.2019.

24. On 02.08.2019, the Chief Secretary of Jammu and Kashmir issued a Security Advisory to advise Amarnath Yatris to forfeit their yatra and return. Consequently, the Central Government started to deploy a large number of troops in Jammu and Kashmir. The Governor of Jammu and Kashmir, in a press statement, clearly refused to acknowledge that any proposals were being discussed by the Central Government to amend Article 370 or Article 35A. He

maintained that troop deployment was spurred in pursuant to intelligence inputs casting feasibility of a major terror threat.

25. By 04.08.2019, a situation tantamount to curfew was created in the Kashmir Valley. People were advised to keep inside their houses and not venture out. All communication channels, including telephone and mobile phones, were suspended. Subsequently, mainstream political leaders of the State were put under house arrest without putting forth any reasons for the same.

26. On 05.08.2019, the President in exercise of the powers under Article 370 (1) passed the Constitution (Application to Jammu and Kashmir) Order, 2019 to supersede the Constitution (Application to Jammu and Kashmir) Order, 1954, which provided that:

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

**1.** (1) This Order may be called the Constitution (Application to Jammu and Kashmir) Order, 2019.

(2) It shall come into force at once, and shall thereupon supersede the Constitution (Application to Jammu and Kashmir) Order, 1954 as amended from time to time.

**2.** All the provisions of the Constitution, as amended from time to time, shall apply in relation to the State of Jammu and Kashmir and the exceptions and modifications subject to which they shall so apply shall be as follows:—

To article 367, there shall be added the following clause, namely:—

“(4) For the purposes of this Constitution as it applies in relation to the State of Jammu and Kashmir—

(a) references to this Constitution or to the provisions thereof shall be construed as references to the Constitution or the provisions thereof as applied in relation to the said State;

(b) references to the person for the time being recognized by the President on the recommendation of the Legislative Assembly of the State as the Sadar-i-Riyasat of Jammu and Kashmir, acting on the advice of the Council of Ministers of the State for the time being in office, shall be construed as references to the Governor of Jammu and Kashmir;

(c) references to the Government of the said State shall be construed as including references to the Governor of Jammu and Kashmir acting on the advice of his Council of Ministers; and

(d) in proviso to clause (3) of article 370 of this Constitution, the expression “Constituent Assembly of the State referred to in clause (2)” shall read “Legislative Assembly of the State”.

A true and correct copy of the Constitution (Application to Jammu and Kashmir) Order, 2019 dated 05.08.2019 is annexed herewith as

**ANNEXURE P-2**

27. In the following day, i.e. 06.08.2019, the President in exercise of his powers under Article 370 (3) promulgated a Notification to declare that all provisions of Article 370 shall become inoperative from the instant date. A true and correct copy of the Presidential Declaration C.O. 273 dated 06.08.2019 is annexed herewith as **ANNEXURE P-3**

28. On 06.08.2019, the Jammu and Kashmir Reorganization Bill, 2019 was tabled and passed in the Parliament. The Bill sought to reorganize the existing State of Jammu and Kashmir into two Union Territories; i.e. Union Territory of Ladakh (comprising of Kargil and Leh District) and Union Territory of Jammu and Kashmir (comprising of all the territories excluding Kargil and Leh District). The Ministry of Home Affairs promulgated a Notification to declare that the provisions of the Jammu and Kashmir Reorganization Act, 2019 will become effective from 31.10.2019. A true and correct copy of the Jammu and Kashmir Reorganization Bill, 2019 dated 06.08.2019 is annexed herewith as **ANNEXURE P-4**

29. The Petitioner firmly believes that democracy, fundamentally, is an idea of an agreement buttressed with the consent of the people as the source of the origin and organization of a political society. In other words, a democracy is underpinned with the roots of a social contract. Where the dispensation's authority has its provenance in the sovereign citizens. Any law-making body could not abode at the same pedestal of sovereignty as the citizens.

30. It is not the Government's mere obligation to conform with the threads of the social contract rather an essential corollary of the Indian Constitution. The Parliament breathes life as an organ of the Constitution. However, it is the people of India who provide a legitimate existence and authority to Constitution. Juxtaposing the Parliament and the Sovereign Citizens as equivalents in a democratic society would constitute a fraud on the principles of Democracy and Federalism; both, as laid down by the Supreme of Court of India, are basic feature of our Constitution.

31. In the foregoing circumstances, the present Writ Petition raises the following questions of law:

- (1) Whether the Parliament could traduce principles of federalism and democracy, deemed as basic features of the Constitution of India, in pursuant of non-participatory developmentalism, as pulled in case of Jammu and Kashmir?
- (2) Whether the term State means a mere geographical territory? If not, does the term State mean a fusion of the people and the geographical territory comprising of a State?
- (3) Whether the Parliament could act like a Hobbesian Sovereign in a democratic constitutional scheme and discharge its duty without permitting the citizens, who would be the inevitable subjects of their decisions, to participate and manifest their will?
- (4) Whether the Parliament could subside constitutional requisites of Article 3 of the Constitution of India to reorganise and bifurcate a State having its own legitimate Constitution, which claimed that the State of Jammu and Kashmir is an integral part of the Indian Dominion, and enjoyed an unconventionally unique relationship with India?
- (5) Whether the Parliament could make a substantive Constitutional Amendment through a Presidential Order without amending the Constitution through the procedure prescribed under Article 368 of the Constitution of India requiring a 2/3<sup>rd</sup> majority in the Parliament, present and voting?

## **FOUNDATIONS**

- A. BECAUSE the Parliament could not infringe the principles of federalism and democracy in pursuant of non-participatory developmentalism as these are basic features of the Constitution of India. In *Kesavananda Bharti v. Union of India*, the Supreme Court laid down the doctrine of basic structure which could not be amended by the Parliament in exercise of its constituent power under Article 368. It is a sheer abuse of power in putting the consent of the Governor equivalent to the consent of the sovereign people. No substantial change in Article 370 could be made without the democratic will of the people of Jammu and Kashmir.
- B. BECAUSE the unilateral mannerism opted by the Central Government to abrogate aught provisions of Article 370 consigns the Constitutional Guarantees to perversity. The people of Jammu and Kashmir laid their trust in the Union of India to uphold the terms and conditions enumerated in the Instrument of Accession, which categorically states that Jammu and Kashmir is an integral part of India but the State shall maintain its special status and autonomy.
- C. BECAUSE the Parliament could not act like a Hobbesian Sovereign in a democratic constitutional scheme and discharge its duty without permitting the citizens, who would be the inevitable subjects of their decisions, to participate and manifest their will. As laid down by the Supreme Court in *Kesavananda Bharti* case, there is no question of the law making body being a sovereign body for that body possesses only those powers which are conferred on it. Regardless of how representative it might be, it cannot be equated with the sovereign people.
- D. BECAUSE the Parliament could not subside constitutional requisites of Article 3 of the Constitution of India to reorganise and bifurcate a State having

its own legitimate Constitution, which claimed that the State of Jammu and Kashmir is an integral part of the Indian Dominion, and enjoyed an unconventionally unique relationship with India.

Article 3 empowers the Parliament to alter state boundaries and create new states. The Parliament can do this without a constitutional amendment. However, it requires that the Bill for alteration/creation of a State must be referred by the President to the legislature of that State for expressing its views thereon. In *Mangal Singh v. Union of India*, the Supreme Court declared that the power which Parliament may exercise by law is supplemental, incidental or consequential to the admission, establishment or formation of a State as contemplated by the Constitution, and is not the power to override the constitutional scheme.

E. BECAUSE the Parliament could not make a substantive Constitutional Amendment through a Presidential Order without amending the Constitution through the procedure prescribed under Article 368 of the Constitution of India requiring a 2/3<sup>rd</sup> majority in the Parliament, present and voting. President's Rule is transient in nature. It comes into force when the constitutional machinery turns incapacitate in a State and an elected Government stands dissolved. Doing something indirectly which could not be done directly is a colourable exercise of power.

To fill in this lacuna, President's Rule is imposed until a fertile ground is restored for an elected government to be formed. Decisions of permanent character- like abrogating the special status of Jammu and Kashmir- is taken without the involvement of an elected government, who happen to be the true representatives of the people and absence of their consent is democratically cumbersome (as laid down in *S.R. Bommai v Union of India*)

F. BECAUSE the President and Parliament could not exercise the constituent powers vested in the legislative assembly of Jammu and Kashmir. During emergency proclamation under Article 356, the President could not function in an unfettered manner. In *Samatha v. State of Andhra Pradesh*, the Supreme Court held that the legislative power of the Constitutional Executive to modify, amend and regulate laws comprise of certain implied limitations.

On perusing Article 370, it enunciates that the provenance could be atomized in the consent of the people of Jammu and Kashmir, and nothing could supersede this consent in defining their political destiny. This erects an implied restriction on the President's amending power by rendering it contingent on the consent of the people of Jammu and Kashmir.

G. BECAUSE the Article 370(1)(c) states that anything contained in the Constitution of Jammu and Kashmir, the provisions of Article 1 and this Article (i.e. Article 370) shall apply in relation to that State. Whereas, other provisions, as laid down in Article 370(1)(d), are to be applied through a Presidential Order conjointly with the concurrence of the elected State Government. Consequentially, a Presidential Order cannot amend/modify provisions of Article 1 and 370 but "other provisions".

H. BECAUSE Article 370 could be amended, modified or abrogated on the recommendation of the Constituent Assembly of Jammu and Kashmir to the President of India. To equate Legislative Assembly with the Constituent Assembly in its powers and functions is a cumbersome measure as the Constitution of Jammu and Kashmir restricts it from exercising constituent powers.

I. BECAUSE this Hon'ble Court has laid down in various cases that Article 370 is not temporary in nature. The rendition behind adding the word 'temporary'

in the said Article was to let the Constituent Assembly take the final decision on the relationship between Jammu and Kashmir and Union of India. This instance is another testimony on the part of our Founding Fathers to vest paramountcy in the people of Jammu and Kashmir in actualising the terms and conditions enumerated in the Instrument of Accession and take the final decision.

J. BECAUSE the President or Government of India cannot decide what the term “Constituent Assembly” would mean as it was not a creation of the Constitution of India. Instead the Founding Fathers vested this authority in the people of Jammu and Kashmir to elect their representative spearheaded by the Ruler of Jammu and Kashmir.

K. BECAUSE Article 370 mandates the concurrence of a democratically elected State Government for the purpose of magnifying the powers of Unions Government in the State. The constitutional requisite of eliciting the recommendation of the Constituent Assembly was laid down to bolster the democratic principle of participation of the people of Jammu and Kashmir in changing the status of Article 370.

L. BECAUSE the President cannot said to be the equivalent of an elected State Government whilst discharging functions of the State Government during Emergency. The distinction is significant as a Constitutional Executive discharging his/her duties in contingent circumstances could not be an equivalent of a popularly elected Government.

M. BECAUSE the provisions of the Impugned Act, Declaration and Order are manifestly arbitrary which infringes the fundamental rights contained in Article 14, 19 and 21 under the Constitution of India. Neither the Central Government attempted to let the people of Jammu and Kashmir participate in their venture nor permitted them manifest their will.

N. BECAUSE the Impugned Order, Declaration and Act offends the foundation of Right to Life with Dignity and Personal Liberty and thus violates Article 21 of the Constitution of India. Diluting an Article, which acted as the bedrock of India's special relationship with Jammu and Kashmir, whilst pummelling the people of Jammu and Kashmir with prolonged curfew and leaving them in a situation of rightlessness is equivalent of an animal existence.

O. BECAUSE the Impugned Order, Declaration and Act offends the very basis of Rule of Law and Equal Protection of Law granted to every citizen of this country as enshrined in our Constitution of India. People of Jammu and Kashmir are equal citizens of India but the Central Government is treating them in an unequal fashion which is arbitrary and discriminatory in nature.

P. BECAUSE the Impugned Order, Declaration and Act has engendered a severe threat to the violations of civil and fundamental rights of the people of Jammu and Kashmir, hence a sense of insecurity and helplessness has grabbed the entire State with the only hope of receiving Justice from this Hon'ble Court.

Q. BECAUSE the Constitution of India has made provisions for the Parliament to expand its territory but no provision is extended to do the otherwise, that is, reduce the territory of India. However, this is what the Impugned Order and Act has done, which is unconstitutional.

### **PRAYER**

A. Declare the Constitution of India (Application to the State of Jammu and Kashmir) Order, 2019 as unconstitutional for being violative of Articles 14 and 19 of the Constitution of India.

B. Declare the Constitution of India (Application to the State of Jammu and Kashmir) Order, 2019 (i.e. Presidential Order C.O. 272) as unconstitutional for being violative of Articles 14, 19 and 21 of the Constitution of India.

C. Quash the Declaration made under Article 370(3) of the Constitution of India (i.e. Presidential Order C.O. 273) as unconstitutional for being violative of Articles 14, 19 and 21 read with Article 370 and 356 of the Constitution of India.

D. Declare the Jammu and Kashmir Reorganization Act, 2019 as unconstitutional for being violative of Articles 14, 19 and 21 read with Article 3 and 370 of the Constitution of India.

**AND FOR THIS ACT OF KINDNESS THE PETITIONER AS IN DUTY  
BOUND SHALL EVER PRAY**

**DRAWN BY:**

Ms. Rifat Ara, (Petitioner)  
Advocate, Supreme Court of India

**ASSISTED BY:**

Mr. Ali Ahmed Saleem,  


**Filed By:-**

**(Md. IRSHAD HANIF)**

**ADVOCATE FOR THE PETITIONER**

FILED ON: \_\_.09.2019

**IN THE SUPREME COURT OF INDIA**  
**CIVIL ORIGINAL JURISDICTION**  
**WRIT PETITION (CIVIL) No. OF 2019**

**IN THE MATTER OF:**

Rifat Ara Butt

.....PETITIONER

VERSUS

Union of India & Anr.

.....RESPONDENT

**AFFIDAVIT**

I, Rifat Ara Butt, D/o Ghulam Nabi Butt, R/o Firdaus Colony, Dr. Ali Jan Road, Edgah, Srinagar, Kashmir, at present in New Delhi, do hereby solemnly affirm and declare on oath as under:

1. I am the Petitioner in the above matter and I am fully conversant with the facts and circumstances of the above case and competent to swear the present affidavit.
2. I have read and understood the contents of the accompanying Writ Petition Synopsis and List of Dates from Page No. \_\_\_ to \_\_\_ and also the accompanying Writ Petition (Page No. \_\_\_ to \_\_\_) which have been drafted under my instructions and I say that the contents of the same are true and correct.
3. I say that the contents of the Petition are based through the knowledge derived by various news sources and from the personal sources of the Petitioner.
4. I say that the Annexures annexed with the Petition is true copy of its original.

**DEPONENT**

I, Rifat Ara Butt, do hereby verify that the contents of the above affidavit are true and correct to the best of my knowledge and belief and no part of it is false and nothing material has been concealed therefrom.

Verified at New Delhi on 11<sup>th</sup> Day of September, 2019.

**DEPONENT**