

**IN THE SUPREME COURT OF INDIA
(CIVIL ORIGINAL JURISDICTION)
I.A No. 145852 OF 2019
IN
WRIT PETITION (CIVIL) NO. 1013 OF 2019**

IN THE MATTER OF:

MANOHAR LAL SHARMA

...PETITIONER

Versus

UNION OF INDIA & ANR.

...RESPONDENTS

AND IN THE MATTER OF:

PREM SHANKAR JHA

...APPLICANT/IMPLEADMENT

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PAPER-BOOK

ADVOCATE FOR THE APPLICANT: MR.K.K.MOHAN

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WRITTEN SUBMISSIONS BY SHRI DINESH DWIVEDI, SENIOR

ADVOCATE ON BEHALF OF THE APPLICANT/IMPLEADMENT

The broad issues involved in this case pertain to, the validity of Union of India's actions/ Orders issued on the 5th and 6th August,2019 virtually ceasing the Article 370 of the Constitution of India. Though the dramatics of it show that Article 370 still survives yet in reality on a deeper look nothing of substance survives. Neither its heart nor the soul. When all the provisions of the Constitution of India, as it is, on date begin to apply then what remains of Article 370. The sole object of Article 370 was to ensure that people of Kashmir have a say in their own governance through there own Constitution. This guarantee has been wiped out alongwith Article 370, when the entire Constitution of India is made applicable.

This idea of "say in their own governance" through their own Constitutions of JK may, myopically appear to be a heresy. Yet if the concept and the guarantee are seen in the wider context of historical necessity, the picture may appear different. Wisest of men called Framers took into consideration the wider angle and the need. They guaranteed to the people of Kashmir, while enacting Constitution of India, autonomy to govern themselves, through their own Constitution. This was an unconditional autonomy to Kashmir by the most august of Assemblies, at a time when it was shaping India into a "Federal State". This guaranteed autonomy was within the Federal State termed by Article 1 as "Union of States".

It needs to be seen through deeper analysis. Why the greater autonomy to Kashmir was guaranteed by the makers of our Constitution. Constituent Assembly of India undoubtedly had the sovereign powers to ordain this. To question their wisdom now would seem to be, not only, unconstitutional but also arbitrary and unethical. The tussle today is between two segments of the Indian Citizens, one living within the territory of Kashmir and clamouring for the restitutions of their guaranteed autonomy, via their own Constitution, while the other clamouring for abrogation of that guaranteed autonomy and freedom, living outside the said territory of Kashmir. This clamour outside J & K is based on mythical concept of "uniform integration within Article 1. The question therefore is that, are there any provisions in our Constitution that require this uniformity in integration or does our Constitution, shedding all rigidity, has accommodating and flexibility in this regard. It would also be important to hear in mind that while the Framers were engrafting a federal structure they did not condition it with the concept of "uniform integration" of

States forming the Union. Neither Article 1 nor Article 3 say so expressly or impliedly. Framers were well aware of various kinds of federal structures ranging from U.S. and the Australian concepts, to the one under the Government India Act 1935. While devising a federal Constitution for India they consciously and deliberately gave greater autonomy to J & K. They welcomed the State of J & K into the Union (Article 1) by merging it as part B States sans Article 238. This alone made part VI of Our Constitution inapplicable to J & K. J & K thus become a State in the Union though Articles 152-237 of Part VI were omitted for it. If Part VI was inapplicable then so would Part XI as it only applies to States covered by Part VI [see the heading]. This would make the distribution of power under Article 246, another importance aspect of federal structure in our Constitution, inapplicable. Article 245-248 read with the Seventh Schedule would consequently not be applicable. The entire federal structure with the distribution of power between the Union, and the States was kept out. This is the clearest indicator that the Federal structure visualized under Article 1 was a flexible one.

This flexibility is also evident from the fact that, at the time when Framers were evolving a federal structure for the Union they evolved and guaranteed a completely separate structure of governance for J & K. It was to have a different kind of relationship with the Union based primarily on its own Constitution, or, consent under Article 370. It could have its own Constitution devised by an independent Constituent Assembly elected on basis of adult franchise. Peoples will was allowed more play in devising the rules of their governances, as well as, their relationship with the Union. This is where the American federal concept creeps in. yet most arbitrarily the Constitution of J

& K has been repealed and replaced by only an Executive Order under Article 370 much against the wishes of the Framers

- The Debates - Book No. 5, Vol. No. X-XII pages 423-429.
- Article 370 - This is the only provision that applies Article 1 to J & K, to make it part of the Union, in the entire Constitution. Article 238 and Article 370 have to be seen together.

Additionally certain other relevant factors have to be kept in mind.

- a. Article 1 did not apply to J & K on its own. It is made applicable by virtue of Article 370. Article 3 was not applied. It was made applicable to J & K by means of the 1954 Presidential Order with a modification limiting the power of Parliament under Article 3. Parliament could only provide for division of State or alter its boundary and the name. It could not convert it to Union Territory. Article 3 has to be seen in the broader context of the Constitution of J & K. Further the alteration could only be made with the consent of Legislature of the State established under the J & K Constitution.
- b. Concept of “uniform integration” does not find a place in our Constitution. This myth has also been repeatedly exploded by the Union from time to time. Article Art 371 A-Article 371 J as well as the new Nagaland Accord that permits separate flag and a Constitution. Besides the reality is that integration is really the outcome of Section 3, 4 & 5 of the

Constitution of J & K and neither Article 370 nor the Presidential Order 1954.

- c. The assessment has to be made detached from the clamour of nationalism that is being raised outside Kashmir to press the claim of “uniform integration. On both the sides, a segment of citizens of India are involved. It is not an individualized issue. It is a claims for the restoration of guaranteed autonomy being made by the population inside J & K, as against claim for its abrogation being made by the population outside Kashmir in the name of Uniform integration.
- d. Article 3 was also not applied under Article 370 or otherwise the framers were visualizing of an independent Constituent Assembly of J & K to draft and enact an independent Constitution for J & K, which were to define the territory of J.K. the only reason was to enable the Constitution to apply to a territory over which it was to apply. Any application of Article 3 under Article 370 after the Constitution of J & K was unpermissible.

Having analyzed the federal concept embedded in the Constitution of India, it would also be necessary to notice certain historical documents which throw light yet again on what was the legal position while the Constitution was being debated and the Union was being formed. Deep and fair assessment of history which led to the enactment of the Constitution of J & K is absolutely necessary. Following documents and factors need to be analyzed.

1. India Independence Act, 1947,

2. Letter dated 26.10.1947 from Raja Hari Singh to Governor General **(Annexure:A1)**,
3. Instrument of Accession signed by the Raja of Kashmir on 27.10.1947 **(Annexure:A2)**,
4. Raja's Proclamation dated 05.03.1948 creating emergency administration **(Annexure:A3)**,
5. Proclamation by Yuvraj dated 25.11.1949 **(Annexure:A4)**,
6. Proclamation dated 01.05.1951 calling of Election to Constituent Assembly of J & K. the Assembly convened in November 1952 after direct election to it **(Annexure:A5)**,
7. Negotiation between the Government of J & K and the Government of India were proceeding simultaneously. Four members were assigned to the Constituent Assembly of India by the Government of J & K,
8. The Constituent Assembly debates- book No. 5 Volume No. X-XII, Pages 423- 429. These relate to scope and ambit of Article 370 [draft Article 306A]. the debates are self-explanatory; **(Annexure:A6)**,
9. "Temporary provision" Article 370 enacted. Debates clearly explain the true character of Article 370 and why it is temporary,
10. The comprehensive 1954 Presidential Order issued under Article 370. This was with the consent of the Constituent Assembly of J & K and immediately precedes the Constitution of J & K. It is issued under Article 370 (1) (d). The relevant modifications made are pertaining to Article 3, 246, 248 and 254; 308; 352. Article 356-360 were omitted, and Article 368 amendment were not to apply except with the consent of Constituent Assembly of J & K, in view of Article 370. **(Annexure:A7)**

11. The Constitution of J & K adopted on 17.11.1956 and enforced on 26.01.1957. Of considerable importance are Section 3 and 5 which finally decree the integration of Kashmir with India and the interrelationship between the Union and the State of J & K.

Keeping the above facts and documents in mind one has to analyse the scope of Article 370 and the interrelationship between the Union and the State of J & K.

Following salient features emerge from the analysis of the above documents;

a. The above Instrument of Accession determined two questions:-

- i. The expanse and sphere of Union control over State was confined to 3-4 subjects pertaining to external sovereignty. This included ancillary subjects; relevant to above major subjects.
- ii. It indicated that only external sovereignty had been ceded while internal sovereignty was retained by the Rajah. Residuary power, in contrast to specific subjects, was with the State.
- iii. The above relationship continued till it was re-determined by the Raja's Proclamation dated 25.11.1949. The Proclamation stated that since the Constitution of India was to commence shortly, it will regulate and govern the interrelationship between the Union and the State "in so far as it relates to J & K".

- b. The Legislative Assembly was the successor of the Constituent Assembly of J & K and was constituted under the provisions of the Constitution of J & K. Since Article 238 and Part VI and XI were not apply. Therefore the Legislature and the Government of J & K continued as per the provisions of the J & K Constitution as its creations.
- c. Article 370 was not permitted to be amended by Article 368 due to non obstante clause. It could be modified under Article 370 only. This implied consent of Constituent Assembly of J & K. Therefore Article 368 could not be utilized to amend the Constitution of J & K, nor was it subject to amendment under Article 368.
- d. Article 370 was temporary and was to cease after the enactment of the Constitution of J & K. Thereafter the governing relationship between Union and the State was to be regulated by the Constitution of J & K.
- e. Article 1 did not apply by itself. It applied only by virtue of Article 370 stating so expressly. The State of J & K became part of the federation called India under Article 370(1) (c), unlike other States.
- f. It is more than evident that, neither the Constitution of J & K, nor, the Constituent Assembly that enacted it, are part of or a creature of the Constitution of India, though Article 370(2) and (3) only recognizes their existence. Both the Constitution of India and that of the State of J & K were to co-exist. Constitutions are not enacted for a day or two or for any definite period of time.

g. Even Article 3 was not applied to J & K despite Article 1. It is the 1954 Presidential Order which made Article 3 applicable with a new proviso, enabling exercise of power under Article 3 with the consent of “Legislative Assembly, which was not there. The power under Article 3 was therefore hardly effective. Once Constitution of J & K commenced Article 370 with all its modification and the 1954 Presidential Order ceased. The power and provision under 1950 Presidential Order also ceases taking with if the application of Article 3 of the Constitution of India. With the enactment of the Constitution of J & K not only Article 370 as well as 1954 Presidential Order ceased, the powers of the Legislative Assembly and Parliament also began to be regulated by the said Constitution. Section 4 defines the territory of Kashmir which is binding on parliament also Section 4 can only be changed under Article 147 by the legislative Assembly there is a specific power.

This is what was guaranteed by the Framers of the Constitution of India, not only through Article 370 but also by other provisions, when Kashmir merged in the Indian Federation. This also denotes and defines the expanse of federalism incorporated in the Constitution of India.

There is no indication any where in the Constitution of India that all the States have to integrate uniformly before a true federation is constituted. Indian federalism permits, rather than bars, multiple levels of integration. Infact Constitution does not use the words “Uniform integration” anywhere. It is a myth while reality is multiplicity.

12. ACCESSION OF KASHMIR

As part of the historical perspective it would also be necessary to notice the kind of Accession of Kashmir that took place. The documents above show that the Instrument of Accession only acceded external sovereignty while the internal sovereignty was retained by the Raja. The Debates and the enactment of Article 370 clearly establishes that the framers did not tamper with the above situation. Article 370 (2) & (3) clearly corroborate this position. As per proclamations of the Raja, the provisions of the Constitution of India, other than those pertaining to ceded powers, were not applicable. Eventually they were to be ceded as per the wish of the people of Kashmir, reflected by their Constituent Assembly. The powers pertaining to internal sovereignty were to be ceded as per the Constitution of J & K. Article 238 of the Constitution of India omitted, the application of part VI and XI alongwith Seventh Schedule.

This is further evident from the fact that P.O. 1954, which was the first comprehensive order under Article 370 was issued with the consent and recommendation of the Constituent Assembly of J & K. Article 356 -357 were omitted. The residuary power under entry 97 list I was also denied to the Union. In other words Article 246-248 were not applicable while the residuary power was given to the State. These features were continued by the Constitution of JK after its enactment. There is near unanimity between the PO of 1954 and the Constitution of J & K. The Drafting Committee of J & K Constitution submitted a Report on 11.02.1954 on Basic Principles alongwith annexures. This Report was approved on 15.02.1954. There was demand in the Constituent Assembly J & K to send the Report to Government of India for modifications to be affected through Article 370. The intent was to

incorporate the content of the Report and its annexure in the Constitution of India, via Article 370. This Report was also approved by the Parliament. In pursuance of this the P.O. 1954 was issued containing the recommendations of the Constituent Assembly of J & K. Importantly this also formed the basis of the Constitution of J & K enacted by the Constituent Assembly.

Page 242-246 - Report Basic Principles Committee dated 03.02.1954

Page 251-261 - Report of the Drafting Committee dated 11.02.1954
with its Annexure – Adopted by the Constituent
Assembly of J & K on 15.02.1954.

13. Article 370 was never intended to be an eternal or perennial source of power. It had to cease after 1956. The exercise of this power to repeal the Constitution of J & K was unthinkable.

- **The Debates as above**
- **AIR 1959 SC 749 - Paras 7-15, 19-24, 26-30, 32-38,**
- **AIR 1961 SC 1519**
- **AIR 1970 SC 1118 - Paras 4-8,**
- **AIR 1971 JK 120**
- **1972 (1) SCC 536**
- **AIR 1974 J K 69(FB) - Para 12**
- **2017 (2) SCC 538**
- **1987 JKLR 109**

Keeping the above in mind the following questions arise:-

1. Is power under Article 370, a perennial fountain had of power or it became inoperative after the commencement of Constitution of J & K?

2. Are Presidential Orders dated 05.08.2019 and 06.08.2019 issued under Article 370(1) & (3) illegal and ultra-vires:-
 - a. Because source of power is not available after commencement of the J & K Constitution.
 - b. Because they repeal and replace Constitution of J & K without authority of law and the Constitution.
 - c. Because clause 2 (d) of order dated 05.08.2019 recognizes the “Legislative Assembly of the State” which is one that is created by the Constitution of J & K and not under the Constitution of India.
 - d. Because there was neither any Constituent Assembly nor the Legislative Assembly in existence on 05.08.2019.
 - e. Whether the concurrence of Government of J & K was enough to empower the President of India to issue the Presidential Orders under Article 370 (1) (d), (2) and (3).
3. Whether the Article 356 applies in case of J & K ignoring the provisions of Section 92 of J & K Constitution?
4. Whether the J & K Reorganisation Act is unconstitutional and in breach of Article 1 and 3 of the Constitution of India read with Section 3 of the J & K Constitution?

QUESTION 1:-

Article 370 is not an eternal source of power available to the President or the Union. The title of the provision is clear and categorical when it states “Temporary Provision for J & K”. The question is it is temporary in relation

to what? There is no provision prescribing any lifetime for it. It is therefore temporary in relation to happening of an event.

The document analysed above historically and the debates, clearly demonstrate that, the relationship between the Union and the State of J & K was left to be finally determined by the Constituent Assembly of J & K by enacting a “Constitution” for the State. Both the Constituent Assembly as well as the Constitution of J & K were kept outside the ambit of the Constitution of India and particularly Article 370. Article 370 notices both yet it is not empowered to either create the Constituent Assembly for J & K, nor, enact the Constitution for it. Infact analysis of Article 370 would establish that the Union cannot interfere with the functioning of the Constituent Assembly or the Constitution enacted by it. Not being a creator it could not spell destruction for it. Both were kept outside the realm of Article 238 as well as Article 368 and part VI and VII. Under Article 368 Parliament was not permitted to repeal or amend the Constitution of J & K. whatever Parliament could do under Article 368 had to pass through Article 370. Besides Article 368 was overridden by the non obstante clause in Article 370. The Constitution of India and the Constitution of J & K. were independent to each other. Section 147 of the J & K Constitution prohibited J & K Legislature to amend Article 370 and other provisions of the Constitution of India.

The temporary character of Article 370 was with reference to the commencement of the Constitution of J & K. This has been accepted by the following:-

- Framers in the Debates pertaining to draft Article 306 A (**book No. 5, Vol. X –XII - Pages 423-429**)
 - **AIR 1959 SC 749 - Para 7-15, 19-24, 26-30, 32-38 & 42**
 - **1972 1 SCC 536 - Para 22-23**
 - **AIR 1970 SC 1118 - Para 4-8**
- The discordant voice in Sampat Prakash case (AIR 1970 SC 1118) appears to be not only incorrect but also ‘per incurium’ as it ignores the Debates as above as well as the earlier Constitution Bench AIR 1959 SC 749. There is a direct conflict. Besides this case proves that Article 368 has no application.

From the above narration it is evident that the object of making Article 370 temporary was to enable enactment of the Constitution of J & K which was to become the sole governing factor. Framers had this objective in their mind and therefore the life of Article 370 has to be assessed in the light of this objective. Article 370 (clause 3) is another indicator when it gives the power to the President to cease Article 370 only on the recommendation of the Constituent Assembly of J & K. Surely they were aware that the said Assembly would cease no sooner it enacted the Constitution. Therefore actual making of recommendation under Article 370 (3) was merely a formality. Life of Article 370 cannot be expanded, in conflict with its objective, beyond the commencement of the Constitution of J & K.

Constitutions are not made for a day or a year. They are long lasting. Framers of the Indian Constitution were well aware of this. Yet while debating and

enacting the Constitution of India they have expressly guaranteed to the people of Kashmir a final say in creating their Constituent Assembly to enact a Constitution for themselves. They deliberately kept these out of the legal as well as the Constitutional jurisdiction of the Parliament of India. Parliament has not been allocated any supervening power over the Legislative Assembly created under the Constitution of J & K. Article 246 and 254 have no application as they operate on Legislations made in regard to the three lists of Seventh Schedule as well as Legislature created under the Constitution of India.

QUESTION 2:-

The answer to question No. 2 can be split into two parts. The first part deals with the validity of the Presidential Order dated 05.08.2019.

Firstly this order is void as the power available under Article 370 has long exhausted and ceased. Secondly, this Order does much more than is permitted under Article 370 (1). Article 370(1) (d) read with clause (2) ordains that such an Order can only be issued with the concurrence of the Constituent Assembly of J & K. Yet it has been issued with the concurrence of the Governor of J & K. This is a serious infirmity that vitiates the Order. Governor cannot be a substitute for the Constituent Assembly.

Thirdly clause (2) (d) of the Presidential Order dated 05.08.2019 only replaces the word "Legislative Assembly of the State" for "the Constituent Assembly".

VALIDITY OF PRESIDENTIAL ORDER DATED 05.08.2019 &06.08.2019:-

By these Orders, issued under Article 370(1) & (3), all the provision of the Constitution of India have been applied to J & K. This virtually abolishes the Constitution of J & K. It's a case of implied repeal where a Constitution has been repealed by an Executive exercise of power. The exercise of this power can only be traceable to Article 370(1d),(2) & (3). The analysis of Article 370(1)(d) has to be in the context of 2nd proviso to Article 370 (1) as well as Article 370 (cl 2 &3).

- **AIR 1959 SC 749 - (Para 32-35)**
- **(1972) 1 SCC 536 - Paras 7-30)**
- **Debates (as above)**

The Presidential Order is unconstitutional for the following reasons:-

1. Constitution of J & K cannot be repealed in exercise of powers under Article 370. It was never created under the Constitution of India or Article 370. It was independent of either. There is no power to repeal, directly a indirectly, the Constitution of J & K under any provision of the Constitution of India.

– (1972) 1 SCC 536 (Para 7-30).

2. As per the intent of the framers, the life of Article 370 was till enactment of the Constitution J & K. It had a limited objective of providing governing relationship of the State with the Union as well as governance of the State only for the period between the commencement of the Constitution on India and the commencement of the J&K Constitution. It ceased thereafter and

therefore no such power of repeal or modification of Article 370 survived to be used now.

– **AIR 1959 SC 749 (Para 32-35).**

– **Debates (as above)**

3. On 05.08.2019 the power under Article 370(1)(d) could only be exercised in compliance with Article 370(2), which was impossible in absence of Constituent Assembly J & K. The power to issue such Presidential Order under Article 370(1) (d) could not be exercised by the President with the concurrence advise of the Governor only. Since the constitution of the Constituent Assembly J & K, this facility of concurrence of the Government ceased and was not available.

- **AIR 1959 SC 749 (Para 32-35).**

- **Debates**

When power is conferred by law which also prescribes the manner of its exercise than the power can only be exercised in that manner or not at all, upon pain of invalidation.

- **AIR 1936 PC 253 (Para 57)**

- **AIR 1955 SC 233**

- **AIR 1960 576**

- **AIR 1980 SC 1230 (Para 23)**

4. Power under clause (1)(d) could not be used to modify Article 370(3). Therefore substitution of the words Constituent Assembly by “Legislative Assembly of State” is unconstitutional. Article 370(1d) is not available to modify the words used in Article 370(3). It can only apply, such other provisions, other than Article 1 & 370. Article

370 (cl 3) could only be modified on the recommendation of Constituent Assembly J & K.

It is important to read Article 370(1)d) in the light of Article 370(1)(c). The words “such of the other provisions of the Constitution” are important. They can only mean, in the context, such other provision, other than Article 1 and Article 370. Therefore Cl. 2 (1)(d) of the Presidential Order above is *ex facie* unconstitutional.

5. In Article 370(3) the modification could only be effected in the manner prescribed on day one. This also suffers from the same vice. The substitution of “Legislative Assembly of the State” for “Constituent Assembly” with the concurrence of State Government or Governor is void. Besides one has to keep in mind that this “Legislative Assembly” is one which is a creature of the Constitution of J & K and not the Constitution of India where Governor cannot be a substitute. While the Constituent Assembly was independent of the Constitution of India as explained earlier.
6. The “Legislative Assembly” cannot be a substitute or the successor of even the “Constituent Assembly” of Jammu & Kashmir for the following reasons:-
 - a) It is the creature of the Constituent Assembly of Jammu and Kashmir, which was a plenary sovereign authority unlike Legislative Assembly.
 - b) Legislative Assembly has only such delegated powers as are conferred by the Constituent Assembly

- c) Power of Legislative Assembly is restricted by various provisions of the Constitution of Jammu and Kashmir unlike the Constituent Assembly, which has enacted those restrictions and had unrestricted sovereign powers.
- d) Legislative Assembly is also subject to amendatory power under Section 147. Its powers are not plenary unlike “Constituent Assembly” of J&K.
- e) Constituent Assembly was enacted as a Sovereign body under Raja`s proclamations of 1948-1949 as shown above while Legislative Assembly is the creature of Constituent Assembly.

Therefore there is no way Legislative Assembly can be the successor or substitute of Constituent Assembly so also the Governor. The object of creation of Constituent Assembly was to enact a Constitution of Jammu and Kashmir and was ordained to die after completion of its work. Legislative Assembly has an entirely different role unlike Constituent Assembly of Jammu and Kashmir. Therefore even Section 18 of General Clause Act of Jammu and Kashmir does not help in the regard. There cannot be a Successor of Constituent Assembly.

Besides on their own reading Section 18 of the General Clauses Act of Jammu and Kashmir and the Union do not apply. It applies only to a Central Act or Regulations as defined in Section 3(7) & 3(50). They donot include Presidential Orders under Article 370.

7. Both the orders are per-se illegal in as much as the Constitution of J & K being outside the Constitution of India and Article 370, it can only be repealed, ceased or suspended in the manner prescribed by the supervening Law of J & K only and not otherwise. What cannot be done directly, cannot be done indirectly also. Therefore both the orders in so far as they intend to apply “all the provisions of the Constitution of India are null and void since they have the effect of repealing the Constitution of J & K and replacing it with the Constitution of India by an executive order.

8. Constitutions are not enacted for a day or two or for a short term. They are the real codes of governance for an undefined period they can only be modified or amended in exercise of the self- confined amendatory powers. Constitution J & K has Section 147 in this regard.

Validity of Reorganisation Act

Reorganisation Act challenged on following grounds:-

a) Article 370 not available to override J&K Constitution, which defines State of Jammu and Kashmir including its territory as immutable.

b) Takeover of all the powers of Legislative Assembly by Parliament under Article 356 not permissible for the following reasons:-

1. Article 356 not available and could not have be infused by Article 370 after its expiry.

2. If Article 356 not there, then Parliament cannot take over all the powers of Assembly of J&K Constitution. Section 92 confers only limited takeover of power, i.e., Legislative powers, only by the Governor.
3. The abolition of Assembly under Article 356 not possible.
4. Assembly is under J&K Constitution and under the Constitution of India, therefore cannot be subjected to Article 356.
5. In view of above ceasing of Article 370 even Article 356 was not available and could not be introduced in J&K, which had its own version of similar but different power under Section 92 of the J&K Constitution.

The abolition of Legislative Assembly on the face of it is void as power under Section 92 besides being different is not available to the President. Section 92 further shows that only legislative power to make law can be taken over not the other powers of the Assembly. Power under Article 356 as well as Section 92 are vitally different and conflicting and therefore cannot subsist together during the continuance of Constituent Assembly of Jammu and Kashmir which is the main instrument of governance. We cannot ignore the fact that upto the commencement of the J&K Constitution. Article 356-357 as well as Article 360 were expressly

excluded (Page 98-99). Once Article 370 ceased to operate, having subserved its objective, it cannot be used perennially to add on powers not sanctioned by the J&K Constitution. Besides at that time word Constituent Assembly was still prevailing in Article 370 (2)&(3).

The introduction of Legislative Assembly in of Constituent Assembly was totally invalid and against the grain of J&K Constitution as well as Article 370. Importantly the provision for consent of Legislative Assembly under Article 3 as introduced by the 1954 President's Order (Page91-92) would also cease after the commencement of the J&K Constitution. The consent of the Legislative Assembly would not have cured the defect as that provision also ceased with Article 370. The correct position will emerge if we see it in the context of J&K Constitution, particularly Section 1, 3 and 4 read with Section 147. The change of territory was not possible or permissible not at least under Article 3. Article 3 was not applied to J&K by Article 370 unlike Article 1. Therefore is Article 3 is inapplicable then there cannot be change of territory of J&K and it would not be correct to state that there is some power to change the Territory of J&K in the Constitution of India apart from J&K Constitution.

c) The orders are illegal as Clause 1(d)&(3) of Article 370 could not be amended and repealed in anyway even under Article 368.

d) The Act is outside the scope of Article 3, as Parliament cannot reduce State to Union Territory without destroying formation of State.

(d1) Parliament does not have power to change the territory which is immutable.

Therefore the change of territory of ceasing of State of J&K is absolutely illegal. Changing the status and character of J&K was not only reneging of part undertakings but also unjust, arbitrary as well illegal. It deprives the people of Kashmir the rights as guaranteed not only under their own Constitution but also by the makers of the Constitution of India.

(DINESH DWIVEDI)
