IN THE SUPREME COURT OF INDIA
CIVIL ORIGINAL JURISDICTION
PUBLIC INTEREST LITIGATION

IN RE: ARTICLE 370 OF THE CONSTITUTION

WP (C) 1104 of 2019

Muzaffar Iqbal Khan … Petitioner

Versus

Union of India … Respondent

Written Submissions of Mr. Gopal Subramanium, Senior Advocate on behalf of the Petitioner (Time Sought: 5 sessions)

I. INTRODUCTION

1. These written submissions are being filed in compliance with the order of this Hon'ble Court dated 11th July 2023, in the matter now titled "**In Re: Article 370 of the Constitution.**" Through this Order, this Hon'ble Court had directed all parties to the case to file their written submissions on or before 27th July 2023.
2. Petitioners impugn the constitutional validity of Constitutional Order [C.O.] 272, issued by the President of India on 5th August 2019 [**Common Compilation, Vol. 3, pg 493**], and Constitutional Order [C.O.] 273, issued by the President of India on 6th August 2019 [**Common Compilation, Vol. 3, pg 495**]. Through these Orders, the union executive sought to amend Article 370 of the Constitution of India, which had hitherto governed the constitutional relationship between the State of Jammu and Kashmir and the Union of India.
3. These written submissions are structured as follows. In order to contextualise the case, Petitioners set out a brief constitutional

history of Jammu and Kashmir (**II**), followed by an account of the three "pillars" that constitute Article 370 of the Constitution: *asymmetric federalism, autonomy, and consent* (**III**). In light of this history, and these pillars, Petitioners then set out the genesis of the dispute (**IV**), and examine the constitutionality of C.O. 272 and 273 on their own terms (**V - VII**), as well as the question of whether the impugned orders could have been passed during a time when Article 356 was applicable in the State of Jammu and Kashmir (**VIII**).

II. HISTORY

4. The history of Jammu and Kashmir is both a history of popular struggles for democratic self-governance within the (erstwhile) princely State, and of a struggle for Independence alongside the Indian national movement.

5. The British Government executed the Treaty of Amritsar with Maharaja Gulab Singh of Jammu on March 16, 1846. (**Common Compilation, vol 1, @ Pg1-3**). Article I of the Treaty transferred to the Maharaja the "*hilly or mountainous country with its dependencies situated to the eastward of the River Indus and the westward of the River Ravi including Chamba and excluding Lahol…*" These were part of the territories ceded to the British

Government by Lahore state in 1846, by the Treaty of Lahore **(Common Compilation, vol. VI, @ pg 1050-3)**.

6. The Interpretation Act of 1889 recognised the status of princely states such as Jammu and Kashmir in Section 18 as being under the *"suzerainty"* of the Crown. In contrast, British India was within the "dominions*"* of the Crown. The relationship of "suzerainty" gradually evolved into the political practice of "paramountcy" as recognised in the Government of India White Paper on Indian States, 1950 **(Common compilation, vol. IV @pg 582, para 14-15).**
7. In 1925, Maharaja Hari Singh, the last Ruler of the Princely State of Jammu and Kashmir ascended the throne. Under his reign, and driven by a popular movement for democracy, representative government and equality several constitutional changes were introduced in the state. These included:
    a. The State Subject Definition Notification dated April 20, 1927, classifying State Subjects into four categories (**Common Compilation, vol. I, @Pg 4-6**)
    b. The enactment of Regulation No. 1 of Samwat 1991 on April 22, 1934, establishing a Legislative Assembly for the State of Jammu and Kashmir called the 'Praja Sabha', with certain

legislative functions delegated to it. The Maharaja retained supremacy over all legislative, executive and judicial matters.

c. The enactment of the Jammu and Kashmir Constitution Act, 1939 on 7 September 1939. While Maharaja Hari Singh retained sovereignty and supremacy over all legislative, executive and judicial functions, the Act empowered the Praja Sabha to make laws for the entire State of Jammu and Kashmir or any part thereof (Section 23) subject to certain conditions (Section 24). Further, the Act vested executive functions with a Council consisting of a Prime Minister and other Ministers appointed by the Ruler, and provided for the High Court (which had been established by the Ruler in 1928) to be a court of record. **(Common Compilation, vol. VI, @pg 1248-69)**

8. In the meantime, the Government of India Act, 1935 was passed. The Act sought to establish India as a Federation comprising Governor's Provinces, Chief Commissioner's Provinces, and the Federated Indian States (i.e., those princely states which would accede to the Federation of India, under Section 6 of the Act). (**Common Compilation, vol. VI, @pg 1067-68**)
9. The State of Jammu and Kashmir did not accede to the Federation of India, and thus remained an "Indian State." The White Paper on

Indian States calls the 1935 Act's attempt at federation "still born," as Indian States were reluctant to lose their internal sovereignty by acceding to the Federation **(Common Compilation, vol. IV @PG 595, para 54).** The Crown continued to exercise rights of paramountcy over the non-acceding "Indian States" as recognised in Section 285 read with Section 311(1) of the 1935 Act. **(Common Compilation, vol. VI, pg 1054, @1160, 1170)**

10. In the freedom struggle against the British Indian Government, the Princely State of Jammu and Kashmir fought alongside the Indian nationalists **(Speech of Sheikh Abdullah, 5th November 1951, Constituent Assembly of J&K @p. 83)**. In a commentary on the Constitution of Jammu and Kashmir by Justice A S Anand, he notes that there had been growing tension between the Muslim Conference, which was an ally of the All India Muslim League, who supported the two-nation theory, and the National Conference comprising leaders such as Sheikh Abdullah, an ally of the Indian National Congress oriented towards a secular and harmonious relationship between people of all religions.[1]

11. On 16 May 1946, the Cabinet Mission issued its Statement that British India would be free to decide its future constitution, and

[1] Justice A. S. Anand, *The Constitution of Jammu and Kashmir* (8th Ed. 2016, Reprint 2019) @ p. 51)

that an Interim Government would carry on administration of British India until the Constitution was created. **(para 3)** It was further clarified that the relationship of paramountcy with the Indian States would not be retained by the British Crown, nor transferred to the new Government. **(para 14)** The Statement also indicated that it would "settle a machinery" for the creation of a constitution for independent India **(paras 17-24).**

12. The Constituent Assembly of India, met for the first session on 9 December 1946. On 22.01.1947, it unanimously adopted the Objectives Resolution. Paragraph (3) declared that Princely States that had joined the Union of India *"… shall possess and retain the status of autonomous units, together with residuary powers, and exercise all powers and functions of government and administration, save and except such powers and functions as are vested in or assigned to the Union…".* However, it was only in June 1949 that four representatives from Jammu and Kashmir were sent to the Constituent Assembly of India due to the history that unfolded after 1947.

13. In July 1947, the Indian Independence Act of 1947 was passed, stating that two independent Dominions – India and Pakistan – were to be established starting August 15, 1947. Under Section 7, the suzerainty of the Crown over Indian States would

lapse and return to the Rulers of such States. Thus, as sovereign States, over 500 Princely States had the choice to accede to either of the two Dominions established by the Act. **(Common Compilation, vol. VI, @pg 1271-83)** Under transitional provisions of the 1947 Act, arrangements were made for the Princely States to accede to the Indian Dominion. **(Common Compilation, vol. VI, @pgs 1285-87)**

14. In the meantime, the State of Jammu and Kashmir had entered into a Standstill Agreement with Pakistan. On 26 October 1947, Maharaja Hari Singh turned to India, asking for help to meet a grave emergency, caused by "the mass infiltration of tribesmen… fully armed with up-to-date weapons [which] cannot possibly be done without the knowing of the Provincial Government of the North-West Frontier Province and the Government of Pakistan." **(Common Compilation, vol I @pgs 7-8**) He made an offer of accession to India, as India could not send help without the State's accession. On 27 October 1947, Lord Mountbatten accepted the offer of accession on behalf of the Dominion of India. His letter further stated the Government of India's policy and wish "that, as soon as law and order have been restored in Kashmir and her soil cleared of the invader, the question of the State's accession should

be settled by a reference to the people." (**Common Compilation, vol I @ pgs 11-12**)

15. Under Article 3 of the Instrument of Accession signed by the State of Jammu and Kashmir, the Dominion Legislature had authority to make laws for the State of Jammu and Kashmir on the subjects of Defence, External Affairs and Communication. Article 7 provided that the Instrument did not commit the Ruler to the acceptance of any future Constitution of India, while Section 8 vested in the Ruler, sovereignty over subjects not acceded to India. **(Common Compilation, vol I @pg 9-10**)

16. In the period between 1947 and 1948, various constitutional developments unfolded within the State of Jammu and Kashmir under the authority of their existing 1939 Constitution, such as the creation of a popular interim government in March 1949, and the handover of authority to Yuvraj Karan Singh in June 1949.

17. A two-step process of integration of States was initiated soon after in India. As described in the Government of India White Paper on Indian States, 1950 **(Common Compilation, vol. IV)**, this process comprised first, States signing merger agreements or covenants of unionisation, to merge with other geographically contiguous provinces or with the centre, or to merge with other States respectively **(Common Compilation, vol. IV @pgs 607-**

619); second, States being administratively integrated into India through various orders, providing for the representation of people of the States in Provincial Legislatures, the extension of central laws to the newly created Provinces and centrally administered areas, and so on **(Common Compilation, vol. IV CCD @pgs 639-642)**.

18. Notably, the State of Jammu and Kashmir did not sign a merger agreement, a covenant of unionisation, or undergo administrative integration like the rest of the States **(Common Compilation, vol. IV @pg 684, para 224).** Its constitutional relationship with India was to be determined only by the Instrument of Accession initially entered into **(Common Compilation, vol. IV @681-3, para 221).**

19. On 17 October 1949, Draft Article 306-A (which later went on to become Article 370) was discussed in the Constituent Assembly of India. Other States were noted by Gopalaswamy Ayyangar to have been integrated into India, thus rendering their Instruments of Accession a thing of the past. However, the conditions in the State of Jammu and Kashmir were, he noted, “special,” given the ongoing war, the presence of invaders, and the commitment of the Government of India to the people of Jammu and Kashmir that their will would be ascertained as to whether they would “remain with the Republic or wish to go out of it”. Further, they had committed “that

the will of the people, through the instrument of a constituent assembly, will determine the constitution of as well as the sphere of the Union jurisdiction over the State." Thus Draft Article 306-A sought to create an interim arrangement till the State of Jammu and Kashmir constituted a constituent assembly of the State **(Common Compilation, vol. V @pgs 1041-1047).** This speech shows that Article 370 was drafted with the constitutional intent of recognising the *sui-generis* nature of the State of Jammu and Kashmir.

20. In November 1949, other States issued proclamations accepting the Constitution of India as the Constitution for their states. **(Common Compilation, vol. IV @ pg 935-41).** On 25 November 1949, a Proclamation was issued by the Head of State of Jammu and Kashmir, declaring inter alia:

> *"That the Constitution of India shortly to be adopted by the Constituent Assembly of India shall in so far as applicable to the State of Jammu and Kashmir, govern the constitutional relationship between this State and the contemplated Union of India…;"* (**Common Compilation, vol. IV @ Pg 941)**

21. On 26.01.1957, the Constitution of Jammu and Kashmir came into force. Through their elected Constituent Assembly, the people of Jammu and Kashmir gave to themselves a constitution that cemented Jammu and Kashmir's status as a State of the Indian

Union. This Constitution established the State's institutions, including its bicameral legislature and its High Court. **(Common Compilation, vol. II @ Pg 232)** Importantly, the Constitution of Jammu and Kashmir has not been subjected to repeal and remains in force.

22. It is in the backdrop of this brief history that the text, structure, and design of Article 370 must be understood.

III. THE THREE PILLARS OF ARTICLE 370

23. In view of the historical position advanced above, it is respectfully submitted that Article 370 of the Constitution is built upon three pillars, which give meaning to its text and structure. These three pillars are *asymmetric federalism*, *autonomy*, and *consent.* These pillars are both independent and mutually reinforcing, and together constitute the foundation upon which the edifice of Article 370 has been constructed.

a. Asymmetric Federalism

24. Asymmetric federalism refers to a situation where the heterogeneity, diversity, and pluralism of a polity is reflected in the

diversity of its federal arrangements.[2] As pointed out by this Hon'ble Court in **Govt of NCT of Delhi vs Union of India[3],** asymmetric federalism is built into the Constitution of India: it is reflected not only in Article 370, but in Articles 371A - J, where no fewer than ten States have "special arrangements" vis-a-vis the union, on a range of issues. It is also reflected in the Fifth and Sixth Schedules, which recognise indigeneity as one of the underlying principles of asymmetric federalism.

25. As a perusal of these constitutional provisions reveal, asymmetric federalism can take a variety of forms, depending on the circumstances and the context: it can take the form of an affirmative action guarantee (as in Andhra Pradesh), a commitment towards non-interference with personal laws (as in Nagaland), or the establishment of territorial autonomy in agreed domains (as in Sixth Schedule territories).

26. What is, therefore, colloquially referred to as the "special status" enjoyed by the State of Jammu and Kashmir under Article 370, is no more than an instance of asymmetric federalism under the Indian Constitution.

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[2] Govt of NCT of Delhi vs Union of India, Civil Appeal No. 2357 of 2017, 11 May 2023.
[3] Id.

27. The above examples also clarify that asymmetric federalism does not violate the principle of equality. As Professor Stephen Tierney points out, because "a federal polity is designed to accommodate territorial pluralism in all its shapes and sizes, it needs to respond to such a variegated social map by recognising any deep differences among the territories."[4] Thus, the premise of an asymmetric federation, such as India, is "a politics of inter-societal diversity rather than of uni-societal homogeneity."[5]

28. An example of this is the Supreme Court of Canada's landmark judgement in **Reference: Re Secession of Quebec [1998] 2 SCR 217[6],** widely considered to be a leading global authority on the issue of asymmetric federalism. The Supreme Court noted that the "social and demographic reality of Quebec" - which explained its existence as a "political unit" - would have to inform the Court's approach and interpretation of federalism in the context of Canada. As Professor Tierney notes, the link between the social (which includes linguistic, cultural, and ethnic identity, and claims to indigeneity) and the political (rights of autonomy) in the Court's approach demonstrates how to reconcile the "twin dimensions

[4] Stephen Tierney, *The Federal Contract* (OUP 2022), pg 129.
[5] Id.
[6] Reference: Re Secession of Quebec [1998] 2 SCR 217

inherent in the federal idea, union and plurality."[7] This was done by recognising Quebec's asymmetrical position within Canada (for the reasons cited above), while denying it any unilateral right of secession.

29. Indeed, Professor Tierney cites India as a pioneer in the recognition that asymmetric federalism is an integral element both of political justice and national stability, an approach that came to be increasingly adopted by nation-states after the 1970s (such as Spain after Franco's dictatorship, Belgium's constitutional reform of 1993, and the devolution debates in the UK at the turn of the century).[8] It is now widely accepted that asymmetric federalism is vital to national integration.[9]

b. Autonomy

30. As submitted above, asymmetric federalism can take many forms, depending upon the context. In the case of Jammu and Kashmir, it is respectfully submitted that the considerations of history (outlined above), linguistic and cultural diversity, and claims to indigeneity, resulted in a political settlement, expressed through the text and structure of Article 370. This political settlement was

[7] Tierney, supra, pg 146.
[8] Ibid., 201.
[9] Maja Sahadzic, *Asymmetry, Multinationalism and Constitutional Law* (Routledge 2021).

characterised by *autonomy* and *consent* - the second and third pillars of Article 370.

31. The State of Jammu and Kashmir was guaranteed political autonomy *within* the framework of the Indian Constitution. The overarching principle (discussed in greater detail) was the application of Article 1 - “India, that is Bharat, shall be a Union of States” - unaltered and unamended - to the State of Jammu and Kashmir (Article 370(1)).

32. Subject at all times to Article 1, Article 370 recognised the *constituent power* of the people of the State of Jammu and Kashmir, as reflected by the reference in Article 370(3) to the *constituent assembly* of Jammu and Kashmir. Constituent power is the power of the People - articulated through a constituent assembly or otherwise - to make, unmake, or remake the Constitution (in this case, the Constitution of Jammu and Kashmir). Notably, this was a *limited* Constituent power, as it was to be exercised in a manner compliant with Article 1 of the Constitution of India. This is reflected in the Constitution of Jammu and Kashmir, which prohibits any amendment that would have the effect of nullifying Article 1 of the Constitution of India, as applied to Jammu and Kashmir. Article 1 and Article 370 therefore constitute a compendious code on the relationship and status of the State of Jammu and Kashmir.

33. Thus, at the first level, the pillar of *autonomy* under Article 370 meant the recognition of the constituent power of the people of Jammu and Kashmir, which took the form of *self-definition* through a Constitution.

34. Furthermore, at the second level, autonomy under Article 370 meant the autonomy to determine when and in what manner provisions of the Indian Constitution would be extended to the State of Jammu and Kashmir (as reflected in Article 370(1)(d) of the Constitution). In the finest tradition of asymmetric federalism, both the framers of the Indian Constitution and the representatives of Jammu and Kashmir understood this autonomy to be integral to the project of national integration. This was reflected with particular clarity in the speech of N. Gopalaswami Ayyangar in the Constituent Assembly. As Ayyangar noted on 17th October 1949:

> Now, it is not the case, nor is it the intention of the members of the Kashmir Government whom I took the opportunity of consulting before this draft was finalised—it is not their intention that the other provisions of the Constitution are not to apply. That particular point of view is that these provisions should apply only in cases where they can suitably apply and only subject to such modifications or exceptions as the

particular conditions of the Jammu and Kashmir State may require. (**Common Compilation, vol. 5, pg 1046)**.

35. Notably, Ayyangar framed this as a “commitment” given by the Constituent Assembly to the people of Jammu and Kashmir.

36. It is therefore submitted that asymmetric federalism under Article 370 rested upon two levels of autonomy: the autonomy of the people of Jammu and Kashmir to exercise constituent power in framing a Constitution through a Constituent Assembly, and to exercise constituent power in determining the contours of the constitutional relationship between the Union and the State. And - crucially - this was *bounded* autonomy, as it was subject to Article 1 of the Constitution. In this way, what Professor Tierney refers to as the “twin dimensions of union and plurality” were to be achieved. And it is this scheme of union and plurality that constituted the second pillar of Article 370.

c. Consent

37. The consent of the People is one of the building blocks of the Indian Constitution. As Dr. Ambedkar noted, “the existence, power and authority of the Government must be derived from the consent

of the governed."[10] Consent - as an element of political justice - is reflected in the opening words of the Preamble: "*We the People of India…*"

38. The consent of the People can take specific forms, depending on the circumstances and the context. It could take the form of participation *via* representative bodies, direct participation (as in the environmental domain, articulated through laws such as the Forest Rights Act), an express veto (as with respect to the extension of certain laws to Nagaland and Mizoram under Article 371) or otherwise. The shades and layers of consent in different domains is an integral feature of asymmetric federalism.

39. It is respectfully submitted that in the case of Article 370, the element of consent flows from the element of autonomy, and can be crystallised as a *commitment to public participation in constitutional change.* This commitment takes two forms: participation through *legislative and representative* bodies in the event of a proposed extension of the Constitution of India to the State of Jammu and Kashmir (Article 370(1)(d)), and participation through a *constituent body* in the event of a proposed alterations to the terms of the constitutional relationship itself (Article 370(3)).

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[10] Prof. Hari Narake (ed), *Dr. Babasaheb Ambedkar: Writings and Speeches,* Vol:3 (Dr. Ambedkar Foundation 2014) p. 98

40. Once again, N. Gopalaswamy Ayyangar's speech in the Constituent Assembly is illuminating. Ayyangar's precise choice of language - "commitment to the *people and Government* of Jammu and Kashmir" - was no accident. By specifically including "people" - as distinct from "government" - Ayyangar was not merely hearkening back to the history of popular struggles and movements in Jammu and Kashmir, but also centering the *People* in the scheme of Article 370.

41. Article 370 was not, therefore, simply a bargain of expediency between political elites, but had popular participation and popular consent at its heart. It is in this sense that Ayyangar's concluding explanation of Article 370(3) must be understood: that the recommendation of the Constituent Assembly (i.e., the People exercising constituent power) would be a "condition precedent" before Article 370 itself could be amended or abrogated.

42. As a final point, it is important to note that this "consent" was not unilateral: as the text of Article 370(1)(d) shows, the extension of the Constitution of India to the State of Jammu and Kashmir required the participation - and the concurrence - of two distinct parties: the President of India (representing the Union) and government of Jammu and Kashmir (representing the people). The founding principle, thus, was the principle of *double consent*: the

Union and the State as equal participants in the crafting of Jammu and Kashmir's relationship with the Union of India.

43. This double consent is further evidenced in the Constitution of Jammu and Kashmir **(Common Compilation, vol 2, p. 232 @248-249)**. Section 2(1)(a) defines the "Constitution of India" for the purposes of the State Constitution to mean the "Constitution of India as applicable in relation to this State." Section 5 stipulates that the legislative and executive 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," which is to say, under the provisions of the Constitution of India "as applicable" to the State. Notably, Section 5 is an unamendable provision of the State's Constitution, per Section 147. Thus, Article 370's entire framework of double-consent dovetails with the powers of the State that it retains for itself under its Constitution.

iv. Conclusion

44. It is respectfully submitted that what the above analysis demonstrates is that Article 370 ought not to be read or interpreted as an expression of power politics or a bargaining chip. Rather, it should be interpreted as a *principled compact* between the people

of India (acting in their constituent capacity through the Indian Constituent Assembly) and the people of the State of Jammu and Kashmir.

45. This compact - expressed through the text of Article 370 - was built upon three reinforcing pillars: asymmetric federalism, autonomy, and consent. The carefully crafted architecture of Article 370 was, thus, akin to how Antonio Salieri described the music of Wolfgang Amadeus Mozart: "*displace one note, and there would be diminishment; displace one phrase, and the structure would fall.*"[11]

46. It is respectfully submitted that impugned Constitutional Orders C.O. 272 and 273 do not merely displace "one note" or "one phrase", but rather, take a sledgehammer to the pillars of Article 370. And in considering whether C.O. 272 and 273 violate the text, structure and powers conferred under Article 370 (as will be argued below), Petitioners respectfully urge this Hon'ble Court to keep these three pillars in mind in the task of interpreting and understanding the true meaning of the words of Article 370.

[11] F. Murray Abraham, speaking as Antonio Salieri, in ***Amadeus*** **(**Milos Forman dir., 1984).

IV. GENESIS OF THE DISPUTE

47. As indicated above, Article 370 - as it stood on 5th August 2019 - was titled "Temporary provisions with respect to the State of Jammu and Kashmir." Article 370(1)(c) provided that "the provisions of Article 1 and of this Article shall apply in relation to that State." (*emphasis supplied*) Article 370(1)(d) provided - in relevant part - that for matters *not* specified in the Instrument of Accession entered into between the State of Jammu and Kashmir and the Union of India, "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." The proviso to Article 370(1)(d) clarified that no such order would be issued "except with the concurrence of that Government" (i.e., the Government of Jammu and Kashmir).

48. To put it in simple terms, therefore, and as explained above, Article 370(1)(d) provided a "bridge" through which the provisions of the Indian Constitution would be applied to the State of Jammu and Kashmir (which had, by 1957, enacted its own State Constitution). This bridge was guarded by two "gates": the President (representing the Union) and the Government of Jammu and Kashmir (representing the State). Provisions of the Indian Constitution could pass over the bridge and into the State of Jammu and Kashmir only

when both “gates” were open - i.e., when both the President and the State Government had consented. This - as indicated above - can be referred to as the principle of “double consent.”

49. The scheme of Article 370 was completed by Article 370(3). Article 370(3) provided the procedure for its own amendment (or extinction). It authorised the President to amend or declare inoperative Article 370 itself, through a notification. The proviso to Article 370(3) then made the recommendation of the Constituent Assembly of the State of J&K the precondition for any such notification.

50. In this context, C.O. 272 (the first impugned Order) was issued on 5th October 2019. Through Clause 2, C.O. 272 sought to extend all the provisions of the Constitution (as amended) to the State of Jammu and Kashmir. One of the “amendments” was the addition of sub-clause 4 to Article 367 of the Indian Constitution (as applied to Jammu and Kashmir). In relevant part, sub-clause (d) of new Article 367(4) (as applied to Jammu and Kashmir) stated that “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”.”

51. In other words, therefore, C.O. 272 invoked Article 370(1)(d) of the Constitution to effectively amend Article 370(3), through an

indirect route: that is, by the creation of a new constitutional provision, Article 367(4), and extending its application to the State of Jammu and Kashmir. In substance, the amendment changed "recommendation of the Constituent Assembly" to "recommendation of the Legislative Assembly."

52. C.O. 273 followed the next day. As, at the time, Jammu and Kashmir was under President's Rule under Article 356 (which is separately under challenge in some of the accompanying petitions), the legislative assembly was not in existence. Consequently, C.O. 273 - which was purported to be issued under the (now-amended) Article 370(3) of the Constitution - stated that the President, *on the recommendation of the Parliament*, hereby declared that all clauses of Article 370 had ceased to be operative, other than a stand-alone clause that, in effect, applied the Constitution of India *mutatis mutandis* to the State of Jammu and Kashmir.

53. It is respectfully submitted that this, in essence, is the process by which the two impugned C.O.s amended Article 370 of the Constitution. Petitioners impugn this process on the following grounds.

54. *First*, Petitioners submit that C.O. 272 is invalid because, by purporting to amend Article 370(3) *via* Article 370(1)(d), it attempts to do indirectly what it cannot do directly, and indeed, what it is

expressly precluded from doing under Article 370 (**II**). Petitioners submit that the text (**IVa)** and history (**IVb**) of Article 370 bear out this view, and that prior instances cited by the Respondents are distinguishable (**IVc**).

55. *Secondly*, Petitioners submit that Article 370(1)(d) is limited to "modifying" or "amending" the provisions of the Constitution, as applied to Jammu and Kashmir. It does not authorise the *creation* of a new constitutional provision out of whole cloth, which is what Article 367(4), in substance, is (**V**).

56. *Thirdly*, Petitioners submit that, at its highest, Article 370(1)(d) contemplates the extension of a defined set of constitutional provisions (suitably amended or modified) to the State of Jammu and Kashmir. This decision is taken by the President, based upon the exigencies of the situation, and upon application of mind. Applying the Constitution *in toto*, and in one go, to the State of Jammu and Kashmir precludes the relevant constitutional functionaries from applying their minds, and is beyond the scope of the power contemplated under Article 370(1)(d) (**VI**).

57. Finally, Petitioners submit that *even if* Article 370 could be amended using the process set out under C.O. 272, it could not have been done *during* the pendency of President's Rule under Article 356 (**VII**). This is because, *first*, the same constitutional

functionary taking its own consent is arbitrary and antithetical to the rule of law (**VIIa**). *Secondly*, President's Rule is - by its very nature - a temporary phenomenon, designed to enable the Union to take over the administration of a State *as a caretaker*, until such time that the state legislative assembly can be restored. President's Rule, therefore, does not authorise permanent and irrevocable *restructuring* of a State's constitutional status, to the extent that any successor assembly *is no longer able* to undo such changes (because its own power has been diminished) (**VIIb**).

58. By way of conclusion, Petitioners respectfully reiterate that the textual, structural, and doctrinal interpretation of Article 370 - and the question of the scope and limitations upon the powers that it confers - ought to be understood in the context of the three pillars that lie at the heart of the provision: asymmetric federalism, autonomy, and consent.

V. C.O. 272 IS INVALID BECAUSE IT ATTEMPTS TO DO INDIRECTLY WHAT IT CANNOT DO DIRECTLY

59. In this context, Petitioners respectfully submit that the text and history of Article 370 preclude its indirect amendment *via* the mechanism of Article 370(1)(d).

a. Text

60. The text of Article 370 is straightforward in its simplicity. Article 370(1)(c) provides that two articles in the Constitution of India - Article 1 and Article 370 itself - *shall* apply to the State of Jammu and Kashmir. Article 370(1)(d) provides the mechanism by which *other* provisions of the Constitution (that is, provisions *other* than Articles 1 and 370) can be extended to Jammu and Kashmir, depending on whether they relate to matters contained in the instrument of accession or not. And Article 370(3) provides the mechanism for amending Article 370 *itself*.

61. The text and structure of Article 370 leave no room for doubt. There is a three-track amendment procedure. The *Article 370(1)(d)* track is for all provisions of the Constitution other than Articles 1 and 370. The *Article 370(3)* track is for Article 370. And Article 1 is outside the scope of amendment altogether, as it clarifies that notwithstanding the State of Jammu and Kashmir's so-called "special status" under Article 370, it remains one of the "States" in the "Union of States" that is India (i.e., an integral part of the Union of India).

62. Article 370 thus delineates the power and procedure for constitutional amendment (as applied to the State of J&K) in

exhaustive terms, leaving no scope for further interpretation. It therefore follows that Article 370 cannot be amended by invoking the authority of Article 370(1)(d), as the specific, designated *track* for amending Article 370 is *via* Article 370(3).

63. Two hoary principles of constitutional interpretation support this point. *First*, what cannot be done directly cannot be done indirectly; and *secondly*, the rule in **Nazir Ahmed's Case,** i.e., that when a legal document specifically prescribes the manner in which a thing is to be done (and confers authority for doing it), it must be done *in that manner*, or not at all.

64. It is respectfully submitted that this proposition was noted by this Hon'ble Court in **Puranlal Lakhanpal vs Union of India, (1955) 2 SCR 1101**, where at **paragraph 8** it was specifically observed that "it is manifest that Article 370(1)(c) and (d) authorises the President by Order to specify the exceptions and modifications to the provisions of the Constitution (other than Articles 1 and 370) subject to which the Constitution shall apply to the State of Jammu and Kashmir." (emphasis supplied) (**Case Law Compilation, Vol. 1, pg 6**).

65. Furthermore, in **Prem Nath Kaul vs State of J&K, 1959 Supp (2) SCR 270, paras 34-35 & 38**, this Hon'ble Court clarified that the power under Article 370(3) could be exercised only on the

recommendation of the Constituent Assembly; it is important to note that **Prem Nath Kaul** was decided in 1959, when the Constituent Assembly of J&K had ceased to exist; nonetheless, this Hon'ble Court reiterated the point that Article 370 could, itself, be amended only upon following the procedure set out in Article 370(3). (**Case Law Compilation, vol. 1, pg 19**). This, it is submitted, demonstrates the continuing relevance of the three-track amendment process even today.

b. History

66. Petitioners respectfully submit that the drafting history of Article 370 supports the textual contention advanced above.

67. On 17th October 1949, the draft version of what would become Article 370 was discussed in the Constituent Assembly [at the time, Article 306A]. The design and the structure of the provision was explained by N. Gopalaswami Ayyangar, the prime mover behind it, and whose speech has been excerpted above. Ayyangar's speech can be taken to be indicative of the intention of the framers when it came to the *meaning* of Article 370, because - as a perusal of the records reveal - his task was to explain to the Assembly how the provision was meant to *work*, with the Assembly voting thereupon.

68. Ayyangar's speech hewed closely to the scheme of Article 370, as described above. Specifically, when it came to clause (3), Ayyangar noted that once the work of the J&K Constituent Assembly was done with respect to the framing of the J&K Constitution and the exact contours of "the range of federal jurisdiction over the State", the President may issue an order declaring 306A inoperative or subject to "exceptions and modifications as may be specified," but that, for any such order, "the recommendation of the Constituent Assembly will be a condition precedent." (emphasis supplied) (**Common Compilation, vo. 5, pg 1047**).

69. Ayyangar's explanation shows that, according to the framers, there were a range of options open to the J&K Constituent Assembly upon the completion of its work, with respect to the future of Article 370. One option was a recommendation that the President declare the Article inoperative, as the nature of the relationship between J&K and the Union had been determined in its entirety, and there was no role left for Article 370 to play. A second option was the operation of a modified version of Article 370, on the assumption that the J&K Constituent Assembly had decided to alter the nature of the federal relationship, which required a suitably amended version of 370 to apply. And the third - and final - option was the continued application of Article 370 *unchanged*; under this option, the future course of the

relationship between J&K and the Union would be determined *through* Article 370 itself.

70. As history has shown, it is this third option that was chosen. Following the adoption of the Constitution of Jammu and Kashmir and the State Constituent Assembly's decision to allow Article 370 to continue unchanged, Article 370 has become an essential part of the Constitution of India. This is clear as provisions of the Constitution, including those establishing the Parliament and the Supreme Court, can only extend to the state through orders passed under Article 370(1). Thus, the relationship between J&K and the Union has been forged through various Presidential Orders that were passed under Article 370(1)(d), extending various provisions of the Indian Constitution to the State of J&K, over a period of decades. In other words, the J&K Constituent Assembly's decision was to *neither* recommend that Article 370 be rendered inoperative, *nor* to recommend its alteration, but to endorse its continued existence.

71. A corollary of this, however, was that Article 370 could not *itself* be altered through a mechanism other than that provided within Article 370(3). This is the only way to give effect to what Ayyangar called the explanation of "the whole of the article."

72. It is respectfully submitted that it does not follow from this that Article 370 is necessarily *unamendable*. To the extent that the terms of this Article *itself* are to be altered, it would require the reconvening of the J&K Constituent Assembly. This, indeed, flows from the fact that altering the *structure* of the constitutional relationship between J&K and the Union is an exercise of *constituent* power, and therefore can *only* be exercised by a Constituent Assembly, convened for that purpose.

73. Petitioners respectfully submit that this is the method that would give true meaning to what Ayyangar called the Indian Constituent Assembly's "commitment" to the people of Jammu and Kashmir. Nor would this be an outlier: there are jurisdictions where constitutional *replacement* (which is what an alteration of Article 370 *itself* would amount to) requires the convening of a Constituent Assembly.

74. Petitioners note, finally, that such an interpretation would not vest in the State of J&K any extra-constitutional sovereignty. It is crucial to note that - as has been pointed out above - *even* the Constituent Assembly of J&K has no constituent power to alter Article 1 of the Constitution: indeed, this is the sole Article that has been placed *entirely* outside the remit of the J&K Constituent Assembly. At all times, therefore, J&K remains an integral part of

the federal union; what specific *form* the federal relationship takes, however, is to be decided by the J&K Constituent Assembly.

c. Precedent

75. There are three prior examples of a purported alteration to Article 370. These are C.O. 44 (1952), C.O. 48 (1954), and C.O. 74 (1965). Petitioners respectfully submit that none of these Constitutional Orders supports the Respondent's case.

76. C.O. 44 was issued under *Article 370(3)* of the Constitution, specifically on the recommendation of the Constituent Assembly of Jammu & Kashmir; it substituted the Explanation to Article 370(1), stating that henceforth, "Government of State" would mean the *Sadar-i-Riyasat*, as recognised by the legislative assembly. (**Common Compilation, vol. 3, pg 405**) The procedure of issuing C.O. 44 is precisely what Petitioners argue the procedure *should* be: the use of Article 370(3), *on* a recommendation from the Constituent Assembly.

77. C.O. 48 was issued under Article 370(1)(d) of the Constitution. For the most part, it applied various provisions of the Constitution (with a few modifications) to the State of J&K, which is what Article 370(1)(d) envisages. (**Common Compilation, vol. 3, pg 406**).

78. In addition, C.O. 48 added a sub-clause (4) to Article 367 (as applied to the State of Jammu and Kashmir). While at a *formal* level, this is similar to what C.O. 272 purports to do, the similarities end there.

79. Unlike C.O. 272, C.O. makes no mention of Article 370. The reason for this is that the Article 367(4) inserted by C.O. 48 was a purely *clarificatory* provision: for example, sub-clause 4(b) read that "for the purposes of this Constitution as it applies in relation to the State of Jammu and Kashmir … references to the Government of the State shall be construed as including references to the Sadar-i-Riyasat acting on the advice of his Council of Ministers." As has been seen above, the substitution of Sadar-i-Riyasat into Article 370 had *already* been achieved via C.O. 44; C.O. 48, thus, was not making any substantive *alterations* to Article 370, beyond recognising a legal change that had already been wrought through the route of Article 370(3). Indeed, C.O. 48 was actually *amending* Article 370, then C.O. 44 would have been superfluous.

80. C.O. 72 (1965) was also issued under Article 370(1)(d). It purported to further amend C.O. 48, and one of these amendments was to Article 367(4). In effect, the amendment relevant for the purposes of this case provided that references to the *Sadar-i-Riyasat* would hereby be construed as references to the Governor

of the State of Jammu and Kashmir. (**Common Compilation, vol. 3, pg 431**).

81. Thus, as with its predecessor, C.O. 72 was likewise not a substantive amendment, but the *recognition* of an existing reality: by 1965, the post of *Sadar-i-Riyasat* had been abolished, and the equivalent post was that of the Governor of the State. C.O. 72 thus merely *harmonised* the Constitution, as applied to the State of J&K, with this changed constitutional reality *within* J&K.

82. This was affirmed by this Hon'ble Court in **Mohd Maqbool Damnoo vs State of Jammu and Kashmir, (1972) 1 SCC 536**. (**Case Law Compilation, vol. 1, pg 35**) In **paragraph 24**, this Hon'ble Court specifically noted that it was *not* concerned with an amendment of Article 370(1), but a situation where the Explanation had ceased to operate, because "*because there is no longer any Sadar-i-Riyasat of Jammu and Kashmir*." (**Case Law Compilation, vol. 1, pg 44**). In **paragraph 25**, the Court want on to note that the Governor was the *successor* of the *Sadar-i-Riyasat* because "*Sadar-i-Riyasat is really the name given to the head of the State*" (**Case Law Compilation, vol. 1, pg 45**). Thus, the Court held that the amendment in question "does not bring about any alteration either in the framework or the fundamentals of the Jammu and Kashmir Constitution" (**paragraph 27) (Case Law Compilation,**

vol. 1, pg 46). To put a seal on it, the Court specifically went on to reject the argument - in **paragraph 28** - that this was an "amendment to Article 370(1) by the back door" (**Case Law Compilation, vol. 1, pg 46**).

83. By contrast, there can be no dispute that whatever its legality, C.O. 272 *is* an amendment of Article 370 by the "back door." The substitution of "Legislative Assembly" for "Constituent Assembly" is in no way equivalent to the replacement of "Sadar-i-Riyasat" with "Governor", because a legislative assembly and a constituent assembly *are fundamentally distinct bodies, exercising fundamentally distinct powers*. After **Kesavananda Bharati vs State of Kerala, (1973) 4 SCC 225,** it is settled beyond cavil that *constituent power* and *legislative power* are distinct concepts: and the distinction is one of kind, not merely one of degree. Even legislative supermajorities authorised to amend a Constitution are not equivalent to *Constituent Assemblies*, which exercise the primary constituent power of making, unmaking, or re-making Constitutions (or, in this case, the fundamentals of the constitutional relationship between the Union of India and the State of J&K). Such an alteration would - in the words of **Damnoo** - amount to a change in "fundamentals", and *that* is something that can only be done on

the recommendation of the Constituent Assembly, as set out under Article 370(3).

84. In addition, and on their own terms, there are substantive differences between a Constituent Assembly and a Legislative Assembly. A few salient differences are enumerated below.

a. The Constituent Assembly is a body that exercises *plenary* constituent power. In contrast, the amending powers with a legislature is only 'delegated' constituent power. The legislature is only a 'delegate' and not a 'successor'. The difference between a delegate and a successor, and indeed between the act of delegation and the act of succession is fairly well established in law.

b. A Constituent Assembly may or may not have its origins in law - but as the body with the plenary power to establish the *grundnorm* to which all law owes its force, its own force and legitimacy flows from the general acceptance of the values it envisions and espouses and the integrity and merit of its members.

c. Beyond mere 'constituent power', an assembly is not just a gathering of persons to vote by a majority. The essential responsibility of an assembly is deliberation. The vote - an expression of public will may be in the arithmetic. However,

the expression of public reason is the record and the result of the deliberation. The deliberations of the Constitutional Assembly are informed by and give rise to constitutional reason. Constitutional Reason is distinct from mere legislative reason. Deliberations on constitutional policy are considerably distinct from deliberation on mere legislative policy. Constitutional reason lays out the most timeless, transcendental parts of the vision and the values for a newly born state or nation. Legislative policy on the other hand is more tactical and deals with specific acts to address specific mischiefs. The rigour and quality of deliberation expected of and seen in a Constitutional Assembly which is seeking to establish transcendental norms and structures that ought to not be altered by transient majorities is incomparable to one that punctuates a Legislative deliberation.

d. While the distinction between plenary and secondary constituent power has been explored in some detail by academics, and indeed by this Court in a Nine Judge Bench in *I.R. Coelho v. State of T.N.*, (2007) 2 SCC 1 **[at Page 776, Case Law Compilation**] the distinction between the responsibilities of both the bodies is ripe for some exploration in this case.

85. The Court in this case is not merely concerned with whether a State Assembly can exercise the 'powers' of a Constitutional Assembly, but also with whether it is a body that is capable of performing the solemn functions of a Constitutional Assembly. If the answer to that question is in the negative, C.O. 272 must be struck down, even without the entanglement of whether the State Assembly could exercise the powers of a Constituent Assembly.

86. In sum, therefore, Petitioners respectfully submit that the text, structure, and history of Article 370 make it clear that the only constitutionally valid process through which it can be amended is *via* Article 370(3), and *not* via Article 370(1)(d); this interpretation is, in turn, supported by prior exercise of these powers, as well as by case law. It is therefore submitted that C.O. 272 - and, by extension, C.O. 273 - are void *ab initio*, and deserve to be struck down.

VI. IN ANY EVENT, ARTICLE 370(1)(D) DOES NOT AUTHORISE THE CREATION OF A SUBSTANTIVE NEW CONSTITUTIONAL PROVISION

87. It is respectfully submitted that even if this Hon'ble Court was to hold that Article 370(1)(d) *is* a repository of power for amending Article 370 *via* Article 367, C.O. 272 is nonetheless unconstitutional.

88. Article 370(1)(d) authorises the application of the provisions of this Constitution to the State of J&K, subject to exceptions or modifications that the President may, by order, specify. What Article 370(1)(d) conspicuously *does not authorise* is the creation of *substantively* new constitutional provisions, out of whole cloth, which are then applied to the State of J&K. This, however, is what Article 367(4) - which did not exist in this form prior to C.O. 272 - purports to do.

89. In **Puranlal Lakhanpal vs The President of India, (1962) 1 SCR 688,** the scope of the terms "exceptions" and "modifications" came to be considered by this Hon'ble Court. This Court held that these terms were to be given a wide meaning, including - potentially - radical changes (**Case Law Compilation, vol. 1, pg 23-25**); however, *even* in **Puranlal Lakhanpal, supra,** did not hold that meaning of these terms stretched so wide so as to include substantively *new* provisions, with new rights, obligations, and liabilities. For the reasons explained in the previous section, this is precisely what C.O. 272 purports to do, through new Article 367(4).

90. It is respectfully submitted that even if **Puranlal Lakhanpal** is held to stand for the wider proposition as canvassed by the Respondents, its observation that the word "modifications" is akin to the word "amend" must now be understood in light of the judgement

in **Kesavananda Bharati, supra**. One of the underlying bases of the majority opinions in **Kesavananda Bharati, supra,** was that *textually*, the word "amend" could not extend to a radical alteration that altered the very identity of what was purported to be "amended." It is respectfully submitted that this holding must logically be applicable not merely to basic structure challenges, but wherever the question of the limits or scope of an *amending* power is at issue.

91. In that context, it is respectfully submitted that, by virtue of the reasons advanced in the previous section, the alteration of "Constituent Assembly" to "Legislative Assembly" is *precisely* the kind of radical change that goes far beyond the ken of a mere "amendment": it is a change to the very nature of the power - and the body exercising that power - which is deemed sufficient to change the fundamentals of the constitutional relationship between the State of J&K and the Union of India. It is therefore submitted that such a change is not contemplated by Article 370(1)(d) *even* assuming that Article 370 itself can be "amended" in the manner done by C.O. 272.

VII. IN THE ALTERNATIVE, C.O. 272 IS UNCONSTITUTIONAL BECAUSE IT PRECLUDES APPLICATION OF MIND BY CONSTITUTIONAL FUNCTIONARIES

92. It is respectfully submitted that even if Article 370(1)(d) is held to cover the manner of change contemplated in C.O. 272, the wholesale application of the Constitution of India to the State of J&K *in toto*, and in one go, is *ultra vires* Article 370(1)(d), and is therefore unconstitutional.

93. Article 370(1)(d) - to reiterate - authorises the application of such of the other provisions of the Constitution of India to the State of J&K, subject to exceptions and modifications, as the President may, by order, specify. It is respectfully submitted that the intent of this provision is clear from the text: it contemplates a situation where, based on the exigencies of the situation, and upon due application of mind, certain specific provisions of the Constitution are extended to the State of J&K *in order* to address said exigencies.

94. This reading is affirmed by the speech of N. Gopalaswami Ayyangar, cited above. Referring to this very provision, Ayyangar noted that its purpose was that provisions of the Indian Constitution would be applied to the State of J&K "in cases where they can suitably apply and only subject to such modifications of exceptions

as the particular conditions of the Jammu and Kashmir State may require." (**Common Compilation, vol. 5, pg 427**)

95. It is evident from Ayyangar's explanation that the purpose behind Article 370(1)(d) was that the relevant constitutional functionaries would apply their mind to decide, from time to time, which constitutional provisions would apply to the State and J&K, and in what manner. This was subsequently affirmed in **Sampat Prakash vs State of Jammu and Kashmir, (1969) 2 SCR 365 (Case Law Compilation, vol. 1, pg 26**)

96. The entire tenor of both the constitutional article and Ayyangar's explanation of it therefore militates against the *wholesale application of the Constitution in one go*, which is what C.O. 272 and 273 purport to do. By its very nature, such an exercise precludes the granular, and clause-by-clause (with suitable modifications) extension of the Indian Constitution to the State of J&K, based upon the (recorded) application of mind by the relevant constitutional functionaries.

97. Non-application of mind is in fact evident in this case in the Respondent's incorrect assumption that the Constitution of Jammu and Kashmir can simply be overridden by C.O. 272 and 273. The Constitution of Jammu and Kashmir is the highest embodiment of the will of the people of the State. It is the supreme law with respect

to the matters it covers, including the establishment of the institutions in the state. The State's Constitution was the outcome of the Union of India's commitment to the people of Jammu and Kashmir that they would have the freedom to determine their relationship with India. It was adopted following detailed deliberations in a Constituent Assembly elected through universal suffrage and is, in fact, the instrument through which the State's union with India was finally cemented. The Constitution of Jammu and Kashmir survives to this day and its status as a valid constitution has not been affected by C.O. 272 and 273.

98. In sum, therefore, it is respectfully submitted that even if the *power* to amend Article 370 in substantive terms is located within Article 370(1)(d), as invoked in C.O. 272, the *process* by which it has been done in *this* case is unconstitutional and void *ab initio*.

VIII. C.O. 272 AND C.O. 273 COULD NOT VALIDLY HAVE BEEN ISSUED DURING PRESIDENT'S RULE UNDER ARTICLE 356 OF THE CONSTITUTION

99. On 20th June 2018, the then-Governor of the State of Jammu and Kashmir issued a proclamation under Section 92 of the Constitution of Jammu and Kashmir, imposing Governor's Rule on the State, on the stated basis that the coalition government had

fallen and no political party or alliance of parties in the House had the requisite numbers to govern. (**Common Compilation, vol. 3, pg 478**). While under the 20th June order the Legislative Assembly was kept in suspended animation, through a succeeding order issued on November 21, 2018 - also under section 92 of the J&K Constitution - the Legislative Assembly was dissolved (**Common Compilation, vol. 3, pg 482**).

100. On 19th December 2018, upon the cessation of six months of Governors' Rule, the President of India issued Proclamation G.S.R. 1223(E) imposing President's Rule upon the State, under Article 356 of the Constitution. (**Common Compilation, vol. 3, pg 485**) Among other things, this Proclamation suspended the proviso to Article 3 of the Constitution, which made the consent of the Legislative Assembly of J&K a pre-requisite for the operationalisation of any changes under Article 3. The validity of this suspension - and of the Article 356 proclamation - has been challenged in some of the accompanying petitions. On 3rd July 2019, the Union Cabinet approved the extension of President's Rule by another six months (**Common Compilation, vol. 3, pg 488**).

101. Consequently, on 5th August 2019, the State of Jammu and Kashmir was under President's Rule, and had been under either President's or Governor's Rule for more than a year.

a. Manifest arbitrariness and the rule of law

102. Petitioners respectfully submit that the invocation of Article 370(1)(d) during a period of President's Rule is manifestly arbitrary, destructive of the rule of law, and *ultra vires* the powers conferred by the Article.

103. During a period of President's Rule, the "government" of a State is carried on by the President, acting on the aid and advice of the Council of Ministers, while legislative functions are carried on under the authority of Parliament.

104. This means that when the opening lines of C.O. 272 state that "the President, with the concurrence of the government of the State of Jammu and Kashmir, is pleased to make the following order", what it effectively means is that "the President, with the concurrence of the President, is pleased to make the following order."

105. It is respectfully submitted that, quite apart from the question of the limits of Article 356 (which will be dealt with in the next section), a constitutional functionary "concurring" with themselves is a contradiction in terms, manifestly arbitrary, and destructive of the rule of law. As a song written soon after the formation of the J&K Constituent Assembly (1951) noted, "it takes two to tango." (**Hoffman and Manning, 1952**). Similarly, it takes two to concur.

106. For this reason, it is respectfully submitted that references to the "Government of Jammu and Kashmir" in Article 370 must be interpreted as references to the "*elected* Government of Jammu and Kashmir", and not to whichever constitutional functionary is, *at a given time*, performing the *functions* of the elected government of J&K. Any other interpretation would destroy the core principle of "double consent" which is at the heart of the constitutional relationship between Jammu & Kashmir and the Union of India, and what Ayyangar called the "commitment" of the Constituent Assembly to the people of Jammu and Kashmir.

b. The Scope of Article 356

107. In the alternative, it is respectfully submitted that, for textual, structural, historical, doctrinal, and consequential reasons, the powers under Article 356 of the Constitution cannot be invoked to carry out *fundamental, permanent and irrevocable* restructuring of a State's constitutional architecture, while it is temporarily under the control of the Union.

108. More specifically, the test that the Petitioners propose - and will develop in the course of these submissions - is that the powers under Article 356 do not extend to changes or alterations that an

eventually reconstituted, elected assembly and government would be *constitutionally unable to reverse*.

109. Petitioners submit that this is not an issue that is limited to the constitutionality of C.O. 272, but goes to the heart of Indian federalism. How this Hon'ble Court decides this issue will have far-reaching consequences for the balance of power between the Union and the States, and the scheme and design of Indian federalism. It will also determine whether future executives will see themselves as entitled to act with complete impunity upon an Article 356 proclamation, or whether their actions will be constrained by principles of constitutionalism and the rule of law.

110. Petitioners begin by respectfully noting that no power under the Constitution is absolute; all powers are conditioned and constrained by the Constitution, and extend to the fulfilment of the purpose for which the Constitution grants them in the first place.

111. *Textually*, Article 356 belongs to Part XVIII of the Constitution, which is titled "Emergency Provisions." Article 356 itself begins with the words, "if the President … is satisfied that a situation has arisen in which the Government of the State cannot be carried on in accordance with the provisions of this Constitution…" (*emphasis supplied*) It is respectfully submitted that the words "*this* Constitution" reflect the underlying thrust of Article 356: it is for a

"temporary" situation, where the purpose of Union control is to ensure the *restoration* of governance under the scheme of *this* Constitution - and not to alter the fundamentals of the Constitution *itself*.

112. The *structure* of Articles 356 and 357 buttress this point. Article 357(2) stipulates that "any law made in exercise of the power of the Legislature of the State by Parliament or the President or other authority referred to in sub-clause (a) of clause (1) which Parliament or the President or such other authority would not, but for the issue of a Proclamation under Article 356 have been competent to make shall, after the Proclamation has ceased to operate, continue in force until altered or repealed or amended by a competent Legislature or other authority." (*emphasis supplied*)

113. It is respectfully submitted that the concluding words of Article 357(2) drive home the limits upon the powers under Article 356 and 357. Article 357(2) presumes the capacity - and the power - of the restored legislature to alter or undo the changes that have been made by the Union with respect to the State's affairs. At the heart of this is the democratic principle that, at the end of the day, the people of the State - acting through their directly elected representatives - should have a final, or ratificatory, say in the changes that took place during the "Emergency period" where they were denied such

representation. C.O. 272 takes a dagger to the heart of this democratic principle by making it *formally, legally, and constitutionally impossible* for the (future) restored legislative assembly to undo the changes it has made.

114. To put the point another way, the core purpose of the power under Articles 356 and 357 - as evinced by both text and structure - is *restorative* and not *transformative*: it is a temporary and exceptional power, that is deployed to *restore* the situation to one where the elected legislative assembly and government can retake the reigns of legislative and executive power. Specific acts during the pendency of an Article 356 proclamation, therefore, must be limited to *restorative* acts, alongside directions or orders that are necessary for the purposes of daily administration. They must therefore *exclude* fundamental structural transformations that the eventually restored, elected legislative assembly is *powerless* to take a call on.

115. *Historically*, it is submitted that the Constituent Assembly Debates bear out this proposition. During the debates on the Emergency provisions, Dr. B.R. Ambedkar clarified that the purpose of the power under Articles 356 and 357 was to ensure that the "form of the Constitution" was "<u>maintained</u>" (*emphasis supplied*) (**Constituent Assembly Debates, vol. IX, 4th August, 1949**). The

word “maintenance”, it is submitted, means to keep in existence, or to conserve, or to retain - i.e., the opposite of “transform.” Indeed, in this context, it is important to heed the prescient warnings about the potential abuse of an Article as broad and powerful as 356, which were raised in the Constituent Assembly.

116. It is submitted that there are two ways in which Article 356 could be abused, and invoked for purposes beyond which Emergency powers are granted. The first form of abuse is the frivolous *invocation* of Article 356, which blighted our polity for the first four decades after Independence, and was finally put an end to by this Hon’ble Court in **S.R. Bommai vs Union of India, (1994) 3 SCC 1** (**Case Law Compilation, vol. 2, pg 156**). The second form of abuse, however, is what the Union does *after* the invocation of Article 356. It is respectfully submitted that this case presents a “Bommai moment” for this Hon’ble Court: by declaring C.O. 272 unconstitutional, this Hon’ble Court will ensure that future union parliaments and executives cannot take a wrecking ball to the federal scheme under cover of Articles 356 and 357.

117. To put it in *consequential* terms: making these kinds of changes during an Article 356 proclamation would be akin to a parliament seeking to bind *future* parliaments, except on this occasion, within the federal domain. Thus, even if under Article 356,

the Union has powers of legislation *equivalent* to the state's power to legislate, such power cannot be deployed to alter the constituent *status* of the State (including under Articles 3 and 4); to do so would be a legally irreversible change that would prevent that state legislative assembly from *returning* to power in the same way, and therefore, cannot be permitted under Article 356.

118. It is respectfully submitted that the principle on the basis of which a certain constitutionally-vested power (in this case, under Article 356), was set out with admirable clarity by the Supreme Court of the United Kingdom in **Miller vs The Queen, [2019] UKSC 41**. In that case, the Supreme Court noted that the exercise of power under one set of constitutional provisions would be limited *at the point at which* such exercise would have the effect of effacing a different constitutional principle. Specifically, in **Miller**, the question before the UK Supreme Court was whether the executive power of the Prime Minister to prorogue Parliament was unlimited. The UK Supreme Court held that it was not; it located the boundaries of this power at the point where its exercise would efface the *equally important* constitutional principle of parliamentary scrutiny over the executive. In the case before it, the Supreme Court found that the timing of Prime Minister Boris Johnson's prorogation had the effect

of *depriving* Parliament of a chance to scrutinise the Brexit Agreement. The prorogation was, accordingly, set aside.

119. It is respectfully submitted that in this case, the exercise of constitutionally vested power under Article 356 clashes with the constitutional principles of federalism and representative democracy. A reconciliation of this clash is achieved through the *temporary* nature of the power under Article 356, and its *restorative* character. It follows that the power under Article 356 is therefore limited at the point at which its exercise would *efface* or *erase* the clashing principles of federalism and representative democracy. As has been shown above, that threshold is the point at which the Union attempts to use Article 356 powers to bring about *permanent* changes in constitutional fundamentals, and *denude* the directly elected legislative assembly of the ability to respond to those changes, upon its restoration. C.O. 272 purports to do precisely that, and that is why this Hon'ble Court should strike it down.

120. The Respondents may argue that Article 356, on its terms, puts the Union parliament and executive in *exactly* the same position as the state legislature and government during the pendency of an Article 356 proclamation, and confers upon them equivalent powers. It is respectfully submitted that the judgement of this Hon'ble Court in **Krishna Kumar Singh vs State of Bihar,**

(2017) 3 SCC 1 provides a complete answer to this contention. In that case, notwithstanding the fact that the Constitution stipulates that a Presidential Ordinance shall have the same "force and effect" as ordinary law enacted through democratic procedures, this Hon'ble Court held that Ordinances were *not* equivalent to temporary statutes; because of the absence of democratic processes, executive legislation could not be treated as constitutionally equivalent to ordinary legislation, even though they shared the same "force and effect."

121. It is respectfully submitted that the logic of **Krishna Kumar Singh, supra**, applies on all fours to this case: during an Article 356 Proclamation, the functions of the state legislature and executive are performed by the Union (and therefore, it must follow that the acts of the Union have the same force and effect), but that does not mean that the two are *equivalent in all constitutional respects*. Petitioners submit that, much like in **Krishna Kumar Singh, supra**, the relevant point of difference is the *democratic deficit* that occurs in the shift from the elected state assembly to President's Rule; this democratic deficit can only be justified if - and to the extent that - the Union's actions under 356 are limited to its *restorative function*, and it is for *that* purpose, and that purpose alone, that the Union temporarily "replaces" the elected state legislature and government.

IX. CONCLUSION

122. On the basis of the above arguments, it is respectfully submitted that impugned orders C.O. 272 and 273 violate the following cardinal constitutional principles:

a. The principle that an exceptional constitutional power, specifically vested in a constitutional functionary, to be exercised in a particular manner, must be exercised in that manner, or not at all.

b. The principle that constitutional functionaries cannot accomplish by the back door (i.e., do indirectly) what they are barred from doing via the front door (i.e., do directly).

c. The principle that substantive new constitutional rights and obligations cannot be created by unilateral executive fiat.

d. The principle that constituent power and legislative power are conceptually distinct forms of power, and cannot be equated.

e. The principle of “double consent” that is at the heart of the asymmetric federal compact between the State of Jammu and Kashmir and the Union of India.

f. The principle that constitutional functionaries cannot act with manifest arbitrariness and in a manner that destroys the rule of law.

g. The principle that no power - including the power under Article 356 - is granted *carte blanche*.

h. The principle that powers under Article 356 must be exercised for a *restorative* purpose, and not to permanently *transform* (in this case, degrade) the status of a constituent federal unit of the Indian Union.

i. The principle of representative democracy.

j. The principle of federalism.

123. Taken together, C.O. 272 and 273 destroy the three pillars of Article 370, and amount to a unilateral reneging by the Union of India of its solemn compact with the people of Jammu and Kashmir.

124. It is therefore submitted that C.O. 272 and 273 are void *ab initio* and ought to be struck down by this Hon'ble Court.

Drafted By:

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