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

**IN RE: ARTICLE 370 OF THE CONSTITUTION**

**WRIT PETITION (CIVIL) NO. 1062 OF 2019**

**IN THE MATTER OF:**

Inder Salim @ Inderji Tickoo and Satish Jacob … Petitioners

Versus

Union of India and Ors. … Respondents

AND

**IN THE MATTER OF:**

**WRIT PETITION (CIVIL) NO. 1210 OF 2019**

Mohammed Yousuf Tarigami … Petitioner

Versus

Union of India and Ors. … Respondents

**WRITTEN SUBMISSIONS OF MR. CHANDER UDAY SINGH, SENIOR COUNSEL ON BEHALF OF THE PETITIONERS**
**(TIME SOUGHT: 4 HOURS)**

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## I. INTRODUCTION

1. These written submissions are 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.**"

2. The petitioners in both these petitions have impugned, inter alia, the Presidential Order number C.O. 272 dated August 5, 2019, the addition of clause (4) to Article 367 of the Constitution of India as applied to Jammu and Kashmir, the declaration under clause (3) of Article 370 effected by C.O. 273 dated August 6, 2019, and have challenged all other aspects of the abrogation of Article 370. In addition, the petitioner in W.P. (C) No. 1210 of 2019, which was filed after the enactment of the Jammu and Kashmir Reorganisation Act, 2019, has also challenged the said Act on diverse grounds set out in the Petition.

3. However, in view of the suggestion by this Hon'ble Court that counsel should divide up the various challenges and issues, counsel in the present written submissions confines himself to issues pertaining to the constitutionality of the said J & K Reorganisation Act. On all other aspects the petitioners respectfully adopt the written submissions filed by Mr. Raju Ramachandran, senior advocate, and Mr. Gopal Sankaranarayanan, senior advocate, while

reserving their right to address oral arguments on any of the issues contained therein, should the need arise.

4. In these written submissions, petitioners impugn the constitutional validity of the Jammu and Kashmir Reorganisation Act of 2019 [“**the Reorganisation Act”** or “**the impugned Act**”]. The Reorganisation Act, in effect, purports to alter the constitutional status of Jammu and Kashmir from a “state” within the Indian Union, to two union territories: the Union Territory of Jammu and Kashmir (with a legislative assembly) and the Union Territory of Ladakh (without a legislative assembly).

5. The Reorganisation Act has been enacted in purported exercise of Article 3 of the Constitution of India. The question, therefore, is whether Article 3 of the Constitution authorises the union legislature to pass a law altering the constitutional status of a state, and reducing or degrading it to a union territory (or more than one union territory).

6. A further question is whether Article 368 and the salutary safeguards incorporated therein can be bypassed by the stratagem of enacting an ordinary Parliamentary law under Article 3, even though the effect of such law is: (i) to denude a state of its legislative powers by making changes in the Lists in the Seventh Schedule as applicable to that State; (ii) to deny a substantial part of a State its rights under

Articles 54 and 55, as has been done to Ladakh; (iii) to impose Article 73 on a State and wipe out its executive powers under Article 162; and (iv) to change the representation of a large part of a State in the Council of States in Parliament. In this behalf, clause (2) of Article 4 makes it clear that Article 3 cannot supplant or obviate an amendment to the Constitution, where one is required under Article 368.

7. In addition, a question arises whether in view of the Proviso to Article 3, the impugned Reorganisation Act is ultra vires the Constitution, stillborn, and void *ab initio*. In this behalf it is submitted that though the said Proviso was by a patent fraud on the Constitution purported to be made inapplicable to the State of Jammu and Kashmir, the Proviso must be deemed to have continued in force at all relevant times, and the Reorganisation Act accordingly be treated as void.

8. All in all, it is respectfully submitted that the text of Article 3 grants no power to degrade a State into a union territory, that the structure and design of the Constitution militates against reading such a power into Article 3, that the history and consistent state practice militates against such a reading, and that, crucially, a contrary reading would violate the basic feature of federalism. The impugned Act, therefore, is beyond the competence of the union legislature, and void *ab initio*.

9. Petitioners respectfully submit that while the facts of this case pertain to the challenge to the Reorganisation Act, its constitutional implications go significantly further. This Hon'ble Court's decision about the scope and limits of Article 3 will have fundamental and far-reaching consequences upon the federal compact, the balance of power between the union and the states, and, therefore, the character of constitutional democracy in India.

10. Petitioners preface their submissions with two caveats. *First*, Article 3 - as it applied to the state of Jammu and Kashmir - required not just consultation with, but the consent of, the legislative assembly of Jammu and Kashmir. The proviso mandating consent was purported to be suspended by a Presidential Proclamation dated December 19, 2018, which also imposed Article 356 upon the state. In view of the division of issues between counsel, these written submissions do not address the validity of the said Presidential Proclamation, but Counsel reserves his right to address this Hon'ble Court on this aspect, to the extent that it dovetails into and is essential for the challenge to the Reorganisation Act.

11. *Second*, the present writ petitions, as also others in this batch, set out, in detail, the constitutional challenge to C.O. 272 and 273, which purport to amend Article 370 of the Constitution. The validity of the Reorganisation Act partially depends upon the validity of C.O.

272 and 273; should this Hon'ble Court hold the former to be invalid, the invalidity of the Reorganisation Act shall necessarily follow. In these written submissions, however, Petitioners impugn the validity of the Reorganisation Act *independently* of C.O. 272 and 273; thus, even if this Hon'ble Court were to uphold C.O. 272 and 273, the Reorganisation Act will nonetheless be unconstitutional and void.

12. These written submissions are structured as follows. After the Introduction (**I**), counsel respectfully submits, in section (**II**), that Article 3 has no operation and confers no power to bypass the rigours and safeguards of Article 368, in cases where the effect of the law made by Parliament is to make changes in respect of the matters set out in sub-clauses (a) to (e) of the Proviso to clause (2) of Article 368, and that this is further borne out by Article 4(2) of the Constitution.

13. It is then submitted in section (**III**) that Article 3 does not, either explicitly or by necessary implication, grant the union legislature the power to degrade or reduce a state into a union territory. Even if it is assumed that the text of Article 3 is open to two possible readings - one that authorises such a power, and one that does not - this Hon'ble Court ought to choose the reading that preserves the basic features of federalism and representative democracy, which are part

of the basic structure of the Constitution, and to abjure a construction that destroys them.

14. It is submitted in section (**IV**) that the power under Article 3 is subject to *implied limitations* flowing from Article 1 of the Constitution, and the principles of federalism.

15. Further, the petitioners submit in section (**V**) that degrading a state to a union territory entails the vitiation of constitutionally entrenched legislative powers under Article 246 of the Constitution read with the Seventh Schedule as was applicable to Jammu and Kashmir, and a *transfer* of those powers from the state to the centre. Such a reduction in status also entails denuding the State of its executive powers under Article 162, and imposing instead the executive powers of the Union under Article 73, in patent violation of the Proviso to clause (1) of Article 73, which permits laws extending only to matters falling within the Concurrent List of the Seventh Schedule.

16. Unlike the other elements of Article 3, the accomplishment of such a drastic transfer of legislative and executive powers through mere Parliamentary legislation could not have been within the contemplation of the framers of the Constitution, and is outside the competence of the union Parliament.

17. In section (**VI**) it is submitted that the historical context of Indian federalism - especially with respect to the integration of the "princely states", and particularly the sovereign Jammu and Kashmir which continued to have its own Constitution within the Union of States – supports the Petitioners' reading of Article 3.

18. Before proceeding further, it bears mentioning that a learned two-Judge Bench of this Hon'ble Court in para 26 of its judgement in *Haji Abdul Gani Khan* v. *Union of India*, 2023 SCC Online SC 138, observed that a conjoint reading of Articles 3, 4 and 239A indicates that Parliament can make a law to convert a State into one or more union territories. However, it is submitted that this holding is in the nature of *obiter dicta*, and in any event would have no bearing on the present matters, as the learned Judges recorded that they "*will have to proceed on the footing that the 2019 Presidential Order, the said declaration and the provisions of the J&K Reorganisation Act are valid*. It was recorded in para 7 that the petitioners therein were not seeking to assail the abrogation of Article 370, and that the challenge was confined to the exercise of delimitation undertaken by Notifications issued in 2020, 2021 and 2022. It was further recorded in paras 19 to 21 that though counsel for the petitioners therein tried to question the validity of the J&K Reorganisation Act 2019, this could not be permitted as no foundation was laid in

pleadings. As such, the Petitioners respectfully submit that the findings in the judgement have no bearing on the constitutional challenge today.

## II. ARTICLE 3 DOES NOT EMPOWER PARLIAMENT TO ENACT A LAW WHICH HAS THE EFFECT OF BYPASSING THE NECESSITY OF A CONSTITUTIONAL AMENDMENT UNDER ARTICLE 368; THE RIGOURS AND SAFEGUARDS PROVIDED TO THE STATES UNDER ARTICLE 368 CANNOT BE SKIRTED BY RECOURSE TO AN ORDINARY LEGISLATION UNDER ARTICLE 3.

15. There is no manner of doubt that the effect of the Reorganisation Act is to denude the State of Jammu and Kashmir of its legislative powers, as were guaranteed to it *inter alia* under Article 246 read with the Lists in the Seventh Schedule, as modified for the State by C.O. 48 dated May 14, 1954, and various other Constitutional Orders which were passed after consultation with, or with the prior concurrence of the State Legislature, under Article 370.

16. Nor can it be disputed that the Reorganisation Act imposes Article 73 on the State, and completely erases its executive powers under Article 162. This is done not only in respect of matters falling within List III of the Seventh Schedule (the Concurrent List) to the

extent applicable in Jammu and Kashmir, but also in respect of matters falling within the State's exclusive powers, and also all residual matters which were exclusively within the State's domain. Similarly, it is clear that the Reorganisation Act denies the entire vast territory of Ladakh, which formed a substantial part of the State, its rights under Articles 54 and 55 of the Constitution of India. Further, it is clear that the Reorganisation Act brings about a change in the representation which a large part of the State formerly enjoyed in the Council of States, as Ladakh is converted into a Union Territory without a Legislative Assembly, and hence stands excluded from the electoral college for the Rajya Sabha.

17. All these changes fall squarely within sub-clauses (a), (c), (d) and (e) of the Proviso to clause (2) of Article 368, and could only have been brought about by moving an Amendment to the Constitution, after following the checks and safeguards contained in Article 368(2). It is submitted that the rigours and safeguards which the framers of the Constitution provided in Article 368 (which is now clause (2) of the said Article), were clearly intended to protect the States from unchecked Parliamentary actions that might prejudicially affect the federal compact.

18. It is for this reason that such amendments can only be carried by a majority of the total membership of either House of Parliament,

as also a two-thirds majority of those present and voting, with the further safeguard that if the amendment purports to make any change in sub-clauses (a) to (e) of the Proviso – in the words of the original Constitution – it would require ratification by the Legislatures of not less than one-half of the "States specified in Part A and Part B of the First Schedule." The text of the original Constitution – with reference to Part A and Part B States – has been cited here to make it clear that the framers intended the Union to have no say in the ratification process through the Part C and Part D states that were directly controlled by them at the time.

19. It is the settled legal position, and this must inform a reading of the Constitution too, that where a direct and explicit provision exists which deals with a particular course of action, with its own scheme, provisions, checks and balances, the same cannot be bypassed by taking recourse to a general provision which does not directly deal with that subject matter. Further, clause (2) of Article 4 makes it clear that Article 3 cannot supplant or obviate an amendment to the Constitution, where one is required under Article 368.

20. In the context of Articles 3 and 4 and Article 368, an eight-Judge Bench of the Supreme Court had occasion to deal with this dichotomy in Special Reference No. 1 of 1959, **In re Berubari**

**Union (I), (1960) 3 SCR 250; AIR 1960 SC 845**. The Court held, inter alia, that the effect of Article 4(2) is that laws relatable to Articles 2 and 3 are not to be treated as constitutional amendments which are required to be made under Article 368; and that where a legislation is not competent under Article 3, the only recourse of Parliament would be to effect a constitutional amendment under Article 368.

21. The Supreme Court has also held that a legislation which takes away the powers of State Legislatures guaranteed to them under Article 246 read with List II of the Seventh Schedule is incompetent under Article 3. In **State of Himachal Pradesh v. Union of India, (2011) 13 SCC 344**, the Court held in paras 92 and 93 that Parliament has no power under Article 3 to enact a law which denudes a State of its legislative powers. Reading this judgment with **In re Berubari Union (I),** it is clear that the Reorganisation Act is patently ultra vires the Constitutional scheme.

22. In addition, it is respectfully submitted that in view of mandatory requirements spelled out in the Proviso to Article 3, as applied to the State through the Presidential Order of 1954, the impugned Reorganisation Act is patently *ultra vires* the Constitution. Having not been referred by the President to the Legislature of the State, the Act is stillborn, and void *ab initio*.

23. In this behalf it is further submitted that though the said Proviso was by a patent fraud on the Constitution purported to be made inapplicable to the State of Jammu and Kashmir, such Constitutional fraud must be disregarded for all purposes. The said Proviso must be deemed to have continued in force at all relevant times, and the Reorganisation Act accordingly be treated as void.

## III. THIS HON'BLE COURT OUGHT TO INTERPRET ARTICLE 3 IN A MANNER THAT PRESERVES THE BASIC FEATURES OF FEDERALISM, DIVISION OF POWERS BETWEEN THE UNION AND STATES, AND THE PRESERVATION OF DEMOCRACY

24. It is beyond cavil that federalism and representative democracy are both part of the basic structure of the Constitution of India. Six learned judges in **S.R. Bommai v. Union of India, (1994) 3 SCC 1** so held, and **Kuldip Nayar v. Union of India, (2006) 7 SCC** 1, in paras 50 to 60, while acknowledging that the Union of India enjoys certain sweeping powers over the States, nevertheless cemented the principle of federalism as a basic and inalienable feature of our Constitution.

25. In **Glanrock Estate v. State of Tamil Nadu, (2010) 10 SCC 96**, the Court in paras 25, 26 and 31 held that even the wide-ranging powers of amendment of the Constitution in Article 368 cannot be

used to make amendments that would abrogate the core constitutional values and overarching principles that form the basic structure of the Constitution. It necessarily follows that if the basic features and structure cannot be changed even by a constitutional amendment after following all the checks and balances of Article 368(2), that certainly cannot be done by an ordinary law enacted by Parliament under Article 3.

26. It is respectfully submitted that the text and structure of Article 3, when interpreted and understood in the context supplied above (**a)**, and supplemented by past practice supports (**b**), leads to the following conclusion: the underlying thrust of Article 3 is to *support* and *enhance* representative democratic governance, and not to degrade it (**c**). When understood this way, it becomes clear that the Reorganisation Act is *ultra vires* Article 3, and unconstitutional.

*a. The text and structure of Article 3*

27. Article 3 of the Constitution is titled "formation of new States and alteration of areas, boundaries, or names of existing States" (emphasis supplied). Its scheme is as follows:

a. Article 3 has five sub-clauses. These sub-clauses authorise Parliament, by law, to "form a new State by separation of territory from any State or by uniting two or more States or

parts of States or by uniting any territory to a part of any State," "increase the area of any State," "diminish the area of any State," "alter the boundaries of any State," and "alter the name of any State." (emphasis supplied)

b. The proviso to Article 3 requires consultation with affected state legislatures as a necessary precondition.

c. Explanation I to Article 3 - which was introduced through a constitutional amendment in 1966 - clarifies that the word "State", in each of the sub-clauses of Article 3, includes "union territory." It is important to note that the import of this Explanation is purely clarificatory, as union territories - as a concept - did not exist at the time of the framing of the Constitution.

d. The scheme of Article 3 is completed by Explanation II, which clarifies that the power to form a new State or Union territory can be exercised by "uniting a part of any State or Union territory to any other State or Union territory."

e. Article 4 provides that any law under Article 3 shall amend the 1st and 4th schedules to the Constitution but shall not be treated as a Constitutional amendment.

28. A close reading of Article 3 reveals that it carefully, specifically, and exhaustively sets out the categories of powers that Parliament

may, by law, exercise with respect to the States. There is no explicitly vested power granted to Parliament to degrade the constitutional status of a State to a union territory.

29. Nor is any such power inherent, or necessarily implied, within any of the sub-clauses of Article 3, or within Explanation 2.

a. Sub-clauses (b) to (e) are concerned with areas, boundaries, and names, all of which are qualitatively different from a State's constitutional position within the federal union.

b. Sub-clause (a) read with Explanation 2 sets out the more far-reaching power of *formation* of a new State (or Union Territory). However, crucially, even this power is not unqualified: Article 3(a) does not stop with the words "form a new State (or union territory)." It sets out the range of permissible ways in which this can be done: i.e. by separating an existing State (or union territory), engrafting existing State (or UT) territories to each other. Notably, despite this specificity, sub-clause (a) read with Explanation 2 does not list the degradation of a State into a union territory as a method of "formation" of a new political entity (whether State or UT). Further, while Article 3 requires legislative views from the State with respect to a change of name, boundary or area, it does not require any such view regarding the much more

fundamental issue of degradation of a state into a union territory. Further, laws made under Article 3 are expressly deemed not to be treated as an amendment to the Constitution under Article 4(2).

30. From a textual perspective, all these factors taken together are instructive, and ought to be determinative. The powers to alter the name, area or boundary of a state in the Indian historical context (detailed below) are qualitatively different from the power to decide whether an existing state continues to deserve such status or whether it ought to be degraded to a union territory. It is one thing to state that a law that changes the name or boundary of a state is not an amendment to the Constitution regardless of the changes it makes to Schedules I and IV but quite another to claim that a law by which a state can allegedly be converted to a union territory *in toto* does not even require a Constitutional amendment. To paraphrase Justice Scalia's memorable phrase in *Whitman* v. *American Trucking*, 531 US 457 (2001), to assume that laws that convert states into union territories are covered by Article 3 requires us to believe that our Framers hid elephants in mouseholes.

31. It is pertinent to note that in **re Berubari Union, AIR 1960 SC 845** this Hon'ble Court did not read or imply into Article 3 a power to pass a law by which territory could be ceded to the erstwhile East

Pakistan pursuant to a Treaty. It held that the same would require a Constitutional amendment. It is respectfully submitted that, in addition, no power to degrade a state to a union territory exists but even if it does, such a drastic act of retrogression would require a constitutional amendment and not a law under Article 3. This understanding is buttressed by the judgement of this Hon'ble Court in **Mangal Singh v Union of India, AIR 1967 SC 944** which, discussed the provisions of Articles 3 and 4 held:

> "*The argument that if it be assumed that the Parliament is invested with this wide power it may conceivably exercise power to abolish the legislative and judicial organs of the State altogether is also without substance. We do not think that any such power is contemplated by Art. 4. Power with which the Parliament is invested by Arts. 2 and 3, is power to admit, establish, or form new States which conform to the democratic pattern envisaged by the Constitution; and the power which the Parliament may exercise by law is supplemental, incidental or consequential to the admission, establishment or formation of a State as contemplated by the Constitution, and is not power to override the constitutional scheme. No State can therefore be*

*formed, admitted or set up by law under Art. 4 by the Parliament which has not effective legislative, executive and judicial organs*."

32. Indeed no commentary on the Indian Constitution has ever indicated that Article 3 contains the power to democratically retrogress a State to a Union Territory. For instance, H.M. Seervai also discusses this power as being the power of Parliament to "*alter the boundaries of states, or to distribute the territories of a State among other states*" (**Para 5.16 at p. 290 Volume I 4th edn, 1991 and para 6.24 at p. 312**).

*b. History and Practice*

33. From a historical perspective, the case for reading an implied power to degrade a state into a union territory is arguably even worse than the textual case. At least in theory during the latter part of British Raj (for example, see the Preamble to the Government of India Act 1919), and in both theory and practice since Independence, Indians have steadily moved towards greater self-government in a federal structure and not lesser.

34. In the century between the Government of India Act 1919 and the impugned Act in 2019, there has been no retrogression of a

“Governor’s Province” to a “Chief Commissioners Province” under British Raj or of a State to a Union Territory under our Constitution (except when the concept of union territories was introduced in 1956 by the 7th amendment and some Part C and D states such as Himachal Pradesh, Manipur and Tripura and were automatically made Union Territories with elected Territorial Councils under the Territorial Council Act 1956 – until the 14th amendment allowed ‘Union Territories with Legislature,' pursuant to which legislative assemblies were set up under the Government of Union Territories Act 1963).

35. The movement is strictly in the other direction, with territories gaining more self-government or swaraj rather than the reverse. For example, Bihar and Orissa, along with Assam, were first separated from the Presidency of Ft. William Bengal by an Act of 1912 under which Bihar and Orissa was one province under a Lt. Governor while Assam was made a Chief Commissioner’s Province. Under the Government of India Act 1919, Bihar and Orissa province and Assam province both became Governor’s Provinces under Section 46. Bihar and Orissa were each constituted as separate provinces by virtue of section 289 of the Government of India Act 1935. Under the Constitution both Bihar and Orissa were admitted as Part A states and have remained in Schedule I as states ever since.

36. Under section 52A of the Government of India Act 1915 (as amended in 1919), the Governor General in Council had the power to create new Governor Provinces but this power was to be exercised after taking the opinion of the local government. The Select Jt Committee Report on this section stated:

> "*The Committee have two observations to make on the working of this Clause. On the one hand, they do not think that any change in the boundaries of a province should be made without due consideration of the views of the legislative council of the province. On the other hand, they are of opinion that any clear request made by a majority of the members of a legislative council representing a distinctive racial or linguistic territorial unit for its constitution under this Clause as a sub-province or a separate province should be taken as a prima facie case on the strength of which a commission of inquiry might be appointed by the Secretary of State, and that it should not be a bar to the appointment of such a commission of inquiry that the majority of the legislative council of the province in question is opposed to the request of the minority representing such a distinctive territorial unit*."

37. The power to create new Lt Governor Provinces was contained in Section 53(2) of the Act. It is pertinent to state that section 60 of the government of India Act 1915 gave the Governor General in Council the power to alter boundaries of provinces in British India.

38. Under the Government of India Act 1935, section 290 provided the Governor General with the Power to create new provinces, diminish or increase the area of any province or alter the boundaries subject to ascertaining the view of the Federal Government and Legislature as well as the Province Legislature. Provinces included both Governors Provinces and Chief Commissioners Provinces. This is identical in structure to Article 3. However, even under this law, powers were used only for the alteration of boundaries of the provinces of Bombay and the State of Hyderabad. No one asserted the right of the Governor- General to abolish a Governor's Province and convert it into a Chief Commissioners Province.

39. With the integration of princely states into independent India, Section 290A was added to the Government of India Act, 1935 which allowed States or groups of States to join the union of India as Chief Commissioner's Provinces or part of Governor's Provinces. Under the Constitution as adopted in 1950, there were Part A States

having Governors and a Legislature (comprising mostly of the erstwhile Governor's provinces with some princely states), Part B States with Rajpramukhs and elected legislatures (largely the princely states who were integrated into India), Part C States with Chief Commissioners (erstwhile Chief Commissioner provinces and some princely states) and a Part D State, namely the Andaman and Nicobar Islands governed by a Lt. Governor appointed by the Union.

40. It is pertinent to note the historical context as regards Indian states, why re-organisation of states and alteration of boundaries was always under contemplation in the Constituent Assembly, and why such debates reverberate in the parliamentary records of the 1950s. The movement for linguistic based federalism began with Orissa in 1895 under British rule and continued to gain steam. The State of Andhra Pradesh was created in 1953, as a result of popular agitation, by a secession of the Telugu speaking parts of Madras State under the Andhra State Act, 1953.

41. The purpose of Article 3 can be understood by a combined read of the States Reorganisation Report 1955 (which was the basis of the States Reorganisation Act 1956) ("SR Report") as well as the 7$^{th}$ Amendment.

(a) The provinces of British India were not based on any rational or scientific planning but rather on military, political or administrative exigencies of the moment. (para 14, and 21 of the SR Report)

(b) In independent India, there were 3 categories of States Part A , Part B and Part C in addition to Part D territories. Part A corresponded to the provinces of British India. Part B states included the former Princely States that merged with India and had Rajpramukhs and were subject to additional supervision by the Union of India. Part C states were governed by the Union in a unitary manner. Andaman and Nicobar Islands constituted a Part D state which had been a Chief Commissioner's province under British India under the Acts of 1919 and 1935. (para 28-31, 33 of the SR Report)

(c) The SR Report found that the disparate status of the states as Part A, B, C and D was unsustainable and was contrary to overwhelming public opinion. It proposed that the majority of Part C states should be merged with other contiguous states while the remainder, which could not be merged due to vital, strategic or other considerations, be treated as territories. Following this paradigm, the 7$^{th}$ Constitutional Amendment removed the distinctions between states and introduced the concept of union territories in the place of

non-merged Part C states and for Andaman and Nicobar Islands. (para 236-268, 237, 285-286 of the SR Report)

(d) From 1955 onwards, Goa, Himachal Pradesh, Manipur, Tripura, Arunachal Pradesh, and Mizoram were converted from union territories to States. This was done through legislation under Article 3. The 14th amendment provided for the creation of legislatures for Puducherry and for other union territories of the time. For Delhi, the 69th amendment Act provided for an insertion of special provisions which brought it closer to a state. At no time post the 7th Amendment has the status of any State been reduced to a Union Territory.

42. Consistent practice from 1950 onwards shows that laws made under the aegis of Article 3 have created new states (Andhra Pradesh, Gujarat and Maharashtra, Kerala), or union territories that have in time become states (Himachal Pradesh, Mizoram, Arunachal Pradesh, Tripura, Manipur, Goa). As a natural consequence of this the territory of parent states has shrunk: for example Madras State post the creation of Andhra, Punjab post the 1966 Act created Haryana and transferred territories to Himachal.

43. Some historical states have been extinguished in this process but it is pertinent to note that in each case the movement was

towards greater self-determination by joining a State due to linguistic or other affinity. In no case has there been democratic regression to a former stage in political evolution.

| Historic State | Date of dissolution | Successor State (s) | Change in Status |
|---|---|---|---|
| Cooch Behar | Constitutional Order dated 28.12.1949 under s. 290 A Government of India Act, 1935 | West Bengal | Part C state to Part A state |
| Bilaspur | Bilaspur and Himachal (New State) Act 1954 | Himachal Pradesh | Merged two Part C States. Himachal became a union territory in 1956, was largely expanded in 1966 under the Punjab Reorganisation Act and made a State in 1971. |
| Hyderabad | States Reorganisation Act 1956 | Andhra Pradesh (now also Telangana), Maharashtra, Madhya Pradesh, Karnataka | Part B State to successor States |
| Vindhya | “ | Madhya | Part C state to |

| | | | |
|---|---|---|---|
| Pradesh | | Pradesh | Successor State |
| Madhya Bharat | “ | Madhya Pradesh | Part B State to successor State |
| Bhopal State | “ | Madhya Pradesh | Part C State to successor State |
| Ajmer State | “ | Rajasthan | Part C State to successor State |
| Coorg State | “ | Karnataka (earlier known as Mysore) | Part C State to successor State |
| Kutch and Saurashtra States | “ | Bombay State (now Gujarat) | Part C and Part B States to successor State |
| Travancore-Cochin | “ | Kerala, Tamil Nadu | Part B State to successor State |
| PEPSU | “ | Punjab, Haryana | Part B State to successor State |

*c. The principle underlying Article 3*

44. It is respectfully submitted that (a) the lack of a categorical mention of the right of the Union to degrade a State under Article 3, and (b) consistent state practice across British India and independent India is neither accidental, nor a matter of semantics. There is an underlying *theme* that unites the several sub-clauses of

Article 3 and Explanation 2. Each of these sub-clauses refer to a situation where, as a result of Parliamentary legislation, a set of citizens may find themselves living in a different State, or - in one set of circumstances - citizens of an erstwhile UT may find themselves living in an existing or new State. In each of these situations, the form of *federal representative democracy* enjoyed by these citizens is either constant, or enhanced.

45. The degradation of a State to a union territory, however, entails a change of a *qualitatively different kind* from the situations described above: that is, a *diminishment or loss of representative democracy* that comes with an alteration of status from State to union territory (whether with or without a legislature). This qualitative difference is the reason why the power to degrade a State into a union territory cannot be “read into” the existing sub-clauses of Article 3.

46. It is respectfully submitted that the thematic unity described above is founded upon two constitutional principles. These are:

a. The reason why Article 3 vests in the union parliament the power that it does - and explicitly denies to the State legislatures a *veto* over alterations of boundaries, areas etc. - is because the framers recognised that the States - as formed - were themselves culturally, linguistically, and otherwise

heterogeneous entities. If, therefore, existing State legislatures were granted a veto over alterations to existing boundaries, it might frustrate the desires of distinct minorities *within* these States for cultural and linguistic autonomy *via* Statehood. This was explicitly discussed in the Constituent Assembly [**Constituent Assembly Debates, Vol. 7, 17-18 November, 1948; Constituent Assembly Debates, Vol. 10, 12-13 October, 1949)**.

b. Consequently, the principled reason underlying the scheme of Article 3 was not to disempower States at the expense of the Union, but to *protect* representative democratic aspirations *within* States. As the history of State formation after Independence has shown, this is how political reality has worked in practice as well.

c. Explanation II to Article 3 is founded in the historical fact that at the time of Independence, there were certain territories (at the time, Commissioner's Provinces) that were deemed to be not yet ready for representative democracy through full Statehood. Without taking a position on the merits of such a view, Petitioners respectfully note that – as indicated above - the march of constitutional history after Independence has

been such that Commissioner's Provinces - and, later, Union Territories - have *ascended* to Statehood at various times.

i. Under the Government of Union Territories Act 1963 and the insertion of Art. 239A into the Constitution by the 14th amendment, the Union Territories got legislative assemblies abolishing the earlier system of Territorial Councils Act, 1956.

ii. After this the Union Territories acquired statehood: Nagaland (1963), Himachal Pradesh (1971), Manipur (1972), Tripura (1973), Goa (1987), Arunachal Pradesh (1987), Mizoram (1987).

iii. Under the 69th Amendment Delhi has also been accorded special democratic status. As on date the union territories Daman and Diu, Dadra and Nagar Haveli, Lakshadweep, Chandigarh and the Andaman and Nicobar Islands exist as union territories because of reasons such as size, history, viability as independent units, and administrative expediency. There are no significant political demands for statehood.

47. It is pertinent to note that the Indian state has dealt with serious insurgencies (Punjab, Manipur, Mizoram, Nagaland), and territorial threats (Arunachal Pradesh) without the need to

contemplate a democratic retrogression. The emergency powers provide sufficient basis for union involvement in a state on a temporary basis.

48. Petitioners therefore submit that the text, design, history and structure of Article 3 - and the powers it vests within the union legislature - is based upon the core, normative principle of *enhancing representative democracy through federalism*. This is entirely consistent with this Hon'ble Court's holding - across multiple cases - that both representative democracy and federalism are a part of the Constitution's basic structure.

49. The Respondents' reading on the other hand, runs contrary to this core principle. Respondents' position entails viewing the States as nothing more than administrative units, where the nature of democratic representation is entirely dependent on the will of the union legislature. It is respectfully submitted that this has *never* been the jurisprudential understanding of Indian federalism. While this Hon'ble Court has noted previously that the Indian Constitution is not a federation in the mould of the United States, and has a set of provisions that are "skewed" towards the centre, it has *also* affirmed that federalism is a part of the basic structure of the Constitution. Treating the States as *mere* administrative units does violence to the concept of federalism. The old adage that India is an

"indestructible union of destructible states" merely implies that states can be reorganised in consonance with the federal democratic principle. It cannot imply that Article 3 is a charter for Central despotism over whether some citizens deserve to live in States or not.

50. In sum, therefore, Petitioners respectfully submit that:

a. The power to degrade an existing State - through union legislation - into one or more union territories is not located within the text of Article 3.

b. Such power is contrary to the thrust and the underlying principles of Article 3, and should therefore not be "read into" the provision.

c. At the highest, it may be argued that Article 3 can be interpreted in two ways: to allow such a power, or to deny it. In that event, it is respectfully submitted that - in line with its prior jurisprudence - this Hon'ble Court should adopt an interpretation that *furthers* representative democracy and the federal principle, rather than denying it. Such an interpretation, in this case, would mean that under Article 3, the union legislature *may not*, by law, degrade a State into a union territory.

## IV. IN THE ALTERNATIVE, THE POWER UNDER ARTICLE 3 IS SUBJECT TO IMPLIED LIMITATIONS

51. It is respectfully submitted that under a constitutional democracy, there is no such thing as power unbounded. As this Hon'ble Court noted in **Raja Ram Pal v. Lok Sabha, (2007) 3 SCC,** 184 para 431(b): the Constitutional system of governance abhors absolutism. All power is limited, whether explicitly by the provisions of the Constitutions, or by *necessary* implication, flowing from the Constitution's structure and principles.

52. In **Miller v. The Queen***,* **[2019] UKSC 41**, the Supreme Court of the United Kingdom set out a principled articulation of implied limitations under constitutionalism, applicable across jurisdictions. 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.

53. It is respectfully submitted that the present case entails a similar clash of powers and principles. The relevant power is Parliament's power under Article 3. The relevant principle is the principle of federalism in its most basic form: i.e., the existence of a two-tiered system of governance involving the Union and the States.

54. The manner in which this clash occurs is as follows:

a. Article 1(1) of the Constitution stipulates that "India, that is Bharat, shall be a Union of States."

b. The federal principle - a part of the basic structure of the Constitution - therefore requires, at a minimum, that there must exist a *Union*, and there must exist *States*.

c. If Parliament's powers under Article 3 were held to include the power to degrade *a* State into a union territory, it must *necessarily* follow that Parliament has the power to degrade *all* States into union territories.

d. It therefore necessarily follows, on this reading, that Article 3 vests in Parliament the power, by law, to convert India from a Union of States to a Union of Union Territories. It is crucial to note that this is not a question of the *abuse* of Article 3, or

whether Parliament will ever *actually* degrade all States into union territories. The question is whether Article 3, as a question of *constitutional interpretation*, can be read to vest in Parliament the power to convert India into a Union of Union Territories.

e. It is pellucid that the answer to the above question is “no”: the power under Article 3 cannot entail the effacement of Article 1 and the erasure of the basic feature of federalism.

f. Consequently, it is respectfully submitted that the powers under Article 3 carry an *implied limitation*: these powers are limited *at the point at which* their exercise would entail the erasure or effacement of federalism. As has been demonstrated above, the power to degrade a State into a union territory has precisely this effect. Therefore, it is respectfully submitted that such a power does not exist under Article 3.

g. It is pertinent to note that this suggestion is not new: this Hon’ble Court read implied limitations in Article 2 in its judgement in **RC Poudyal v. Union of India, 1994 Supp (1) SCC 324: AIR 1993 SC 1804.**

## V. THE DEGRADATION OF A STATE INTO A UNION TERRITORY AFFECTS ENTRENCHED CONSTITUTIONAL POWERS UNDER ARTICLE 246 READ WITH THE SEVENTH SCHEDULE

55. It is respectfully submitted that - as has been pointed out above - the degradation of a State to a union territory is qualitatively different from other kinds of alterations explicitly authorised by the text of Article 3. The distinction is grounded in the core constitutional difference between States as *federal units* and union territories as *administrative units*.

56. Article 246 of the Constitution constitutionally entrenches the power of the States to make laws for enumerated matters under Lists II and III of the Seventh Schedule. This power is the characteristic and defining feature of Indian federalism.

57. The alterations entailed in sub-clauses (a) to (e) of Article 3 do not involve any alteration of this constitutionally entrenched power (the one exception is the engrafting of a union territory to a State, or the "upgradation" of a union territory to a State, where an entity that previously did not have direct Article 246 powers, now does).

58. Unlike these alterations, however, acts such as the Reorganisation Act entail the *transfer* of constitutionally entrenched Article 246 powers from a federal unit *to* the centre.

59. It is respectfully submitted that this cannot be done by mere legislation, as it encroaches upon an existing, constitutionally entrenched set of powers; it does not merely involve classificatory changes to the First and Fourth Schedules of the Constitution, as provided for under Article 4.

60. Petitioners' submission is buttressed by the fact that in the past, when Parliament has decided to vest *additional* law-making powers in a union territory, it has done so *via the route of constitutional amendment* (such as Articles 239A (introduced by the 14th amendment to allow for legislatures for Goa, Himachal Pradesh, Tripura, Manipur, Pondicheri and Daman and Diu) and 239AA, (Introduced by the 69th amendment for Delhi), and *not* via Articles 3 and 4.

61. It is therefore submitted that, as the specific manner of alteration envisaged by the Reorganisation Act entails the transfer of constitutionally entrenched powers *between federal levels* (and not simply through reclassification or alteration of boundaries *at the same federal level*), it does not fall within the scope of Article 3, and cannot be accomplished simply through parliamentary legislation.

## VI. THE HISTORY OF INDIAN FEDERALISM AFFIRMS THE PETITIONERS' READING OF ARTICLE 3

62. It is respectfully submitted that the issue before this Hon'ble Court must be adjudicated keeping in mind the specific origins and history of Indian federalism.

63. It is commonly argued - and has occasionally been observed by this Hon'ble Court, albeit in *obiter dicta* - that, unlike the United States, which was an example of "coming together federalism", where sovereign States pooled and divested themselves of power to form a Union of States, in India, there was no prior conception of the sovereignty of States. Power belonged to the British Crown, from whence - at independence - it flowed into the hands of the People of India, and was then - through the Constitution - *redistributed* between the Union and the States.

64. It is respectfully submitted that this argument misses an important historical nuance. Whatever the applicability of this argument on its own terms to *British India*, it applies with limited relevance to the so-called former Princely States, whose entry into the Indian Union was accomplished through various Instruments of Accession, which were effectively *treaties* between two sovereigns.

65. After accession, a two-step process of integration of the states was carried out in respect of States other than J&K, as described in

the Government of India White Paper on States, 1951 **[Common Compilation, Vol IV]**. First, the States entered into merger agreements by which the State was merged either with an existing geographically contiguous Province **[Common Compilation, Vol IV, p. 607**] or with the Union (into centrally administered areas) **[Common Compilation, Vol IV, p. 616],** thus automatically transferring power to the people. Alternatively, Princely States entered into covenants for unionisation by which multiple States joined in union by transferring power from the rulers to the people **[Common Compilation, Vol IV, p. 619],** and later entered fresh Instruments of Accession acceding in all matters specified in the federal and concurrent lists of the time (barring financial fields) **[Common Compilation, Vol IV, p. para 175]**. Next, the Princely States were administratively integrated into the Indian Union by way of merger orders issued under Cl. 290A of the Government of India Act, 1935, 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, p. 639-642]**

66. This two-step process of integration of the States effectively rendered them equivalent to the Provinces **[Common Compilation, Vol IV, p. 642, para 172].** Under the Constitution of India, these

Princely States were “full-fledged constituent units” of the Indian union whose accession was no longer based merely on the Instrument of Accession initially entered into. **[Common Compilation, Vol IV, p. 678, para 215]** Thus, these Princely States were subject to a process of “holding together”, after initially “coming together” by way of Instruments of Accession.

67. In contrast, the State of J&K was not part of the above-described two-fold integration process **[Common Compilation, Vol IV, p. 684, para 224]**. Its constitutional relationship with India was determined only by the Instrument of Accession initially entered into **[Common Compilation, Vol IV, p. 681-3, para 221]**.

68. Indeed, in **Prem Nath Kaul, 1959 Supp (2) SCR 270; AIR 1959 SC 749,** while considering the specific situation of Jammu and Kashmir, this Hon’ble Court specifically held that all the way up to its merger with the Indian Union, Jammu and Kashmir was a *sovereign State*.

69. Consequently, at least as far as the princely State of J&K is concerned Indian federalism is *indeed* an instance of “coming together federalism”, along the United States model: that is, federalism born out of a compact entered into between two or more *sovereigns*.

70. It is respectfully submitted that in **State of West Bengal v. Union of India, (1964) 1 SCR 371** in the context of West Bengal, the Supreme Court rejected the argument that the States enjoyed sovereignty in *their own domains* on the basis that India was not an example of "coming together federalism." However, in that case, the case of Jammu and Kashmir was not before the Court, and the aspect of constitutional history advanced here was not considered by the Court. As submitted earlier, due to the exceptional nature in which the State of J&K's constitutional relationship with the Union of India was determined only by the Instrument of Accession, it retained its internal autonomy unlike other states that acceded to the Union and underwent the two- fold process of integration. Consequently, *State of West Bengal* - and further cases that rely upon it - cannot be considered to foreclose the argument advanced here.

71. It is respectfully submitted that one essential aspect of federalism as a model of *shared and pooled sovereignty* (as, it is submitted, applies to Jammu and Kashmir) is that one federal unit cannot *permanently degrade the constitutional status of the other* without consent.

72. Consequently, Petitioners respectfully submit that the specific history of Indian federalism - and the nature of its origin with respect

to the State of J&K in the Instrument of Accession between the States and the Indian Union - places an implied limitation upon the exercise of Article 3 powers to unilaterally degrade *such* a State to the status of a union territory.

## VII. CONCLUSION

73. By way of conclusion, Petitioners respectfully submit that this case requires the anxious consideration of this Hon'ble Court, not simply because of the immediate facts (although those facts are very important), but also because of its implications for the federal compact that binds this Nation together. A reading of Article 3 that would place the very concept of *statehood* at the mercy of the Union Parliament would be utterly destructive of the federal compact as we know it. It is precisely this reading that forms the basis of the impugned Act, and it is for that reason that Petitioners respectfully urge this Hon'ble Court to declare that the Jammu and Kashmir Reorganisation Act of 2019 is *ultra vires* the Constitution.

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