

REPORTABLE

**IN THE SUPREME COURT OF INDIA
CIVIL ORIGINAL JURISDICTION**

WRIT PETITION(S)(CIVIL) NO(s).1099/2019

IN RE: ARTICLE 370 OF THE CONSTITUTION

(WITH IA No. 138432/2023 - APPROPRIATE ORDERS/DIRECTIONS, IA No. 147639/2023 - CLARIFICATION/DIRECTION, IA No. 147636/2023 CLARIFICATION/DIRECTION, IA No. 129177/2019 - EX-PARTE STAY, IA No. 139294/2023 - INTERLOCUTORY APPLICATION, IA No. 146764/2023 INTERLOCUTORY APPLICATION, IA No. 9573/2020 - INTERVENTION APPLICATION, IA No. 144248/2023 - INTERVENTION APPLICATION, IA No. 144241/2023 - INTERVENTION APPLICATION, IA No. 174525/2019 INTERVENTION APPLICATION, IA No. 142552/2023 - INTERVENTION APPLICATION, IA No. 164438/2019 - INTERVENTION APPLICATION, IA No. 10999/2020 - INTERVENTION APPLICATION, IA No. 189526/2019 INTERVENTION/IMPLEADMENT, IA No. 142335/2023 INTERVENTION/IMPLEADMENT, IA No. 136349/2019 INTERVENTION/IMPLEADMENT, IA No. 154272/2022 INTERVENTION/IMPLEADMENT, IA No. 129178/2019 - PERMISSION TO FILE LENGTHY LIST OF DATES, IA No. 166037/2019 - STAY APPLICATION, IA No. 146832/2023 - WITHDRAWAL OF CASE / APPLICATION)

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INTERVENTION/IMPLEADMENT,	IA	No.	55540/2019
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Kashmir (Kas'mira)

1. Legend has it that eons ago Kashmir valley was a vast mountain lake called 'Satisar' and that *Rishi Kashyap* created the valley of Kashmir by draining this lake.¹

2. An analysis of the Nilamat Purana, the oldest scripture of Aryan Saraswat Brahmins of Kashmir (can put Kas'mira) indicates that the first set of settlers in Kashmir were the *Nagas* – snake worshippers and animists. A batch of *Aryans*, originally settled on the banks of the mighty *Vedic* River Saraswati, moved to the Valley when the Saraswati river dried up. This was about 5,000 years ago.² The origin of the people of the Valley has had varied versions, including that they were descendants of one of the lost tribes of Israel.³ The Valley has heritage and culture as a place of learning. One of the most respected places of learning is the *Sharda Peeth*, now in the Pakistan Occupied Kashmir area, where education was gender neutral and based on excellence.⁴

3. In 326 BC, Alexander the Great is said to have invaded the Jammu and Kashmir area. Thereafter, from 206 BC, Kashmir was part of the Silk

¹ As per the *Rajatarangini* (The River of Kings) of *Kalhana* and *Nilamatpurana*, believed to be composed by *Candra Deva*.

² P.N.K Bamzai, *Culture and Political History of Kashmir: Ancient Kashmir*, vol. 1 (M.D. Publications Pvt. Ltd., New Delhi 1994) 16.

³ P.N.K Bamzai, *Culture and Political History of Kashmir: Ancient Kashmir*, vol. 1 (M.D. Publications Pvt. Ltd., New Delhi 1994) 16.

⁴ A.R. Nazki, 'In Search of Roots' in S.S. Toshkhani & K. Warikwoo (eds.), *Cultural Heritage of Kashmiri Pandits* (Pentagon Press 2009) 145.

Route, connecting China with southern Europe.⁵ A land which has witnessed different faiths, the Valley carries the history of giving passage to Christ, and root to Buddhism, from where it spread to Tibet, China and Central Asia.⁶

4. In much later periods of time, Thomas Moore (18th Century AD) introduced Kashmir to the Western world in his famous poem '*Lalla Rookh*' (1817)⁷ with these words:

“Who has not heard of the Vale of Cashmere,
With its roses the brightest that earth ever gave,
Its temples, and grottos, and fountains as clear
As the love-lighted eyes that hung over their wave?”

5. The State of Jammu & Kashmir, prior to the independence of our country, consisted of the Kashmir Valley, Jammu, Ladakh, Baltistan, Gilgit, Hunza and Nagar. It stands on the old Central Asian trade route, and the Kashmir Valley, since ancient times, has been the halting place for caravans travelling between the plains of India and the high reaches of Central Asia.⁸ The mountains provide a wall of protection to the Valley and *Kalhana* speaks of Kashmir as unconquerable by the force of

⁵ Iqbal Chand Malhotra & Maroof Raza, *Kashmir's Untold Story*, (Bloomsbury India 2019) 1-2.

⁶ *Ibid* at 3.

⁷ P.N.K Bamzai, *Culture and Political History of Kashmir: Ancient Kashmir*, vol. 1 (M.D. Publications Pvt. Ltd., New Delhi, 1994) 16.

⁸ P.N.K Bamzai, *Culture and Political History of Kashmir: Ancient Kashmir*, vol. 1 (M.D. Publications Pvt. Ltd., New Delhi, 1994) 1-2.

soldiers.⁹ The Chinese travelers (Hiuen Tsang and Ou-Kong), thus, refer to the difficulty of coming through the mountain passes.¹⁰ To the south of the Valley is the area now known as Jammu, which is the home of the *Dogras* and several other castes and sects, both Hindus and Muslims. Into this region have also come people from the Kashmir Valley, as settlers. Another interesting tribe in the area is the *Gujjar* tribe which leads a semi-nomadic life, moving its herds and flock from Jammu to Kashmir, depending on the weather of the local region.

6. An overwhelming majority of the people in the Valley professed Islam, which started its advent in the Valley during the 14th century, apart from the presence of the Kashmiri Pandits and the Sikh population. Both the Shia and Sunni sects find their presence in the Muslim population.¹¹ The State, in its pre-independence era, did not have historical boundaries in the same form as those of other princely States, but these disparate territories were brought under a single State only in the 19th century. The unifiers were a clan of *Dogra Rajputs* from Jammu, who conquered Ladakh in the 1830s and acquired the Valley of Kashmir from the British in the 1840s for a consideration of Rs.75 lakh, moving into the Gilgit area by the end of the century.¹²

⁹ P.N.K Bamzai, *Culture and Political History of Kashmir: Ancient Kashmir*, vol. 1 (M.D. Publications Pvt. Ltd., New Delhi, 1994) 10.

¹⁰ P.N.K Bamzai, *Culture and Political History of Kashmir: Ancient Kashmir*, vol. 1 (M.D. Publications Pvt. Ltd., New Delhi 1994) 10.

¹¹ Walter R. Lawrence, *The Valley of Kashmir* (Oxford University Press 1895) 284, 296, 300, 302.

¹² Ramachandra Guha, *India After Gandhi: The History of the World's Largest Democracy* (Picador 2008) 60; See also V.P. Menon, *The Story of the Integration of the Indian States* (Orient Longmans Pvt. Ltd. 1956) 391.

7. The people of Kashmir have many resemblances in their dressing style, social customs and ceremonies, across followers of the two different faiths. The sacred shrines of both the communities are situated close together and often fairs at these shrines are also held on the same date, with the participation of one community in the celebrations of the other.¹³

8. The State had dual capitals - Srinagar and Jammu, with the 'Darbar' moving from one place to the other for a period of six (6) months giving them political sanctity. Srinagar, in the Valley, stands on the banks of *Vitasta*, and its history dates back to the time of Asoka, who is credited with having founded it during his visit to Kashmir. In view of its numerous canals and the Dal Lake, it is aptly called the 'Venice of the East'.¹⁴

9. Originally, the population of Kashmir is stated to be Brahmin, but with other sects namely, *Nishads*, *Khashas*, *Darads*, *Bhauittas*, *Bhikshas*, *Damaras*, *Tantrins*, etc, also prevalent.¹⁵ This was prior to the advent of Islam in the 14th century, when the Zoji-la Pass acted as a route for successful invasions of Kashmir. The early 14th century saw the forays of the *Turk Dulca* and *Bhauitta Rincana*. About two centuries later, Mirza

¹³ P.N.K Bamzai, *Culture and Political History of Kashmir: Ancient Kashmir*, vol. 1 (M.D. Publications Pvt. Ltd., New Delhi 1994) 21.

¹⁴ P.N.K Bamzai, *Culture and Political History of Kashmir: Ancient Kashmir*, vol. 1 (M.D. Publications Pvt. Ltd., New Delhi 1994) 7.

¹⁵ P.N.K Bamzai, *Culture and Political History of Kashmir: Ancient Kashmir*, vol. 1 (M.D. Publications Pvt. Ltd., New Delhi 1994) 16.

Haider Dughlat, with his small Mughal force, successfully fought his entrance into Kashmir, in 1533 AD.¹⁶ Interaction, however, was not restricted to these invasions. In this chequered history of Kashmir, there have also been periods when the people came in contact with the Roman, Greek and Persian civilizations, resulting in a happy blending of cultures which were tolerant and sympathetic towards the ideas and beliefs of others.¹⁷ This is reflected in the presence of different forms of *Naga* worship, *Brahmanism*, Buddhism and Islam. The synthesis of Hindu and Islamic religious thought found its greatest champions in Lalleshwari and Sheikh Nur-ud-din, who are even to this day venerated by the Hindus and Muslims alike.¹⁸ Sheikh Nur-ud-Din Wali, originally known as Nund Rishi preached and practised a faith of tolerance and inclusivity, *Kashmiriyat*.¹⁹ The Brahmins were, and are, popularly called Kashmiri Pundits.²⁰ The Kashmiri Pandits are believed to be residents of Kashmir from the *Vedic* era, being part of the society, culture milieu, civilization, customs, traditions, myths and realities of Kashmir. They trace their history to more than 11,000 years ago, beginning with the early origins of the Valley.²¹ Religious persecution made them leave the Valley *en masse*

¹⁶ Durgaprasad (ed.), *The Rajatarangini of Kalhana*, vol. 2 (1894) 408.

¹⁷ P.N.K Bamzai, *Culture and Political History of Kashmir: Ancient Kashmir*, vol. 1 (M.D. Publications Pvt. Ltd., New Delhi 1994) 16.

¹⁸ P.N.K Bamzai, *Culture and Political History of Kashmir: Ancient Kashmir*, vol. 1 (M.D. Publications Pvt. Ltd., New Delhi 1994) 17.

¹⁹ Iqbal Chand Malhotra & Maroof Raza, *Kashmir's Untold Story*, (Bloomsbury India 2019) 3.

²⁰ Monier-Williams, *Modern India and the Indians* (3rd edn., Trübner and Co. 1879) 151.

²¹ A.R. Nazki, 'In Search of Roots' in S.S. Toshkhani & K. Warikwoo (eds.), *Cultural Heritage of Kashmiri Pandits* (Pentagon Press 2009) 2.

for the plains on many occasions,²² but in subsequent peaceful reigns, like that of Sultan Zain-ul-abidin, they returned to their original homeland.²³

10. Turning back again to the political entity of Jammu & Kashmir, as was known then, and its comparatively recent history of the Sultan dynasty establishing itself and continuing its rule till 1586,²⁴ when Akbar invaded Kashmir and appended it to the Mughal Empire. For the next, approximately, 200 years, it remained the summer residence of the Mughal emperors.²⁵ As Emperor Jahangir described the Valley- “*Gar firdaus, bar-ruee zameen ast, hameen asto, hameen asto, hameen ast*” (if there is a paradise on earth, it is this, it is this, it is this).²⁶ In 1752, Kashmir passed on to the powerful grasp of the Pathans, but in 1819, it was conquered by Maharaja Ranjit Singh, the great Sikh Ruler, and it remained under the Sikh administered dynasty till 1846.²⁷ Meanwhile, in the latter half of the 18th century, Jammu was ruled by a *Dogra* chief of Rajput descent, Ranjit Deo. The quarrel about his succession gave the Sikhs an opportunity of turning Jammu & its neighbouring hill tracks into

²² Iqbal Chand Malhotra & Maroof Raza, *Kashmir's Untold Story*, (Bloomsbury India 2019) 3.

²³ P.N.K Bamzai, *Culture and Political History of Kashmir: Ancient Kashmir*, vol. 1 (M.D. Publications Pvt. Ltd., New Delhi 1994) 17.

²⁴ Iqbal Chand Malhotra & Maroof Raza, *Kashmir's Untold Story*, (Bloomsbury India 2019) 3.

²⁵ VP Menon, *The Story of the Integration of the Indian States* (Orient Longmans Pvt. Ltd. 1956) 390.

²⁶ Anita Medhekar & Farooq Haq, ‘Promoting Kashmir as an Abode of Peace Tourism Destination by India and Pakistan’ in Alexandru-Mircea Nedelea & Marilena-Oana Nedelea, *Marketing Peace for Social Transformation and Global Prosperity* (IGI Global 2019) 34.

²⁷ VP Menon, *The Story of the Integration of the Indian States* (Orient Longmans Pvt. Ltd. 1956) 390-391.

a dependency.²⁸ Having conquered Jammu, Maharaja Ranjit Singh installed one of his soldiers, Gulab Singh, who happened to be one of the great-grand nephews of Ranjit Deo, as the vassal ruler of Jammu in 1822.²⁹ The principality of Jammu was conferred on Gulab Singh, with the hereditary title of ‘Raja’ in 1823. With the death of Ranjit Singh in 1839, followed the Sikh Wars and post the first Sikh war (1846), Gulab Singh appeared as a mediator between the English and the Lahore *Darbar*.³⁰ Political expediency made Gulab Singh, thus, the independent ruler of Jammu & Kashmir, with the treaty at Amritsar being inked on 16.3.1846. It is this treaty which marks the commencement of the history of Jammu & Kashmir as a political entity.

11. Owing to his failing health, Maharaja Gulab Singh, abdicated his throne in favour of Maharaja Ranbir Singh, who was then succeeded by Maharaja Pratap Singh. Maharaja (Sir) Hari Singh became the ruler of Jammu & Kashmir in 1925 and was the ruler at the time of transfer of power in 1947.³¹ Maharaja Hari Singh’s tenure saw growing opposition from the Muslim population in the Valley, who wanted a greater say in the administration. This saw the emergence of a local popular leader in Sheikh Abdullah, known as the ‘Lion of Kashmir’. In 1932, the ‘All Jammu & Kashmir Muslim Conference’ was formed, which, six (6) years

²⁸ VP Menon, *The Story of the Integration of the Indian States* (Orient Longmans Pvt. Ltd. 1956) 390-391.

²⁹ Iqbal Chand Malhotra & Maroof Raza, *Kashmir’s Untold Story*, (Bloomsbury India 2019) 3.

³⁰ VP Menon, *The Story of the Integration of the Indian States* (Orient Longmans Pvt. Ltd. 1956) 390-391.

³¹ VP Menon, *The Story of the Integration of the Indian States* (Orient Longmans Pvt. Ltd. 1956) 392.

later, was transformed into the 'National Conference', having representation from all communities.³²

12. A negotiation between the rulers and the ruled, with a more democratic process, saw the promulgation of the Jammu & Kashmir Constitution Act, 1939 on 7.9.1939,³³ with sovereignty and supremacy over all legislative, executive and judicial functions being retained by the Maharaja while empowering the Praja Sabha to make laws for the entire State of Jammu & Kashmir.³⁴ Executive functions under the Act were vested with a Council consisting of the Prime Minister and such other Ministers as appointed by the Maharaja.³⁵ The Act also provided for the establishment of a High Court (which, in fact, had already been established in 1928),³⁶ which was to be a court of record with jurisdiction to adjudicate upon any original civil suits of value of Rupees ten thousand or more, and also civil, criminal and revenue appeals.³⁷

³² Ramachandra Guha, *India After Gandhi: The History of the World's Largest Democracy* (Picador 2008) 60.

³³ Iqbal Chand Malhotra & Maroof Raza, *Kashmir's Untold Story*, (Bloomsbury India 2019) 24.

³⁴ Sections 5 & 23 of the Jammu & Kashmir Constitution Act, 1939. *See also* Justice A.S. Anand, *The Constitution of Jammu & Kashmir: Its Development & Comments* (3rd edn., Universal Law Publishing Co. Pvt. Ltd. 1998) 41, 44.

³⁵ Section 7 of the Jammu & Kashmir Constitution Act, 1939. *See also* Justice A.S. Anand, *The Constitution of Jammu & Kashmir: Its Development & Comments* (3rd edn., Universal Law Publishing Co. Pvt. Ltd. 1998) 42.

³⁶ Justice A.S. Anand, *The Constitution of Jammu & Kashmir: Its Development & Comments* (3rd edn., Universal Law Publishing Co. Pvt. Ltd. 1998) 50.

³⁷ Section 56 of the Jammu & Kashmir Constitution Act, 1939. *See also* Justice A.S. Anand, *The Constitution of Jammu & Kashmir: Its Development & Comments* (3rd edn., Universal Law Publishing Co. Pvt. Ltd. 1998) 51.

Prelude

13. The Second World War and the independence movement made independence inevitable. The Cabinet Mission Plan of 16.5.1946 envisaged a Union of India where the Union would have responsibility over defence, foreign affairs and communication and the States would retain jurisdiction over all other subjects not ceded to the Union.³⁸ The Constituent Assembly of India on 22.1.1947 unanimously adopted the Objective Resolution declaring the Assembly's "*firm and solemn resolve to proclaim India as an Independent Sovereign Republic.*" The Princely States that had joined the Union of India were to possess and retain the status of autonomous units, together with residuary powers, save and except such powers and functions as were vested or assigned to the Union.

14. On 3.6.1947, the Mountbatten Plan envisaged a partition of India with accession of Indian States to one dominion or the other (i.e. India or Pakistan). The deadline of 15.8.1947 was set for transferring power to an independent India.³⁹ The State of Jammu & Kashmir had the biggest area in India with a predominantly Muslim population ruled by a Hindu King.⁴⁰ It was the political acumen of Sardar Patel, assisted by V.P. Menon, which saw over 500 autonomous and sometimes ancient chiefdoms being dissolved into 14 new administrative units of India, a

³⁸ Point 15 of the Cabinet Mission Plan, 1946.

³⁹ Iqbal Chand Malhotra & Maroof Raza, *Kashmir's Untold Story*, (Bloomsbury India 2019) 49.

⁴⁰ V.P. Menon, *The Story of the Integration of the Indian States* (Orient Longmans Pvt. Ltd. 1956) 394.

stupendous achievement brought about by wisdom, foresight and hard work.⁴¹ But Junagadh, Jammu & Kashmir and Hyderabad proved to be a challenge, as by 15.8.1947, none of these three had acceded to India.⁴² Kashmir was a peculiar situation. Unlike the other two, it was on the border of India and Pakistan. The then Maharaja Hari Singh dreamt of Jammu & Kashmir as an independent State – not part of either the Indian or Pakistani Dominion.⁴³ He offered to sign a standstill agreement with both countries which would allow the free movement of people and goods across the borders. Pakistan signed, but India was waiting and watching.⁴⁴ This was in the background of the local Muslim leadership of the Valley not being in favour of the two-nation theory and the presupposed inevitability of the Valley joining Pakistan. Eventually, it took a deliberate and conscious decision of joining India and negotiating autonomy within the asymmetrical federal model. The ideological symmetry of the National Conference and the Indian National Congress was an important factor towards this path.⁴⁵

15. Pakistan was not willing to wait. On 22.10.1947, with the onset of winter, several Pathan tribesmen, led unofficially by the Pakistani Army, invaded Kashmir and rapidly pushed towards Srinagar. The Maharaja's

⁴¹ Ramachandra Guha, *India After Gandhi: The History of the World's Largest Democracy* (Picador 2008) 44.

⁴² Bipin Chandra, Mridula Mukherjee & Aditya Mukherjee, *India After Independence 1947-2000* (Penguin Books 2007) 92.

⁴³ Iqbal Chand Malhotra & Maroof Raza, *Kashmir's Untold Story*, (Bloomsbury India 2019) 46.

⁴⁴ Ramachandra Guha, *India After Gandhi: The History of the World's Largest Democracy* (Picador 2008) 63.

⁴⁵ Rekha Chowdhary, 'Kashmir in the Indian Project of Nationalism' in Nyla Ali Khan (ed.), *The Parchment of Kashmir: History, Society and Polity* (Palgrave Macmillan 2012) 154.

army proved no match for the invading forces. The Maharaja was left with little option but to appeal to India for military assistance, but India awaited a formal accession, in the spirit of true democratic principles. Finally, on 26.10.1947, the Maharaja acceded to India and agreed to install Shri Sheikh Abdullah as the head of the state administration.⁴⁶ Lord Mountbatten accepted the accession, with the caveat that there would be a plebiscite to ratify the accession.⁴⁷ The Indian troops, thus, moved in and saved the day. Nehru's words addressed to his sister capture it well, "*Srinagar might have been a smoking ruin. We got there in the nick of time.*"⁴⁸

Instrument of Accession and the Constituent Assembly Debates

16. The moot point – whether the original Instrument of Accession (hereinafter referred to as “**IoA**”) was different for the 500 Principality States. The answer would be in the negative. The next question - was the IoA for Jammu & Kashmir State different in any manner. The answer is again in the negative. The IoA for the State of Jammu & Kashmir reads as under:

“Instrument of Accession of Jammu and Kashmir State

WHEREAS the Indian Independence Act, 1947, provides that as from the fifteenth day of August, 1947, there shall be set up an

⁴⁶ Bipin Chandra, Mridula Mukherjee & Aditya Mukherjee, *India After Independence 1947-2000* (Penguin Books 1999) 93-94.

⁴⁷ Iqbal Chand Malhotra & Maroof Raza, *Kashmir's Untold Story*, (Bloomsbury India 2019) 80.

⁴⁸ Ramachandra Guha, *India After Gandhi: The History of the World's Largest Democracy* (Picador 2008) 69.

independent Dominion known as INDIA, and that the Government of India Act, 1935, shall, with such omissions, additions, adaptations and modification as the Governor- General may by order specify be applicable to the Dominion of India ;

AND WHEREAS the Government of India Act, 1935, as so adapted by the Governor-General, provides that an Indian State may accede to the Dominion of India by an Instrument of Accession executed by the Ruler thereof :

NOW THEREFORE

I Shriman Inder Mahinder Rajrajeswar Maharajadhiraj Shri Hari Singhji, Jammu and Kashmir Naresh Tatha Tibbet adi Deshahhipatti, Ruler of Jammu & Kashmir State in the exercise of my sovereignty in and over my said State Do hereby execute this my Instrument of Accession and

1. I hereby declare that I accede to the Dominion of India with the intent that the Governor-General of India, the Dominion Legislature, the Federal Court and any other Dominion authority established for the purposes of the Dominion shall, by virtue of this my Instrument of Accession, but subject always to the terms thereof, and for the purposes only of the Dominion, exercise in relation to the State of Jammu and Kashmir (hereinafter referred to as "this State") such functions as may be vested in them by or under the Government of India Act, 1935, as in force in the Dominion of India on the 15th day of August, 1947 (which Act as so in force is hereinafter referred to as "the Act").

2. I hereby assume the obligation of ensuring that due effect is given to the provisions of the Act within this State so far as they are applicable therein by virtue of this my Instrument of Accession.

3. I accept the matters specified in the Schedule hereto as the matters with respect to which the Dominion Legislature may make

laws for this State.

4. I hereby declare that I accede to the Dominion of India on the assurance that if an agreement is made between the Governor General and the Ruler of this State whereby any functions in relation to the administration in this State of any law of the Dominion Legislature shall be exercised by the Ruler of this State, then any such agreement shall be deemed to form part of this Instrument and shall be construed and have effect accordingly.

5. The terms of this my Instrument of Accession shall not be varied by any amendment of the Act or of the Indian Independence Act, 1947 unless such amendment is accepted by me by an Instrument supplementary to this Instrument.

6. Nothing in this Instrument shall empower the Dominion Legislature to make any law for this state authorizing the compulsory acquisition of land for any purpose, but I hereby undertake that should the Dominion for the purposes of a Dominion law which applies in this State deem it necessary to acquire any land, I will at their request acquire the land at their expense or if the land belongs to me transfer it to them on such terms as may be agreed, or, in default of agreement, determined by an arbitrator to be appointed by the Chief Justice of India.

7. Nothing in this Instrument shall be deemed to commit me in any way to acceptance of any future constitution of India or to fetter my discretion to enter into arrangements with the Government of India under any such future constitution.

8. Nothing in this Instrument affects the continuance of my sovereignty in and over this State, or, save as provided by or under this Instrument, the exercise of any powers, authority and rights now enjoyed by me as Ruler of this State or the validity of any law at present in force in this State.

9. I hereby declare that I execute this Instrument on behalf of this

State and that any reference in this Instrument to me or to the Ruler of the State is to be construed as including a reference to my heirs and successors.

Given under my hand this 26th day of OCTOBER Nineteen hundred and forty seven.

Sd/-
Hari Singh
Maharajadhiraj of Jammu and Kashmir State.

I do hereby accept this Instrument of Accession.

Dated this twenty seventh day of October, Nineteen hundred and forty seven.

Sd/-
Mountabatten of Burma,
Governor-General of India.

SCHEDULE

THE MATTERS WITH RESPECT TO WHICH THE DOMINION
LEGISLATURE MAY MAKE LAWS FOR THIS STATE

A. Defence

1. The naval, military and air forces of the Dominion and any other armed force raised or maintained by the Dominion; any armed forces, including forces raised or maintained by an Acceding State, which are attached to, or operating with, the armed forces of the Dominion.

2. Naval, military and air force works, administration of cantonment areas.

3. Arms; firearms; ammunition.

4. Explosives.

B. *External Affairs*

1. External affairs; the implementing of treaties and agreements with other countries; extradition, including the surrender of criminals and accused persons to parts of His Majesty's dominions outside India.

2. Admission into, and emigration and expulsion from, India, including in relation thereto the regulation of the movements in India of persons who are not British subjects domiciled in India or subjects of any acceding State; pilgrimages to places beyond India.

3. Naturalisation.

C. *Communications*

1. Posts and telegraphs, including telephones, wireless, broadcasting, and other like forms of communication.

2. Federal railways; the regulation of all railways other than minor railways in respect of safety, maximum and minimum rates and fares, station and service terminal charges, interchange of traffic and the responsibility of railway administrations as carriers of goods and passengers; the regulation of minor railways in respect of safety and the responsibility of the administrations of such railways as carriers of goods and passengers.

3. Maritime shipping and navigation, including shipping and navigation on tidal waters; Admiralty jurisdiction.

4. Port quarantine.

5. Major ports, that is to say, the declaration and delimitation of such ports, and the constitution and powers of Port Authorities therein.

6. Aircraft and air navigation; the provision of aerodromes; regulation and organization of air traffic and of aerodromes.

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

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

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

D. Ancillary

1. Elections to the Dominion Legislature, subject to the provisions of the Act and of any Order made there under.

2. Offences against laws with respect to any of the aforesaid matters.

3. Inquiries and statistics for the purposes of any of the aforesaid matters.

4. Jurisdiction and powers of all courts with respect to any of the aforesaid matters but, except with the consent of the Ruler of the Acceding State, not so as to confer any jurisdiction or powers+ upon any courts other than courts ordinarily exercising jurisdiction in or in relation to that State.”

17. We may refer to communication from Lord Mountbatten to Maharaja Hari Singh on the very next day, i.e., 27.10.1947, which reads as under:

“My dear Maharajah Sahib,

Your Highness’s letter, dated the 26th October has been delivered to me by Mr. V.P. Menon. In the special circumstances mentioned

by Your Highness, my Government have decided to accept the accession of Kashmir State to the Dominion of India. Consistently with their policy that, in the case of any State where the issue of accession has been the subject of dispute, the question of accession should be decided in accordance with the wishes of the people of the State, it is my Government's 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. Meanwhile, in response to your Highness's appeal for military aid, action has been taken today to send troops of the Indian Army to Kashmir to help your own forces to defend your territory and to protect the lives, property and honour of your people.

My Government and I note with satisfaction that your Highness has decided to invite Sheikh Abdullah to form an Interim Government to work with your Prime Minister.

Yours sincerely,
Sd/-
Mountbatten of Burma"

18. Now turning to the preparation of the first draft of the Indian Constitution, which was handed over by Dr. B.R. Ambedkar on behalf of the Drafting Committee as its Chairman to the Constituent Assembly President, Dr. Rajendra Prasad on 21.2.1948.⁴⁹ There was no equivalent of Article 370 in that draft Constitution. During this period, the Jammu & Kashmir dispute between India and Pakistan was being tabled at the

⁴⁹ 'Draft Constitution of India, 1948' (*Constituent Assembly Debates*)
<https://www.constitutionofindia.net/historical_constitutions/draft_constitution_of_india__1948__21st%20February%201948>.

United Nations.⁵⁰ The insertion of Article 306-A (the equivalent of Article 370) took place during the Constituent Assembly Debates and was introduced on 17.10.1949. Article 306-A was drafted by Gopaldaswami Ayyangar, in close consultation with Sheikh Abdullah, the content being a result of negotiations between the Centre and the Government of Jammu and Kashmir, from May to October, 1949.⁵¹ The Constituent Assembly Debates refer to the peculiar position of Jammu & Kashmir as *inter alia* enunciated by Shri N. Gopaldaswami Ayyangar. What was said was that an interim system had to be established through Article 306-A till a Constituent Assembly for the State of Jammu & Kashmir came into being. Article 306-A reads as under:

“306-A. (1) Notwithstanding anything contained in this Constitution.

(a) the provisions of article 211A of this Constitution shall not apply in relation to the State of Jammu and Kashmir.

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

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

⁵⁰ A.G. Noorani, *The Kashmir Dispute 1947-2012*, vol. 2 (Tulika Books 2013) 77-80.

⁵¹ A.G. Noorani, *Article 370: A Constitutional History of Jammu and Kashmir* (Oxford University Press, India 2014) 50-78. *See also* Iqbal Chand Malhotra & Maroof Raza, *Kashmir's Untold Story*, (Bloomsbury India 2019) 98.

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

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

(c) the provisions of article I of this Constitution shall apply in relation to the State;

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

Provided that no such order which relates to the matters specified in the Instrument of Accession of the State aforesaid shall be issued except in consultation with the Government of the State:

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

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

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

Provided that the recommendation of the Constituent Assembly of the State shall be necessary before the President issues such a notification.”

19. The legislative authority of the Parliament over the State of Jammu & Kashmir, referred to in the second portion of that Article (Article 306-A), was stated to be governed primarily by the IoA. It was further stated that since Jammu & Kashmir was one of the States mentioned in Part III of the First Schedule (detailing the States and territories of India at that point), Article 1 was to automatically apply. Shri Ayyangar stated that other provisions in the Constitution would apply to Jammu & Kashmir with such exception and modifications as may be decided when the President issues an Order to that effect. With respect to matters mentioned in the IoA, the issuance of such an Order would require consultation with the Government of the State. For other matters, concurrence of the Government would be required.

Shri Ayyangar then also turned to Clause (2) to canvass that it relates particularly to those matters which are not mentioned in the IoA and any addition with respect to such matters would be made with the consent of the Constituent Assembly which may be called for the purposes of framing the Constitution of the State of Jammu & Kashmir. Article 211A (Article 238 of the Constitution of India, repealed on 1.11.1956) was not to apply to the State of Jammu & Kashmir, but that was said to not be a permanent feature of the Constitution of the State. So, when the Constituent Assembly of the State would meet and take a

decision on its Constitution the range of its federal jurisdiction, the President, may, on the recommendation of the Constituent Assembly, issue an order stating that Article 306-A shall cease to be operative, or shall be operative only subject to such exceptions and modifications as may be specified by him. There were undoubtedly dissenting views on the introduction of Article 306-A (including by Dr. Ambedkar on its very inclusion). But, the fact remains that, ultimately, it was proposed as a part of the Constitution as Article 370, and the Constitution was adopted by the people of this country with that provision.

Constituent Assembly of the State of J&K and Article 370

20. On 9.6.1949, Maharaja Hari Singh, who was taking a 'temporary' leave of absence, issued a proclamation entrusting Yuvraj Karan Singh with all his powers and functions, in regard to the State and Government of Jammu & Kashmir.⁵² On 25.11.1949, Yuvraj Karan Singh, as regent, issued a proclamation accepting the new Constitution of India.⁵³ A proclamation was issued on 1.5.1951 by Yuvraj Karan Singh directing the establishment of an elected Constituent Assembly to draft a Constitution for the State of Jammu & Kashmir.⁵⁴ In August, 1951, elections were conducted for the constitution of the Constituent Assembly. The only effective opposition group to the National

⁵² A.G. Noorani, Article 370: A Constitutional History of Jammu and Kashmir (Oxford University Press, India 2014) 48, 49.

⁵³ A.G. Noorani, Article 370: A Constitutional History of Jammu and Kashmir (Oxford University Press, India 2014) 78.

⁵⁴ A.G. Noorani, Article 370: A Constitutional History of Jammu and Kashmir (Oxford University Press, India 2014) 95.

Conference, the Praja Parishad, in Jammu, boycotted these elections. This boycott arose out of the rejection of the candidature of all 27 Praja Parishad members for election to the Constituent Assembly. Resultantly, 72 of the 75 members were elected unopposed on the National Conference Ticket, to the Constituent Assembly.⁵⁵

21. In the meantime, in exercise of powers under Article 370(1) of the Constitution of India, and following consultation with the Government of Jammu & Kashmir, the President issued the Constitution (Application to Jammu & Kashmir) Order, 1950 (hereinafter referred to as “C.O. 10”) dated 26.1.1950, identifying a Schedule of those subjects which corresponded to the IoA and regarding which, alone, the Parliament had law making power for the State of Jammu & Kashmir, in terms of Article 370(1)(b)(i). Further, C.O. 10 clarified that along with Articles 1 and 370 of the Constitution of India, only those constitutional provisions would apply to the State of Jammu & Kashmir as identified in the Second Schedule of the said C.O., subject to the specified exceptions and modifications.

22. On 10.6.1952, an Interim Report was submitted by the Basic Principles Committee, which had been appointed on 7.11.1951, for evolving basic principles for the framing of the Constitution of Jammu &

⁵⁵ Iqbal Chand Malhotra & Maroof Raza, *Kashmir's Untold Story*, (Bloomsbury India 2019) 100.

Kashmir.⁵⁶ This Report recommended the termination of the institution of hereditary rulership, and of providing for an elected head of State, which was eventually accepted by the Constituent Assembly of Jammu & Kashmir.⁵⁷ The President of India, exercising his powers under Article 370(3), and upon the recommendation of the Constituent Assembly of the State of Jammu & Kashmir, issued the Declaration under Article 370(3) of the Constitution (hereinafter referred to as “C.O. 44”) effective from 17.11.1952, to include an explanation that the phrase ‘Government of the State’ meant the ‘Sadar-i-Riyasat’ of Jammu & Kashmir, acting on the aid and advice of the Council of Ministers of the State for the time being in office. Yuvraj Karan Singh became the first elected Sadr-i-Riyasat.⁵⁸

23. The Delhi Agreement was finally entered into in the July of 1952, between the Government of India and the Government of Jammu & Kashmir,⁵⁹ which provided that the residuary powers of the legislature vested in the Parliament with respect to the other States would vest in the State itself, for the State of Jammu & Kashmir. A statement was made by Sheikh Abdullah in 1952, to the effect that while the accession of the State of Jammu & Kashmir in India was complete in fact and in law, to the extent of the subjects enumerated in the IoA, the autonomy of the

⁵⁶ A.G. Noorani, Article 370: A Constitutional History of Jammu and Kashmir (Oxford University Press, India 2014) 111-113.

⁵⁷ A.G. Noorani, Article 370: A Constitutional History of Jammu and Kashmir (Oxford University Press, India) 117-120, 217-223.

⁵⁸ A.G. Noorani, *The Kashmir Dispute 1947-2012*, vol. 2 (Tulika Books 2013) 401.

⁵⁹ Ramachandra Guha, *India After Gandhi: The History of the World's Largest Democracy* (Picador 2008) 248.

State with regard to all other subjects was to be preserved.⁶⁰ *Contra* to the other States, the residuary powers vested in the State of Jammu & Kashmir itself.⁶¹

24. This period witnessed opposition to the provisions of the Delhi Agreement, *inter alia* pertaining to the limitations and restrictions placed on the applicability of the Constitution of India with respect to fundamental rights, emergency powers exercisable by the President of India and the jurisdiction of the Supreme Court of India. This opposition was acute in the Jammu region and was bolstered by a nationalist call for the abolition of Article 370 of the Constitution of India, led by the erstwhile Bharatiya Jana Sangh under the aegis of Dr. Shyama Prasad Mukherjee and the Praja Parishad.⁶²

25. The political relationship between the Jammu & Kashmir Government, led by Sheikh Abdullah, and the Central Government, led by Pandit Jawaharlal Nehru, unfortunately, deteriorated to a point where it was perceived that Sheikh Abdullah was leaning towards separation of the State, and by the middle of July 1953, he publicly demanded that Kashmir should become independent. Sheikh Abdullah was consequently

⁶⁰ Iqbal Chand Malhotra & Maroof Raza, *Kashmir's Untold Story*, (Bloomsbury India 2019) 102-103.

⁶¹ As per the Delhi Agreement between the Government of India and Government of Jammu & Kashmir, entered into in July 1952; *See also* Ramachandra Guha, *India After Gandhi: The History of the World's Largest Democracy* (Picador 2008) 248.

⁶² Rekha Chowdhary, 'Kashmir in the Indian Project of Nationalism' in Nyla Ali Khan (ed.), *The Parchment of Kashmir: History, Society and Polity* (Palgrave Macmillan 2012) 171-172. *See also* Bipin Chandra, Mridula Mukherjee & Aditya Mukherjee, *India After Independence 1947-2000* (Penguin Books 2007) 418.

dismissed as the Prime Minister and a new Government immediately put in place, headed by Bakshi Ghulam Mohammed, with Sheikh Abdullah put under arrest.⁶³ He was finally released only in April, 1964.⁶⁴ The President issued The Constitution (Application to Jammu and Kashmir) Order, 1954 on 14.5.1954 (hereinafter referred to as “C.O. 48”) with the concurrence of the Government of Jammu & Kashmir, superseding C.O. 10. Paragraph 2 of this Order sets out the provisions of the Constitution which, in addition to Articles 1 and 370, would be applicable to the State of Jammu & Kashmir, subject to the exceptions and modifications specified. One of the notable specifications introduced, which is of significance to the present matter, was a second proviso to Article 3 of the Constitution of India, as applied to the State of Jammu & Kashmir, which reads as under:

“Provided further that no Bill providing for increasing or diminishing the area of the State of Jammu and Kashmir or altering the name or boundary of that State shall be introduced in Parliament without the consent of the Legislature of that State.”

26. The Constituent Assembly of Jammu & Kashmir approved and adopted the Constitution of Jammu & Kashmir on 17.11.1956, and the said Constitution came into force on 26.1.1957. In terms of the Preamble of this Constitution,

⁶³ A.G. Noorani, *The Kashmir Dispute: 1947-2012*, vol. 1 (Tulika Books 2013) 44.

⁶⁴ Bipin Chandra, Mridula Mukherjee & Aditya Mukherjee, *India After Independence 1947-2000* (Penguin Books 2007) 418-419.

“WE, THE PEOPLE OF THE STATE OF JAMMU AND KASHMIR, having solemnly resolved, in pursuance of the accession of this State to India which took place on the twenty-sixth day of October, 1947, to further define the existing relationship of the State with the Union of India as an integral part thereof, and to secure to ourselves --

JUSTICE, social, economic and political;

LIBERTY of thought, expression, belief, faith and worship;

EQUALITY of status and of opportunity; and to promote among us all;

FRATERNITY assuring the dignity of the individual and the unity of the Nation;

IN OUR CONSTITUENT ASSEMBLY this seventeenth day of November, 1956, do HEREBY ADOPT ENACT AND GIVE TO OURSELVES THIS CONSTITUTION.”

27. Some of the relevant Sections of the Jammu & Kashmir Constitution, which would require discussion are being reproduced hereinunder:

“PART I
PRELIMINARY

XXXX XXXX XXXX XXXX XXXX

2. *Definitions.*-(1) In this Constitution, unless the context otherwise requires-

(a) "Constitution of India" means the Constitution of India as applicable in relation to this State;

XXXX XXXX XXXX XXXX XXXX”

“PART II
THE STATE

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

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

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

....

THE COUNCIL OF MINISTERS

35. Council of Ministers to aid and advise the Governor.

(1) There shall be a council of Ministers with the Prime Minister at the head to aid and advise the Sadar-i-Riyasat in the exercise of his functions.

(2) All functions of the Sadar-i-Riyasat except those under sections 36, 38 and 92 shall be exercised by him only on the advice of the Council of Ministers.

(3) The question whether any, and if so what, advice was tendered by Ministers to the Sadar-i-Riyasat shall not be inquired into in any court.

....

53. Session of the Legislature, prorogation and dissolution.

(1) The Sadar-i-Riyasat shall from time to time summon each House of the Legislature to meet at such time and place as he thinks fit, but six months shall not intervene between its last sitting in one session and the date appointed for its first sitting in the next session.

(2) The Sadar-i-Riyasat may from time to time –

(a) prorogue the Houses or either House

(b) dissolve the Legislative Assembly.

....

BREAKDOWN OF CONSTITUTIONAL MACHINERY

92. Provisions in case of failure of constitutional machinery in the State.- (1) If at any time the Governor 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, the Governor may by Proclamation-

(a) assume to himself all or any of the functions of the Government of the State and all or any of the powers vested in or exercisable by anybody or authority in the State;

(b) make such incidental and consequential provisions as appear to the Governor to be necessary or desirable for giving effect to the objects of the Proclamation, including provisions for suspending in whole or in part the operation of any provision of this Constitution relating to anybody or authority in the State:

Provided that nothing in this section shall authorise the Governor to assume to himself any of the powers vested in or exercisable by

the High Court or to suspend in whole or in part the operation of any provision of this Constitution relating to the High Court.

(2) Any such Proclamation may be revoked or varied by a subsequent Proclamation.

(3) Any such Proclamation whether varied under sub-section (2) or not, shall except where it is a Proclamation revoking a previous Proclamation, cease to operate on the expiration of six months from the date on which it was first issued.

(4) If the Governor by a Proclamation under this section assumes to himself any of the powers of the Legislature to make laws, any law made by him in the exercise of that power shall, subject to the terms thereof, continue to have effect until two years have elapsed from the date on which the proclamation ceases to have effect, unless sooner repealed or re-enacted by an Act of the Legislature, and any reference in this Constitution to any Acts of or laws made by the Legislature shall be construed as including a reference to such law.

(5) No Proclamation under sub-section (1) shall be issued except with the concurrence of the President of India.

(6) Every Proclamation under this section shall, except where it is a Proclamation revoking a previous Proclamation, be laid before each house of the Legislature as soon as it is convened.”

“PART XII AMENDMENT OF THE CONSTITUTION

147. *Amendment of the Constitution.*- An amendment of this Constitution may be initiated only by the introduction of a Bill for the purpose in the Legislative Assembly and when the Bill is passed in each House by a majority of not less than two-thirds of the total membership of that House, it shall be presented to the Governor for his assent and, upon such assent being given to the

Bill, the Constitution shall stand amended in accordance with the terms of the Bill:

Provided that a Bill providing for the abolition of the Legislative Council may be introduced in the Legislative Assembly and passed by it by a majority of the total membership of Assembly and by a majority of not less than two-thirds of the members of the Assembly present and voting:

Provided further that no Bill or amendment seeking to make any change in-

(a) this section; or

(b) the provisions of Sections 3 and 5; or

(c) the provisions of the Constitution of India as applicable, in relation to the State,

shall be introduced or moved in either House of the Legislature.”

28. The Constitution (Application to Jammu and Kashmir) Third Amendment Order, 1964 (hereinafter referred to as “C.O. 71”) dated 21.11.1964, modified the Constitution of India, as applicable to the State of Jammu & Kashmir, and made Article 356 applicable to the State, with the modification that the expression ‘Constitution’ included the ‘Constitution of Jammu & Kashmir’. The Constitution of Jammu and Kashmir (Sixth Amendment) Act, 1965, was passed on 10.4.1965, replacing the expressions ‘Sadar-i-Riyasat’ and the ‘Prime Minister’ in the State Constitution with the ‘Governor’ and the ‘Chief Minister’ respectively. Simultaneously, the Constitution (Application to Jammu &

Kashmir) Second Amendment Order, 1965 (hereinafter referred to as “C.O. 74”) was issued by the President of India in concurrence with the Government of the State of Jammu & Kashmir, under Article 370(1). It *inter alia* amended CO 48 to substitute Article 367(b) to reflect the nomenclature change of Sadar-i-Riyasat to Governor.

29. Political negotiations and developments saw the Kashmir Accord, 1975 being entered into between the Government of India and the Government of Jammu & Kashmir, *inter alia*, emphasizing that the relationship between the two would be governed by Article 370 of the Indian Constitution (as per Clause (1) of the Kashmir Accord). Clause (2) of the Accord reiterated that the residuary powers would remain with the State. With this, came the rehabilitation and re-establishment of Sheikh Abdullah as the Chief Minister of Jammu & Kashmir, with the then Chief Minister Syed Mir Qasim stepping down.⁶⁵ This was with the support of the Congress Party, which had a majority in the Jammu and Kashmir State Assembly, on the understanding that fresh elections would be held soon.⁶⁶

30. The political stability, however, did not last long with the imposition of the 1975 Emergency. When the Congress Party lost the 1977 Lok Sabha elections, support was withdrawn from Jammu &

⁶⁵ David E. Lockwood, ‘Kashmir: Sheikh Abdullah's Reinstatement’ (1975) 31(6) *The World Today*, 250 <<https://www.jstor.org/stable/40394860?seq=1>>.

⁶⁶ A.G. Noorani, *Article 370: A Constitutional History of Jammu and Kashmir* (Oxford University Press, India) 16-17.

Kashmir. This led to the fall of Sheikh Abdullah's Government in March 1977 and imposition of Governor's Rule.⁶⁷ However, Sheikh Abdullah's National Conference came back into power in the 1977 state elections.⁶⁸

1989-1990 onwards: Another troubled time

31. God and nature have been very kind to the Kashmir Valley. Unfortunately, the human species has not been so considerate. The 1980s saw some troubled times culminating in the 1987 elections, which saw allegations and counter-allegations.⁶⁹ There was a growth of fundamentalism fueled from across the border. The 1971 creation of Bangladesh was not forgotten. Unemployed and frustrated youth were trained as militia and were sent back into Kashmir to create chaos. It was a major change for people who, irrespective of faith, were known for peace and tolerance. The Kashmiri *Shaivism* and Islamic Sufism were taken over by such militant tendencies. Prior to this, what Sir Walter Lawrence wrote about the absence of crime against persons in Kashmir had held good.⁷⁰ There was a mass exodus of the Kashmiri Pandit community, threatened for their life and property, changing the very cultural ethos of Kashmir. There has been little turn-back despite three decades on this issue. It was a proxy war on the territory of India with

⁶⁷ A.G. Noorani, Article 370: A Constitutional History of Jammu and Kashmir (Oxford University Press, India) 17.

⁶⁸ Surinder Mohan, 'Democracy in Jammu and Kashmir 1947-2008' 2012 16(3) World Affairs, 104 <<https://www.jstor.org/stable/48504940>>.

⁶⁹ A.G. Noorani, *The Kashmir Dispute 1947-2012*, vol. 2 (Tulika Books 2013) 543.

⁷⁰ P.N.K Bamzai, *Culture and Political History of Kashmir: Modern Kashmir*, vol. 3 (M.D. Publications Pvt. Ltd., New Delhi 1994) 852.

active support from across the border.

32. In order to curtail the activities of terrorists, either from across the border, or indigenous, armed forces and paramilitary forces were brought in. The kidnapping of the daughter of the then Home Minister Mufti Mohammad Sayeed, and her subsequent release in exchange for terrorists detained,⁷¹ lit the last match, which produced such unprecedented fire that it engulfed the whole Valley. The bottom-line is that today's generation aged 35 years or younger have not seen the cultural milieu of different communities, which formed the very basis of the society in Kashmir.

33. Re-establishment of democracy was sought to be affirmed by the elections held in 1996.⁷² There have been constant endeavours thereafter to find a peaceful solution to the problem of Kashmir, with the former Prime Minister P.V. Narasimha Rao stating that the "...sky is the limit" for autonomy of the State and Shri Atal Bihari Vajpayee raising the slogan of *Insaniyat, Jamhuriyat, Kashmiriyat* (i.e., *Insaniyat*: Humanism; *Jamhuriyat*: Democracy; *Kashmiriyat*: Inclusive culture of Kashmir, with amity between Hindus and Muslims).

⁷¹ 'After five days, Kashmiri militants releases Home Minister Mufti Mohammed Sayeed's daughter' *India Today* (31 December, 1989) < <https://www.indiatoday.in/magazine/special-report/story/19891231-kashmiri-militants-releases-rubaiya-daughter-of-union-home-minister-mufti-mohammed-sayeed-816863-1999-11-30>>.

⁷² Surinder Mohan, 'Democracy in Jammu and Kashmir 1947-2008' 2012 16(3) *World Affairs*, 112-113 < <https://www.jstor.org/stable/48504940>>.

The recent developments

34. The trigger for this batch of petitions is the enactments by the Parliament in August 2019. We may add here that, on account of the coalition Government of the Bharatiya Janata Party (hereinafter referred to as “**BJP**”) and the Peoples Democratic Party (hereinafter referred to as “**PDP**”) collapsing, Governor’s Rule was imposed on 20.6.2018, under Section 92 of the Constitution of Jammu & Kashmir, as the constitutional machinery in the State had failed and thus, all powers and functions of the Government of the State were conferred on the Governor. On 21.11.2018, the Governor, under Section 53(2)(b) of the Constitution of Jammu & Kashmir, dissolved the Legislative Assembly of the State. This was just prior to the expiry of the proclamation of Governor’s Rule, at the end of the six-month period, on 19.12.2018. A resolution approving the proclamation of President’s Rule issued under Article 356 of the Constitution of India, by the President of India on 19.12.2018, was passed in the Lok Sabha and the Rajya Sabha. As per this proclamation [GSR 1223(E)], the President assumed all the functions of the Government of the State as also all the powers exercisable by the Governor. All powers of the Legislature of the State were to be exercised by the Parliament. Further, the first and second provisos to Article 3 of the Constitution of India as applicable to the State of Jammu & Kashmir, insofar as they related to the reference by the President to the Legislature of the State, came to be suspended. Further, by way of GSR 1224 (E), issued on the same date, the powers assumed by the President under GSR 1223 (E) were held to also be exercisable by the Governor of the State.

The President's Rule was then extended for a further period of six months, w.e.f. 3.7.2019, as the State Assembly Elections had not been held in the meantime.

35. The State of Jammu & Kashmir issued a security advisory on 2.8.2019, advising all Amarnath *yatris* to stop their *yatra* midway and return in view of certain intelligence inputs of terror threats.

36. On 5.8.2019, the fateful day, the President of India issued the impugned Order titled 'The Constitution (Application to Jammu & Kashmir) Order, 2019' (hereinafter referred to as "C.O. 272"), under Article 370(1) of the Constitution of India with the concurrence of the Government of State of Jammu & Kashmir (through the Governor, as the powers of the Government of the State vested in the Governor at that time). Article 367(4) was inserted in the Constitution of India in that process, and Article 367(4)(d) in effect amended sub-clause (3) Article 370 of the Constitution of India, by replacing the expression 'Constituent Assembly of the State' with 'Legislative Assembly of the State'. This happened at 11:00 a.m. approximately.

37. At 11:15 a.m., two statutory resolutions, viz., a Statutory Resolution regarding cessation of all clauses of Article 370 except clause (1), and a Statutory Resolution regarding the Jammu & Kashmir Reorganisation Bill, 2019, were introduced in the Rajya Sabha. The Reorganisation Bill provided for reorganising the existing State of Jammu & Kashmir into two Union Territories – one of Jammu and

Kashmir and the other of Ladakh, comprising territories of the erstwhile State of Jammu & Kashmir, namely Kargil and Leh Districts. The said Bill further clarified that there was to be a Legislative Assembly for the Union Territory of Jammu & Kashmir. At 5:30 p.m., the Statutory Resolution in respect of the Jammu & Kashmir Reorganisation Bill, 2019 was passed by the Lok Sabha, by way of a voice vote. It may be noted that pursuant to the Presidential Proclamation dated 19.12.2018, Parliament was exercising the powers of the State Legislative Assembly, in its absence.

38. Soon thereafter, the Resolution regarding cessation of all clauses of Article 370, except clause (1) and the Statutory Resolution regarding the reorganisation of the State of Jammu & Kashmir was passed by the Rajya Sabha, and on the next day by the Lok Sabha. We are informed that these Resolutions were, in fact, passed by 2/3 majority of the Members present and voting, both of the Lok Sabha and the Rajya Sabha.

39. On 6.8.2019, the President issued a Declaration under Article 370(3) of the Constitution (hereinafter referred to as “**C.O. 273**”), as amended by C.O. 272, declaring that Article 370 would cease to apply w.e.f. 6.8.2019. It is the case of the petitioners that, effectively, this endeavour emasculated Article 370 without formally abolishing it using the route of a constitutional amendment.

40. On 9.8.2019, upon receiving the assent of the President of India, in exercise of powers under Section 2(a) of the Jammu & Kashmir

Reorganisation Act, 2019 (hereinafter referred to as “**the said Act**”), the respondent, through the Ministry of Home Affairs, issued a notification bearing number SO 2889 (E), for provisions of the said Act to come into force, w.e.f. 31.10.2019.

41. This is what has resulted in the batch of petitions.

42. The other development has been that in pursuance of the aforesaid, on 31.10.2019, the two Union Territories were carved out and President’s Rule was revoked.

The Challenge

43. A clutch of writ petitions have been filed in the present case. The oral submissions were led by Mr. Kapil Sibal, learned senior counsel, on behalf of Mohd. Akbar Lone and Hasnain Masoodi. *Inter alia*, these challenge the following State actions:

- i. Para (c)(ii) of the Proclamation of President’s Rule in the State of Jammu & Kashmir *vide* GSR 1223(E) dated 19.12.2018, and extended for a further period with effect from 3.7.2019.
- ii. Concurrence given by respondent No.2 State enabling the President of India to issue Constitution of India (Application to the State of Jammu and Kashmir), Order 2019, numbered CO 272 dated 5.8.2019.

iii. Constitution of India (Application to the State of Jammu & Kashmir), Order 2019 numbered CO No.272 dated 5.8.2019.

iv. Declaration under Article 370(3) of the Constitution numbered CO No.273 dated 6.8.2019.

v. The Jammu and Kashmir Reorganisation Act, 2019 (Act No.34 of 2019) which received the assent of the President on 9.8.2019.

44. The oral submissions were elaborate, relying on voluminous documents, reports, views, texts and such. The counsels did endeavour to divide the submissions amongst themselves but due to their nature, there was a considerable overlap of the submissions. Thus, to record submissions of each counsel would require a lot of duplication, which is why it has been thought expedient to deal with the submissions, under different heads of submissions rather than counsel-wise. This will additionally help in making the judgment crisper and help in focusing on the areas of contention between the two parties. Thus, the discussion.

1. The relation between the Union and the State of Jammu & Kashmir.

A. The evolution of constitutional relationship between the Union and the State of Jammu & Kashmir prior to the impugned executive actions:

A great deal of emphasis was laid on the assurances held out to the Princely State of Jammu & Kashmir prior to it acceding to the

Indian State and the consequent constitutional guarantees which emerged in the Constitution of India as evinced by Article 370 of the Constitution of India. Thus, the impugned executive action was alleged to be in breach of the assurances held out and the constitutional scheme which evolved in pursuance thereof. We may summate the different aspects urged on this behalf by the counsel.

i. Article 370(1) is stated to be *sui generis* as it opened with a non obstante clause. The State of Jammu & Kashmir was excluded from Article 238; which limits the lawmaking power of the Parliament; and there was no democratic institution in the State at the time of accession. A final decision on the nature of federal relations crystallized when a democratic frame to determine this was put into existence which was then agreed upon by the Constituent Assembly amongst others. This decision was unique in character as it was urged to be a different arrangement from other States who had merged in the Indian Union. We may note a little divergence on the significance of the Constituent Assembly as according to Mr. Zafar Shah, the Constituent Assembly alone was to determine the relationship while according to Mr. Kapil Sibal, learned Senior Counsel there could be other aspects, however in the given circumstances that would not be germane.

ii. The text of Article 370 reflects the “level of cooperation” between the Union and the State Government. The endeavour was

to accommodate the views of Jammu & Kashmir to facilitate the accession. Thus, the scheme of accession proceeded on the basis of consultation, concurrence and recommendation, the last being the narrowest and most exceptional.

iii. A great deal of reliance was placed on the statements of Shri Gopaldaswami Ayyangar in the Constituent Assembly debates conducted on 17 October 1949 qua Article 370 emphasising that the very existence and structure of Article 370 was necessitated due to the peculiar conditions prevailing in the State at that time. As to what would be the fate of Article 370 ultimately and whether it could at all be abrogated was left only to the Jammu & Kashmir Constituent Assembly which in turn reflected the will of the people. This was the common theme of submissions of Mr. Sibal, Mr. Zafar Shah and Mr. Dushyant Dave.

iv. Article 370 is animated by a spirit of bilateralism. The Presidential Orders, particularly C.O. 48 provided for coextensive law-making powers between the Legislative Assembly and the Parliament. Article 246 was curtailed in its application to Jammu & Kashmir while on the other hand Section 5 of the Jammu & Kashmir Constitution extended the Assembly's power to all matters except those where the Parliament had the power. Thus, Mr. Gopal Subramaniam's contention was that the Parliament and the State Assembly spoke through the medium of Article 370, which was the fulcrum of the governing relationship.

v. Mr. Rajiv Dhawan, senior counsel, sought to contend that there were different provisions in the Constitution dealing with the federal structure and the existence of Article 370 in the Indian Constitution was a facet of India's "multi-symmetrical" federal structure. The Constitution, thus, provides for varying level of autonomy to different federal units in order to address the unique historical contingencies. He sought to rely on the observations of this Court in *R.C. Poudyal v. Union of India*⁷³ to advance the argument that this Court had favourably treated such contingencies as relevant aids to legal interpretation of the constitutional relationship.

B. Article 370 had assumed permanence in the Constitution of India:

i. The Constituent Assembly of Jammu & Kashmir Constituent at the time debated the relationship for a number of years before deciding not to recommend the pathway to statehood as offered via Article 370(3) of the Constitution, with the consequence that this special relationship envisaged between the State and the Union acquired a permanent status. Thus, Article 370 was permanently implemented, which could only be subject to changes in its legislative power and application of the constitutional provisions under Article 370(1) of the Constitution.

⁷³ 1994 Supp (1) SCC 324

The observations made in *Sampat Prakash v. State of J&K*⁷⁴ were referenced by Mr. Sibal for the aforesaid proposition, which was further strengthened by the recommendation of the Constituent Assembly of the State which plead that the Article should be operative with one modification to be incorporated in the explanation clause (1) of the Article, which was notified by C.O. 44 dated 15.11.1952. The inference drawn by this Court was that the Constituent Assembly of the State did not desire for this Article to cease to be operative. In fact, it agreed to the continued operation of this Article by recommending that it should be considered operative with this modification only.

ii. Part XXI of the Constitution, which incorporates Article 370 is titled as “*Temporary, Transitional and Special Provisions.*” With respect to how the expression ‘temporary’ is to be understood, a common theme of submissions was presented by Mr. Kapil Sibal, Mr. Gopal Shankarnarayan. The use of the phrase “temporary” was stated to be in a limited sense by the nature of Article 370, i.e., and the final decision on its continuance was to be taken by the Jammu & Kashmir Constituent Assembly. However, once the Assembly dissolved, there is no conceivable way that Article 370 could remain temporary, even if the phrase was not deleted from the Constitution. In a sense it was urged that the

⁷⁴ 1969 (2) SCR 365

phrase ‘temporary’ became infructuous after the Constituent Assembly of the State had done its task.

iii. The Constituent Assembly of the State had a wide and defined role. Since no other body could take over the role of the State Constituent Assembly, neither could the Legislative Assembly. The constituent power was urged to be a different genus from the legislative power, as per Mr. Sibal.

iv. It was urged by the petitioners that the marginal heading to the provision could not dictate the very contents of the provisions. To stress this the speeches of Dr. Ambedkar from the Constituent Assembly and the observations made in *Kesavananda Bharati v. State of Kerala*⁷⁵ were quoted.

v. The C.O. 48 was urged to be a bilateral effort and a sign of confirmation both by the Jammu & Kashmir Constituent Assembly and the Indian Government that the provision must continue. The report of the J&K Constituent Assembly Drafting Committee was adopted verbatim as C.O. 48 to clearly define the sphere of Parliament’s jurisdiction in the State.

vi. A uniquely divergent view was urged by Mr. Dinesh Dwivedi, learned senior counsel, which was not common to any of

⁷⁵ (1973) 4 SCC 225

the other counsel. It was his say that once the Jammu & Kashmir Constituent Assembly was dissolved, Article 370 came to an end. Article 370(2) of the Constitution, gave the Constituent Assembly the final authority on deciding upon the continuance of the Presidential orders made under Article 370(1) and, thus, no fresh orders could be made after the Assembly ceased to be in existence. Thus, he urged that all C.O.s issued from time to time were without the constitutional mandate and that the view adopted in *Sampat Prakash*⁷⁶ case was not the correct view. Nevertheless, the two Constitutions would keep operating concurrently and in perpetuity.

We may note from a preliminary round of this very matter that an endeavour was made by some counsel, contending that the matter be considered by a Bench larger than five Judges. The plea to refer to a larger Bench was negated by the judgment of this Court in *Dr. Shah Faesal and Ors. v. Union of India and Anr*⁷⁷. The contention before us was in a way simply a repetition of what was urged at that time and was therefore specifically negated for reasons recorded in paras 42 to 45 of that judgment while opining that there was no conflict of judgment in *Prem Nath Kaul v. State of J&K*⁷⁸ and *Sampat Prakash*⁷⁹ case.

⁷⁶ supra

⁷⁷ (2020) 4 SCC 1

⁷⁸ 1969 Supp (2) SCR 270

⁷⁹ supra

vii. Article 370 could be abrogated only through Article 368, assuming that 370(3) of the Constitution, survived post the dissolution of the Jammu & Kashmir Constituent Assembly as per Mr. Dushyant Dave and Mr. S. Naphade. We may note that some of the counsel in turn did not refrain from commenting on it as according to them such a course of submissions was not required. It was their understanding that Article 370(3), post the Jammu & Kashmir Constituent Assembly dissolution, had a vestigial existence on paper, and in its operative sense, it did not survive since Article 378 is not the passage through which alleged offensive action was taken. It was Mr. Sibal's view that this would be an academic exercise in the present proceedings.

C. The effect of Article 370(3) of the Constitution:

i. Article 370(3) is actually a fulcrum upon which the arguments of both sides hinge on. It is the petitioner's submission that the power under Article 370(3) can be exercised only till the Constituent Assembly of the State was in seizin. Once recommendations of the State Constituent Assembly were made and the said Assembly was dissolved, the power under Article 370(3) of the Constitution stands extinguished. The statement in the Constituent Assembly of India debates by Shri Gopaldaswami

Ayyangar extracted in *Prem Nath Kaul*⁸⁰ case was relied upon for this purpose.

ii. The petitioners referred to Article 370(3), submitting that the phraseology “notwithstanding” used in the beginning in the context of provisions of Articles 370 is followed by the phrase “the President may”. Thus, there is a conditional characteristic present. The proviso to Article 370(3) requires the recommendation of the State Constituent Assembly, albeit sub clause (2) makes a provision for such recommendation to be “necessary” before the President issues a notification. Thus, the State Constituent Assembly’s recommendation is mandatory before the President of India can exercise the power. The exercise of power by the President was, thus, conditional as submitted by Mr. Gopal Shankarnarayan.

iii. A reading of the documents executed by the Maharaja as the Instrument of Accession, seeks to preserve the preliminary legislative power of the Maharaja and the powers provided by the Jammu & Kashmir Constitution were not proscribed by Article 370 of the Constitution.⁸¹

iv. A distinction was sought to be carved out between the Instrument of Accession and the Merger Agreement. Historically,

⁸⁰ supra

⁸¹ Prem Nath Kaul (Para 38)

the Instrument of Accessions were signed for the release of ‘external sovereignty’ and Merger Agreements were signed for the release of ‘internal sovereignty’. In this regard, observations of this Court in *Promod Chandra Deb v. State of Orissa*⁸² were referred to, to highlight this distinction. In this context, it was submitted by both Mr. Rajiv Dhawan and Mr. Zafar Shah that the Maharaja Hari Singh or his successors never signed any merger agreement with the Dominion and, thus, retained their legislative powers.

v. The assimilation of more than 600 States as part of India through the mechanism of Instruments of Accession and Merger Agreements must be understood in the historical context in which they were executed. The submission, thus, was that such historical agreements cannot be negated unilaterally by the Union of India by relying on the observations in *Madhav Rao Jivaji Rao Scindia v. Union of India*⁸³ in the context of the unilateral action by the President therein, which was not upheld then, though the abolition of privy purses was later upheld on account of the Parliament having passed a law in regard to that.

vi. Mr. Zafar Shah in addition to the aforesaid sought to contend that Article 370(3) of the Constitution at best could have been used only to de-operationalise Article 370 of the Constitution.

⁸² 1962 Supp (1) SCR 405

⁸³ (1971) 1 SCC 85

vii. The Constitution of Jammu & Kashmir was stated to derive its authority from the sovereignty of Maharaja Hari Singh, which was retained in the State, as reflected by the Merger Agreement not being signed. Thus, it stands on its own feet and not by virtue of the Constitution of India. The arrangement envisaged two Constitutions to coexist, as enunciated by Y.V. Chandrachud, J. (as he then was) in *Kesavananda Bharati*⁸⁴ case.

viii. The observations made in the *State Bank of India v. Santosh Gupta*⁸⁵ opining that Jammu & Kashmir possessed no sovereignty was urged to be treated as merely an obiter as the Court had already decided that the legislative competence to enact the SARFAESI Act, 2002 was to be found in List I. Thus, it was submitted that there was no occasion to determine the sovereignty (if any) inhering in Jammu & Kashmir and were alternatively urged to be *per incuriam* in the light of the judgment in *Prem Nath Kaul*⁸⁶.

2. The Impugned Executive Orders are not competent to alter the relationship between the State and the Union:

⁸⁴ (supra) para 2072

⁸⁵ (2017) 2 SCC 538

⁸⁶ supra

A. C.O. 272 is illegal and *mala fide*:

i. Mr. Sibal urged that while interpreting the constitutional provisions, the constitutional values must be kept in mind and any interpretation must be consistent with such constitutional values. These constitutional values were enumerated as democracy, federalism, and constitutional morality.

ii. The unilateral concurrence granted by the Governor to the actions of the President under Article 370 of the Constitution was assailed as the Jammu & Kashmir Constitution mandated that the Governor could have acted only with the aid and advice of the Council of Ministers. The exception to this could only be actions present in Sections 36, 38 and 92 of the Jammu & Kashmir Constitution.

iii. It was the bounden duty under the oath of the Governor which required him to uphold and preserve the Jammu & Kashmir Constitution, and the impugned action amounted to a breach of said oath taken by the Governor.

iv. The constitutional power was not an instrument to efface any other constitutionally vested power. The impugned action practically amounted to effacing the power vested with the Constituent Assembly of Jammu & Kashmir under Article 370(3).

The principle of *Miller v. Queen*⁸⁷ was referred to regarding this submission.

v. The impugned action amounted to an amendment of Article 370 of the Constitution by addition of clause (4) to Article 367 of the Constitution. This exercise of power was stated to be *mala fide* as it confirmed that the objective of the amendment was to confer a specialized authority on the Legislative Assembly which could not have ordinarily assumed that authority.

vi. The Governor of the State acts on the aid and advice of the Council of Ministers. With the conditions not having been satisfied, the provision was unworkable.

vii. Article 367 of the Constitution must be applied on its own terms and was meant as an aid in interpretation. The said Article could not be used to effectuate an amendment in another provision of the Constitution like, Article 370.

viii. Article 370(3) of the Constitution begins with a non obstante clause and, thus, Article 367 of the Constitution was not available through that process as urged by Mr. Gopal Shankarnarayan.

ix. There was stated to be an implied relation in any delegated power to create 'exceptions and modifications'. This would

⁸⁷ (2019) UKSC 41

include the corresponding power of the President under Article 370(1)(d) and such limitations were urged to be well recognized in the statutory provisions. There were stated to be more than one judgment recognizing this limitation [*Delhi Laws Act, In Re.*⁸⁸ and *Kesavananda Bharati*⁸⁹ case para 1423]. This would amount to effacing fundamentals of the provisions and, thus, no exception ought to be made.

x. The observations in *Puranlal Lakhanpal v. President of India*⁹⁰ were required to be construed strictly as a mere obiter of the Court. In the judicial adjudication already completed, the Court had already determined that the modification in the facts of that case did not constitute a ‘radical alteration’. The inherent limitation of such power was recognized in the *Kesavananda Bharati*⁹¹ case and, thus, observations which set to dilute that principle in *Puranlal Lakhanpal*⁹² case have to be treated as *per incuriam*.

B. C.O. 273 is illegal and *mala fide*:

The essence of the scheme of Article 370 of the Constitution was stated to be that any decision under Article 370(3) must reflect the will of the people. The State Constituent Assembly had already

⁸⁸ 1951 SCC 568

⁸⁹ *supra*

⁹⁰ (1962) 1 SCR 688

⁹¹ (*supra*) para 2072

⁹² (*supra*)

been dissolved. There was no elected State Assembly. The issue had not been put to the people in any other form and, thus, the will of the people was not reflected in any manner as urged by Mr. Sibal.

C. Improper exercise of power under Article 356 of the Constitution while issuing C.O. 272 and C.O. 273.

i. Mr. Kapil Sibal, learned senior counsel, sought to strenuously contend that the route adopted by the respondents was Constitutionally unsustainable, as the power under Article 356 could not be used to amend the Constitution. What the respondents had done was to amend the Constitution of India and in order to avoid the most stringent norm specified for any amendment to the Constitution, a substitute had been practiced while taking recourse to Article 356 of the Constitution.

ii. Without prejudice to the aforesaid, it was urged that Article 356 of the Constitution could not be used to make irreversible changes. Article 356 stipulated the provisions in case of failure of the Constitutional machinery in the State. Thus, an alternative arrangement had to be envisaged till the Constitutional machinery was restored. The interregnum period could not be used to nullify the powers, which solely vested with the Assembly of the State⁹³. The mechanism of Article 356 of the Constitution was confined to

⁹³ *Krishna Kumar Singh v. State of Bihar*, (2017) 3 SCC 1

a method for restoration of elected Government i.e., restoration of the democracy⁹⁴.

iii. An additional plea, sought to be advanced by Mr. Rajeev Dhavan, was that in the larger Constitutional scheme, the Supreme Court should read in a condition in Article 356 such that the Governor's recommendation for imposing President's Rule should also be placed before the Legislative Assembly.

iv. Mr. Naphade, learned Senior Counsel, sought to urge that it was not within the limit of the President's power to issue a proclamation that there was a breakdown of State machinery, thus necessitating his intervention, while the Governor had dissolved the Assembly and assumed power of the State. Once the Governor assumes such power, the very basis of the breakdown of the State machinery did not subsist⁹⁵.

3. The big question mark of even altering the status of the State to Union Territory.

A. Article 3 of the Constitution does not warrant the power to convey a State into Union Territory.

i. Article 3 itself is under the heading '*formation of new States and alteration of areas, boundaries or names of existing States*'.

⁹⁴ *S.R. Bommai v. Union of India*, (1994) 3 SCC 1, (Para 108 By Sawant, J.)

⁹⁵ *K.N. Rajgopal v. M. Karunanidhi*, (1972) 4 SCC 733

As to what could be done under the same was specified in Clauses (a) to (e). It does not mention any power to abolish a State and such power could not be read into it. This was submitted to be in line with the principle of a *two-tier* democracy.

ii. While referring to the pre-Constitutional period, as a development in that behalf, it was urged that there was a consistent progression towards self-governance and statehood since the Government of India Act, 1919, where Section 15 of that Act also mandated the process of obtaining opinions from the local Government prior to reorganization into a Governor's province. This practice was also adopted in the Government of India Act, 1935, which was a precursor to Article 3 of the Constitution of India. Thus, Mr. Chandra Uday Singh, learned senior counsel, urged that the abolishment of a State and a lowering of status to Union Territory was not something envisaged from earlier times.

iii. Once again from a historical perspective, it was urged that since the introduction of the Seventh Amendment in 1955, no State had been reduced to a Union Territory, though the reverse was true i.e. Union Territories had been converted into States such as Goa, Himachal Pradesh, Manipur, etc. It may be possible to carve out a Union Territory out of a State, as in the case of Chandigarh, on account of it being the capital of both Punjab and Haryana. The enormous potentiality of misuse of the process was emphasized, as in the future any politically inconvenient elected Government of a

State could be affected by reducing that State into a Union Territory.

iv. The conversion of a State into Union Territory was an exercise carried out through a simple majority of both Houses of Parliament. This extinguishes several Constitutional rights guaranteed to States, such as rights to borrow upon the Security of the Consolidated Fund of State under Article 293, as urged by Mr. Chandra Uday Singh, learned Senior Counsel. Such an exercise, if at all, at best, could have been carried out only through a Constitutional Amendment with all its checks and balances. The Constitution (18th Amendment) Act, 1966, which contained the explanations to Article 3, had not been extended to Jammu & Kashmir till the impugned action. It may be observed that the Explanation I refers to Clauses (a) to (e) including Union Territory within the expression 'State', but in the Proviso the 'State' did not include a Union Territory. Explanation II referred to power conferred on the Parliament by Clause (a) to include the power to form a State or Union Territory by uniting a part of any State or Union Territory to any other State or Union Territory.

B. The suspension of *proviso* to Article 3 was illegal.

i. The *proviso* to Article 3, as applicable to the State of Jammu & Kashmir, could not be suspended through the route of Article 356, as urged by Mr. Rajeev Dhavan. This holds ground as the *proviso* mandatorily envisaged an expression of democratic will of

the people of the State, which was not possible as there was no elected assembly at the relevant time, since it had been dissolved and the power assumed by the Governor.

ii. The suspension of the Proviso to Article 3 must have a direct nexus to the objective to be achieved by proclamation of the President's Rule under Article 356. If the objective was restoration and preservation of State, then there was no need to suspend the Proviso. The second Proviso, as applicable to the State of Jammu & Kashmir, stipulated that no bill providing for increasing or diminishing the area of the State of Jammu & Kashmir or altering the name or boundary of that State should be introduced in Parliament without the consent of the Legislature of that State.

iii. Mr. Dhavan emphasized that the President of India did not have a *carte blanche* under Article 356. Article 356(1)(c) provides that the President can suspend provisions of the Constitution 'relating to any body or authority in the State'. The *proviso* under Article 3 could not be said to fall in this category.

iv. The President can exercise only Legislative powers of the Assembly under Article 356(1)(b) read with Article 357. The latter refers only to the power to 'make laws'. The power under *the proviso* to Article 3 is non-legislative in character and more akin to the power of election and consultation.

The Constitutional defense of the respondents

1. The nature of the Constitutional relationship between the Union and the State of Jammu and Kashmir prior to the impugned Executive actions.

A. No semblance of sovereignty remained with the State of Jammu & Kashmir, as its integration was complete.

i. As per Section 6 of the Government of India Act, 1935, as confirmed by Section 6 of Indian Independence Act, 1947, accession is complete in all respects once a ruler has accepted the Instrument of Accession. Thus, both the Attorney General and Solicitor General, urged that States are thereafter '*united in a Federation*' (in terms of Section 5 of the Government of India Act), leaving no vestige of separate sovereignty. The supremacy of the Constitution of India had been accepted by Yuvraj Karan Singh in his Proclamation of 25.11.1949.

ii. Jammu & Kashmir was stated as standing on the same footing as other acceding States. The rationale for the said submission was:

- a) 63 other States had their own Constitution prior to accession.
- b) representatives from Jammu & Kashmir also participated in the Constituent Assembly; and
- c) many other States did not sign any Merger Agreement.

On all three accounts, it was urged that there was nothing distinct about the accession of the State of Jammu and Kashmir on the principle of sovereignty.

iii. Once authority was surrendered to the Dominion, the Jammu & Kashmir Constituent Assembly had no sovereignty or plenary power to create a document that had the status of a Constitution. The Constitution of Jammu & Kashmir was urged to be a document of internal governance and not a parallel Constitution. This position was stated to be reflected by Section 5 of the Jammu & Kashmir Constitution, which provided that the State's law-making powers extend only to the domain left to it by the Constitution of India. Thus, the State Constitution certainly had the 'inferior' status vis-à-vis the Constitution of India, and Section 5 of the Jammu and Kashmir Constitution was incapable of any amendment. The State Constitution's inferior status, thus, vis-à-vis the Constitution of India was also made unalterable by Section 147 of the Constitution of Jammu & Kashmir.

iv. Individual agreements signed prior to accession have no legal force. All obligations, vis-à-vis former Princely States, are to be derived solely from the relevant Constitutional provisions. This plea was sought to be supported by the earlier judicial pronouncement in *Raghunathrao Ganpatrao v. Union of India*⁹⁶,

⁹⁶1994 Supp (1) SCC 191

which upheld the Constitutional validity of the Constitution (Twenty-sixth Amendment) Act of 1971. This judgment in *Madhavrao Scindia's* case⁹⁷ was thus sought to be distinguishable as it dealt with an impermissible exercise of President's *executive* power to remove the provision of the privy purses and that the abolishment of the privy purses was upheld in the subsequent judgment, post the necessary Legislative exercise.

v. In *State of West Bengal v. Union of India*⁹⁸, it was opined that the features of a compact or agreement between different federal units is absent in the Constitution of India. This judgement was thus cited. The said judgment instead provides for distribution of power, which is not an index of sovereignty. Thus, legal sovereignty is vested with the people of India, as submitted by Mr. Rakesh Dwivedi, learned senior counsel.

vi. It was also urged by Mr. Rakesh Dwivedi that there could not be any internal sovereignty once the Apex Court and organs of the Union are allowed to operate in Jammu & Kashmir. C.Os had been issued from time to time. Prior to the impugned CO, in terms of various C.Os, the Union Government, Parliament, Supreme Court, CAG, Delimitation Commission, Part XIII, introduction of 'Governor' and 'Chief Minister', activation of 94 out of 97 Entries

⁹⁷ *supra*

⁹⁸ (1964) 1 SCR 371

in List I, Financial Provisions, Residuary powers, etc., have all been applied to Jammu & Kashmir. Thus, the foundation had been laid and what remained would be done under the impugned actions.

B. Article 370, both from the Part in which it falls (Heading) as well as reading of the transitional provision.

At no stage, it requires a permanency and if it had been so, the necessary amendments would have been made to the Constitution. It was also treated as a transitional provision. The *proviso* to Article 370(3) of the Constitution became *otiose* once the State Constituent Assembly dissolved itself.

i. Mr. Gopaldaswami Ayyangar's statements in the Constituent Assembly were in fact supportive of the transient nature of the arrangement under Article 370, as it was meant to endure only until the situation in the State had been normalized.

ii. Various Presidential orders passed under Article 370(1), especially C.O.10 (which applied a large part of the Constitution of India to Jammu & Kashmir), show that Article 370(1) was a mechanism to gradually bring the State on par with other States by applying various provisions of the Constitution of India in a step-by-step fashion and that exercise was completed by the impugned Executive action.

iii. If Article 370 of the Constitution were to be presumed to have permanence, it would lead to an incongruous situation where the President, in applying the Constitution of India to Jammu & Kashmir under Article 370(1) would have near limitless power to create exceptions and modifications (with the concurrence of the State Government). In a historical perspective, this practice had led to the application of the provisions of the Constitution of India in the State in a patchwork fashion. The illustration of this practice was enunciated when it was seen that CO48 removed references to the Scheduled Tribes from Article 15(4). Article 19 was also applied with modifications such that the Legislative Assembly had the power to define what constituted '*reasonable restrictions*' to the freedoms under the said provision. Article 35A can be considered as a new provision altogether, applied only to the State of Jammu & Kashmir.

iv. The State Constituent Assembly did not give a recommendation either way and that had left it to the discretion of the supreme Executive authority, i.e. the President to abrogate Article 370.

v. Article 370 prevented residents of Jammu & Kashmir from being treated on par with other citizens of India. Ultimately equality was the necessity. Thus, it could never have been intended to be a permanent arrangement.

C. Article 370(3) – How it works out? The *proviso* to Article 370(3) became *otiose* once the State Constituent Assembly dissolved itself.

i. It was urged that Article 370 has always been interpreted in a *functional* manner with due consideration of different historical contingencies. Illustratively, in C.O. 39, we have applied Articles 54 and 55 with modifications to Jammu & Kashmir, recognized the Constituent Assembly of the State as the Legislative Assembly since there was no Legislative Assembly in the State at that time.

ii. Constitutional practice suggests that whenever a term in Article 370 becomes *otiose*, it is replaced by the next functional equivalent or its successor. Illustratively: a) C.O. 39 discussed above; b) C.O. 44, which altered the definition of *Sadar-i-Riyasat* in the Explanation to Article 370(1); and c) C.O. 48, which added Article 367(4), whereby references to Legislative Assembly would be construed as references to the Constituent Assembly for purposes of voting in the Presidential election. It was, thus, a working arrangement, which applied from time to time in its perspective.

iii. Article 370(3) was in nature, a '*safety valve*' entrusted with the President, to be invoked when the political compromise anticipated in Article 370(1) fails to achieve its purpose, as urged by Mr. Harish Salve.

iv. The observations in *Puranlal Lakhanpal*⁹⁹ case were cited, where it held that the Presidential powers of creating exceptions and modifications in applying provisions of the Constitution under Article 370(1)(d) to be of the ‘*widest possible amplitude*’. These observations were reaffirmed by the Constitution Bench of this Court in the *Sampat Prakash*¹⁰⁰ case and, thus, could never be considered as mere *obiter*.

v. The compliance of an impossible condition need not be explicitly excused by the provision as per the maxim *lex non cogit ad impossibilia*.

vi. Reading the *proviso* as a mandatory condition would be impermissible as it would make the exercise of the President’s powers *conditional* to the approval of an independent, non-constitutional body. The Constitution of India envisaged the President as a *continuing* institution and the Constituent Assembly of Jammu & Kashmir as an ephemeral one. Thus, the latter’s obsolescence cannot affect the powers of the former. The work of the Constituent Assembly had been completed and with that Article 370(3) had worked itself out.

⁹⁹ (supra)

¹⁰⁰ (supra)

vii. There were only two Constitutionally compliant methods of reading Article 370 – a) Reading in an unfettered plenary power of the President under Article 370(3) once the State Constituent Assembly dissolved itself; or b) replacing the Constituent Assembly in Article 370(3) with its successor body. It is the latter one, which has been adopted in the present case, it was urged by the Solicitor General that though this option had been exercised, both options were equally permissible.

viii. Article 370(3) of the Constitution consciously used the word ‘*recommendation*’ by the Constituent Assembly, which is an inferior body to the President of India. Thus, a recommendation of an inferior authority could never be binding on the superior authority, as per Mr. Rakesh Dwivedi.

ix. Where the Constitution of India envisaged that the President has to act only on directions of another authority, such contingency has been explicitly expressed. Illustratively, Article 103(1) makes the decision of the President final, but Article 103(2) requires the President to obtain the opinion of the Election Commission and act according to such opinion. In such a scenario, the President has no other discretion and acts on the opinion of the Election Commission. There is no deployment of the language corresponding to the same in Article 370(3) and the term ‘*recommendation*’ implies that the President is not bound to act on that recommendation.

2. Whether the relationship could be altered by the impugned Executive orders.

A. C.O. 272 is *intra vires*.

i. When an institution or clause contemplated in Article 370 became *otiose*, it can be replaced by its successor or next functional equivalent. This alteration can be made through an amendment to Article 367 which was permissible through the exercise of powers under Article 370(1)(d). Such a practice had the legal imprimatur in *Mohd. Maqbool Damnoo v. State of Jammu & Kashmir*¹⁰¹, where the Constitution Bench of this Court upheld the substitution of *Sadar-i-Riyasat* for Governor in C.O. 74.

ii. Alterations to Article 370 of the Constitution itself must be permitted through the route of amending Article 367 in exercise of the President's powers under Article 370(1)(d). If this route is not left open, Article 370 would become permanent, which is not what the Constitution makers envisaged as *inter alia* apparent from the Chapter under which it fell. The only other method to alter the provision was through Article 370(3) (such as the change made in C.O. 44). This route was closed after State Constituent Assembly dissolved itself and the provision became *otiose*. Alternatively, if it were to be accepted that Article 370(3) was the only possible route

¹⁰¹ (1972) 1 SCC 536

to alter the provision, then even an amendment under Article 368 would have been impermissible.

iii. The amendment to Article 367, through Article 370(1)(d), was also with concurrence, which is a *sine qua non* under the second *proviso* to Article 370(1)(d). This is notwithstanding the fact that the concurrence so obtained from the Governor was when he was acting in place of the Council of Ministers. In any case, ‘*concurrence*’ constitutes a higher threshold than ‘*recommendation*’ and the framers consciously insisted on a lower threshold of agreement under Article 370(3). The absence of recommendation would not be fatal to the exercise of power.

iv. C.O. 272 reflects democratic principles, as it was made on the recommendation of the Parliament. The decision of the President also reflects a decision made on the aid and advice of the Council of Ministers, which is collectively responsible to the Parliament.

v. Any Constitutional measure meant to further equality and fraternity, assuring the dignity of the individual, and the unity and integrity of the nation should be welcomed¹⁰².

¹⁰² Raghunath Ganpatrao’s case (*supra*)

B. C.O. 273 is *intra vires*.

i. In the line of the arguments already advanced, it was suggested that when the Constituent Assembly dissolved itself without giving any recommendation, the *proviso* to Article 370(3) became *otiose*. However, this could never render the main provision inoperative. The President would always have the power to abrogate Article 370 in the absence of any modification to Article 367 through C.O. 272. Nevertheless, the option under Article 370(1)(d) was chosen in view of the strategic importance of the State and the need to have the issue debated before both Houses of Parliament.

ii. Article 370 vests the President with constituent power, i.e. power to apply or re-fashion different provisions of the Constitution of India, as applicable to Jammu & Kashmir. Thus, it is not amenable to ordinary forms of judicial review, such as the grounds of *mala fides*, etc. *Delhi Laws, in Re* was distinguishable as the said case dealt with statutory delegation of power. But, on the other hand, in the present scenario, the assignment of the powers to the President is directly from the Constitution itself.

C. Permissible exercise of power under Article 356 while issuing C.O. 272 and C.O. 273.

i. Article 356 encompasses/vests all shades of legislative/constituent powers in the Parliament. The said powers

cannot be limited by Article 357 as the said provision deals only with the powers of the Parliament to ‘make laws’. Article 357 does not deal with ‘powers of the legislatures’ as used in Article 356 (1)(b). There are thus, no implied limitations in the power under Article 356.

ii. Petitioners have challenged the imposition of the Governor’s and President’s Rule at a belated stage i.e., after almost 14 months.

3. Whether the alteration from a State to a Union Territory was permissible?

A. Article 3 grants Parliament the power to convert a State into a Union Territory.

i. C.O. 272 had already been issued by the President before the Reorganization Act was passed. Thus, Article 3, as applied to the rest of the country, applied to Jammu & Kashmir and the additional *proviso* did not apply.

ii. Article 3 provides for a plenary power of the Parliament, where it is entitled to consider factors such as national security, integrity, etc. An assessment of these factors would not be justiciable before the Court.

iii. In the process of scrutiny of the delimitation exercise undertaken qua State of Jammu & Kashmir in *Haji Abdul Ghani*

*Khan v. Union of India*¹⁰³, this Court had held that Explanation I to Article 3 provides Parliament with power to form new Union Territories. This was in the context of the Reorganization Act. Explanation II clarifies that such Union Territory can be formed by uniting parts of any States. Thus, Parliament can convert a State into one or more Union Territories.

iv. The power under Article 3 extends to effectively extinguishing the existence of a State, notwithstanding any assumption of sovereignty of the said State¹⁰⁴.

v. The power is such that States only have the right to express their views on proposals for reorganization. It is not necessary to make a Constitutional amendment¹⁰⁵. The power further extends to providing the extent of representation in the State Legislature, varying its numerical strength, and even affecting the existence of a State Legislature¹⁰⁶.

vi. Parliament is paramount in the matter of constitution of States. Article 3 only envisages that the affected States will '*express their views*'. There is no requirement of concurrence¹⁰⁷. In effect, views are to be taken from the entire nation *via* the

¹⁰³ 2023 SCC OnLine SC 138

¹⁰⁴ *State of West Bengal v. Union of India*, (1964) 1 SCR 317

¹⁰⁵ *Babulal Parate v. State of Bombay*, (1960) 1 SCR 605

¹⁰⁶ *Raja Ram Pal v. Hon'ble Speaker, Lok Sabha*, (2007) 3 SCC 184

¹⁰⁷ S.R. Bommai (supra)

Parliament, as the issue leading to the reorganization affects the nation as a whole. The Parliament would include the representatives of Jammu & Kashmir.

vii. Lastly, upon a question of the Court, at the very inception, it was emphasized that instructions were taken, and a statement was made by the Solicitor General before the Court in unambiguous terms that the status of the Union Territory of Jammu and Kashmir would be restored to status of a State once the elections were held. On a query as to when the elections would be held, it was stated that the endeavours are being made to do so at the earliest and that grassroot democracy have already been restored by the elections held at the *Panchayat* levels. It was submitted that the Hon'ble Home Minister on the floor of the House had already said that this was a temporary measure, and it would again become a State.

B. The suspension of the *proviso* to Article 3 was permissible.

i. The *proviso* to Article 3 has been suspended each time Article 356 is invoked. Every provision of the Constitution that refers to any decision to be made by the Legislative Assembly is suspended in this manner, notwithstanding whether that decision is legislative or recommendatory in character. The Parliament then substitutes the Assembly in all capacities.

ii. The exercise of powers of the State Legislature by the Parliament under Article 356 for the purpose of reorganizing the State of Punjab in 1966 was upheld by the High Court of Delhi in *Manohar Lal v. Union of India*¹⁰⁸. This includes the takeover of powers of the State Legislature to meet and express its views, as contemplated by the *proviso* to Article 3. This was because the Governor's power to summon the Legislature was itself suspended.

iii. The views contemplated by the *proviso* to Article 3 can be given by the Parliament itself without obviating the federal structure of the Constitution. At times, reorganization of a State is required to bring it out of the situation that necessitated the imposition of President's Rule in the first place. The principle that the Indian Constitution is both, unitary and federal, must, thus, be appreciated in this context.

Resolution of Constitutional Dilemma:

45. The task which confronts us is of analyzing the wide spectrum of submissions to assess the constitutionality of the path adopted by the respondents. The submissions advanced before us by both sides and different counsels have been set forth hereinabove. In the conspectus of the same, we have analyzed these submissions under the following broad heads:

¹⁰⁸ AIR 1970 Del 178

1. The Constitutional Relationship between the Union and the State of Jammu and Kashmir prior to the impugned actions.

A. The concept of internal sovereignty after the IoA.

46. The petitioners urge that Maharaja Hari Singh retained an element of ‘internal sovereignty’ with himself, having signed the IOA but not a Merger Agreement. To our mind, this question is no longer *res integra*, having received earlier consideration by a coordinate bench of this Court in *Prem Nath Kaul*,¹⁰⁹ where the *vires* of the Jammu & Kashmir Big Landed Estate Abolition Act, 1950 was in question. The challenge before the Court was whether Yuvraj Karan Singh had exceeded his powers under the Jammu & Kashmir Constitution Act, 1939, in enacting the said law. The petitioners therein, *inter alia*, pleaded that the Maharaja’s sovereignty was considerably affected by the Instrument of Accession, and, thus, he was no longer a sovereign ruler and could not have passed on any sovereignty to the Yuvraj.

47. The argument did not find favor with the Court. It was noted that with the Indian Independence Act, 1947, the suzerainty of His Majesty over princely states lapsed, thereby restoring the Maharaja’s status of an ‘absolute monarch’. Later, with the signing of the IoA, it was opined that the Maharaja conceded to the

¹⁰⁹ *supra*

authorities mentioned in Clause 1 of the IoA, his right to exercise certain functions subject to other terms of the Instrument. Clause 6 expressly recognized the continuance of the sovereignty of his Highness in and over the State. It is in this context that in paragraph 26 of the judgment, the Court was constrained to “*reject the argument that the execution of the Instrument of Accession affected in any manner the legislative, executive and the judicial powers in regard to the Government of the State when they vested in the Ruler of the State.*”

48. The matter did not rest at this as the Court observed that the powers of Yuvraj Karan Singh (vested by the Maharaja on 20.06.1949) were not ‘substantially limited’ by his Proclamation dated 26.11.1949, whereby he declared that the Constitution of India would govern the constitutional relationship between the State and the Union. Thus, the Proclamation did not alter the Constitutional position established once the Maharaja had signed the IoA.

49. Even Article 370(1) was opined to not affect the plenary power of the Maharaja in the governance of the State, as these powers had been recognized and provided by the Constitution of the State itself. It is through the Constituent Assembly that the State was free to choose its own form of Government.

50. The Coordinate Constitution Bench of this Court is thus clear in its finding that the State did not lose all semblance of its

internal sovereignty – which included deciding upon the form of government of the State - upon signing the IoA. The distinguishing feature, as compared to some of the other States, was that a slightly different path was followed for the accession of the State of Jammu & Kashmir by recognizing the Constituent Assembly to be formed for the State. The route of assimilation of the State of Jammu and Kashmir was through Article 370.

51. The Constitution of Jammu and Kashmir, which resulted from the deliberations of the State Constituent Assembly, was thus the repository of the sovereignty of the State of Jammu and Kashmir.

B. Article 370 of the Constitution as a temporary provision.

52. The nature of Article 370 itself – whether temporary or permanent – is the key to assessing the validity of the impugned actions. We propose to conduct this enquiry in three ways. First, by examining the historical background that led to the introduction of the provision in the Constitution. Second, by looking at the structure of the provision itself, and third, by reflecting on how the provision has worked out in the context of State-Union relations.

53. Certain aspects of the history that we have enumerated in the preceding sections guide us in this endeavour. Jammu and Kashmir had not acceded to India when the latter attained independence. Whereas Maharaja Hari Singh had entered into a standstill

agreement with Pakistan, India had not opted to do the same. It is in this context that the Maharaja addressed a letter to India, narrating the precarious situation of the State due to infiltration by armed men. The Maharaja sought assistance, which India made conditional upon him signing the IoA.

54. The Maharaja finally acceded through the IoA on 26.10.1947. On 05.03.1948, he proclaimed the establishment of a Constituent Assembly for devising a Constitution for the State.

55. On turning the pages of the Constituent Assembly Debates, which were read and re-read before the Court at length, Shri N. Gopaldaswami Ayyangar's statements allude to this historical context. When questioned by Maulana Hasrat Mohani about the reasons for special treatment of the State, Ayyangar replied that it was not yet ripe for the manner of integration which was provided in the Constitution for other States. This was on account of 'special conditions of Kashmir'. Ayyangar went on to express his hope that 'in due course even Jammu and Kashmir will become ripe for the same sort of integration'. Later, he detailed the ongoing conflict and a part of the State being under control of rebels as reasons for this 'special treatment'.

56. Spelling out the way forward, Ayyangar reflected that the Constitution of the State would decide on the future of relations with the Union. It is in this context that he stated: "Till a Constituent Assembly comes into being, only an interim

arrangement is possible and not an arrangement which could at once be brought into line with the arrangement that exists in the case of other States.”

57. This sentiment was echoed by Shri Sheikh Abdullah in his address to the State Constituent Assembly. He recounted the grave peril that the State was in due to the invasion of armed tribesmen and the sacrifices made by Kashmiris to save their State from being overrun. He noted that these considerations led the Maharaja to take assistance from India by signing the IOA. He also gave other reasons in support of acceding to India, which merit reiteration:

“The Hon’ble Sheikh Mohammad Abdullah:-

...

As a realist I am conscious that nothing is all black or all white, and there many facts to each of the proposition before us, I shall first speak on the merits and demerits of the State’s accession to India. In the final analysis, as I understand it, it is the kinship of ideals which determines the strength of ties between two States. The national Congress has consistently supported the cause of the States peoples’ freedom. The autocratic rule of the Princes has been away with and representative Governments have been entrusted with the administration. Steps towards democratization have been taken and these have raised the people’s standard of living, brought about much needed social reconstruction, and, above all built up their very independence of spirit. Naturally, if we accede to India there is no danger of a revival of feudalism and autocracy. Moreover, during last four years, the Government of India has never tried to

interfere in our internal autonomy. This experience has strengthened our confidence in them as a democratic State.

The real character of a State is revealed in its constitution. The Indian Constitution has set before the country the goal of secular democracy based upon justice, freedom and equality for all without distinction. This is bedrock of modern democracy. This should meet the argument that the Muslims of Kashmir cannot have security in India, where the large majority of the population of Hindus. Any unnatural cleavage between religious groups is the legacy of imperialism, and no modern State can afford to encourage artificial divisions if it is to achieve progress and prosperity. The Indian Constitution has amply and finally repudiated the concept of a religious state, which is a throwback to medievalism, by guaranteeing the equality of right of all citizens in respect of their religion colour, caste and class.

The national movement in our state naturally gravitates towards these Principles of secular democracy. The people here will never accept a principle, which seeks to favour the interests of one religion or social group against another. This affinity in political principle as well as in past association, and our common path of suffering in the cause of freedom, must be weighed properly while deciding the future of the State.

We are also intimately concerned with the economic well-being of the people of this State. As I said before while referring to constitution building, political ideals are often meaningless unless linked with economic plans. As a State, we are mainly with agriculture and trade. As you know, and as I had detailed before we have been able to put through our "land to the tiller" legislation and make of it a practical success. Land and all it means is an inestimable blessing to our peasants who have dragged along in servitude to the landlord and his allies for centuries without number. We have been able under present conditions to carry these

reforms through; are we sure that in alliance with landlord ridden Pakistan, with so many feudal privileges in act, that this economic reforms of our will be tolerated? We have already heard that news of our Land Reforms has traveled to the peasants of the enemy occupied area of our State who vainly deserve alike status, and like benefits. In the second place, our economic welfare is bound of with our arts and crafts. The traditional markets for these precious goods, for which we are justly known all over the world, have been centered in India. The volume of our trade, inspite of the dislocation of the last few years, shows this, industry is also highly important to us. Potentially we are rich in minerals, and in the raw materials of industry; we need help to develop our resources. India, being more highly industrialized than Pakistan, can give us equipments, technical services and materials. She can help us too in marketing. Many goods also which it would not be practical for us to produce here for instance, sugar, cotton, cloth and otherwise essential commodities can be got by us in large quantities from India. It is around the sufficient supply of such basic necessities that the standard of living of the man-in-the-street depends.

...

The most powerful argument which can be advanced in her favour is that Pakistan is a Muslim State, and a big majority of our people being Muslim the State must accede to Pakistan. This claim of being a Muslim state is of course only a camouflage. It is a screen to dupe the common man, so that he may not see clearly that Pakistan is a feudal State in which a clique is trying by these methods to maintain itself in power. In addition to this, the appeal to religion constitutes a sentimental and a wrong approach to the question. Sentiment has its own place in life, but often it leads to irrational action. Some argue, supposedly natural corollary to this that our acceding to Pakistan our annihilation or survival depends. Facts have disproved this;

right thinking man would point out that Pakistan is not an organic unity of all the Muslims in this subcontinent. It has on the contrary, caused dispersion of the Indian Muslims for whose benefit it was claimed to have been created. There are two Pakistan at least a thousand miles apart from each other. The total population of western Pakistan which is contiguous to our State is hardly 25 million, while the total number of Muslims resident in India is as many as 40 million. As one Muslim is as good as another, the Kashmiri Muslim if they are worried by such considerations should choose the 40 million living in India.

Looking at the matter too from a more modern political angle, religious affinities alone do not and should not normally determine the political alliances of State. We do not find a Christian bloc, a Buddhist block or even a Muslim block, about which there is so much talk now-a-days in Pakistan. These days economic interests and a community of political ideals more appropriately influence the policies of state.

We have another important factor to consider, if the State decides to make this the predominant consideration. What will be the fate of the one million of non-Muslims now in our State? As things stand at present, there is no place for them in Pakistan. Any solution which will result in the displacement or the total subjugation of such large number of people will not be just or fair, and it is the responsibility of this House to ensure that the decision that it takes on accession does not militate against the interests of any religious group.

As regards the economic advantages, I have mentioned before the road and river links with Pakistan. In the last analysis, we must however remember that we are not that concerned only with the movement of the people but also with the movement of goods and the linking up of markets. In Pakistan there is a chronic death of markets for our

products. Neither, for that matter, can she help us with our industrialization, being herself industrially backward.”

58. The Instruments of Accession signed by the various erstwhile princely states were to be reflected in the Constitution of India itself. However, insofar as Jammu and Kashmir State was concerned, Article 370 was a special procedure contemplated due to the ‘*special conditions*’ in the State and hope was expressed that in times to come, ‘Jammu & Kashmir will become ripe for the same sort of integration as had taken place in the other States’.

59. Thus, the intent was clear: of complete integration but taking place over a period of time. Article 370 was envisaged as an interim system till the State’s Constituent Assembly came into being and for a *limited period*, on account of the special circumstances of the State.

60. If we were to turn to the wording of Article 370, we will find that it reflects this intent. The provision was placed in Part XXI, which was titled ‘Temporary and Transitional Provisions’ at the time. The marginal note to the provision was titled ‘Temporary Provisions with Respect to the State of Jammu and Kashmir’. Although the law is settled that a marginal note to a provision cannot dictate its meaning, the note can certainly be a guide to the provision’s drift and purpose. The meaning as a matter of course would have to be derived from a reading of the provision as a whole.

61. Article 370 opens with a *non obstante* clause, which implies that the contents of the provision remain unaffected by the other provisions of the Constitution. Clause (1)(a) specified that Article 238 shall not apply to the State. As a consequence, Part VI did not apply. Clause (1)(b) enabled the Parliament to make laws for the State predicated on a specification made by the President of the subjects comprising in the Union and Concurrent Lists. Sub-clause (b)(i) provided for consultation whereas (b)(ii) provided for concurrence by the State Government.

62. Article 370(1)(c) states that Articles 1 and 370 shall apply in relation to the State. The necessary consequence of the application of Article 1 is that Jammu and Kashmir became an integral part of 'India that is Bharat'.

63. Clause (1)(d) speaks of extending 'other provisions' of the Constitution to the State, subject to exceptions and modifications specified by the President. The first proviso stipulates that for matters specified in the IOA, consultation with the State Government is required, whereas for other matters concurrence would be necessary. Article 370(2) specifies the procedure when the Constituent Assembly of the State is in existence, providing that concurrence provided under Article 370(b)(ii) or the second proviso to Article 370(1)(d) shall be placed before such Assembly for further decision. Finally, Article 370(3) contained a procedure to bring the arrangement to an end by way of public notification. However, a recommendation by the Constituent Assembly was stated to be necessary in this regard.

64. Article 370 thus contemplated the mechanism for extending the Parliament's law-making power and the various provisions of the Constitution of India to the State, which show that Article 370 was meant to gradually bring the State bring on par with other States in this process of phased integration. We may note that this is evinced by the series of Constitutional Orders passed by the President in consultation or concurrence with the Government of the State, from time to time. Once the State was firmly a part of India under Article 1, only further integration remained to be undertaken over a period of time – by extending both the Parliament's lawmaking powers to the State and various provisions of the Constitution of India. This leaves no manner of doubt that Article 370 was a temporary provision, meant to serve a specific function.

65. At this stage, we reject Mr. Dinesh Dwivedi, Learned Senior Counsel's submission that the provision was temporary only until the State Constituent Assembly was dissolved. Other than the historical and textual reading alluded to above, this issue has been decided by a coordinate Bench of this Court in *Sampat Prakash*.¹¹⁰ There, the petitioner challenged COs 59 and 69 as *ultra vires* the power of the President under Article 370(1). The argument raised was that Article 370 was temporary and ceased to be operational after the State Constituent Assembly dissolved itself. The Court held otherwise, taking the view that the 'special conditions' necessitating the provision continued to exist, and

¹¹⁰ (supra)

the Constituent Assembly of the State had also not recommended that the provision cease to exist.

66. Nevertheless, we may note that the question of whether the power under 370(3) could be exercised after the dissolution of the State Constituent Assembly was not considered by the Court therein. That is a question that we are called to decide upon presently.

C. The effect of Article 370(3)

67. Our discussion above has dealt with two aspects. *First*, the recognition of Jammu and Kashmir's internal sovereignty through the mechanism of Article 370. Specifically, this was through Article 370(2), which contemplated the Constituent Assembly of the State. *Second*, the temporary nature of Article 370 as such, in light of historical context, the text of the provision, and the constitutional practice surrounding it.

68. Once these aspects are read with Article 370(3), the corollary is that there was a mechanism to bring the whole arrangement to an end. The effect of the power under Article 370(3), once exercised, would be that the Article 'shall cease to be operative'. In other words, the mechanism was meant to de-recognize the State's internal sovereignty. Thus, the exercise of the power under Article 370(3) meant that for the purposes of the Constitution of India, only the Constitution of India would apply to Jammu & Kashmir and not any other Constitution i.e. the Constitution of Jammu & Kashmir. Since the Constitution of India is a complete code, providing for all aspects of lawmaking and governance,

there would be no need for the Constitution of Jammu and Kashmir to apply to the State, and it would be replaced by the Constitution of India.

2 Article 370(3) after the dissolution of the Constituent Assembly of the State.

A. Article 370(3) continues to operate.

69. An important question left to be determined is whether the power under Article 370(3) could be exercised after the Constituent Assembly of the State had dissolved itself.

70. We have already noted the temporary nature of Article 370, as apparent from the provision's placement in the Constitution, its historical context, and its phraseology. Turning specifically to Article 370(3), which contains the procedure to bring the arrangement to an end, we may note that it vests power into two institutions: The President and the Jammu and Kashmir Constituent Assembly. The former is permanent, whereas the later is ephemeral by its very nature – meant for a specific purpose and intended to be extinguished after the purpose is achieved. The purpose of the Constituent Assembly was to draft a Constitution for the governance of the State. On the other hand, the purpose of Article 370, as noted above, was to slowly bring Jammu and Kashmir on par with other States in India. It can hardly be contended that the second (and in some ways, larger) purpose would be affected by the fulfilment of the first. The second purpose remained an ongoing exercise, long after the State Constituent Assembly was dissolved. Thus,

the conditionality in Article 370(3), of the requirement of a recommendation from the Constituent Assembly, cannot be read in a manner as to make the reference to the larger intention of the provision redundant.

71. In a nutshell, if the provision was meant to be temporary (as established above), Article 370(3) must be construed to continue to be in subsistence even after the expiry of the conditionality, i.e. the State's Constituent Assembly.

B. The President can exercise their power under sub-clause (3) without a recommendation from the Jammu and Kashmir Constituent Assembly.

72. The next question is to determine what process is to be followed for the President to exercise their power under Article 370(3).

73. As discussed above, the power under Article 370(3) vests with two institutions – the President, who has a permanent power and the Constituent Assembly of the State, which has a temporary power. From the above analysis, if Article 370 can be abrogated even after the Constituent Assembly of the State has been dissolved, what follows is that the power of the Constituent Assembly of the State to make a recommendation cannot be read as a condition precedent to the exercise of the power of the President to issue a declaration under Article 370(3).

74. The Petitioners argue that the recommendation of the Constituent Assembly of the State is necessary for the President to exercise their power, or in other words, that the power cannot be exercised unilaterally in the absence of the Constituent Assembly of the State. I am unable to agree with this view. When the Constituent Assembly ceased to exist, only the power of the Constituent Assembly to make a recommendation ceased to exist, that is, the proviso to Article 370 became otiose. The main provision, which is the President's power to issue a declaration continued to exist. Adopting the Petitioners' view would mean that Article 370, which was meant to be temporary, would no longer be temporary after the Constituent Assembly ceases to exist. This is incongruent with the purpose of Article 370.

75. On the other hand, the power of the President to unilaterally de-operationalize Article 370 once the Constituent Assembly of the State ceases to exist accords with the vision of the Constituent Assembly of India and the purpose of Article 370 – to ensure full constitutional integration as and when the circumstances permitted the same. An evaluation of various Presidential Orders issued under Article 370(1) demonstrate that very little remained in terms of making constitutional integration complete at the time of issuance of C.O. 273.

76. Even prior to the Constituent Assembly of the State, the President had the power to de-operationalize Article 370. For example, Article 371

of the Constitution, prior to being amended in 1956,¹¹¹ gave the President general control over Part B States for a period of ten years, extendable by the Parliament.

77. Recognizing the power of the President, the word ‘recommendation’ is used in Article 370(3), which implies a very narrow and minimal standard of agreement, especially when contrasted with the other conditionalities used in Article 370 which provide for ‘concurrence’ and ‘consultation’ with the Government of the State. A recommendation is advisory.¹¹² Thus, the conditionality attached to the exercise of the President’s power was so negligible that its absence cannot efface the power of the President itself.

78. Mr. Sibal submits that even the Union was aware that the recommendation of the Constituent Assembly was necessary, and thereby proceeded to substitute it for another body using the route of Article 367. However, this need not have been done, since the President had the power to exercise the power under Article 370(3) unilaterally.

3. The issuance of CO 272.

A. The power under Article 370(1)(d) read with Article 367 was improperly exercised.

79. On 5 August 2019, the President issued C.O. 272 under Article 370(1)(d) applying the entire Constitution of India to the State, but

¹¹¹ The Constitution (Seventh Amendment) Act, 1956.

¹¹² Black’s Law Dictionary, (VI Edition, 1990).

modified Article 367 by adding Article 367(4). Article 367(4), after C.O. 272, reads as follows:

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

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

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

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

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

80. In effect, C.O. 272 envisaged that the recommendation under Article 370(3) could be provided by the Legislative Assembly of the State. C.O. 272 has been impugned on the basis that Article 370(1)(d) cannot be used to amend Article 370 and that the power under Article 370(1)(d) can only be exercised with concurrence of the Government of the State.

81. The Petitioners contend that the addition of Article 367(4)(d) r/w Article 370(1)(d) amounts to an amendment of Article 370(3), which exceeds the power of the President to make modifications under Article 370(1)(d), and is not in accordance with the procedure under the Constitution.

82. Mr. Mehta submits that there was no necessity for the Union to modify Article 370(3) using Article 367(4)(d). However, as Mr. Sibal rightly submits, the Union's actions must be tested for what they are.

Article 370(1)(d) does not allow modifications to Article 370

83. The power under Article 370(1)(d) can only be exercised to make modifications to terms of the Constitution other than Article 370 and Article 1. This can be gathered from a combined reading of Article 370(1)(c) and (d). Article 370(1)(c) lays down that Article 1 and Article 370 shall apply to the state of Jammu and Kashmir. Article 370(1)(d) permits the President to apply *other provisions* of the Constitution, even with modifications. The exceptions to the provisions contemplated under Article 370(1)(d), that is Article 1 and Article 370, were also noted in

*Puranlal Lakhanpal v Union of India.*¹¹³ The route to modify Article 370 is through an order under Article 370(3), which gives the power to the President to de-operationalize Article 370 or to make it operational subject to exceptions and modifications.

84. The same approach was followed even in the past to modify Article 370. For example, Article 370 of the Constitution of India, as originally enacted referred to “Maharaja” in the Explanation to Para (ii) of sub-clause (b) of Article 370. The reference to “Maharaja” was replaced by *Sadar-i-Riyasat* by C.O. 44. This was done under Article 370(3) on the recommendation of the Constituent Assembly which was in subsistence at the time. The other orders referenced by the Respondents, such as C.O. 48 and C.O. 74 (which replaced *Sadar-i-Riyasat* with Governor), were merely clarificatory and did not make any substantive amendments to Article 370.

The direct effect of C.O. 272 is an amendment to Article 370(3)

85. Article 367(4) has been purportedly added under the President’s power to make modifications under Article 370(1)(d) when applying provisions of the Constitution of India. First, Article 367(4) is an interpretation clause whose purpose is to define and give meaning to terms. If we allow Article 367(4) to be used to amend provisions of the Constitution, circumventing the procedure under Article 368 of the

¹¹³ (1955) 2 SCR 1101

Constitution of India, or the procedure contemplated under other provisions, the effect would be disastrous.

86. Second, although the phrase “modifications” has not been defined in the Constitution, there are limits to every exercise of power. In this case, the modification is an addition that replaces one authority with another, but also changes the very core concept and nature of powers. The Constituent Assembly, is a constituent body and therefore, sovereign. A reference to a sovereign body cannot be construed as reference to Legislative Assembly. Dr. BR Ambedkar clearly underlined the importance of the constituent assembly being a non-partisan body as opposed to an elected legislative assembly where members would try to push a partisan agenda for the party. This has been captured in Jaganmohan Reddy J’s opinion in *Kesavananda Bharati* case.¹¹⁴

87. Thus, an exception or modification cannot make a radical alteration that effaces the fundamentals of the provision, as the substitution in C.O. 272 seeks to do.

88. Similarly, in *Delhi Laws Act, In Re*,¹¹⁵ the Court was examining the validity of Section 7 of the Delhi Laws Act, 1912, which provided as follows: “*The Provincial Government may, by notification in the Official Gazette, extend with such restrictions and modifications as it thinks fit to the Province of Delhi or any part thereof, any enactment which is in*

¹¹⁴ (supra).

¹¹⁵ (supra).

force in any part of British India at the date of such notification.” (Emphasis supplied). Specifically, Seven Judges of this Court analysed the phrase “restrictions and modifications” to not encompass unfettered powers for the statutory authority.

89. In response, the Union has relied on the observations in *Puranlal Lakhanpal v. President of India*,¹¹⁶ in which this Court the President’s power to make modifications ought to be considered in its “*widest possible amplitude*”. However, as submitted by the Petitioners, these observations are obiter. In this case, the Court was considering the constitutionality of a provision in C.O. 48, where the President, in exercise of his powers under Article 370(1)(d), had modified Article 81(1) as it applied to J&K. The modification provided that “*the representatives of the State in the House of the People shall be appointed by the President on the recommendation of the legislature of the State.*” Specifically, the Court dealt with the question as to whether this alteration constituted a ‘radical modification’ of Article 81 as it applied to Jammu & Kashmir, and whether the same was within the powers of the President under Article 370(1)(d). In Paragraph 3 of the said judgment, this Court noted that there had been no radical alteration of Article 81 by the modification effected in C.O. 48. This was because the President only had the power to nominate such persons who had been recommended by the State Legislature, which was elected on adult suffrage. The only way the Legislature could make a recommendation

¹¹⁶ (supra)

for this purpose was by voting. Thus, the effect was that six seats to the House of the People would be filled by indirect election. Since the element of election still remained (although indirect), it could not be said that the President had exceeded his powers under Article 370(1)(d).

90. Although the Court found in Paragraph 4 that the power was of the *widest possible amplitude*, these comments were made after the Court had already decided the question of whether C.O. 48 constituted a radical alteration of Article 81 and were not relevant for determination of the *lis*.

91. Thus, C.O. 272, to the extent that it “modifies” Article 367 by introducing Article 367(4) is invalid.

B. Concurrence with the Government of the State was not necessary to apply all the provisions of the Constitution of India to the State.

92. As discussed above, CO 272 applied all the provisions of the Constitution of India to the State. Article 370(1)(d) requires:

- i. Consultation with the Government of the State for applying those provisions which are declared by the President as corresponding to matters in the Instrument of Accession
- ii. Concurrence with the Government of the State for applying any other provisions

In this case, the Governor of the State had dissolved the Legislative Assembly of the State, there were no Council of Ministers, and the

President had assumed to himself all functions of the Government of the State under the 2018 Proclamation, as extended.

93. The Petitioners have contended that this is invalid, as Article 367(4)(c) of the Constitution of India read with Section 35 of the Constitution of the State required the Governor to act on the aid and advice of the Council of Ministers of the State. At the outset, Constitutional Orders have been issued in the past during President's Rule. In 1989, the State of Jammu and Kashmir was under Governor's Rule, and C.O. 136¹¹⁷ was issued. The Solicitor General also drew our attention to other Constitutional Orders 151,¹¹⁸ 154,¹¹⁹ 160¹²⁰ and 162¹²¹ issued during the President's Rule, which extended the period of President's Rule from three years to six years.

94. Notwithstanding these illustrations, I find that the concurrence of the Union Government can substitute the concurrence of the Government of the State in this case, since, as discussed above, the President has unilateral power to notify that Article 370 ceases to exist under Article 370(3), which, in effect, amounts to applying all provisions of the Constitution under Article 370(1)(d). Therefore, there was no requirement to obtain concurrence of the Government of the State in applying all provisions of the Constitution under C.O. 272.

¹¹⁷ The Constitution (Application to Jammu and Kashmir) Amendment Order, 1989.

¹¹⁸ The Constitution (Application to Jammu and Kashmir) Amendment Order, 1993.

¹¹⁹ The Constitution (Application to Jammu and Kashmir) Amendment Order, 1994.

¹²⁰ The Constitution (Application to Jammu and Kashmir) Amendment Order, 1995.

¹²¹ The Constitution (Application to Jammu and Kashmir) Amendment Order, 1996.

4. Whether the exercise of power under Article 356 was permissible while issuing COs 272 and 273.

A. Article 356 can be imposed once the Legislative Assembly had been dissolved:

95. The imposition of the Governor's rule under Section 92 of the Jammu & Kashmir Constitution on 20.6.2018 was a direct result of the failure of the constitutional machinery of the State. This is, however, not a matter of challenge in the present proceedings. On the Legislative Assembly being dissolved during the Governor's rule on 21.11.2018, the status quo position continued as prior to it, and on 28.11.2018, the Governor submitted a report to the President regarding the imposition of emergency under Article 356. The President's rule was, thus, imposed. The imposition of the President's rule took place as Section 92 of the Jammu & Kashmir Constitution limited the Governor's rule to six months without any scope to extend it, and there is nothing on record to show that any political party was willing to stake claim to form the Government during this period. There was a belated challenge to the imposition of the Central rule.

96. The consequence of the imposition of the President's rule was that the President assumed the power of the State Government under the Indian Constitution. This imposition was predicated on the failure of the constitutional machinery, which really took place prior to the Governor's rule.

97. The petitioners strongly relied upon the observations in *Thiru K.N. Rajgopal v. Thiru M. Karunanidhi & Others*¹²² to canvas that dissolution of the Assembly does not amount to failure of constitutional machinery within Article 356. The scenario is slightly different in the present case as that case did not contemplate the imposition of the President's rule subsequent to the Governor's rule. In the instant case, the President's rule was predicated on the failure of the constitutional machinery, which took place prior to the Governor's rule and formed the basis for the Governor's rule. The imposition was not solely based on the dissolution of the Legislative Assembly.

B. Article 356 permits the President to make irreversible changes:

98. The petitioners relied upon the observations of Sawant, J. in *S.R. Bommai*¹²³ case to harmonize clauses (1) & (3) of Article 356 to opine that the President's powers are meant to be checked by the Parliament and this check would be rendered meaningless if the President took an irreversible measure. One such irreversible measure was stated to be the dissolution of the Assembly. It was, however, held in *S.R. Bommai*,¹²⁴ that dissolution is permitted if the proclamation had been approved by the Parliament prior to such irreversible action, i.e., in a sense, the will of the people as reflected in the Parliament had given its imprimatur. The sequitur to the aforesaid view would be that the President had the

¹²² (1972) 4 SCC 733

¹²³ (supra)

¹²⁴ (supra)

power to make irreversible changes. The settled principle is that the President had the power to make irreversible changes if the proclamation under Article 356 had received prior approval from both Houses of Parliament. If we turn to the present case, the proclamation received approval on 28.12.2018 by the Lok Sabha and on 03.01.2019 by the Rajya Sabha. Thus, prior approval existed before the promulgation of COs 272 and 273. Secondly, since the proclamation of an emergency is justiciable and if the same is declared to be invalid by the Court, then, notwithstanding its approval by the Parliament, the status quo ante can be restored by the Court at its discretion. In other words, a dissolved Legislative Assembly and the Ministry can be revived. At the same time, while restoring the status quo ante, the Court can validate the President's action taken till that date and grant other necessary reliefs.

C. The President reserves both legislative and non-legislative powers after the proclamation of emergency:

99. To understand the powers conferred on the President after the emergency proclamation, we need to closely appreciate the statutory provision, i.e., Article 356 enumerating the powers exercisable by the President. It is to be borne in mind that the imposition of emergency highlights an exceptional situation. The inclusion of emergency provisions in the Constitution, starting with the procedure of imposing emergency to the powers of the President under clause (1) of Article 356, are all measures catering to an exigency, albeit aimed towards restoring the constitutional equilibrium of the State.

100. The constitutional scheme permits the Constitution to adapt itself to a unitary structure in exceptional situations, with the powers of the Union Parliament taking precedence over the State Legislature. Article 355 casts an additional burden on the Union to protect the State from any form of external aggression and internal disturbance whilst mandating the Union to oversee that every State is functioning in consonance with the Constitution. During Constituent Assembly debates, Dr. B.R.Ambedkar aptly distinguished the nature of the Constitution of India from the federalism in the United States and succinctly defined how the Constitution of India is equipped to adapt itself to a federal or unitary structure of governance based on the situation at hand. The relevant portion is extracted below:

“All federal systems including the American are placed in a tight mould of federalism. No matter what the circumstances, it cannot change its form and shape. It can never be unitary. On the other hand the Draft Constitution can be both unitary as well as federal according to the requirements of time and circumstances. In normal times, it is framed to work as a federal system. But in times of war it is so designed as to make it work as though it was a unitary system.”¹²⁵

101. Sub-clause (a) of Article 356(1) permits the President to assume “all or any” of the functions of the State Government, powers exercisable by the Governor or any other authority in the State.

¹²⁵ Constituent Assembly Debates, Vol. VII, Pg 34

However, the sub-clause excludes the President from assuming powers of the State Legislature. In the present case scenario, the State Legislature was already dissolved before the imposition of emergency under Article 356.

102. Sub-clause (b) of Article 356(1) allows the Union Parliament to exercise the powers of the State Legislature under a proclamation made by the President. Evidently, sub-clause (b) is of a wider amplitude since the term “powers of the Legislature of the State” includes all powers exercisable by the State Legislature, and the same would encompass legislative and non-legislative functions. When the provision explicitly allows the Union Parliament to exercise all powers of the State Legislature without carving out an exception, it would be incorrect to read the provision implying any restrictions. Though Article 357 is in continuance of Article 356, the former does not stipulate any bar or restriction on the Union Parliament or President to exercise non-legislative powers of the State Legislature.

103. Article 357 of the Constitution is another unitary feature of our Constitution since the prime and focal power of the State Legislature, i.e., the power to make laws, is transferred to the Union Parliament during an emergency and in the absence of a State Legislature. The Union Parliament further derives competency from Clause (1) of Article 357 to confer on the President the power of the State Legislature to make laws. These provisions illustrate that in the absence of a State Legislature during an emergency, the power of governance and daily

administrative duties cannot be kept in abeyance and must be transferred to any other competent authority till the resumption or election of a State Legislature. It is imperative for the President or the Union Parliament to take up the powers of the State Legislature; otherwise, a State without any administrative and governmental oversight is nothing short of anarchy. When the President is permitted to take over the legislative functions of the State Legislature under Article 357 and has received judicial imprimatur even to take extreme irreversible steps, such as dissolving the State Legislature, albeit after both Houses of Parliament approve the proclamation, there is no reason to curtail the President from exercising non-legislative powers of the State Legislature.

104. It is only in exceptional situations that the Constitution contemplates the exercise of such unitary powers. Constitutional and judicial safeguards have been imposed to ensure that the exercise of powers during an emergency is not unfettered and absolute. The imposition of an emergency is subject to judicial review as per ***S.R. Bommai***¹²⁶ and ***Rameshwar Prasad v. Union of India***,¹²⁷ and the Courts can assess the material that formed the basis of the advice to the President to impose an emergency. Furthermore, every proclamation must be ratified and approved by both Houses of Parliament under Article 356(3) within two months from the date of the proclamation.

¹²⁶ (supra)

¹²⁷ (2006) 2 SCC 1

5. The extent of powers under Article 3 and the constitutionality of the Reorganization Act.

A. The Parliament's authority to alter or extinguish a State under Article 3.

105. We may note that CO 272 had already been issued by the President at the time the Jammu and Kashmir Reorganization Bill, 2019 was taken up for discussion by the Parliament. This implied that all provisions of the Constitution of India were applicable to the State of Jammu and Kashmir. Article 3, as applicable to the rest of the country, was thus also applicable to Jammu and Kashmir. The Reorganization Act needs to be considered in this conspectus.

106. If we examine the powers of the Parliament under Article 3, it provides that Parliament may by law inter alia form new States, diminish the area of any State, and alter the boundaries or names of existing States. The Explanation I provides that in clauses (a) to (e) of Article 3, a 'State' includes 'Union Territory'. This implies that the power of the Parliament under Article 3(a), to make a law or form a new State or alter the boundary of a State includes the power to make law to form a new Union Territory. Explanation II to the provision notes that the power under clause (a) implies that the Parliament can form a Union Territory by uniting parts of any State or Union Territory to any other State or Union Territory.

107. The question before us is whether Article 3 contemplates the power to convert a State into a Union Territory, thereby abolishing its character as a State. It would be pertinent to refer to this Court's judgment in the *State of W.B. v. Union of India*,¹²⁸ where it was noted that it would be incorrect to presume that absolute sovereignty remained vested in the States. The Court drew this conclusion from the framework of the Constitution: noting that there was no concept of dual (State and national) citizenship in India, there were no independent Constitutions of States, and pertinently, Article 3 gave Parliament wide powers to alter the boundaries of States. States themselves had no constitutional guarantee against the Parliament's exercise of this power. The power of States extended merely to expressing their opinions on the same.

108. The position that States have no independent sovereignty was also reiterated by this Court in *Babulal Parate v. State of Bombay*,¹²⁹ where the Court was again persuaded to reach this finding by looking at the nature and extent of Article 3 itself. Another factor that weighed with the Court here was that the Parliament was enabled to exercise this power simply by making law, it was thus not even necessary to invoke the procedure of constitutional amendments.

109. We agree with these findings, as under the Constitutional setup, States have no independent or standalone sovereignty. They derive their

¹²⁸ (1964) 1 SCR

¹²⁹ (1960) 1 SCR 605

existence from the Constitution, which at the same time gives Parliament the power to vary or alter the boundaries of the State. Since the petitioners concede that the power under Article 3 extends to carving out a Union Territory from a State, the Respondents claim that this power must also extend to converting the State into a Union Territory *in toto*. The Petitioners contended that such a move would be contrary to the federal principle, which guarantees a two-tier democracy and continuing statehood under the Indian constitution. In response, the Solicitor-General contended that the federal structure is not disturbed by converting Jammu, Kashmir, and Ladakh into a Union Territory, as Article 239A (which is an entrenched part of the federal scheme) would apply to the newly formed Union Territories. However, at present, we need not examine this aspect in greater depth as the Solicitor-General assured this Court of the Union's commitment made on the floor of the House that the Statehood of Jammu and Kashmir would be restored in the near future upon elections being held.

B. Suspension of the first proviso to Article 3 was permissible during President's rule:

110. The second proviso to Article 3, as was applicable to the erstwhile State, was not in force after the issuance of CO 272 on 5.8.2019. The President was liable to refer the Bill introduced in 2019 to the State Legislature of the erstwhile Jammu & Kashmir to express their "views" in compliance with the first proviso to Article 3. However, during the operation of the President's Rule, which I have found to be valid, the functions of the State Legislature were being performed by the

Parliament. Therefore, it was not possible to take the views of the State Legislature. We may refer to the judgment in *Manohar Lal*¹³⁰ case on the legal proposition laid down. If we turn to the observations of Justice H.R. Khanna (as he then was) of the Delhi High Court, it was opined that the exercise of power of the State Legislature under Article 3 by the Parliament, in view of Article 356 being imposed, was permissible for purposes of reorganizing the State of Punjab in 1956. The need to consult the views of the concerned State Legislature was dispensed with in absence of a duly constituted State Legislature.

111. In conclusion, Sections 3 and 4 of the Reorganization Act, which was the effect of the exercise of power under Article 3 of the Constitution of India, is valid.

CONCLUSION:

112. On the basis of the analysis, I record the conclusions as follows:

- a. In light of this Court's prior finding in *Prem Nath Kaul*, the State of Jammu and Kashmir retained an element of internal sovereignty despite Maharaja Hari Singh signing the IoA with the Dominion. Article 370 of the Constitution recognized this internal sovereignty by recognizing the Constituent Assembly of the State;

¹³⁰ (supra)

- b. A combination of factors, such as Article 370's historical context, its text, and its subsequent practice, indicate that Article 370 was intended to be a temporary provision;
- c. Article 370(3) contained the mechanism to bring the temporary arrangement to an end, and in turn, to de-recognize the internal sovereignty of the State and apply the Constitution of India *in toto*;
- d. Since Article 370 is meant to be a temporary arrangement, it cannot be said that the mechanism under Article 370(3) came to an end after the State Constituent Assembly was dissolved;
- e. The power of the President under Article 370(3) was unaffected by the dissolution of the Constituent Assembly of Jammu and Kashmir. The President could exercise their power anytime after the dissolution of the Constituent Assembly of Jammu and Kashmir, in line with the aim of full integration of the State. Hence, C.O. 273, which declares that Article 370 shall cease to operate except as provided, and was issued under Article 370(3), is valid;
- f. The power to issue C.O. 272 without the concurrence of the Government of the State is valid, as the power of the President is not limited by the concurrence of the Government of the State in this case;
- g. The power under Article 370(1)(d) read with Article 367 cannot be used to do indirectly, what cannot be done directly. The power to make modifications under Article 370(1)(d) cannot be used to amend Article 370 and Article 367, which is an interpretation clause, cannot be used to

alter the character of a provision. Therefore, Paragraph 2 of C.O. 272, which amends Article 367(4) is *ultra vires* Article 370;

h. However, the President had the power to apply all provisions of the Constitution of India to Jammu and Kashmir under Article 370(1)(d), which is similar to the power under Article 370(3). Therefore, the remainder of Paragraph 2 of C.O. 272 is valid;

i. President's rule can be imposed after the dissolution of the State Assembly since the Presidential emergency was predicated on the failure of the constitutional machinery, which took place prior to the Governor's rule and the dissolution of the Assembly by the Governor of Jammu & Kashmir was only a subsequent consequence;

j. Once the Presidential proclamation has been approved by both Houses of Parliament, so as to reflect the will of the people, the President has the power under Article 356 to make irreversible changes, including the dissolution of the State Assembly;

k. The imposition of an emergency highlights an extraordinary situation and in the absence of the State Government and State Legislature, the power of these elected organs must lie with any other competent authority. Article 357 does not bar the President from exercising the non-legislative powers of the State Legislature, and Article 356(1)(b) allows the Union Parliament to exercise all powers of the State Legislature without distinguishing between legislative and non-legislative powers of the State Legislature. Therefore, the President is

permitted to exercise both legislative and non-legislative functions of the State Legislature. However, a proclamation of emergency is bound by judicial and constitutional scrutiny to ensure the exercise of emergency powers is not unfettered and absolute.

l. The challenge to Section 4 of the Jammu and Kashmir Reorganization Act on the touchstone of Article 3 is not required to be debated on account of the assurance on behalf of the Government of India that the Statehood of Jammu & Kashmir would be restored on elections being held;

m. It is imperative to ascertain the ‘views’ of the State Legislature under the first proviso to Article 3 if the proposed Bill affects the area, boundaries or name of the State. However, in the instant case since the State of Jammu & Kashmir was under President’s Rule and the State Legislature was already dissolved, the functions of the State Legislature were performed by the Union Parliament. Hence, it was not possible to ascertain the views of the State Legislature. It follows that Section 3 of the Reorganization Act is valid.

EPILOGUE:

113. The Valley of Kashmir carries a historical burden. It has a social context. Thus, in evolving a constitutional status of the region, it is difficult to segregate the aforesaid. “We, the people” of Jammu & Kashmir are at the heart of the debate. They have carried the burden as victims of the conflict for several decades originating from 1947 with

the invasion of the Valley. Intervening political circumstances did not permit a redressal to the fullest extent of the invasion. The consequences remained in terms of parts of Kashmir being occupied by other countries. The second round of insurgency holds its origin to the latter part of 1980s. There was a troubled situation at the ground level, which was apparently not redressed. It culminated in the migration of one part of the population of the State 1989-90. It is something that our country has had to live with and without any redressal for the people who had to leave their home and hearth. It was not a voluntary migration.

114. The situation became so aggravated that the very integrity and sovereignty of our country was endangered and, thus, the Army had to be called in. Armies are meant to fight battles with enemies of the State and not really to control the law and order situation within the State but then, these were peculiar times. The entry of the Army created its own ground realities in their endeavour to preserve the integrity of the State and the nation against foreign incursions. The men, women and children of the State have paid a heavy price.

115. During my travels home over the years, I have observed the social fabric waning, and the consequences of intergenerational trauma on an already fractured society. I cannot help but feel anguish for what peoples of the region have experienced and am constrained to write this Epilogue.

116. In order to move forward, the wounds need healing. What is at stake is not simply preventing the recurrence of injustice, but the burden of restoring the region's social fabric to what it has historically been based on – coexistence, tolerance and mutual respect. It is worth noting that even the partition of India in 1947 did not impair Jammu & Kashmir's communal and social harmony. In this context, Mahatma Gandhi is famously quoted to have said that Kashmir was a ray of hope for humanity!

117. The first step towards this is to achieve a collective understanding of the human rights violations perpetrated both by State and non-State actors, against peoples of the region. There have been numerous reports documenting these incidents over the years. Yet, what is lacking is a commonly accepted narrative of what happened, or in other words, a collective telling of the "truth". Internationally, the right of victims of human rights violations to the truth is an end in itself.¹³¹ It encompasses a structural investigation of the events and socio-political structures that led to the atrocity, the particular circumstances of individual suffering, and an authoritative reporting of the results of the investigation.¹³² Additionally, truth-telling provides an opportunity for victims to narrate their stories, which facilitates an acknowledgement from those

¹³¹ M. Klinkner and H. Davis, *THE RIGHT TO THE TRUTH IN INTERNATIONAL LAW: VICTIM'S RIGHTS IN HUMAN RIGHTS AND INTERNATIONAL CRIMINAL LAW*,

¹³² *Id.* at 63.

responsible for perpetuating the wrongs, and from society as a whole. This paves the way for reconciliation.

118. While there are different ways of achieving these objectives, truth and reconciliation commissions have been particularly effective globally. South Africa's truth and reconciliation commission was set up to investigate human rights violations perpetrated during the period of the Apartheid regime. It served as a means of reckoning or catharsis for victims, and fostered peace-building. Reflecting on its success, Albie Sachs, J notes:

*“...As a result of the TRC, the private sorrow and grief of tens of thousands was publicly acknowledged in an embracing and personalized way. Another form of acknowledgement emerged from the perpetrators themselves. They had to come forward openly in front of the television cameras, owning up to their crimes. Finally, there was acknowledgement by the whole country that these things happened and can happen again—that we needed to fit all these facts together into some kind of significant pattern which would enable us to understand their genesis and do what we could to minimize any possibility of their recurrence.”*¹³³

119. In the past, calls for setting up a truth and reconciliation commission have also been echoed by different sections of the Valley.

¹³³ A.Sachs, STRANGE ALCHEMY OF LIFE AND LAW, 155 (OUP, 2009).

120. In view of the in-roads made globally, and endogenous requests for truth and reconciliation, I recommend the setting up of an impartial truth and reconciliation commission (“Commission”). The Commission will investigate and report on the violation of human rights both by State and non-State actors perpetrated in Jammu & Kashmir at least since the 1980s and recommend measures for reconciliation.

121. This Commission should be set up expediently, before memory escapes. The exercise should be time-bound. There is already an entire generation of youth that has grown up with feelings of distrust and it is to them that we owe the greatest duty of reparation. At the same time, considering the significance of the matter and the sensitivities involved, it is my view that it is for the Government to devise the manner in which this should be set up, and to determine the best way forward for the commission.

122. I am alive to the challenge that recommending the setting up of a truth and reconciliation is beyond the realm of this Court. However, I am of the view that transitional justice, and its constituents, are facets of transformative constitutionalism. Globally, constitutionalism has evolved to encompass responsibility of both state and non-state actors with respect to human-rights violations.¹³⁴ This includes the duty to take

¹³⁴ RG Tietel, *Transitional Justice and Transformation of Constitutionalism* in GLOBALIZING TRANSITIONAL JUSTICE, (OUP, 2014).

reasonable steps to carry out investigations of violations.¹³⁵ It is in this context that the proposed truth and reconciliation commission accords with constitutionalism.

123. Our Constitution is no different, and is designed to ensure that courts offer justice in situations where fundamental rights have been violated. In doing justice, historically, our courts have been sensitive to the social demands of our polity and have offered flexible remedies. In *Vishaka and Others v State of Rajasthan*,¹³⁶ this Court issued guidelines to address workplace sexual harassment in the absence of an enacted law, which operated until the Parliament enacted the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013.

124. As a word of caution, the Commission, once constituted, should not turn into a criminal court and must instead follow a humanized and personalized process enabling people to share what they have been through uninhibitedly. It should be based on dialogue, allowing for different viewpoints and inputs from all sides. In the context of South Africa's truth and reconciliation commission, Albie Sachs, J observed:

“Judges do not cry. Archbishop Tutu cried. It was not a court of law in the sense of an austere institution making highly formalized

¹³⁵ Velasquez Rodriguez v Honduras, (Ser. C) No. 4 (IACHR) 1988.

¹³⁶ (1997) 6 SCC 241

findings. It was an intensely human and personalized body, there to hear in an appropriately dignified setting what people had been through. There were comforters sitting next to the witnesses—in a court of law no one is there to help the witness, to pat the shoulder, or provide water or tissues when the person weeps. Frequently the sessions would start with a song in beautiful African harmony intended to give a sense of encouragement and support to everybody present. Or it could begin with prayers. And thereafter people spoke and spoke in all the regions and in all the languages of the country. The testimony was televised, and thus the nation became witness to what had happened and heard the stories directly from the mouths of the persons concerned. Those who spoke were not complainants in a court denouncing accused persons in the dock. Nor were they litigants demanding damages for themselves, so that the greater the loss, the greater the sum they would receive.”¹³⁷

125. Taking a leaf out of South Africa’s book, the principles of “ubuntu”, or the art of humanity, and inclusiveness should be central to the process. This will facilitate a reparative approach that enables forgiveness for the wounds of the past, and forms the basis of achieving a shared national identity. Needless to say, the Commission is only one of the many avenues towards the goal of systemic reform. It is my sincere

¹³⁷ (supra)

hope that much will be achieved when Kashmiris open their hearts to embracing the past and facilitate the people who were compelled to migrate to come back with dignity. Whatever has been, has been but the future is ours to see.¹³⁸

.....J.
[Sanjay Kishan Kaul]

New Delhi.
December 11, 2023.

¹³⁸ With apologies to the song, “Que Sera, Sera”, a song by Jay Livingston and Ray Evans.