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IN THE SUPREME COURT OF INDIA
ORIGINAL WRIT / APPELLATE JURISDICTION

Writ Petition (Civil) No. 1099 of 2019

IN RE: ARTICLE 370 OF THE CONSTITUTION

With

Writ Petition (C) No. 871 of 2015

With

Writ Petition (C) No. 722 of 2014

With

SLP (C) No. 19618 of 2017

With

Writ Petition (C) No. 1013 of 2019

With

Writ Petition (C) No. 1082 of 2019

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Writ Petition (C) No. 1068 of 2019

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Writ Petition (C) No. 1037 of 2019

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Writ Petition (C) No. 1062 of 2019

With

Writ Petition (C) No. 1070 of 2019

With

Writ Petition (C) No. 1104 of 2019

With

Writ Petition (C) No. 1165 of 2019

With

Writ Petition (C) No. 1210 of 2019

With

Writ Petition (C) No. 1222 of 2019

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Writ Petition (C) No. 396 of 2017

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Writ Petition (C) No. 924 of 2018

With

Writ Petition (C) No. 1092 of 2018

With

Writ Petition (C) No. 1162 of 2018

With

Writ Petition (C) No. 1048 of 2019

With

Writ Petition (C) No. 1268 of 2019

And With

Writ Petition (C) No. 1368 of 2019

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J U D G M E N T

Dr Dhananjaya Y Chandrachud, CJI

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1. This judgment is enriched by the discussions with my distinguished colleagues - Justice Sanjay Kishan Kaul, Justice Sanjiv Khanna, Justice Bhushan R Gavai and Justice Surya Kant - during the course of oral arguments and thereafter. Their inputs to the judgment have led to a synthesis of thought resulting in a unanimous outcome. We record our deep appreciation for the scholarship of senior counsel during the course of arguments and in the written briefs, assisted by an able team of junior counsel.

A. Background

2. Article 370 of the Constitution of India incorporated special arrangements for the governance of the State of Jammu and Kashmir. The President issued Constitutional Orders 272 and 273 during the subsistence of a Proclamation under Article 356(1)(b). These orders have the effect of applying the entire Constitution of India to the State of Jammu and Kashmir and abrogating Article 370. Contemporaneously, Parliament enacted the Jammu and Kashmir Reorganisation Act 2019[1] which bifurcated the State into two Union territories. The petitioners have challenged the constitutionality of these actions.

3. The State government in Jammu and Kashmir was formed by an alliance of the Peoples' Democratic Party[2] with the Bharatiya Janata Party in 2015. The Chief Minister of the State, Ms Mehbooba Mufti, belonging to the PDP,

[1] "Reorganisation Act"
[2] "PDP"

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resigned on 19 June 2018 after the Bharatiya Janata Party withdrew support. The next day, the Governor issued a Proclamation under Section 92 of the Constitution of Jammu and Kashmir, which entrusts power to the Governor to assume all the powers and functions of the Government of the State in the event of a failure of the constitutional machinery in the State. A Proclamation under Section 92 requires the concurrence of the President of India under clause (5). Under clause (3) of Section 92, the Proclamation ceases to exist after six months. The promulgation of Governor's rule in the State was made with the concurrence of the President. On 21 November 2018, the Governor dissolved the Legislative Assembly of the State under Section 53(2) of the Constitution of Jammu and Kashmir.

4. On 28 November 2018, the Governor submitted a report to the President recommending the invocation of Article 356 of the Constitution since six months since the issuance of the Proclamation under Section 92(3) was to end. On 19 December 2018, the President issued a Proclamation under Article 356 promulgating President's rule in the State upon considering the report from the Governor of Jammu and Kashmir and other information. The Proclamation, *inter alia,* contained the following declarations:

   a. The functions of the Government of the State and the powers vested in or exercisable by the Governor of that State under the Constitution of India and the State Constitution are assumed by the President;

   b. The powers of the Legislature of the State shall be exercisable by or under the authority of Parliament; and

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c. The first proviso and second provisos to Article 3 of the Constitution stand suspended.

5. The Proclamation was approved by the Lok Sabha on 28 December 2018 and by the Rajya Sabha on 3 January 2019. On the same day, the President issued another order stating that the functions of the Government of the State and the powers vested in the Governor which shall be exercisable by the President in view of the above Proclamation shall be exercisable also by the Governor subject to the superintendence, direction, and control of the President.

6. The extension of President's rule was approved by the Lok Sabha on 28 June 2019 and by the Rajya Sabha on 1 July 2019. President's rule was extended on 3 July 2019. The duration of President's rule in terms of Article 356(4) in its application to the State of Jammu and Kashmir was six months after the second of the resolutions was passed by the Rajya Sabha on 3 July 2019.

7. On 5 August 2019, the President issued CO 272, the Constitution (Application to Jammu and Kashmir) Order 2019. By the CO, the President in exercise of powers under Article 370(1), applied:

a. All the provisions of the Constitution of India by superseding all previous Constitution Orders by which select provisions of the Constitution were made applicable to Jammu and Kashmir either with or without modifications; and

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b. Article 367(4) in which a modification was made, changing the term "Constituent Assembly" in the proviso to Article 370(3) to "Legislative Assembly."

8. On 5 August 2019, Parliament undertook the following exercise in its capacity as the legislature of the State, since the Proclamation under Article 356 was subsisting:

a. The Rajya Sabha recommended to the President under Article 370(3) that all clauses of Article 370 shall cease to operate:

> "That this House recommends the following public notification to be issued by the President of India under Article 370 (3): '
>
> In exercise of the powers conferred by Clause (3) of article 370 read with clause (1) of article 370 of the Constitution of India, the President, on the recommendation of the Parliament, is pleased to declare that, as from [*date*], all clauses of the said article 370 shall cease to be operative except clause (1) thereof which shall read as under, namely:
>
> "All provisions of this Constitution, as amended from time to time, without any modifications or exceptions, shall apply to the State of Jammu and Kashmir notwithstanding anything contrary contained in article 152 or article 308 or any other article of this Constitution or any other provision of the Constitution of Jammu and Kashmir or any law, document, judgement, ordinance, order, bye-law, rule, regulation; notification, custom or usage having the force of law in the territory of India, or any other instrument, treaty or agreement as envisaged under article 363 or otherwise."

b. Simultaneously, the Rajya Sabha expressed its views on the Jammu and Kashmir Reorganisation Bill 2019[3] which was sent to the House under the proviso to Article 3, in the following terms :

[3] "Reorganisation Bill"

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> "That the President of India has referred the Jammu and Kashmir Reorganisation Bill, 2019 to this House under the proviso to article 3 of the Constitution of India for its views as this House is vested with the powers of the State Legislature of Jammu and Kashmir, as per proclamation of the President of India dated 19 December, 2018. This House resolves to express the view to accept the Jammu and Kashmir Reorganisation Bill, 2019."

c. Simultaneously, the Lok Sabha also accepted the Jammu and Kashmir Reorganisation Bill 2019 in terms of the following resolution:

> "That the President of India has referred the Jammu and Kashmir Reorganisation Bill, 2019 to this House under the proviso to article 3 of the Constitution of India for its views as this House is vested with the powers of the State Legislature of Jammu and Kashmir, as per proclamation of the President of India dated 19 December, 2018. This House resolves to express the view to accept the Jammu and Kashmir Reorganisation Bill 2019"

d. The Rajya Sabha passed the Jammu and Kashmir Reorganisation Act 2019[4].

9. On 6 August 2019, Parliament discharged its functions as the legislature of the State of Jammu and Kashmir and proceeded with the following legislative business:

a. The Lok Sabha recommended to the President under Article 370 (3) that the special provision in Article 370 shall cease to be operative and the provision would instead apply all the provisions of the Constitution to the State of Jammu and Kashmir without any modifications and exceptions:

> "That this House recommends the following public notification to be issued by the President of India under Article 370(3):
>
> Declaration under Article 370(3) of the Constitution. In exercise of the powers conferred by Clause (3) of article 370 read with clause

[4] "Reorganisation Act"

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> (1) of article 370 of the Constitution of India, the President, on the recommendation of the Parliament, is pleased to declare that, as from the date on which the President of India signs the Declaration and published in the official Gazette, all clauses of the said article 370 shall cease to be operative except clause (1) thereof which shall read as under; namely:-
>
> "All provisions of this Constitution; as amended from time to time, without any modifications or exceptions, shall apply to the State of Jammu and Kashmir notwithstanding anything contrary contained in article 152 or article 308 or any other article of this Constitution or any other provision of the Constitution of Jammu and Kashmir or any law, document, judgement, ordinance, order, bye-law, rule, regulation; notification, custom or usage having the force of law in the territory of India, or any other instrument, treaty or agreement as envisaged under article 363 or otherwise."

b. The Lok Sabha passed the Reorganisation Act.

10. Both Houses of Parliament passed the Reorganisation Bill (after expressing their views in favour of such an exercise as stipulated in the proviso to Article 3) bifurcating the State of Jammu and Kashmir into:

    a. the Union Territory of Jammu and Kashmir with the Legislative Assembly; and

    b. the Union Territory of Ladakh without the Legislative Assembly.

11. The Appendix to the Reorganisation Bill contained a Schedule listing out central legislations enacted under the Union List and the Concurrent List by Parliament which would thereafter be applicable to the two Union Territories. Amendments have also been carried out to existing state legislations to bring them in conformity with the Constitution.

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12. On 6 August 2019, pursuant to the recommendation by the Lok Sabha, the President of India issued CO 273 under Article 370(3) of the Constitution as amended by CO 272 by which Article 370 ceased to apply with effect from 6 August 2019. On 9 August 2019, the Union Ministry of Home Affairs issued a notification, S.O. 2889 (E), in exercise of the powers conferred by Section 2(a) of the Reorganisation Act bringing the provisions of the Act into force with effect from 31 October 2019 following Presidential assent. Pursuant to this notification, the State of Jammu and Kashmir stood bifurcated on 31 October 2019 into the Union Territory of Ladakh and the Union Territory of Jammu and Kashmir. President's rule was revoked.

B. Reference

13. On 19 August 2019, the jurisdiction of this Court was invoked under Article 32 of the Constitution in **Dr Shah Faesal** v. **Union of India**.[5]

14. When a batch of petitions challenging the constitutional validity of CO 272 and CO 273 came before a Constitution Bench, the petitioners sought a reference to a larger bench. The submission was that in **Prem Nath Kaul** v. **State of Jammu & Kashmir**,[6] a Constitution Bench had held that Article 370 was temporary in nature. According to counsel, subsequently in **Sampat Prakash** v. **State of Jammu & Kashmir**,[7] another Constitution Bench held (without

[5] Writ Petition (c) No. 1099 of 2019
[6] 1959 Suppl (2) SCR 270
[7] (1969) 2 SCR 365

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considering the earlier decision in **Prem Nath Kaul** (supra)) that Article 370 is not a temporary provision because:

a. Neither the Constituent Assembly of Jammu and Kashmir nor the President had ever made a declaration that Article 370 ceased to be operative; and

b. In view of the proviso to Article 368 as it applied to Jammu and Kashmir, the President is required to exercise powers from time to time under Article 370 to bring into effect constitutional amendments made under Article 368 in the State of Jammu and Kashmir.

15. A reference to a larger Bench was also sought on the ground that the subsequent decision of the Constitution Bench in **Mohd Maqbool Damnoo** v. **State of Jammu and Kashmir**[8] ignored the interpretation of Article 370 in **Prem Nath Kaul** (supra) and, in any event, the judgment does not decide whether Article 370 can continue to operate after the Constitution of Jammu and Kashmir was adopted. The Constitution Bench in **Dr Shah Faesal** (supra) framed three questions:

> "(i) When can a matter be referred to a larger Bench?
>
> .(ii) Whether there is a requirement to refer the present matter to a larger Bench in view of the alleged contradictory views of this Court in Prem Nath Kaul case [Prem Nath Kaul v. State of J&K, AIR 1959 SC 749] and Sampat Prakash case [Sampat Prakash v. State of J&K, AIR 1970 SC 1118] ?
>
> (iii) Whether Sampat Prakash case [Sampat Prakash v. State of J&K, AIR 1970 SC 1118] is per incuriam for not taking into

[8] (1972) 1 SCC 536

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consideration the decision of the Court in Prem Nath Kaul case [Prem Nath Kaul v. State of J&K, AIR 1959 SC 749] ?"

16. The Constitution Bench, while rejecting the plea for a reference to a larger Bench, adduced three reasons which emerge from the extract of the judgment set out below:

"42. First, it is worth highlighting that judgments cannot be interpreted in a vacuum, separate from their facts and context. Observations made in a judgment cannot be selectively picked in order to give them a particular meaning. The Court in Prem Nath Kaul case [Prem Nath Kaul v. State of J&K, AIR 1959 SC 749] had to determine the legislative competence of the Yuvaraj, in passing a particular enactment. The enactment was passed during the interregnum period, before the formulation of the Constitution of State of Jammu and Kashmir, but after coming into force of the Constitution of India. The observations made by the Constitution Bench in this case, regarding the importance given to the decision of the Constituent Assembly of the State of Jammu and Kashmir needs to be read in the light of these facts"

43. Second, the framework of Article 370(2) of the Indian Constitution was such that any decision taken by the State Government, which was not an elected body but the Maharaja of the State acting on the advice of the Council of Ministers which was in office by virtue of the Maharaja's proclamation dated 5-3-1948, prior to the sitting of the Constituent Assembly of the State, would have to be placed before the Constituent Assembly, for its decision as provided under Article 370(2) of the Constitution. The rationale for the same is clear, as the task of the Constituent Assembly was to further clarify the scope and ambit of the constitutional relationship between the Union of India and the State of Jammu and Kashmir, on which the State Government as defined under Article 370 might have already taken some decisions, before the convening of the Constituent Assembly, which the Constituent Assembly in its wisdom, might ultimately not agree with. Hence, the Court in Prem Nath Kaul [Prem Nath Kaul v. State of J&K, AIR 1959 SC 749] indicated that the Constituent Assembly's decision under Article 370(2) was final. This finality has to be read as being limited to those decisions taken by the State Government under Article 370 prior to

the convening of the Constituent Assembly of the State, in line with the language of Article 370(2).

44. Third, the Constitution Bench in Prem Nath Kaul case [Prem Nath Kaul v. State of J&K, AIR 1959 SC 749] did not discuss the continuation or cessation of the operation of Article 370 of the

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> Constitution after the dissolution of the Constituent Assembly of the State. This was not an issue in question before the Court, unlike in Sampat Prakash case [Sampat Prakash v. State of J&K, AIR 1970 SC 1118] where the contention was specifically made before, and refuted by, the Court. This Court sees no reason to read into Prem Nath Kaul case [Prem Nath Kaul v. State of J&K, AIR 1959 SC 749] an interpretation which results in it being in conflict with the subsequent judgments of this Court, particularly when an ordinary reading of the judgment does not result in such an interpretation."

C. Submissions

17. Mr Kapil Sibal, Dr Gopal Subramanium, Mr Zafar A Shah, Dr Rajeev Dhavan, Mr Dushyant Dave, Mr Shekar Naphade, Mr Dinesh Dwivedi, Mr CU Singh, Mr Sanjay Parikh, Mr PC Sen, Ms Nitya Ramakrishnan, Dr Menaka Guruswamy, Mr Muzaffar H Baig, and Mr Gopal Sankaranarayanan appeared for the petitioners. Mr Manish Tiwari, and Mr Warisha Farasat also appeared for the petitioners. Mr Irfan Hafeez Lone and Dr Zahoor Ahmad Bhat were the parties in person.

18. Mr R Venkataramani, Attorney General, Mr Tushar Mehta, Solicitor General; Mr. Harish Salve, Mr Rakesh Dwivedi and Mr V Giri, Mr Mahesh Jethmalani, Mr Gurukrishna Kumar, Mr Ravindra Kumar Raizada, Mr Bimal Jod senior counsel; Mr KM Nataraj and Vikramjit Banerjee, Additional Solicitor Generals appeared on behalf of the respondents. Mr. Kanu Agrawal, Ms Archana Pathak Dave, Mr VK Biju, Mr Vikram Sharma, Dr Aniruddha Rajput, Mr DV Raina, Mr Rahul Tanwani, Mr Eklavya Dwivedi, Mr Rajesh Bhushan, and Dr Charu Mathur also appeared for the respondents.

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PART C

i. Submissions of the petitioners

19. The Governor's Proclamation under Section 92 of the Constitution of Jammu and Kashmir dated 20 June 2018 is challenged as being *void*. The mandatory pre-condition of the satisfaction of the Governor that the State government cannot be carried out in accordance with the provisions of the Constitution, was not fulfilled.[9] It was a political act, in violation of the Constitution, brought about with the intention to ultimately abrogate Article 370.[10] Governor's rule was imposed on 20 June 2018, a day after the Bharatiya Janata Party withdrew from the coalition on 19 June 2019. No opportunity was afforded to the other parties to demonstrate strength in the house. Other parties – the Congress, the PDP and the National Conference – had, in a fax to the Governor expressed willingness to form a coalition.[11] It was incumbent upon the Governor to reach out to the parties and explore the possibilities of forming a government.[12]

20. Section 92 of the Jammu and Kashmir Constitution envisages a mandatory maximum period of six months of Governor's rule, which cannot be extended any further. Successive imposition of the President's rule after Governor's rule defeats the scheme of Section 92 and amounts to a fraud on the Jammu and Kashmir Constitution and the Indian Constitution.[13] The manner in which the Union Government has acted and the decisions of the Governor and the

[9] Written Submissions on Behalf of Mr. Kapil Sibal, Senior Advocate.
[10] Written Submissions on Behalf of Mr. Kapil Sibal, Senior Advocate.
[11] Written Submissions of Dr. Rajeev Dhavan, Senior Advocate.
[12] Written Submissions on behalf of Mr. Kapil Sibal, Senior Advocate.
[13] Submissions By Dr. Rajeev Dhavan, Senior Advocate.; Rejoinder on behalf Of Mr. Kapil Sibal Sr. Advocate.

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President were all political stratagems to achieve outcomes that are unconstitutional.[14]

21. The President's Proclamation under Article 356 dated 19th December 2018 is *void ab initio* for the following reasons:

a. After the Proclamation under Section 92, the Proclamation under Article 356 was issued by the President. This was also without basis as the report of the Governor showing the failure of constitutional machinery was not placed before Parliament[15]. The debates in the Lok Sabha and the Rajya Sabha show that the motion approving the Proclamation was passed without debate and without the Governor's report[16]; and

b. A unilateral exercise of the powers under Article 356 sets a dangerous precedent and raises the apprehension that such a treatment can be extended to any other state of the country in the exercise of emergency powers under the Constitution. It renders the federal structure susceptible to the whims of the political party in power. It can also be used to undermine the special provisions under the Constitution designated for the special interests of the North-Eastern States of India.[17]

[14] Rejoinder on behalf of Mr. Kapil Sibal Sr. Advocate.
[15] Written Submissions of Mr. Dushyant Dave, Senior Advocate; S.R. Bommai vs Union of India (1994) 3 SCC 1.
[16] Submissions By Dr. Rajeev Dhavan, Senior Advocate.
[17] Written Submissions on behalf of Impleader by Manish Tewari & Mr. Abhimanyu Tewari, Advocate.

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PART C

22. The impugned actions taken when the Proclamation issued under Article 356 was in force are *void*. There are limits on the exercise of power by the President after the issuance of a Proclamation for the following reasons:

a. Once the Legislative Assembly of the State is dissolved, as was the case in the state, after the Proclamation of Governor's rule, there was no occasion for the President to exercise the power under Article 356. This renders the Proclamation dated 19 December 2018 and all consequential actions – the impugned COs and suspension of the second proviso to Article 3 applicable to the State of Jammu and Kashmir *void ab initio*[18];

b. The purpose of Article 356 is to restore governance in the State.[19] Article 356 is housed in Part XVIII of the Constitution of India- which deals with 'Emergency provisions'. The President must be satisfied that the government cannot be carried out in accordance with "this Constitution". The emphasis on "this" indicates the nature of the power. The object of the exercise is to ensure that constitutional government is possible in the state[20];

c. Article 357(2) stipulates that the laws made by the President or the Parliament, in the exercise of the power of the state legislature, shall continue, after the Proclamation has ceased to operate, until altered or

[18] Thiru K.N. Rajagopal v. Thiru M. Karunanidhi, (1972) 4 SCC 733 [5 Judges], Submissions on Behalf of The Petitioners, Mr Shekhar Naphade, Senior Advocate; Written Submissions By Sh. Sanjay Parikh, Senior Advocate; Written Submissions of Gopal Sankaranarayanan, Senior Advocate on Behalf of the Petitioner; Rejoinder on behalf of Mr. Kapil Sibal Sr. Advocate.
[19] SR Bommai (Paras 108,113, 288, 289),
[20] Outline of Submissions on Behalf of the Petitioners by Raju Ramachandran, Senior Advocate.

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repealed or amended "by a competent Legislature or other authority." These words presume the power of the restored legislature to alter or undo the changes made by the Union in respect of the State's affairs. Article 357(2) allows the subsequent State Legislature to alter or repeal any laws made by the Parliament in the exercise of such powers. Thus, the Parliament cannot make **irreversible changes** in the exercise of this temporary power during the Proclamation under Article 356.[21] Dr. BR Ambedkar clarified that the purpose of the power under Articles 356 and 357 was to ensure that the "form of constitution" was maintained[22];

d. Article 250(2) states that laws shall cease to have effect after six months from the date when the Proclamation ceases to operate[23]. Considering the restorative purpose and the temporary nature of the power, the President could not have, in the exercise of this power effected a permanent change to the Constitution by way of the impugned actions;

e. In accordance with Article 356(1), the power of the Legislature and the Executive of the State are transferred to the Parliament and the President respectively. However, Article 356 does not envisage a transfer of the constituent power to the President or to Parliament**.** Constituent power cannot be transferred unless the Constitution of Jammu and Kashmir specifically provides for it. The President does not

[21] Written Submissions of Dr. Rajeev Dhavan, Senior Counsel; Written Submissions of Mr. Gopal Subramanium, Senior Advocate on behalf of the Petitioner; Written Submissions on Behalf of The Intervenor By Dr. Menaka Guruswamy, Senior Advocate; Written Submissions of Ms. Nitya Ramakrishnan, Senior Advocate on behalf of Intervenors;
[22] Written Submissions of Mr. Gopal Subramanium, Senior Advocate on behalf of the Petitioner.
[23] Outline of Submissions on Behalf of the Petitioners by Raju Ramachandran, Senior Advocate.

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acquire the power of the State Government under Article 370(1)(d), to give concurrence, and Parliament does not acquire the constituent powers of the Legislative Assembly to recommend a Presidential notification under Article 370(3)[24];

f. This Court in **Krishna Kumar Singh** v. **State of Bihar**[25] has held that the President's ordinance-making power cannot be treated as a constitutional equivalent of ordinary legislative power, notwithstanding a deeming provision which confers the same force and effect on it. Similarly, the functions of the Union executive or legislature cannot be treated as constitutional equivalents of the powers of the state executive or legislature, due to a "*democratic deficit*"[26]; and

g. Articles 75 and 164 of the Constitution stipulate that the Council of Ministers is collectively responsible to the Legislature. The State Legislature is vested with certain non-legislative functions such as questions and debates. Such non-legislative functions vested in the State Legislature cannot be exercised by Parliament during President's rule[27].

23. The will of the people finds no expression in the purported concurrence of the State Government, essentially the Governor, since there was no Council of

[24] Outline of Submissions on Behalf of the Petitioners by Raju Ramachandran, Senior Advocate; Synopsis and Written Submissions/ Arguments.
[25] (2017) 3 SCC 1
[26] Written Submissions by Mr Gopal Subramanium, Senior Advocate.
[27] Written Submissions of Dr. Rajeev Dhavan, Senior Advocate.

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Ministers in place. Thus, the COs are undemocratic for want of public will and public reason.[28]

24. Article 370 must be interpreted keeping in mind the following principles:

a. Article 370 envisages three modes of cooperation between the Union and the State of Jammu and Kashmir: the lowest degree is under the first proviso to Article 370(1)(d) where only consultation with the State Government is required; the second degree is under Article 370(1)(b)(ii) and the second proviso to Article 370(1)(d), where consent of the Government of the State is required; and the highest degree is under Article 370(3) where the recommendation of the Constituent Assembly of Jammu and Kashmir is required[29];

b. Article 370 must be interpreted in the context of three pillars namely- asymmetric federalism[30], autonomy, and consent.[31] Asymmetrical federalism, that is differential rights to certain federal sub-units is a part of the Indian federal scheme. It is a part of the basic structure, as is federalism[32];

c. Article 370 reflects the agreement between two contracting parties namely the acceding State of Jammu and Kashmir and the Dominion of

[28] Outline of Submissions on Behalf of The Petitioners by Muzaffar H. Baig, Senior Advocate; Rejoinder on behalf of Mr. Kapil Sibal Sr. Advocate.
[29] Written Submissions on Behalf of Mr. Kapil Sibal.
[30] Submissions On Behalf Of The Petitioners, Mr Shekhar Naphade.
[31] Written Submissions of Mr. Gopal Subramanium, Senior Advocate on behalf of the Petitioner.
[32] Submissions on behalf of the petitioners by Senior Advocate Prashanto Chandra Sen.

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India, under which the Constituent Assembly of Jammu and Kashmir was given the power to finally determine the state's affiliation to the Union and its limits. Once this relationship was crystallised by the Constitution of the State, there was no scope of change, since the Constituent Assembly, solely empowered to change the relationship, ceased to exist[33]; and

d. Article 370 recognized the constituent power of the people of the State of Jammu and Kashmir articulated through the Constituent Assembly of Jammu and Kashmir or otherwise, to make or remake the Constitution of the state, subject to Article 1 of the Constitution of India.[34]

25. The marginal note to Article 370 and the placement of the provision in Part XXI of the Constitution cannot be used to hold that the provision is temporary for the following reasons:

a. Since the Maharaja or his successors did not sign a merger agreement with the Union of India, the State retained residual sovereignty and Article 370 was incorporated in the Indian Constitution as a recognition of the same.[35] The reason for placing Article 370 in Part XXI of the Constitution of India was that the Constituent Assembly of India assumed that as and when the Constituent Assembly of the State will be established, it would recommend the abrogation of Article 370, and

[33] Outline Of Submissions on Behalf Of The Petitioners By Muzaffar H. Baig, Senior Advocate.
[34] Written Submissions of Mr. Gopal Subramanium, Senior Advocate on behalf of the Petitioner.
[35] Submissions by Mr Zaffar Shah, Senior Advocate.

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thereby fully integrate the state into the Union. It cannot be said that by reason of being placed in Chapter XXI of the Constitution of India, Article 370 could have been abrogated at any time by the President. This is apparent also from the fact that the provision was kept out of the purview of Article 368 of the Constitution, and a mechanism for its abrogation was provided in Article 370(3).[36] Thus, it was temporary only insofar as the Constituent Assembly was not in place at the time of its incorporation into the Indian Constitution. It was a permanent provision of the Indian Constitution notwithstanding its placement in Chapter XXI of the Constitution and the state was to be governed by two Constitutions[37]; and

b. The word 'temporary' in the marginal note, does not refer to the limited duration of time, after which the Article would cease to exist. It implies that unless the specific conditions of its repeal, that is, convening of the Constituent Assembly of the State of Jammu and Kashmir cannot be secured, the Article will continue to operate irrespective of the duration of time.[38]

26. Upon the enactment of the Constitution of Jammu and Kashmir, the Constituent Assembly became *functus officio* and as such, Article 370 became permanent. Absent the recommendation of the Constituent

[36] Submissions by Mr Zaffar Shah, Senior Advocate.
[37] Submissions by Mr Zaffar Shah, Senior Advocate.
[38] Submissions by Mr Zaffar Shah, Senior Advocate.

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Assembly, Article 370 could not be amended and the Legislative Assembly could not substitute the Constituent Assembly.[39]

27. Article 370 could only have been repealed by the Constituent Assembly between 1950 and1957. After that, that is after the Constituent Assembly of the State ceased to exist, it can only be amended by way of the procedure specified under Article 368, followed by its extension to the State of Jammu and Kashmir by Article 370(1)(d). After the enactment of the Constitution of Jammu and Kashmir and the consequent cessation of the Constituent Assembly of the State, Article 370(1) alone survives since the only mechanism of its repeal i.e. Article 370(3) could not be resorted to, without the recommendation of the Constituent Assembly. As such, the dual constitutional arrangement between the State and the Union attained finality.[40]

28. Contrary to the position taken by the senior counsel for certain Petitioners that Articles 370(1) and 370 (3) are permanent facets of the Constitution of India, after the dissolution of the Constituent Assembly, Mr Dinesh Dwivedi, senior counsel argues that Article 370 was a temporary provision. The interim arrangement in the form of Article 370 ceased to operate after the Constitution of Jammu and Kashmir was enacted. Article 370 ceased to be a source of power for the President, as was originally intended.[41] Mr Dinesh Dwivedi disagreed with the proposition that since the Constituent Assembly chose to

[39] Written Submissions on Behalf of Mr. Kapil Sibal.
[40] Written Submissions Of Dr. Rajeev Dhavan, Senior Counsel.
[41] Written Submissions By Shri Dinesh Dwivedi, Senior Advocate.

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not recommend the abrogation of Article 370, Article 370(3) would continue to operate after the dissolution of the Constituent Assembly.[42] He challenges the impugned actions on the ground that any power under Article 370 could no longer be exercised. A temporary provision could not be made a permanent source of power to bring about the impugned Constitutional Orders or the Reorganisation Act. After January 1957, no provisions of the Constitution of India could be applied to the State of Jammu and Kashmir and the Constitution of Jammu and Kashmir could not be repealed, being entirely independent from the Constitution of India.[43]

29. Unlike the other States, the State of Jammu and Kashmir retained a part of the sovereignty even while acceding to the Dominion of India:

a. There was no merger agreement between the Dominion of India and the State of Jammu and Kashmir, unlike other states. The terms of their relationship were defined in the Instrument of Accession[44] whereby though certain matters were acceded to the Union; residual sovereignty was retained by the Maharaja in accordance with Clause 8 of the Instrument. This position – that the residual sovereignty vested with the Maharaja was affirmed by this Court as well[45];

b. The very recognition of a separate Constituent Assembly for a state by

[42] Written Submissions By Shri Dinesh Dwivedi, Senior Advocate.
[43] Written Submissions By Shri Dinesh Dwivedi, Senior Advocate.
[44] "IoA"
[45] Zaffar Shah; Written Submissions of Mr. Gopal Subramanium, Senior Advocate on behalf of the Petitioner; Written Submissions of Mr. Dushyant Dave, Senior Advocate; Written Submissions By Shri Dinesh Dwivedi, Senior Advocate.

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the Constitution of India indicates that the Constitution of Jammu and Kashmir which was the creation of a sovereign body, represented the sovereignty of the state of Jammu and Kashmir. Once the Constituent Assembly ceased to exist, the sovereignty was transferred to the Constitution. This sovereignty is recognised by Article 370(3)[46];

c. The sovereignty of the Constituent Assembly of Jammu and Kashmir is clear also from Article 370(2) which effectively states that if any proposal for conferring additional powers to the Union Parliament is mooted once the Constituent Assembly comes into existence, it should be placed before the Constituent Assembly and not before the State government.[47] Once the Constituent Assembly ceased to exist, the Constitution of Jammu and Kashmir assumed sovereignty. The Constitution of the state and the Legislative Assembly of the State created by the Constitution, are permanent.[48] The Constitution of Jammu and Kashmir is an independent, perpetual document. Since it was not created by the Constituent Assembly, it was neither subordinate to the Constitution of India, nor to Article 370. It cannot be substituted or repealed by an act of the Union Government[49];

d. This Court has recognised that internal sovereignty may be divided by a distribution of legislative powers, which is an essential feature of

[46] Submissions On Behalf Of The Petitioners, Mr Shekhar Naphade, Senior Advocate.
[47] Submissions On Behalf Of The Petitioners, Mr Shekhar Naphade, Senior Advocate.
[48] Submissions on behalf of the Petitioners, Mr Shekhar Naphade, Senior Advocate.
[49] Written Submissions By Shri Dinesh Dwivedi, Senior Advocate.

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federalism[50]; and

e. The sovereignty of the Ruler was recognised in the 1939 Constitution of Jammu and Kashmir, and contrary to the Respondents' argument (that the Ruler's sovereignty ended after he executed the IoA), the sovereignty continued even after the IoA or the 1949 Declaration.[51] Read with other proclamations and the IoA, the Declaration did not take away the Ruler's sovereignty[52]. The power of the Union flowed from the IoA with respect to the three subjects therein. It was later extended to cover all the entries in List I by the Ruler in 1991. In 1991, Section 5 of the Jammu and Kashmir Constitution was modified to end the sovereignty of the Ruler and to adopt the principle of collective sovereignty of the legislature. However, this 1991 Amendment should be viewed in light of the Parliament's limited power until the enactment of the Constitution of Jammu and Kashmir.

30. CO 272 issued under Article 370(1)(d) is unconstitutional for the following reasons:

a. Article 370(1)(d) refers to the modification of the Constitutional provisions and their application to India. However, CO 272 goes beyond mere modification of the provisions of Article 367 and their application

[50] SR Bommai vs Union of India; para 97 Submissions On Behalf Of The Petitioners, Mr Shekhar Naphade, Senior Advocate.
[51] Rejoinder by Mr. Dinesh Dwivedi, Senior Advocate.
[52] Rejoinder by Mr. Dinesh Dwivedi, Senior Advocate.

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to the State of Jammu and Kashmir. It vests the power of a certain kind, meant to be exercised by a certain body, in a completely different body. This is tantamount to changing the fundamental basis of Article 370(3)[53] which could have only been done through an amendment of Article 370(3). The expression "Constituent Assembly" cannot be substituted with "Legislative assembly" in view of Article 370(2) which ascribes a specific meaning to the former term.[54] The expression 'Constituent Assembly' is not ambiguous and no other meaning can be ascribed to it[55]. The Constituent Assembly is completely different from the Legislative Assembly. The latter is neither a substitute nor the successor of the former.[56] CO 272 is thus a colourable exercise of the President's power[57];

b. Article 367 is an interpretation clause. The CO does not merely change the manner of interpretation but substitutes the provision by conferring constituent power of the Constituent Assembly on the Legislative Assembly. This amounts to an amendment of Article 370(3)[58];

c. The Legislative Assembly had no power under the Constitution of Jammu and Kashmir to amend any provision of the Constitution of

[53] Submissions by Mr Zaffar Shah, Senior Advocate; Written Submissions of Mr. Gopal Subramanium, Senior Advocate on behalf of the Petitioner; Written Submissions of Gopal Sankaranarayanan Senior Advocate on Behalf of the Petitioner; Written Submissions On Behalf Of The Intervenor By Dr. Menaka Guruswamy, Senior Advocate.
[54] Submissions On Behalf Of The Petitioners, Mr Shekhar Naphade, Senior Advocate; Written Submissions of Gopal Sankaranarayanan Senior Advocate on Behalf of the Petitioner.
[55] Submissions On Behalf Of The Petitioners, Mr Shekhar Naphade, Senior Advocate.
[56] Written Submissions On Behalf Of The Intervenor By Dr. Menaka Guruswamy, Senior Advocate.
[57] Written Submissions On Behalf Of The Intervenor By Dr. Menaka Guruswamy, Senior Advocate.
[58] Submissions by Mr. Zaffar Shah, Senior Advocate; Submissions On Behalf Of The Petitioners, Mr Shekhar Naphade, Senior Advocate.

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India, according to Section 147 of the Constitution of Jammu and Kashmir. Consequently, neither the Legislative Assembly nor the Governor could have given consent to CO 272. CO 272 is invalid because it vests in the Legislative Assembly a power that the Constitution of Jammu and Kashmir expressly bars[59];

d. Article 370 recognizes the unique constitutional status of the state of Jammu and Kashmir. As such, the provision contains a provision for its own amendment in Article 370(3). When such a specific provision exists, the amendment cannot be done in any other manner[60];

e. Article 370(1)(d) is for application of provisions "other" than Articles 1 and 370 to the state of Jammu and Kashmir. Since CO 272 pertains to Article 370, any amendment to the provision can only be done through Article 370(3) and not through Article 370(1)(d);

f. Article 370 was previously amended through the exercise of power under Article 370(3). COs 48 and 72 were issued under Article 370(1)(d), and they added and amended sub-clause 4 to Article 367. However, unlike CO 272, COs 48 and 72 did not contain any references to Article 370. They were purely clarificatory orders. They did not make any substantive changes to Article 370.[61] However, CO 272 makes

[59] Written Submissions by Sh. Sanjay Parikh, Senior Advocate.
[60] Written Submissions of Mr. Gopal Subramanium, Senior Advocate on behalf of the Petitioner.
[61] Mohd Maqbool Damnoo vs State of Jammu and Kashmir, (1972) 1 SCC 536; Written Submissions of Mr. Gopal Subramanium, Senior Advocate on behalf of the Petitioner.

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amendments to Article 370, through the backdoor[62];

g. The Respondents' argument that the proviso to Article 370(3) and the requirement of a recommendation of the Constituent Assembly ceased to exist after the dissolution of the Constituent Assembly is incorrect. While the powers under Article 370(1)(b) are in the nature of amending powers, the power under Article 370(3) is a constituent power. Considering the limitations placed on both, to accept the Respondents' argument would lead to an inconsistent conclusion that the amending provision would be more onerous than abolishing it under Article 370(3). Thus, Article 370(3) could only be abrogated by a Constituent body and no less[63];

h. Article 370 could have been amended only by resorting to Article 370(3), subject to the proviso thereto. This was reiterated by this Court in **Prem Nath Kaul** v. **State of J&K**[64], which was decided after the Constituent Assembly of Jammu and Kashmir had ceased to exist;

i. In the alternative, Article 367 does not apply to Article 370(3) because the latter starts with a non-obstante clause. Impliedly, Article 367 cannot

[62] Written Submissions of Mr. Gopal Subramanium, Senior Advocate on behalf of the Petitioner.
[63] Rejoinder on behalf of Mr. Kapil Sibal Sr. Advocate pg 18-19 para 41; Brief Written Submissions in Rejoinder on Behalf of Ms. Warisha Farasat, Advocate for the Intervenor.
[64] 1959 Supp (2) SCR 270.

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be used to make any changes to Article 370(3)[65];

j. The Constitution cannot be amended by an executive order. Only Parliament in exercise of its constituent power can amend the Constitution of India. The CO, which effectively amends the Constitution, could not be affected by an executive order[66];

k. CO 272 made CO 1954 inapplicable. It was issued with the due concurrence of the Constituent Assembly of the state, which was in existence at the time. As such, the Governor had no jurisdiction to concur to make such a CO, issued with the concurrence of the Constituent Assembly non-applicable[67];

l. The wholesale application of the Constitution of India suffers from a lack of application of mind – which was a mandatory pre-condition. Article 370(1)(d) contemplates a situation where, based on the exigencies of the situation, and upon due application of mind, certain specific provisions of the Constitution are extended to the State of Jammu and Kashmir in order to address the said exigencies. CO 272 applies the provisions of the entire Constitution of India to the state. No deliberations took place to decide the suitability of those provisions for the state. Such wholesale application of the whole Constitution, in one

[65] Written Submissions On Behalf Of Mr. Kapil Sibal, Sr. Adv; Submissions by Mr. Zaffar A Shah, Senior Advocate Rejoinder.
[66] Written Submissions Of Dr. Rajeev Dhavan, Senior Counsel.
[67] Submissions by Mr Zaffar Shah, Senior Advocate.

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go, is apparently without any deliberation[68];

m. The Respondents have erroneously relied on **Mohd. Maqbool Damnoo** v. **The State of Jammu and Kashmir**[69] to argue that the Constituent Assembly and the Legislative Assemblies are interchangeable. In the said case, the Court had held that the Governor, being the successor to Sadr-i-Riyasat, can exercise the same powers as the latter. The reliance on this case is misplaced[70]; and

n. The IoA was meant to accede to the Union. The State retained sovereignty on matters except those stipulated in the IoA. The Constituent Assembly of Jammu and Kashmir was the fulfilment of the promise to the people of the State that the issue of accession would be referred to them for ratification. Therefore, treating the Legislative Assembly as a substitute for Constituent Assembly of the State, would violate the terms of the IoA as well as the very integration of the state into the Union on its own terms.[71]

31. CO 272 is unconstitutional because the President could not have secured his own concurrence to fulfil the second proviso to Article 370(1)(d):

a. CO 272 has been issued purportedly with the concurrence of the State

[68] Written Submissions of Mr. Gopal Subramanium, Senior Advocate on behalf of the Petitioner.
[69] (1972) 1 SCC 536
[70] Rejoinder on behalf of Mr. Kapil Sibal Sr. Advocate.
[71] Written Submissions of Ms. Nitya Ramakrishnan, Senior Advocate.

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Government. However, since the Legislative Assembly of the State of Jammu and Kashmir was dissolved by the Governor when CO 272 was issued, the Council of Ministers was not in place and no such concurrence could have been sought. The Governor was not acting on the aid and advice of the Council of Ministers. This is not only against the mandate of the Governor's powers under the Constitution of India, but also, does not fulfil the concurrence requirement under the second proviso to Article 370(1)(d);

b. The President usurped the power of the State Government. The provisos to Article 370(1)(d) distinguish between matters specified and not specified in the IoA. Article 370(1) begins with a non-obstante clause. Therefore, notwithstanding any other provisions of the Constitution of India, including Article 356, the President has the power to extend the application of certain provisions to the State of Jammu and Kashmir. This power is subject to the second proviso. Notably, Article 356 does not contain any non-obstante clause. Impliedly, considering the importance of non-obstante clauses, the concurrence can only be given by the State Government and not the President. The State Government was not in existence at the time CO 272 was issued. Absent such concurrence as required by the second proviso, CO 272 could not have been issued[72]; and

[72] Written Submissions of Gopal Sankaranarayanan Senior Advocate on Behalf of the Petitioner; State Bank of India vs Santosh Gupta (2017) 2 SCC 538, Written Submissions On Behalf Of The Intervenor By Dr. Menaka

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c. Without prejudice to the above, even if the State Government's functions could be validly exercised by the President according to Article 356, Article 356(1)(a) permits the President to exercise the "functions" and not the "privileges" of the State Government. To concur with the President in accordance with Article 370(1)(d) is a privilege and not a function and thus could not have been exercised by the President, even under Article 356.[73]

32. CO 273 dated 6 August 2019 is unconstitutional for the following reasons:

a. CO 273 states that the President, on the recommendations of the Parliament, had declared that all the clauses of Article 370 have ceased to be operative, except a clause that effectively applies the Constitution of India *mutatis mutandis* to the State of Jammu and Kashmir[74];

b. Consequent to the invalidity of CO 272, CO 273 is void ab initio for the same reasons as stated above in respect of CO 272[75];

c. CO 273 was issued in exercise of power under Article 370(3). However, there was no "recommendation" from a representative body competent to issue such a recommendation under the proviso to Article 370(3). Since the recommendation of the Constituent Assembly is mandatory under the proviso to Article 370(3), and no such recommendation could

Guruswamy, Senior Advocate; Written Submission On Behalf Of Impleader By Manish Tewari & Mr. Abhimanyu Tewari.

[73] Written Submissions of Gopal Sankaranarayanan Senior Advocate on Behalf of the Petitioner.

[74] Written Submissions of Mr. Gopal Subramanium, Senior Advocate on behalf of the Petitioner.

[75] Written Submissions of Mr. Gopal Subramanium, Senior Advocate on behalf of the Petitioner; Written Submissions On Behalf Of The Intervenor By Dr. Menaka Guruswamy, Senior Advocate.

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have been obtained in view of the non-existence of the Constituent Assembly at the relevant time, CO 273 is *ultra vires* Article 370(3).[76] The proviso to Article 370(3) was included to give power to the people of the State to decide whether they wanted to integrate with India[77];

d. The Constituent Assembly of Jammu and Kashmir was the sole authority to determine whether Article 370 ought to continue to exist. After its dissolution, no such determination could have been made. The Constituent Assembly had already expressed its desire to not abrogate the special status of Jammu and Kashmir. Therefore, the President had no power to act contrary to the desire of the Constituent Assembly.[78] The intention was to make it a temporary power exercisable only by the Constituent Assembly, and (without prejudice), by the people of the State to abrogate Article 370[79];

e. Even assuming CO 272 was valid to the extent that it substituted the Constituent Assembly with the Legislative Assembly, even then the requirement of recommendation was not satisfied since CO 273 was issued at a time when the Proclamation under Article 356 was in force and the Legislative Assembly was not in existence[80];

[76] Outline of Submissions on Behalf of the Petitioners by Raju Ramachandran, Senior Advocate.
[77] Written Submissions on Behalf of Mr. Kapil Sibal.
[78] Sampat Prakash Vs State of Jammu and Kashmir 1969 2 SCR 365, "This clause clearly envisages that the article will continue to be operative and can cease to be operative only if, on the recommendation of the Constituent Assembly of the State, the President makes a direction to that effect…. "This makes it very clear that the Constituent Assembly of the State did not desire that this article should cease to be operative and, in fact, expressed its agreement to the continued operation of this article by making a recommendation that it should be operative with this modification only." Written Submissions of Mr. Dushyant Dave, Senior Advocate.
[79] Rejoinder on behalf Of Mr. Kapil Sibal Sr. Advocate.
[80] Outline of Submissions on Behalf of the Petitioners by Raju Ramachandran, Senior Advocate.

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f. Unlike other states which acceded to the Constitution of India, the State of Jammu and Kashmir had a separate Constitution and had not merged with the Union. It had acceded to India only on the terms agreed to by way of the IoA. CO 273 has invalidated the IoA[81];

g. CO 273 (along with CO 272) amounts to the destruction of the basis of Article 370 by a unilaterally reneging by the Union of India, of the compact made with the people of Jammu and Kashmir[82]; and

h. The Respondents argue that since the Constituent Assembly was dissolved, recourse to the proviso to Article 370(3) was not possible and the maxim *lex non cogit ad impossibilia* (that is, law does not compel the doing of impossibilities) justifies the impugned actions without recommendations from the Constituent Assembly. This is not tenable in view of the above arguments based on Article 370(2) and the difference between the Constituent and Legislative Assembly.[83].

33. The Reorganization Act is unconstitutional for the following reasons:

a. The Presidential Proclamation issued under Article 356 suspended the first proviso to Article 3 of the Constitution to the extent that it relates to the reference by the President to the Legislature of the state for its views and the whole of the Second proviso to Article 3 as it applies to the State of Jammu and Kashmir by which a Bill under Article 3 could be

[81] Submissions by Mr Zaffar Shah, Senior Advocate.
[82] Written Submissions of Mr. Gopal Subramanium, Senior Advocate on behalf of the Petitioner; Rejoinder on behalf Of Mr. Kapil Sibal Sr. Advocate.
[83] Rejoinder on behalf Of Mr. Kapil Sibal Sr. Advocate.

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initiated only with the consent of the Legislature of the State. A law which brings permanent changes cannot be brought into force by temporarily suspending the provisos to Article 3. Since the Proclamation under Article 356 itself was void (for reasons mentioned above), the suspension of Article 3 was similarly void. Even otherwise, the suspension of the provisos to Article 3 was neither an incidental nor consequential exercise of powers under Article 356(1). It was beyond the President's power conferred under Article 356(1)(c), which cannot be to abrogate the State itself. The Reorganisation Act is not a law which the Parliament would be competent to make under Article 357(1) and Article 356[84];

b. The suspension of the proviso to Article 3 prescribing a mandatory reference to the State Legislature by the President had the effect of suspending the will of the people, protected under the proviso. The purpose of the proviso is the mandatory ascertainment of the will of the people, before changing the boundary, name or area of the state. The President was thus required to ensure that their "wishes have been consulted", and that, only at the instance of the state legislature, such a change could be effected[85];

c. In any case, even if the second proviso to Article 3 was validly suspended, it was merely an acknowledgment of the territorial integrity

[84] Submissions On Behalf Of The Petitioners, Mr Shekhar Naphade, Senior Advocate.
[85] Written Submissions on Behalf of Mr. Kapil Sibal, Senior Advocate.

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of the State of Jammu and Kashmir and not the source of it. The territorial integrity of the state of Jammu and Kashmir and its continued existence is *dehors* the second proviso to Article 3. The territorial integrity of the State of Jammu and Kashmir stems from the Constitution of Jammu and Kashmir, and was permanent, sovereign, and recognized by the Constitution of India. The proviso to Article 3 was merely a formal recognition of the territorial integrity[86];

d. The Reorganisation Act has bypassed the mandatory procedures and safeguards under Article 368 by resorting to Article 3. When there is a particular course of action under particular provisions, it cannot be bypassed by recourse to a general provision that does not directly deal with the subject matter. Article 4 states that the laws referred to in Articles 2 or 3 shall contain provisions for amending the first and the fourth schedule, as may be necessary to give effect to the provisions of the law and may contain supplemental, incidental or consequential provisions, as the Parliament may deem fit. However, Article 4(2) states that no such law shall be deemed to be an amendment of the Constitution for the purpose of Article 368. Article 4(2) implies that Article 3 cannot be used to supplant Article 368, which is a specific provision in respect of constitutional amendments[87]. The Reorganisation Act violates Article 3;

[86] Submissions On Behalf Of The Petitioners, Mr Shekhar Naphade, Senior Advocate.
[87] Written Submissions of Mr. Chander Uday Singh, Senior Counsel.

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e. The text and the structure of Article 3 do not support the degradation of a state into a Union Territory. There is no categorical power to degrade a state into an Union Territory and consistent state practice indicates movement in the direction of greater federal self-governance, rather than less. Sub-clauses (b) to (e) of Article 3 deal with areas, boundaries, and names; sub-clause (a) read with Explanation 2 sets out the broader power to form a new state or Union Territory. There are a number of ways in which this is permissible and none of them entail the degradation of a state into a Union Territory.[88] Article 3 has to be read in a manner that is consistent with the principles of federalism. It cannot be invoked in order to fulfil the political objectives of the party in power at the Centre[89];

f. The 2019 Act is unrelated to the nature of powers prescribed by Article 3 of the Constitution. Article 3 does not deal with the reorganization of a State into a Union Territory. Unlike the other elements of Article 3 (clauses a-e), the reorganization of a state into Union Territories involves a drastic transfer of legislative and executive power. The Constituent Assembly would have not intended that such a transfer be affected by Parliamentary legislation[90];

g. The Reorganisation Act has the effect of bringing the following changes:

[88] Written Submissions of Mr. Chander Uday Singh, Senior Counsel; Submissions On Behalf Of The Petitioners, Mr Shekhar Naphade, Senior Advocate.
[89] D.C. Wadhwa Vs State of Bihar (1987) 1 SCC 378. Written Submissions Of Mr. Dushyant Dave, Senior Advocate.
[90] Written Submissions of Mr. Chander Uday Singh, Senior Counsel.

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Article 73 of the Constitution of India on the State, erasing the executive powers under Article 162; depriving the entire territory of Ladakh of its rights under Article 54 and 55, altering the representation of the territory in the Council of States; excluding the territory from the electoral college of the Rajya Sabha – all of these changes fall squarely under the clauses (a) to (e) of the proviso to Article 368 (2). Thus, these changes could have been affected only by recourse to Article 368(2), subject to procedural safeguards such as ratification by states.[91] A law that, *inter alia*, denudes the state of its legislative assembly such as the impugned Act cannot be brought under Article 3[92];

h. There is a qualitative difference between the reduction of a state into a Union Territory as opposed to the situations envisaged in Article 3 – each of the sub-clauses of Article 3 refers to a situation where as a result of a law, citizens may find themselves living in an existing or a new state. The federal representative democracy enjoyed by the citizens under these provisions is either constant or enhanced. As opposed to this, the degradation of a State into a Union Territory *causes* a diminishment or a loss of representative democracy[93];

i. The purpose of Article 3 must be read in accordance with the State Reorganisation Report 1955. The Report suggested that the

[91] Written Submissions of Mr. Chander Uday Singh, Senior Counsel.
[92] Written Submissions of Mr. Chander Uday Singh, Senior Counsel.
[93] Written Submissions of Mr. Chander Uday Singh, Senior Counsel.

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demarcation of Indian States into Part A, B, C and D states was not feasible. Thus, the Constitution (Seventh Amendment) Act 1956[94] removed these distinctions and introduced the concept of Union Territories. From 1955 onwards, through various legislations under Article 3 the present states of Goa, Himachal Pradesh, Manipur etc. were converted from Union Territories to States[95];

j. There were historical and cultural reasons to designate certain territories as Union Territories and not full-fledged states[96]. In certain cases, it was not deemed reasonable to create a full-fledged state for a small area, and the cultural differences of the people in these territories meant that they could not be subsumed in the neighbouring states. Such territories were considered fit to be centrally administered. However, in due course of time, these territories came to be designated as states – which was a progressive step towards federalism. However, in the history of Independent India, an existing state has never been retrograded into a Union Territory. This leads to a diminishment of representative democracy and federalism. The Indian understanding of federalism is not to treat states as mere administrative units. The adage that India is an "indestructible union of destructible states" only means that the states can be reorganized by the Parliament; but they cannot be extinguished or retrograded into the Union Territories, in violation of

[94] "Seventh Constitution Amendment"
[95] Written Submissions of Mr. Chander Uday Singh, Senior Counsel.
[96] Written Submissions on Behalf of Mr. Kapil Sibal.

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the federal structure[97]; and

k. Article 1(1) states that India, that is Bharat, shall be a Union of States. The power under Article 3 cannot be used by Parliament to create a 'Union of Union Territories'. The issue is not whether Parliament would in fact do that. The power of the Union under Article 3 thus clashes with the principle of federalism.[98]

34. The Reorganisation Act did not represent the people of Jammu and Kashmir because:

a. Any alteration to the existing units, their territories, boundaries, and names should come not from the Centre but from the people familiar with the unit concerned. The people affected by the alteration should desire such an alteration. The Centre which is not aware of the local conditions and relevant considerations for such a course, should leave the alteration of such boundaries to the competent bodies such as the Boundary Commission[99];

b. The Rajya Sabha expressed its views in support of the Reorganisation Bill. Only 4 out of the 240 members of the Rajya Sabha were from Jammu and Kashmir. Therefore, the Rajya Sabha cannot be said to be

[97] Written Submissions of Mr. Chander Uday Singh, Senior Counsel; Written Submissions on Behalf of Mr. Kapil Sibal.
[98] Written Submissions of Mr. Chander Uday Singh, Senior Counsel.
[99] (Constituent Assembly Debates on November 17, 1948, Speech by Mr. KT Shah, Book 2, Pgs. 437-438); Submissions On Behalf Of The Petitioners, Mr Shekhar Naphade, Senior Advocate.

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representative of the will of the people of the State. The will of the people could have been expressed only through the Legislative Assembly of the State. The Assembly was dissolved and elections to the Assembly were deliberately not held only with a view to enact the impugned Act[100]; and

c. The people of the state of Jammu and Kashmir must initiate change rather than the Parliament, which is not the true representative of the people of the state. If the people do not feel the need to abrogate or modify Article 370, they would have done so through their representatives. Just as Parliament cannot decide the members of the Rajya Sabha on behalf of the states, it cannot decide on behalf of the people of the state. Bicameralism and shared sovereignty would prohibit this unilateral non-democratic process wherein the people of the State are excluded.[101]

ii. Submissions of the Union of India[102]

35. The process of constitutional integration of Jammu and Kashmir bears all the resemblance with the process of constitutional integration of various territories of India, namely democratization combined with merger of small states, formation of union of states, the idea of having constituent assemblies for framing constitutions, etc. There was no distinct or special compact

[100] Submissions On Behalf of The Petitioners, Mr Shekhar Naphade, Senior Advocate.
[101] Written Submissions of Ms. Nitya Ramakrishnan, Senior Advocate, Rejoinder.
[102] Mr R Venkataramani, the Attorney General for India made prefatory submissions which are recorded in the initial six paragraphs below. Thereafter the substantive submissions were made by Mr Tushar Mehta which are encapsulated after the submissions of the Attorney General.

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between Union of India and Jammu and Kashmir as far as the constitutional integration process was concerned.[103]

36. It was open to the President to take a final stock of the exercise of the authority under Article 370(1)(d), and to decide as to whether there is a need of updating exercise at all, or there is a need for any other invocation of Article 370(1)(d). This power of the President is not limited or conditioned by any practice in relation to Article 370 in the past.[104]

37. Article 370 was conceived and designed to aid the constitutional integration process on the same lines as it happened with other states. Its continued exercise over a period cannot be seen as a cloud over or distortion of its original purpose.[105]

38. Border states are a distinct class of territories and their reorganisation under Article 3 ought to receive distinct consideration.[106]

39. Neither asymmetrical federalism nor any other federal features have been infringed.[107]

40. No rights in relation to representative democracy have been taken away.[108]

41. Article 370 is the only provision in the Constitution which the Constitution itself declares to be "temporary". This understanding that it is temporary is furthered from the drafting history of the article, debates in the Constituent Assembly,

[103] Written Submissions of Mr. R. Venkataramani, Attorney General for India
[104] Written Submissions of Mr. R. Venkataramani, Attorney General for India
[105] Written Submissions of Mr. R. Venkataramani, Attorney General for India
[106] Written Submissions of Mr. R. Venkataramani, Attorney General for India
[107] Written Submissions of Mr. R. Venkataramani, Attorney General for India
[108] Written Submissions of Mr. R. Venkataramani, Attorney General for India

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Parliamentary debates, the gradual issuance of constitution orders. The other provisions of the Part XXI are named either "special provisions" or "transitory provisions".[109]

42. The effect of Article 370(1) was to permit two organs under the Constitution of India, by way of an Executive Order, to create, amend or destroy, any part/provision of the Constitution of India [except Article 1] at their free will and apply such tailored constitutional provisions to the State of Jammu and Kashmir. The expansive width of this power shows it could not have been intended to be a permanent provision – either by efflux of time or in any other manner.[110]

43. The impact of Article 370 was to be deprive the residents of Jammu, Kashmir and Ladakh from being treated at par with their fellow citizens in the rest of India. Article 370 deprived them of several fundamental and statutory rights without any legislative or parliamentary process. Such a consequence would obviously be known to the framers of the Constitution and therefore, the framers could have never intended for it to be a permanent provision.[111]

44. The abrogation of Article 370 brings the residents of Jammu and Kashmir at par with the citizens residing in the rest of the country, confers them with all rights flowing from the entire Constitution as well as hundreds of beneficial

[109] Written Submissions of Mr. Tushar Mehta, Solicitor General of India
[110] Written Submissions of Mr. Tushar Mehta, Solicitor General of India
[111] Written Submissions of Mr. Tushar Mehta, Solicitor General of India

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legislations. Therefore, applying the Constitution of India to the State can never be an "arbitrary act".[112]

45. This is the only provision in the Constitution where the application of (i) the provisions of the Indian Constitution; and (ii) the application of beneficial legislations to the residents of Jammu and Kashmir, is made dependent upon the Government of the day agreeing to the application. Such an arrangement could never have been conceived by the framers of the Constitution.[113]

46. Article 370 is the only provision which provides for a mechanism (by way of Article 370(3)) by which it would cease to be in existence. A provision intended to be permanent would not have such an "inbuilt extinguishing clause".[114]

47. The proviso to Article 370(3) was to remain in operation only during subsistence of the Constituent Assembly of Jammu and Kashmir because:[115]

    a. When the Jammu and Kashmir Constituent Assembly was formed, Article 370 of the Constitution of India was already in existence. Being aware of Article 370(3) the Constituent Assembly of Jammu and Kashmir could have, at the time of its dissolution –

        i. Recommended to the President not to exercise his powers under Article 370(3);

[112] Written Submissions of Mr. Tushar Mehta, Solicitor General of India
[113] Written Submissions of Mr. Tushar Mehta, Solicitor General of India
[114] Written Submissions of Mr. Tushar Mehta, Solicitor General of India
[115] Written Submissions of Mr. Tushar Mehta, Solicitor General of India

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ii. Recommended some exceptions and modification with which Article 370 could have remained in force;

iii. Recommended the deletion of sub-clause (3) and consequently sub-clause (2), making Article 370(1) permanent;

iv. It could have changed the marginal note substituting the word “temporary” with “permanent” and “Constituent Assembly” with “Legislative Assembly” in Article 370(3);

v. Recommended the deletion of Article 370(1)(d), freezing the relationship between the State and the Union as it existed when the Constitution [Application to Jammu and Kashmir] Order, 1954 was passed by CO 48 by the President of India; and

vi. Despite these powers of recommendation being available and despite being conscious of the availability of the power, the Constituent Assembly chose not to do any of this and was dissolved.

b. Once the State Constituent Assembly ceased to exist, the proviso to Article 370(3) itself ceases to exist and the President becomes the sole repository of powers under Article 370(3). He has a duty to exercise this power in the interests of the residents of the State even in the absence of a recommendation.

48. The petitioners’ assertion that the decision to abrogate Article 370 was taken purely by executive feat is incorrect. The process followed clearly reflects the

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participation of the entire nation through their chosen representatives both in the Lok Sabha and the Rajya Sabha.[116]

49. If the President cannot exercise the powers under Article 370(3), it would mean that the existence and exercise of power of the President of India provided for in the Indian Constitution is dependent upon a decision or a lack of it by a body outside the Constitution of India.[117]

50. If the mere absence of the Constituent Assembly mentioned in the proviso to clause 3 of Article 370 is treated as rendering the power of the President of India nugatory and redundant, it would mean that under Article 370(1)(b) and 370(1)(d), any provision of the Constitution of India can be amended and applied to the State of Jammu and Kashmir. Even the provisions which are part of the basic structure of the Constitution can be modified and applied to Jammu and Kashmir or even stultified and eradicated in its application to Jammu and Kashmir – as has happened in the past. This interpretation would amount to placing Article 370 above even the basic structure of the Constitution of India.

51. Even if the State Constituent Assembly was currently in existence, the limited role envisaged for it was to merely make a "recommendation". Such a recommendation was not binding upon the President.[118]

52. Considering the limited role that the State Constituent Assembly was to play, its replacement with the "Legislative Assembly" and the recommendation by

[116] Written Submissions of Mr. Tushar Mehta, Solicitor General of India
[117] Written Submissions of Mr. Tushar Mehta, Solicitor General of India
[118] Written Submissions of Mr. Tushar Mehta, Solicitor General of India

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Parliament in place of the State Legislative Assembly passes muster. Parliament is not an undemocratic body and along with the Council of States, it represents federal aspirations.[119]

53. Parliament is the repository of the democratic will of the entire nation and in a situation which concerns the relationship of one federal unit with other federal units, the apt constitutional authority to exercise democratic powers as per the Constitution would be Parliament. The question concerns all States in the federal setup and not merely Jammu and Kashmir.[120]

54. The power of the President under sub-clause (3) of Article 370 is unfettered because (a) Article 370 begins with a non-obstante clause "*notwithstanding anything contained in the Constitution of India"*; and (b) Sub-clause (3) of Article 370 begins with a non-obstante clause "*notwithstanding anything in the foregoing provisions of this Article"*. The exercise of powers by the President is, thus, not controlled either by any constitutional provisions including the provisions of Article 370.[121]

55. The replacement of the term "Constituent Assembly" with "Legislative Assembly" was necessary to democratize the decision-making process of the President.[122]

[119] Written Submissions of Mr. Tushar Mehta, Solicitor General of India
[120] Written Submissions of Mr. Tushar Mehta, Solicitor General of India
[121] Written Submissions of Mr. Tushar Mehta, Solicitor General of India
[122] Written Submissions of Mr. Tushar Mehta, Solicitor General of India

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56. Parliament had to exercise the powers of the Legislative Assembly because:[123]

    a. Of the Emergency under Article 356(1)(b);

    b. Considering the strategic significance of the State from the point of view of the sovereignty and integrity of nation, it is desirable that every federal unit should, through its representatives, both at the Lok Sabha and at the Rajya Sabha, participate in the decision-making process; and

    c. The Constituent Assembly of India was exercising constituent power while the Constituent Assembly of Jammu and Kashmir was exercising "legislative" power.

57. Clause (3) of Article 370 is an extraordinary, unique and unprecedented clause. A provision in the nature of Article 370(3) is not present in any constitutional document or any provision of the Indian Constitution. It is not possible to classify the power under clause (3) under a specific nomenclature. The power under clause (3) of Article 370 is a plenary Presidential power, specially designed for a "temporary" provision.[124]

58. The position as far as the State of Jammu and Kashmir is concerned, even prior to the coming in to force of Article 1 and the Constitution of India, was:[125]

    a. By the IoA, the ruler surrendered his authority; and

[123] Written Submissions of Mr. Tushar Mehta, Solicitor General of India
[124] Written Submissions of Mr. Tushar Mehta, Solicitor General of India
[125] Written Submissions of Mr. Tushar Mehta, Solicitor General of India

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b. By the proclamation dated 25 November 1949, the ruler surrendered his absolute power in regard to the affairs of the State.

59. The Constituent Assembly of Jammu and Kashmir was formed by a ruler who himself had surrendered his sovereignty. The document called the Constitution of Jammu and Kashmir and the body framed for its creation cannot claim any equivalence with the Constitution of India and the Constituent Assembly of India. This is because the Constituent Assembly of Jammu and Kashmir and the resultant Constitution of Jammu and Kashmir:[126]

a. Were formed in 1951 by the Proclamation of the Maharaja who had already acceded to India;

b. Were formed after the Constitution of India already included the State of Jammu and Kashmir under the Schedule to Article 1 thereby making it a part of India, devoid of any sovereignty;

c. Were not framed in their classical sense as documents for a new nation or for providing an independent model of governance. It was only a legislative enactment for the internal governance of the State and subject to the Constitution of India; and

d. Had a limited mandate and could not have overridden the provisions of the Indian Constitution *qua* Jammu and Kashmir.

[126] Written Submissions of Mr. Tushar Mehta, Solicitor General of India

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60. The State Constitution does not establish a republican form of government in its entirety as it was dependent on the real sovereign document i.e., the Constitution of India.[127]

61. The Indian Constitution clearly establishes the Union of India as a sovereign democratic republic. The State Constitution neither establishes sovereignty nor does it claim to do so. The Preamble is indicative of this fact.[128]

62. To become a fundamental document, a Constitution must necessarily include several facets of undisputed sovereignty including the power to acquire new territory [which, in itself include power to "cede" its own territory]. This is absent in the State Constitution as it was already a part of the Indian Constitution under Article 1.[129]

63. The power of President under Article 370(3) necessarily pre-supposes the repeal of every document which is required to be repealed to ensure that the entire Constitution of India is made applicable to Jammu and Kashmir without any hinderance or legal hurdle. This power necessarily inheres in the President of India under Article 370(3).[130]

64. There can only be one supreme document known as the Constitution flowing from the power conferred by the people of India. All other enactments [whether known as a constitution or otherwise] are subordinate to the

[127] Written Submissions of Mr. Tushar Mehta, Solicitor General of India
[128] Written Submissions of Mr. Tushar Mehta, Solicitor General of India
[129] Written Submissions of Mr. Tushar Mehta, Solicitor General of India
[130] Written Submissions of Mr. Tushar Mehta, Solicitor General of India

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Constitution of India and the body creating such other documents is also subordinate to the Constitution of India.[131]

65. Article 367 has previously been utilised to modify Article 370. This is a legitimate route to modify Article 370.[132]

66. When the Reorganisation Act was enacted, the second proviso to Article 3 (which applied to the State of Jammu and Kashmir alone) was not in force. This is because CO 272 issued by the President made the entire Constitution applicable to the State in supersession of any previous Constitutional Orders. As a result, all the 'modifications' of the Constitution were superseded and only the first proviso was in force. Hence, there was no requirement to comply with the second proviso.[133]

67. The power of Parliament under Article 3 is a plenary power which may be exercised during the subsistence of a proclamation under Article 356. States have previously been reorganised during the subsistence of a State Emergency.[134]

68. Under Article 3, Parliament has the power to convert a State into two Union territories.[135]

[131] SBI v. Santosh Gupta, (2017) 2 SCC 538; Written Submissions of Mr. Tushar Mehta, Solicitor General of India; Written Submissions of Mr. V K Biju, Advocate
[132] List of Dates by Mr. Tushar Mehta, Solicitor General of India
[133] Written Submissions of Mr. Tushar Mehta, Solicitor General of India
[134] Written Submissions of Mr. Tushar Mehta, Solicitor General of India
[135] Written Submissions of Mr. Tushar Mehta, Solicitor General of India; Written Submissions of Ms. Divya Roy, Advocate

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69. The sufficiency of the material which necessitated a decision under Article 3 lies beyond the realm of judicial review.[136]

70. The petitioners did not challenge the dissolution of the Legislative Assembly and the issuance of the Proclamation declaring an Emergency under Article 356. They only challenged the actions taken during the subsistence of the Proclamation.[137]

71. It is impermissible for this Court to read in limitations on the powers under Article 356(1)(b).[138]

72. The President has previously exercised powers under Article 370 even when Governor's rule or President's rule was in force.[139]

73. The term "modification" used in Article 370(1) cannot be interpreted in a narrow manner. It gives the President the power to amend the Constitution in its application to the State of Jammu and Kashmir. Therefore, the addition of clause (4) to Article 367 by CO 272 is valid.[140]

74. The continuity of constituent power having been exercised by the legislative assembly of the State of Jammu and Kashmir by virtue of Section 147 of the State Constitution, the legislative assembly is equally competent to provide the requisite recommendation under Article 370(3).[141]

[136] Written Submissions of Mr. Tushar Mehta, Solicitor General of India
[137] Written Submissions of Mr. Tushar Mehta, Solicitor General of India
[138] Written Submissions of Mr. Tushar Mehta, Solicitor General of India
[139] Written Submissions of Mr. Tushar Mehta, Solicitor General of India
[140] Written Submissions of Mr. Vikramjeet Banerjee, Additional Solicitor General of India
[141] Written Submissions of Mr. Vikramjeet Banerjee, Additional Solicitor General of India

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75. The erstwhile States ceased to be independent with the advent of the Constitution. In fact, every vestige of their sovereignty was abandoned with the execution of the Instruments of Accession and the States stood fully assimilated and integrated with the Dominion of India.[142]

76. Article 370(3) contains a non-obstante clause, overriding Article 370(1) and (2), providing for the cessation of Article 370 itself when the conditions are right.[143]

77. Article 35-A, introduced through CO 48 of 1954, seeks to provide special rights to permanent residents of Jammu and Kashmir. It affects several fundamental rights, impacting the basic structure of the Constitution. However, it goes beyond the scope of "exceptions and modifications" under Article 370(1)(d).[144]

78. The constitutional scheme under Section 6 of the Constitution of J & K is in flagrant violation of the constitutional scheme under Articles 14 and 15(1) of the Constitution of India.[145]

79. The non-obstante clause under Article 370 must give way to the non- obstante clause of Article 368 of the Constitution.[146]

[142] Written Submissions of Mr. Rakesh Dwivedi, Senior Advocate
[143] Written Submissions of Mr. Rakesh Dwivedi, Senior Advocate
[144] Written Submissions of Mr. Rakesh Dwivedi, Senior Advocate
[145] Written Submissions of Ravindra Raizada, Senior Advocate with Divya Roy, Advocate
[146] Written Submissions of Ravindra Raizada, Senior Advocate with Divya Roy, Advocate

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PART C

80. The provisions of the Jammu and Kashmir Constitution create a number of problems, particularly in regard to the right to hold property, right to citizenship, and right to settlement.[147]

81. The actions of the Union of India are in conformity with the intention of the framers of the Constitution and the understanding of Article 370 as expressed by the representatives from the State of Jammu and Kashmir.[148]

82. The views of the Legislative Assembly of the State are required to be obtained only when a new State is formulated and not in case of formation of new Union Territories.[149]

83. All the powers of the Constituent Assembly of the State of Jammu and Kashmir were being exercised by legislature of State. Therefore, by necessary implication, the word 'Constituent Assembly' in Article 370(3) should have been construed as 'Legislative Assembly.' This interpretation was given statutory form by virtue of CO 272.[150]

84. Article 370 is not a part of the basic structure of the Constitution of India.[151]

85. Article 35A is in violation of fundamental rights of the citizens of other parts of the country.[152]

[147] Written Submissions of Mr. Bimal Roy Jad, Senior Advocate
[148] Written Submissions of Mr. Aniruddha Rajput, Advocate
[149] Written Submissions of Mr. Apoorv Shukla, Advocate
[150] Written Submissions of Ms. Archana Pathak Dave, Advocate
[151] Written Submissions of Mr. Rahul Tanwani, Advocate
[152] Written Submissions of Ms. Madhusmita Bora

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D. Issues

86. The reference before the Constitution Bench raises the following questions for determination:

a. Whether the provisions of Article 370 were temporary in nature or whether they acquired a status of permanence in the Constitution;

b. Whether the amendment to Article 367 in exercise of the power under Article 370(1)(d) so as to substitute the reference to the "Constituent Assembly of the State referred to in clause (3) of Article 370 by the words "Legislative Assembly of the State" is constitutionally valid;

c. Whether the entire Constitution of India could have been applied to the State of Jammu and Kashmir in exercise of the power under Article 370(1)(d);

d. Whether the abrogation of Article 370 by the President in exercise of the power under Article 370(3) is constitutionally invalid in the absence of a recommendation of the Constituent Assembly of the State of Jammu and Kashmir as mandated by the proviso to clause (3);

e. Whether the proclamation of the Governor dated 20 June 2018 in exercise of power conferred by Section 92 of the Constitution of Jammu and Kashmir and the subsequent exercise of power on 21 November 2018, under Section 53(2) of the Constitution of Jammu and Kashmir to dissolve the Legislative Assembly are constitutionally valid;

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f. Whether the Proclamation which was issued by the President under Article 356 of the Constitution on 19 December 2018 and the subsequent extensions are constitutionally valid;

g. Whether the Jammu and Kashmir Reorganisation Act 2019 by which the State of Jammu and Kashmir was bifurcated into two Union Territories (Union Territory of Jammu and Kashmir and Union Territory of Ladakh) is constitutionally valid bearing in mind:

   i. The first proviso to Article 3 which requires that a Bill affecting the area, boundaries or name of a State has to be referred to the legislature of the State for its views; and

   ii. The second proviso to Article 3 which requires the consent of the State legislature for increasing or diminishing the area of the State of Jammu and Kashmir or altering the name of boundary of the State before the introduction of the Bill in Parliament;

h. Whether during the tenure of a Proclamation under Article 356, and when the Legislative Assembly of the State is either dissolved or is in

suspended animation the status of the State of Jammu and Kashmir as a State under Article 1(3)(a) of the Constitution and its conversion into a Union Territory under Article 1(3)(b) constitutes a valid exercise of power.

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E. Analysis

i. The State of Jammu and Kashmir did not possess sovereignty

87. Some petitioners urged that the State of Jammu and Kashmir retained an element of sovereignty when it joined the Indian Union. They argued that the IoA ceded 'external sovereignty' to the Union of India by ceding control over the subjects of defence, foreign affairs, and telecommunication but the State retained 'internal sovereignty' because of:

a. The history of the relationship between Jammu and Kashmir and India;

b. The formation of the Constituent Assembly of Jammu and Kashmir;

c. The adoption of the Constitution of Jammu and Kashmir; and

d. The power to enact laws on all subjects except defence, foreign affairs, and telecommunication.

They urged that Article 370 subsumed the sovereignty retained by the State. In response, the Union of India advanced the argument that any sovereignty which vested with the State was ceded with the signing of the IoA. The Union argued that the constitutional scheme (of both the Indian Constitution and the Constitution of Jammu and Kashmir) does not indicate that any element of sovereignty was retained by the State. The question of whether the State retained any element of sovereignty is a primary issue which will bear upon the other issues before this Court.

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a. The meaning of sovereignty

88. Sovereignty has different connotations in political theory, law and philosophy. Even within these fields, there is no definitive meaning about its content. European philosophers, from Hobbes to Locke to Rousseau deliberated upon sovereignty, and its meaning has evolved over centuries. While it was initially considered as residing within a person (generally, the monarch), it is now thought to rest within a body or group.

89. Despite the absence of agreement on its precise content, there is broad agreement that legal sovereignty exists when a body has unlimited or unrestricted legislative power or authority and when none other is superior to it.[153] This indicates that a sovereign authority has the supreme power to make laws and is not subordinate to another entity. In *Law of the Constitution,* Dicey stated:

> "It should, however, be carefully noted that the term 'sovereignty,' as long as it is accurately employed in the sense in which Austin sometimes uses it, is a merely legal conception, and means simply the power of law-making unrestricted by any legal limit"[154]

The emphasis on the unlimited nature of the power available to a body has diminished with the development of international law and other modern limits on the exercise of power.[155] While the expression 'sovereignty' was previously understood to mean that the sovereign could enact any type or form of law in exercise of sovereign power, modern legal systems limit the nature of the laws

[153] See, for instance, Dicey, *Law of the Constitution* (8th ed. 1915); Austin, *Jurisprudence* (4th ed. 1873); John Dickinson, A Working Theory Of Sovereignty I, Political Science Quarterly, Volume 42, Issue 4, December 1927, Pages 524–548;
[154] Dicey, *Law of the Constitution* (8th ed. 1915) at 70
[155] Union of India v. Sukumar Sengupta, 1990 Supp SCC 545

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that can be enacted by constitutional or other interdicts. Hence, the aspect of sovereignty which requires no subordination to another body is of greater significance as compared to the traditional aspect that requires power to be unlimited.

90. The meaning of sovereignty elucidated in the preceding paragraph is descriptive not of external sovereignty but internal sovereignty. The former is commonly understand to mean the independence of a nation in relation to other nations whereas the latter is the relationship of the "*sovereign within the state to the individuals and associations within the state.*"[156] External and internal sovereignty are not entirely distinct concepts but are different facets. They have gradually come to be regarded as two sides of the same coin.[157] Dicey's comment (extracted above) is evidently with reference to internal sovereignty because the unrestricted power to make laws concerns individuals and associations within a state, as opposed to the relationship between two nations.

91. Orfield undertook a study of the literature on the subject of sovereignty. The study listed five leading characteristics of internal sovereignty:

    a. It exists as a matter of fact or as a matter of fact and law. Though the law of a state need not necessarily recognize, it may recognize the sovereign;

[156] Lester B Orfield, *The Amending of the Federal Constitution* (2012)
[157] Max Planck Encyclopedia of Public International Law, 'Sovereignty' Oxford Public International Law <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1472>

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b. Sovereign power is absolute in that a law may be passed on any subject;

c. It is indivisible;

d. The law passed by the sovereign need not be enforced in particular cases; and

e. The legal sovereign is determinate. It may be a single person or a group of persons.

92. In India, sovereignty vests in the people of India.[158] The Preamble to the Constitution of India states that "*We, the people … hereby adopt, enact and give to ourselves this Constitution.*" The Constitution was not adopted by an external authority such as a colonial power or its monarch. The Constitution does not owe its existence to an internal authority such as the rulers of the Princely States.

93. The voice of the people echoed in the Constituent Assembly though it was not formed by an election based on adult suffrage. On 16 May 1946, the Cabinet Mission Plan stated that though the "most satisfactory method" of constituting the Constituent Assembly would be through adult suffrage, it would lead to a "wholly unacceptable delay". Thus, the Plan stipulated that the most "practicable course" is to "utilize the recently elected Provincial Legislative Assemblies as the electing bodies." The Cabinet Mission proposed the following plan for the constitution of the Assembly:

[158] Indira Nehru Gandhi v. Raj Narain, 1975 Supp SCC 1; State (NCT of Delhi) v. Union of India, (2018) 8 SCC 501

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a. To allot to each Province a total number of seats proportional to its population, roughly in the ratio of one to a million, as the nearest substitute for representation by adult suffrage;

b. To divide its provincial allocation of seats between the main communities in each Province in proportion to their population; and

c. To provide that the representatives allotted to each community in a Province shall be elected by the members of that community in its Legislative Assembly.

Muslims, Sikhs, and 'General' (all persons who were not Muslims or Sikhs) were recognised as the three main communities. However, since the interests of smaller minorities would not be adequately represented through this method, it was proposed that the Advisory Committee on the rights of citizens, minorities, and tribal and excluded groups should "contain full representation of the interests affected, and their function will be to report to the Union Constituent Assembly upon the list of Fundamental Rights, the clauses for the protection of minorities, and a scheme for the administration of the tribal and excluded areas, and to advise whether these rights should be incorporated in the Provincial, Group or Union Constitution."

94. Even after the Constituent Assembly was elected, the general public were engaged in the process of the drafting of the Constitution. In February 1948, the Draft Constitution of India 1948 prepared by the Drafting Committee was published and widely disseminated. Copies of the Draft Constitution were sold

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for one rupee, inviting comments from a wide range of civic bodies including the public.[159] Thus, the people of India – as a whole – exercised their sovereign political power to adopt, enact, and give to themselves the Constitution through the Constituent Assembly. Consequent on the adoption of the Constitution, the people exercise the power of sovereignty through their elected representatives.[160]

95. The question which is being considered by this Court when it adjudicates whether Jammu and Kashmir retained sovereignty is two-fold: first, did the State of Jammu and Kashmir retain sovereignty as distinct from its people? If not, is the exercise of sovereign power by the people of Jammu and Kashmir different from the exercise of sovereign power by the citizens of India who reside in different states? The answer to these and related issues will have be understood in the context of historical events which have shaped our past and continue to have an impact on the present.

b. The history of the Union of India and Jammu and Kashmir

96. In 1834, Zorawar Singh, the General commanding the army of Gulab Singh, the Maharaja of Jammu invaded Ladakh. Ladakh came under Dogra rule and was incorporated into the State of Jammu and Kashmir in 1846. In the course of the Sino-Sikh War in 1841-42, the Qing empire invaded Ladakh but the Sino Tibetan army was defeated. On 9 March 1846, the Treaty of Lahore was executed between the Maharaja of Lahore and the British Government,

[159] Shiva Rao, *The Framing of India's Constitution, IV,* pp. 3-4
[160] State (NCT of Delhi) v. Union of India, (2018) 8 SCC 501

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resulting in the transfer of certain territories to the East India Company. At Partition in 1947, Ladakh was a part of Jammu and Kashmir and was administered from Srinagar.

97. Following the Treaty of Lahore, the British Government executed the Treaty of Amritsar on 16 March 1846 in terms of which the hilly mountainous country with its dependencies situated to the east of the river Indus and west of the Ravi, including Chamba, and excluding Lahaul were transferred by the British Government to Maharaja Gulab Singh of Jammu. Maharaja Gulab Singh died on 30 June 1857 and was succeeded by his son Maharaja Ranbir Singh. Initially, the State was ruled as a monarchy and as a consequence, sovereignty vested in the monarch.

98. Following the passage of the Government of India Act 1858 on 2 August 1858, territories formally in the possession or under the control of the East India Company were vested in the British Monarch in whose name India was to be governed. Maharaja Ranbir Singh died in 1885 and was succeeded by Maharaja Pratap Singh.

99. On 30 August 1889, the British Parliament enacted the Interpretation Act 1889. Section 18(4) defined the expression British India to comprise of :

> "all territories and places withing Her Majesty's dominions which are for the time being governed by Her Majesty through the Governor-General of India…"

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PART E

100. The term “India” was defined in Section 18(5) as comprising of :

> “British India together with any territories of native prince or chief under the suzerainty of Her Majesty exercised through the Governor-General of India…”

The suzerainty of the colonising British over the territory of Jammu and Kashmir was such that external sovereignty rested with the Crown.

101. Maharaja Pratap Singh was succeeded in 1925 by Maharaja Hari Singh, the last Ruler of the Princely State of Jammu and Kashmir. On 20 April 1927, the expression “State Subject” was defined in a notification issued by Maharaja in terms of which ‘State Subjects’ were classified into four categories which were subsequently to become the basis of the definition of the expression “Permanent Residents” of Jammu and Kashmir under Article 35A of the Constitution of India as it applied to the State of Jammu and Kashmir.

102. Maharaja Hari Singh enacted Regulation No 1 of Samvat 1991 on 22 April 1934 which established a Legislative Assembly called the ‘Praja Sabha’ for the State of Jammu and Kashmir. While delegating certain legislative functions to the Praja Sabha, Maharaja Hari Singh retained supremacy over all legislative, executive and judicial matters. This was indicative of internal sovereignty, in terms of its meaning discussed in the preceding section.

103. By the Government of India Act, 1935 which was enacted by the British Parliament on 2 August 1935, India was established as a federation comprising of the Governors’ Provinces, Chief Commissioners’ Provinces and the Indian States which had or would accede to the Federation of India. Part II was titled the ‘Federation of India’ and Chapter I of the Part provided for

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'Establishment of Federation and Accession of Indian States'. Section 5 provided for the Proclamation of the Federation of India.[161] Section 6 enabled the Ruler of an Indian/Princely State to execute an IoA declaring that he acceded to the Federation of India subject to the terms of the Instrument. The State of Jammu and Kashmir was not a part of British India. Hence, the provisions of the Government of India Act 1935 would apply to it only upon the execution of an IoA by the Maharaja in accordance with Section 6.

104. The Jammu and Kashmir Constitution Act 1939 was promulgated on 7 September 1939. While Maharaja Hari Singh retained sovereignty and supremacy over all legislative, executive and judicial functions, Section 23 of the Act empowered the Praja Sabha to make laws for the entire State of Jammu and Kashmir or any part of it subject to the conditions specified in Section 24. The Act vested executive functions with a Council consisting of a Prime Minister and other Ministers appointed by the ruler. The Act provided for the High Court (which had been established in 1928) to be a Court of Record with jurisdiction over civil suits and civil, criminal and revenue appeals.

105. In May 1946, the British Cabinet Mission issued a Memorandum titled 'State's Treaties and Paramountcy' which affirmed that upon the establishment of an

[161] Section 5 – Proclamation of Federation of India
(1) It shall be lawful for His Majesty, if an address in that behalf has been presented to him by each House of Parliament and if the condition hereinafter mentioned is satisfied, to declare by Proclamation that as from the day therein appointed there - shall be united in a Federation under the Crown, by the name of the Federation of India-
(a) the Provinces hereinafter called Governors' Provinces ; and
(b) the Indian States which have acceded or may thereafter accede to the Federation; and in the Federation so established there shall be included the Provinces hereinafter called Chief Commissioners' Provinces.
(2) The condition referred to is that States-
(a) the Rulers whereof will, in accordance with the provisions contained in Part II of the First Schedule to this Act, be entitled to choose not less than fifty-two members of the Council of State; and
(b) the aggregate population whereof, as ascertained in accordance with the said provisions, amounts to at least one-half of the total population of the States as so ascertained, have acceded to the Federation.

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independent government in India, the paramountcy of the British monarch over Indian States would lapse and paramount power over their respective territories would return to the respective Princely States. It envisaged that the States could enter into a federal relationship with the successor government. On 16 May 1946, a Statement was issued by the Cabinet Mission. According to paragraphs 15(1) and 15(4) of the Statement, the Cabinet Mission Plan recommended a Union of India where the Union would have control over defence, foreign affairs and communications while the States would retain jurisdiction over all other subjects which were not ceded to the Union.

106. Meanwhile, the Constituent Assembly was elected and came together to deliberate upon the form of governance for the country and frame a Constitution for it. The Constituent Assembly comprised of a broad-based representation from across the country in which the representatives of the Princely States continued to join. In terms of the Cabinet Mission Plan, the Constituent Assembly of India met for its first session on 9 December 1946.

107. On 22 January 1947, the Constituent Assembly unanimously adopted the Objectives Resolution which declared the "*firm and solemn resolve to proclaim India as an Independent Sovereign Republic.*" Paragraphs 2, 3, 4 and 7 declared that:

> "(2) WHEREIN the territories that now comprise British India, the territories that now form the Indian States, and such other parts of India as are outside British India and the States, as well as such **other territories as are willing to be constituted into the Independent Sovereign India, shall be a Union of them all**; and
>
> (3) WHEREIN the said territories whether with their present boundaries or with such others as may be determined by the

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> Constituent Assembly and thereafter according to the law of the Constitution, shall possess and **retain the status of autonomous units,** together with residuary powers, and exercise all powers and functions of government and administration, save and except such powers and functions as are vested in or assigned to the Union or as are inherent or implied in the Union or resulting therefrom; and
>
> (4) WHEREIN **all power and authority of the Sovereign Independent India, its constituent parts and organs of government, are derived from the people**; and
>
> …
>
> (7) WHEREIN there shall be maintained the integrity of the territory of the Republic and **its sovereign rights** on land, sea, and air according to justice and the law of civilized nations;
>
> …"
>
> (emphasis supplied)

108. The Objectives Resolution is significant to the discussion of whether Jammu and Kashmir retained an element of sovereignty because it reflects the understanding of the framers of the Constitution as to the consequences of acceding to India. Undoubtedly, the rulers of the Princely States, had a contemporaneous and parallel understanding of the consequences of accession – the loss of sovereignty. Indeed, this was one of the factors (if not the main factor) which caused some of the Princely States (such as Hyderabad) to hesitate in acceding to India. The following portions of the Objectives Resolution are of particular significance:

a. Paragraph 2 indicated that the territories which acceded would be acceding to the sovereign country of India;

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b. Paragraph 3 indicated that the acceding territories would retain some level of autonomy (which is different from sovereignty);

c. Paragraph 4 indicated that the sovereignty of India was derived from its people as a whole. This included the people of the acceding territories; and

d. Paragraph 7 reinforced that the centrality of sovereignty vests with the people of the country as a whole.

109. On 20 February 1947, Clement Attlee, the Prime Minister of United Kingdom announced that:

a. The British Government would grant full self-government to British India by 30 June 1948; and

b. The future of the Princely States would be decided after the date of final transfer was determined.

110. On 3 June 1947, representatives of the Indian National Congress, the Muslim League and the Sikh Community came to an agreement with Lord Mountbatten, the agreement being known as the 'Mountbatten Plan'. The Mountbatten Plan *inter alia* envisaged:

a. The partition of British India;

b. Grant of Dominion status to successor governments;

c. Autonomy and sovereignty to India and Pakistan;

d. Adoption of Constitutions by both the nations; and

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e. An option to Princely States to either join India or Pakistan.

111. On 13 June 1947, a meeting was convened by Lord Mountbatten with Jawaharlal Nehru, Sardar Patel, Acharya Kripalani, Muhammad Ali Jinnah, Liaquat Ali Khan, Sardar Abdul Nishtar and Sardar Baldev Singh, at which the creation of a States' Department was envisaged. It was envisaged that:

> "That it would be advantageous if the Government of India were to set up a new Department, possibly called the "States Department", to deal with matter of common concern with the States; that, if this were done, the new Department should be divided into two sections, ready for the partition of the country and that the existing Political Department and the Political Adviser should give all possible assistance and advice in the formation of this new Department"

112. On 15 June 1947, the Congress Working Committee on States repudiated the British perspective that the lapse of paramountcy would result in the creation of independent states. It stated that :

> "The committee does not agree with the theory of paramountcy as enunciated and interpreted by the British Government; but even if that is accepted, the consequences that flow from the lapse of paramountcy are limited in extent. The privileges and obligations as well as the subsisting rights as between the States and the Government of India cannot be adversely affected by the lapse of paramountcy. These rights and obligations have to be considered separately and renewed or changed by mutual agreement. The relationship between the Government of India and the States would not be exhausted by lapse of Paramountcy. The lapse does not lead to the independence of the States."

The British Government and Indian bodies evidently disagreed on whether paramountcy would lapse.

113. On 25 June 1947, the Interim Cabinet of India issued a press communique on 27 June 1947 for the setting up of a States' Department chaired by Sardar

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Vallabhai Patel to deal with matters arising between the central Government and Indian states. The communique stated that :

> "In order that the successor Government will each have an organisation to conduct its relations with the Indian States when the Political Department is wound up, His Excellency the Viceroy, in consultation with the Cabinet, has decided to create a new Department called the States Department to deal with matters arising between the Central Government and the Indian States. This Department will be in charge of Sardar Patel, who will work in consultation with Sardar Abdur Rab Nishtar. The new Department will be organised in such a way and its work so distributed that at the appropriate time it can be divided up between the two successor Governments without any dislocation."

114. On 3 July 1947, Sardar Patel wrote to Maharaja Hari Singh stating that "the interests of Kashmir lie in joining the Indian Union and its Constituent Assembly without any delay" and that "its past history and tradition demand it, and India looks up to you and expects you to take this decision".

115. The States Department was a part of the Ministry of Home Affairs headed by Sardar Patel. On 5 July 1947, Sardar Patel issued the following statement:

> "I have a few words to say to the rulers of Indian States among whom I am happy to count many as my personal friends. It is the lesson of history that it was owing to her political fragmented condition and our inability to make a united stand that India succumbed to successive waves of invaders. Our mutual conflicts, and internecine quarrels and jealousies have in the past been the cause of our downfall and our falling victims to foreign domination a number of times. We cannot afford to fall into those errors or traps again. We are on the threshold of independence.
>
> …
>
> But there can be no question that despite this separation a fundamental homogeneous culture and sentiment reinforced by the compulsive logic of mutual interests would continue to govern us. Much more would this be the case with that vast majority of States which owing to their geographical contiguity and indissoluble ties, economic, cultural and political, must continue to maintain relations

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> of mutual friendship and co-operation with the rest of India. The safety and preservation of these States as well as of India demand unity and mutual co-operation between its different parts.
>
> …
>
> I do not think it can be their desire to utilise this freedom from domination in a manner which is injurious to the common interests of India or which militates against the ultimate paramountcy of popular interests and welfare or which might result in the abandonment of that mutually useful relationship that has developed between British India and Indian States during the last century. This has been amply demonstrated by the fact that a great majority of Indian States have already come into the Constituent Assembly. To those who have not done so, I appeal that they should join now. The States have already accepted the basic principle that for Defence, Foreign Affairs and Communications they would come into the Indian Union. We expect (sic) more of them than accession on these three subjects in which the common interests of the country are involved.
>
> …
>
> Nor would it be my policy to conduct the relations of the new Department with the States in any manner which savours of the domination of one over the other; if there would be any domination, it would be that of our mutual interests and welfare.
>
> …
>
> Let not the future generations curse us for having had the opportunity but failed to turn it to our mutual advantage. Instead, let it be our proud privilege to leave a legacy of mutually beneficial relationships which would raise this Sacred Land to its proper place amongst the nations of the world and turn it into an abode of peace and prosperity."

116. On 10 July 1947, during the second reading of the Indian Independence Bill, Prime Minister Attlee made the following statement:

> "A feature running through all our relations with the states has been that the Crown has conducted their foreign relations. They have received no international recognition independent of India as a whole. With the ending of the treaties and agreements, the states regain their independence. **But they are part of geographical India, and their rulers and peoples are imbued with a patriotism**

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> **no less great than that of their fellow Indians in British India. It would, I think, be unfortunate if, owing to the formal severance of their paramountcy relations with the Crown, they were to become islands cut off from the rest of India. The termination of their existing relationship with the Crown need have no such consequence.**
>
> …
>
> It is the hope of His Majesty's Government that all states will, in due course, and their appropriate place within one or other of the new dominions within the British Commonwealth, but until the constitutions of the Dominions have been framed in such a way as to include the states as willing partners, there must necessarily be a less organic form of relationship between them, and there must be a period before a comprehensive system can be worked out."
>
> (emphasis supplied)

Even within the British Government, there was uncertainty as to the precise practical effects of the lapse of paramountcy.

117. On 18 July 1947, the British Parliament enacted the Indian Independence Act 1947. In terms of Section 1(1), two independent Dominions – India and Pakistan - were to be established from 15 August 1947. Section 7(1)(b) stipulated that following independence, the sovereignty of the British monarch over Indian States would lapse and return to the rulers of those States. Consequently, as sovereign States, 562 Princely States had the choice to remain independent or to accede to either of the two Dominions established by this Act. Section 8 enunciated that as a transitional measure, the provisions of the Government of India Act 1935 would continue to apply to the two Dominions subject to conditions. In pursuance of the provisions of Section 9, the Governor-General of India issued the India (Provisional Constitution) Order 1947 which made certain provisions of the Government of India Act

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1935 applicable to India until other provisions were made applicable by the Constituent Assembly. Section 6 dealt with the accession of Princely States to India through the execution of an IoA. Section 6 provided as follows:

> "Section 6. Accession of Indian States:-
>
> (1) An Indian State shall be deemed to have acceded to the Dominion if the Governor-General has signified his acceptance of an Instrument of Accession executed by the Ruler thereof whereby the Ruler on behalf of the State:-
>
> (a) declares that he accedes to the Dominion with the intent that the Governor-General, the Dominion Legislature, the Federal Court and any other Dominion authority established for the purposes of the Dominion shall, by virtue of his Instrument of Accession, but subject always to the terms thereof, and for the purposes only of the Dominion, exercise in relation to the State such functions as may be vested in them by order under this Act; and
>
> (b) assumes the obligation of ensuring that the effect is given within the State to the provisions of this Act so far as they are applicable therein by virtue of the Instrument of Accession.
>
> (2) An Instrument of Accession shall specify the matters which the Ruler accepts as matters with respect to which the Dominion Legislature may make laws for the State, and the limitations, if any, to which the power of the Dominion Legislature to make laws for the State, and the exercise of the executive authority of the Dominion in the State, are respectively to be subject.
>
> (3) A Ruler may, by a supplementary Instrument executed by him and accepted by the Governor-General vary the Instrument of Accession of his State by extending the functions which by virtue of that Instrument are exercisable by any Dominion authority in relation to his State."

A Draft Common IoA and Standstill Agreements were drawn up by the Department of States.

118. India obtained independence on 15 August 1947. Partition resulted in the establishment of the two Dominions of India and Pakistan. British

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paramountcy lapsed. Those of the Princely States which had not executed an IoA with either Dominion became independent States. These were Junagarh, Hyderabad and Jammu and Kashmir. Once again, the sovereignty of Jammu and Kashmir rested in the ruler, Maharaja Hari Singh.

119. The Government of Jammu and Kashmir signed a Standstill Agreement with Pakistan. On 27 September 1947, Nehru addressed a letter to Sardar Patel underlining that "the Pakistani strategy is to infiltrate Kashmir now and to take some big action as soon as Kashmir is more or less isolated because of coming winter."

120. Shortly thereafter, on 26 October 1947, Maharaja Hari Singh addressed a communication to Lord Mountbatten requesting the immediate assistance of his government. The letter noted that the Maharaja wanted time to decide to which Dominion he should accede or whether it would be in the best interest of both the Dominions as well as Jammu and Kashmir for the State to "stand independent." The Maharaja noted the grave danger to Jammu and Kashmir from Pakistan in spite of the Standstill Agreement.

121. Adverting to the conditions in the State and the "great emergency of the situation as it exists," the Maharaja stated that he had no option but to ask for help from the Indian Dominion, accepting at the same time that India could not send the help asked for by him without Jammu and Kashmir acceding to the Dominion of India. The Maharaja decided to accede to the Union of India. The offer of accession noted that if the State of Jammu and Kashmir "has to be saved immediate assistance must be available at Srinagar."

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122. Maharaja Hari Singh signed the IoA on 26 October 1947. The Maharaja stated that he was doing so in terms of the provisions of the Government of India Act 1935 enabling any Indian State to accede to the Dominion of India by the execution of an IoA by the Ruler. The Maharaja acceded to the Dominion of India "in the exercise of my sovereignty in and over my said State." As a consequence, the independence attained by the State when British paramountcy lapsed was ceded to the Union of India. The IoA contains the following declaration in paragraph 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 & Kashmir … 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…"

123. In terms of Paragraph 3, the Maharaja accepted matters specified in the Schedule "as the matters with respect to which the Dominion Legislature may make laws for the State." Paragraph 5 stipulated that the terms of the IoA shall not be varied by any amendment "of the Government of India Act 1935 or the Indian Independence Act 1947 unless such an amendment is accepted by the Maharaja by an Instrument supplementary to the Instrument." Paragraph 7 provided that:

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

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124. Paragraph 8 provided that nothing in the IoA would affect the continuance of the sovereignty of the Maharaja in and over the State, the exercise of any powers, authority and rights enjoyed by him as Ruler save as otherwise provided by the Instrument and the validity of any law which was in force.

125. The IoA was accepted by the Governor-General on 27 October 1947. The Governor-General stated that in response to the Maharaja's appeal for military aid, action has been taken to send the 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."

126. On 5 March 1948, Maharaja Hari Singh issued a Proclamation establishing an Interim Government for the State of Jammu and Kashmir pending the framing of a Constitution for the State.

127. Before the Constitution of India came into force, the process of integrating Princely States with the Dominion of India was progressively being achieved. Many Princely States executed IoA and Standstill Agreements.

128. The White Paper on States (1951) contains an illuminating discussion on territorial integration:

> "224. One of the important consequences of the adoption of the new Constitution is the completion of the process of the territorial integration of States. The States geographically contiguous to the Dominion of India, as they existed before the Constitution of India became operative, could be divided into two main categories:
>
> (i) the acceding States, and
>
> (ii) the non-acceding States.

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There were only two non-acceding States, namely, Hyderabad and Junagadh. The acceding States could be sub-divided into the following groups:-

(a) States which were not affected by the process of integration and continued as separate units. i.e. Mysore and Jammu and Kashmir;

(b) Unions of States;

(c) Centrally-merged States;

(d) Provincially-merged States; and

(e) Khasi Hill States Federation.

Under the new Constitution, all the constituent units, both Provinces and States-the latter term includes non-acceding States-have been classified into three classes, viz:

(1) Part A States which correspond to the former Governors' Provinces,

(2) Part B States which comprise the Unions of States and the States of Hyderabad, Mysore and Jammu and Kashmir and

(3) Part C States which correspond to the former Chief Commissioners' Provinces.

The new Constitution effects the territorial integration of States by means of a of a two-fold process. Firstly, Article 1 of the Constitution defines the territories of India to include the territories of all the States specified in the First Schedule, including Part B States. This is an important departure from the scheme embodied in the Act of 1935 in that, while section 311(1) of that Act defined India to include British India together with all territories of Indian Rulers, the Act did not define the territories of the Indian Federation. Secondly, with the inauguration of the new Constitution, the merged States have lost all vestiges of existence as separate entities. This will be clear from the position set out in the paragraphs which follow."

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PART E

129. As regards the State of Jammu and Kashmir, Para 221 of the White Paper provides:

> "Special provisions regarding the State of Jammu and Kashmir
>
> 221. The State of Jammu and Kashmir acceded to India on October 26, 1947. The form of the Instrument of Accession executed by the Rule of the State is the same as that of the other Instruments executed by the Rulers of other acceding States. **Legally and constitutionally therefore the position of this State is the same as that of the other acceding States. The Government of India, no doubt, stand committed to the position that the accession of this State is subject to confirmation by the people of the State. This, however, does not, detract from the legal fact of accession.** The State has therefore been included in Part B States."
>
> (emphasis supplied)

130. The White Paper notes Jammu and Kashmir was incorporated as a Part B State. Moreover, with the inauguration of the Constitution, all the merged entities "have lost all vestiges of existence as separate entities". The White Paper noted that in view of the special problems which were arising in the State of Jammu and Kashmir and bearing in mind the assurance of the Government of India that its people would themselves finally determine their political future, the provisions of Article 370 were introduced. However, the legal fact of accession had resulted in the transfer of sovereignty from the Maharaja to India. The White Paper states:

> "The effect of this provision is that the State of Jammu and Kashmir, continues to be a part of India. It is a unit of the Indian Union and the Union Parliament will have jurisdiction to make laws for this State on matters specified either in the Instrument of Accession or by after additions with the concurrence of the Government of the State. An order has been issued under Article 370 specifying (1) the matters in respect of which the Parliament may make laws for the Jammu and Kashmir State and (2) the provisions, other than Article 1 and Article 370, which shall apply to that State (Appendix LVI). Steps will be taken for the purpose of convening a Constituent Assembly

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> which will go into these matters in detail and when it comes to a decision on them, it will make a recommendation to the President who will either abrogate Article 370 or direct that it shall apply with such modifications and exceptions as he may specify."

131. In June 1949, Maharaja Hari Singh issued a Proclamation delegating his power and authority to Yuvraj Karan Singh who would function as the ruler of the State. Following his appointment as the ruler, Yuvraj Karan Singh nominated four representatives from Jammu and Kashmir to the Constituent Assembly of India. On 16 June 1949, Sheikh Abdullah joined the Constituent Assembly together with three other representatives from the State of Kashmir namely Mirza Mohammed Afzal Baig, Maulana Mohammed Sayeed Masoodi and Moti Ram Bagda.

132. At this time, several Princely States entered into covenants to form single units. The Princely States of Bhavnagar, Porbandar, Junagadh and others formed the United State of Saurashtra. Gwalior, Indore and eighteen other Princely States formed the United State of Gwalior, Indore and Malwa (Madhya Bharat). Similar covenants led to the formation of the Patiala and East Punjab States Union (PEPSU), the United State of Rajasthan and the United State of Travancore and Cochin.

133. In July 1949, a note prepared by the Ministry of States regarding the Indian States specifically noted that Jammu and Kashmir would be treated as a part of Indian Territory:

> "The Government of India have considered the matter in its various aspects and are of the opinion that in view of the present peculiar situation in respect of Jammu and Kashmir State it is desirable that the accession of the State should be continued on the existing basis **till the State could be brought to the level of other States. A**

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> **special provision has therefore to be made in respect of this State on the basis suggested above as a transitional arrangement**."
>
> (emphasis supplied)

This note expressly clarifies the position that the accession of Jammu and Kashmir was to continue on the then-existing basis till the State could be brought to the level of other States; the State would be treated as a part of Indian Territory until Parliament made all the provisions of the Constitution (which were applicable to the States specified in Part III of Schedule I to the Constitution) applicable to Jammu and Kashmir. The power of Parliament to make laws for the State would be limited to those matters specified in the IoA reflecting the power of the Dominion of India to legislate. The special provision for Jammu and Kashmir was not, therefore, indicative of the fact that it retained an element of sovereignty. Rather, it was necessitated by the conditions in the State at the time and was intended to continue until the State could be brought on par with other States.

134. On 14 October 1949, Jammu and Kashmir was included among Part III States under Article 1 with a territory comprising of the corresponding Indian States immediately before the commencement of the Constitution. The Part III States were:

> "1. Hyderabad
>
> 2. Jammu and Kashmir
>
> 3. Madhya Bharat
>
> 4. Mysore

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5. Patiala & East Punjab States Union

6. Rajasthan

7. Saurashtra

8. Travancore-Cochin

9. Vindhya Pradesh”

There were nine Part III States including Jammu and Kashmir.

135. On 15 October 1949, four seats were allocated in the Constituent Assembly to Kashmir. The re-allocation of seats in the Constituent Assembly to various States was necessitated because between December 1946 and November 1949:

a. Many of the smaller States merged with the provinces;

b. Many other States were united to form Unions of States; and

c. Some States came to be directly administered as Chief Commissioners’ Provinces.

136. These changes required a re-adjustment of the representation of the States. The modalities which were followed were thus:

a. For States which were merged in Provinces, the Speaker of the Legislative Assembly was authorised to hold elections and to notify the persons elected or nominated to the Constituent Assembly;

b. Where the States were united to form a Union of States and for Hyderabad, Mysore and Jammu and Kashmir, the Rajpramukh or Ruler was entrusted with this function; and

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c. In the case of States which were constituted into Chief Commissioners' Provinces, the function was entrusted to the Chief Commissioner.

137. On 17 October 1949, four seats were allotted to the State of Jammu and Kashmir, among other States, in the Council of States. The allocation of seats of all states was as follows:

> "REPRESENTATIVES OF STATES FOR THE TIME BEING
>
> SPECIFIED IN PART III OF THE FIRST SCHEDULE
>
> States/ Total Seats
>
> 1 Hyderabad 11
>
> 2 Jammu & Kashmir 4
>
> 3 Madhya Bharat 6
>
> 4 Mysore 6
>
> 5 Patiala & East Punjab States Union 3
>
> 6 Rajasthan 9
>
> 7 Saurashtra 4
>
> 8 Travancore-Cochin 6
>
> 9 Vindhya Pradesh 4
>
> Total: 53
>
> TOTAL OF ALL SEATS. 205"

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PART E

138. Draft Article 306A, which later became Article 370 on the adoption of the Constitution, was debated in the Constituent Assembly on 17 October 1949. Gopalaswami Ayyangar, while participating in the debate, furnished the rationale for Article 370. Ayyangar's speech has been read and re-read numerous times in the course of submissions. Ayyangar stated that:

> "Sir, this matter, the matter of this particular motion, relates to the Jammu and Kashmir state. The house is fully aware of the fact that that State has acceded to the Dominion of India. The history of this accession is also well known. The accession took place on the 26th October, 1947. Since then, the State has had a chequered history. **Conditions are not yet normal in the state.** The meaning of this accession is that at present that state is a unit of a federal state namely, the Dominion of India. This Dominion is getting transformed into a Republic, which will be inaugurated on the 26th January, 1950. **The Jammu and Kashmir State, therefore, has to become a unit of the new Republic of India. As the House is aware, accession to the Dominion always took place by means of an instrument which had to be signed by the Ruler of the State and which had to be accepted by the Governor-General of India. That has taken place in this case as the House is also aware, instruments of accession will be a thing of the past in the new Constitution. The States have been integrated with the Federal Republic in such a manner that they do not have to accede or execute a document of accession for the purpose of becoming units of the Republic, but they are mentioned in the Constitution itself;** and, in the case of practically all States other than the State of Jammu and Kashmir, their constitutions also have been embodied in the Constitution for the whole of India. All those other states have agreed to integrate themselves in that way and accept the constitution provided."
>
> (emphasis supplied)

139. On 25 November 1949, a Proclamation was issued for the State of Jammu and Kashmir by Yuvraj Karan Singh. The Preamble to the Proclamation notes that the Constituent Assembly which was drafting the Constitution of India included representatives of the State of Jammu and Kashmir. The Preamble states that:

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> "Whereas with the inauguration of the new Constitution for the whole of India now being framed by the Constituent Assembly of India, the Government of India Act, 1935 which now governs the constitutional relationship between this State and the Dominion of India will stand repealed;
>
> And Whereas, in the best interests of this State, which is closely linked with the rest of India by a community of interests in the economic political and other fields, it is desirable that the constitutional relationship established between this State and the Dominion of India, should be continued as between this State and the contemplated Union of India; and the Constitution of India as drafted by the Constituent Assembly of India, which included duly appointed representatives of this State, provides a suitable basis for doing so;
>
> …"

140. The Proclamation stated that the provisions of the Constitution shall govern the constitutional relationship between the State and Union of India, and that it shall supersede all other constitutional provisions which are inconsistent with the provisions of the Constitution:

> "I now hereby declare and direct-
>
> That the Constitution of India shortly to be adopted by the Constituent Assembly of India shall in so far as it is applicable to the State of Jammu and Kashmir, govern the constitutional relationship between this State and the contemplated Union of India and shall be enforced in this State by me, my heirs and successors in accordance with the tenor of its provisions
>
> **That the provisions of the said Constitution shall, as from the date of its commencement, supersede and abrogate all other constitutional provisions inconsistent therewith which are at present in force in this State**."
>
> (emphasis supplied)

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PART E

141. The Proclamation by the ruler made it abundantly clear that:

a. The constitutional relationship between the State of Jammu and Kashmir and the Union of India would be governed by the Constitution of India upon its adoption by the Constituent Assembly;

b. The Constitution would be enforced in the State of Jammu and Kashmir in accordance with its provisions; and

c. The Constitution would upon its commencement supersede and abrogate all other constitutional provisions of the State which were inconsistent with it.

The Proclamation is of particular significance in addressing the argument of the petitioners that Jammu and Kashmir retained sovereignty because it did not enter into an agreement of merger with the Union of India. The declaration that the Constitution of India would not only supersede all other constitutional provisions in the State which were inconsistent with it but also abrogate them achieves what would have been attained by an agreement of merger. We may recall that paragraph 7 of the IoA provided that nothing in the Instrument shall be deemed to commit to acceptance of any future constitution of India. The Proclamation accepted the Constitution of India in no uncertain terms. Paragraph 7 of the IoA therefore ceased to have legal import. The acceptance of the Constitution was not a conditional, temporary or reversible act. Paragraph 8 of the IoA provided that nothing in it would affect the continuance of the sovereignty of the Maharaja in and over the State, the exercise of any powers, authority and rights enjoyed by him as Ruler save as otherwise provided by the Instrument and the validity of any

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law which was in force. With the issuance of the Proclamation, paragraph 8 ceased to be of legal consequence. The Proclamation reflects the full and final surrender of sovereignty by Jammu and Kashmir, through its sovereign ruler, to India – to her people who are sovereign.

142. The Constitution of India was adopted by the Constituent Assembly on 26 November 1949 and came into force on 26 January 1950, repealing the Indian Independence Act 1947 and the Government of India Act 1935.

143. On 1 May 1951, a Proclamation was issued by Yuvraj Karan Singh directing the establishment of an elected Constituent Assembly to draft a Constitution for the State of Jammu and Kashmir. The Constituent Assembly of Jammu and Kashmir was convened on 31 October 1951. In his statement before the Constituent Assembly, Sheikh Abdullah adverted to the circumstances leading up to the signing of the IoA by the Maharaja, categorically adverting to the invasion from the side of Pakistan which would have otherwise led to the occupation of the whole state by Pakistani troops and tribesmen:

> "The overwhelming pressure of this invasion brought about a total collapse of the armed force of the State as well as its administrative machinery leaving the completely defenseless people at the mercy of invaders. It was not an ordinary type of invasion, inasmuch as no canons of warfare were observed. The tribesmen, who attacked the State in thousands, killed, burned, looted and destroyed whatever came their way and in this savagery no section of the people could escape. Even the nuns and nurses of a Catholic Mission were either killed, or brutally maltreated. As these raiders advanced towards Srinagar, the last vestige of authority, which lay in the person of the Maharaja, suddenly disappeared from the Capital. This created a strange vacuum, and would have certainly led the occupation of the whole state by Pakistani troops and tribesmen, if, at this supreme hour of crises, the entire people of Kashmir has not risen like a solid barrier against the aggressor. They halted his onrush, but could not stop him entirely as the defenders, had not enough experience training to fight back effectively. There is no doubt that some of them

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> rose to great heights of heroism during these fateful days. Who can help being moved by the saga of crucified Sherwani, Abdul Aziz, Brigadier Rajendra Singh, Prem Pal, Sardar Rangil Singh early militia boys like Poshkar Nath Zadoo, Somnath Bira Ismail, among scores of other named and unnamed heroes of the all communities. But we, through rich in human material, lacked war equipment and trained soldiers.
>
> When the raiders were fast approaching Srinagar, we could think of only one way to save the state from total annihilation-by asking for help from a friendly neighbour. The representative of the National Conference, therefore, flew to Delhi to seek help from the Government of India. But the absence of any constitutionalities between our State and India made it impossible for her to render us any effective assistance in meeting the aggressor. As I said earlier, India had refused to sign a Stand Still Agreement with the state on the ground that she could not accept such a Agreement until it had the approval of the people. But now, since the people's representatives themselves sought an alliance, the Government of India showed readiness to accept it. Legally the instrument of Accession had to be signed by the ruler of the state. This the Maharaja did. While accepting that accession, the Government of India said that she wished that "as soon as law and order have been restored in the Kashmir and her soil cleared of the Invader, the question of the state's accession should be settled by reference of the people."

144. In the course of his address to the Constituent Assembly of Jammu and Kashmir, Sheikh Abdullah highlighted the following reasons in support of acceding to India:

a. The adoption of democracy, as a consequence of which "there is no danger of a revival of feudalism and autocracy" if Jammu and Kashmir were to accede to India;

b. In the previous four years, the Government of India had made no attempt to interfere in the internal autonomy of Jammu and Kashmir;

c. The Indian Constitution provided for a secular democracy based on the precepts of justice, freedom and equality;

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d. The Indian Constitution had repudiated the concept of a religious state by guaranteeing the equality of citizens irrespective of religion, colour, caste and class;

e. The national movement in Jammu and Kashmir gravitated towards these principles of secular democracy;

f. The economic advantages of aligning with India; and

g. The potential of achieving land reforms under the Indian Constitution.

145. Sheikh Abdullah noted that the most powerful argument in favour of acceding to Pakistan was that the Pakistan was a Muslim state and a large majority of the people in Jammu and Kashmir professed the religion. Repelling the argument, Sheikh Abdullah observed:

> "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."

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146. On 10 June 1952, the Basic Principles Committee of the Jammu and Kashmir Constituent Assembly submitted its interim report recommending that:

a. The form of the future Constitution of Jammu and Kashmir would be wholly democratic;

b. Hereditary rulership shall be terminated and;

c. The Head of State shall be elected.

147. In 1952, the Delhi Agreement was entered into between the Government of India and the Government of Jammu and Kashmir. In terms of the Agreement, the Union Government agreed that while residuary powers of the Legislature vested in Parliament in respect of other States, in the case of Jammu and Kashmir, the residuary powers vested in the State itself because of the consistent stand taken by the Jammu and Kashmir Constitution that "sovereignty in all matters other than those specified in the IoA reside in the State":

> "in view of the uniform and consistent stand taken up by the Jammu and Kashmir Constituent Assembly that sovereignty in all matters other than those specified in the Instrument of Accession continues to reside in the State, the Government of India agreed that, while the residuary powers of legislature vested in the Centre in respect of all states other than Jammu and Kashmir, in the case of the latter they vested in the State itself"

148. In the meantime, the President issued Constitutional Orders from time to time as discussed in the other parts of the judgment. The process of integration of Jammu and Kashmir was a gradual one. This was necessitated due to the special conditions which prevailed in the State, as discussed in this segment.

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The Constitution of Jammu and Kashmir, too, was meant to play a role in this gradual process of integration. As evinced by the discussion of the historical trajectory of the relationship of Jammu and Kashmir with the Union of India, sovereignty was surrendered in part with the signing of the IoA and in full, with the issuance of the Proclamation by Yuvraj Karan Singh in November 1949. It remains to consider whether the Constitution of India or the Constitution of Jammu and Kashmir lead to the conclusion that the State retained an element of sovereignty.

c. Neither the constitutional setup nor any other factors indicate that the State of Jammu and Kashmir retained an element of sovereignty

149. Article 1 of the Constitution of India provides that India is a Union of States. The immutability and import of Article 1 in its application to the State of Jammu and Kashmir may be gleaned from many provisions:

a. Article 1 (as it then stood) referenced Part III States, and Jammu and Kashmir was listed as a Part III State in the First Schedule to the Constitution of India;

b. Article 370(1)(c) of the Indian Constitution reiterates that Article 1 shall apply to the State. While Article 370 contains provisions for applying other provisions of the Constitution with modification or exceptions to the State of Jammu and Kashmir, there is no provision for the modification or abrogation of Article 1; and

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c. Section 3 of the Constitution of Jammu and Kashmir declares that Jammu and Kashmir is an integral part of India:

> "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."

d. Section 147 prohibits any amendment to Section 3.

These provisions, too, contradict the argument that an agreement of merger was necessary for Jammu and Kashmir to surrender its sovereignty. The Constitution, once adopted and in force, became the supreme governing document of the land. The merger of Jammu and Kashmir with the Union of India was an unequivocal fact, as evinced from these provisions.

150. On 17 November 1956, the Constituent Assembly of Jammu and Kashmir approved and adopted the Constitution of Jammu and Kashmir. The Preamble to the Constitution states:

> "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**."
>
> (emphasis supplied)

Three aspects of the Preamble are of significance:

a. The Constitution of Jammu and Kashmir was not adopted independently of the Union of India but was adopted in pursuance of the accession of the State to India;

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b. The Constitution of Jammu and Kashmir was only to **further** define the relationship between the Union of India and the State of Jammu and Kashmir. The relationship was already defined by the IoA, the Proclamation issued by Yuvraj Karan Singh in November 1949 and more importantly, by the Constitution of India; and

c. That the State of Jammu and Kashmir was an integral part of the Union of India was reiterated in the Constitution of Jammu and Kashmir.

151. The debates of the Constituent Assembly of Jammu and Kashmir also reveal that sovereignty lay with the people of India (which included the people of Jammu and Kashmir) and not with the State or its people alone:

a. Shri Kushuk Bakula stated: [162]

> "…**That we are thus made an integral party of India**, that great country of high ideas and glorious traditions to which the nation of the world look for guidance and which is the one potent factor for the maintenance of world peace at the present day cannot but be a matter for unlimited jubilation for all of us…"[163]
>
> (emphasis supplied)

b. Shri Kotwal Chuni Lal stated:

> "We again stand by the pledge of the National Conference that Kashmir is an inseparable part of India."[164]

[162] Shri Kushuk Bakula made his remarks in Bodhi. The Secretary of the Constituent Assembly read out an English version of his speech.
[163] 25 October 1956, Debates of the Constituent Assembly of Jammu and Kashmir
[164] 7 November 1956, Debates of the Constituent Assembly of Jammu and Kashmir

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c. Mrs Isher Devi Mani stated:

> "The first point I want to emphasis is that we all must be aware that Kashmir is an integral part of India. We have acceded to India of our own free will and I see no reason why we should not be happy and jubilant over this."[165]

d. The President of the State Constituent Assembly, GM Sadiq stated:

> "We are an integral part of India and shall remain so forever. (Loud applause). You stick to your decision. Today we are not alone or unarmed today we are with India and 360 million Indians."[166]

This is a reiteration of the understanding of the members of the Constituent Assembly of Jammu and Kashmir that accession to India was complete and that sovereignty was surrendered.

152. There is a noticeable difference between the Preamble to the Indian Constitution[167] and the Preamble to the Constitution of the State of Jammu and Kashmir which has been extracted above. The Preamble to the Indian Constitution states, "We the people of India, having solemnly resolved to constitute India into a **sovereign**, socialist, secular and democratic republic…" There is a clear absence in the Constitution of Jammu and Kashmir of a reference to sovereignty. While the Constitution of India emphasises in its Preamble that the people of India resolved to constitute India into a sovereign, socialistic, secular, democratic, republic, the basic purpose of the Constitution of Jammu and Kashmir as set out in the Preamble

[165] 17 November 1956, Debates of the Constituent Assembly of Jammu and Kashmir
[166] 25 January 1957, Debates of the Constituent Assembly of Jammu and Kashmir
[167] *The Preamble to the Indian Constitution: "WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC and to secure to all its citizens: JUSTICE, social, economic and political; LIBERTY of thought, expression, belief, faith and worship; EQUALITY of status and of opportunity; and to promote among them all; FRATERNITY assuring the dignity of the individual and the unity and integrity of the Nation…"*

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is to define further the relationship of the State with the Union though as an integral part of India. Section 2(a) of the Constitution of Jammu and Kashmir provides that "the Constitution of India means the Constitution as applicable in relation to this State". Section 4 defines the territory of the State of Jammu and Kashmir to comprise of all the territories which on 15 August 1947 were under the sovereignty or suzerainty of the Ruler of the State. Section 5 defines the extent of the executive and legislative power of the State in the following terms:

> "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."

153. Section 5 defines the extent of the legislative and executive power of the State by relating it to matters over which Parliament has power to make laws for the State. In other words, the residual power which is left after excluding the domain which falls within the ambit of the legislative power of Parliament in relation to the State, would be within the legislative and executive domain of the State of Jammu and Kashmir. Section 5 however recognises that the legislative domain of Parliament in relation to the State of Jammu and Kashmir would be prescribed by the Constitution of India and necessarily therefore not by the Constitution of the State of Jammu and Kashmir.

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154. Section 6 of the Jammu and Kashmir Constitution provides for Permanent residents:

> "Permanent residents
>
> (1) Every person who is, or is deemed to be, a citizen of India under the provisions of the Constitution of India shall be a permanent resident of the State, if on the fourteenth day of May, 1954.
>
> (a) he was a State subject of class I or of class II: or
>
> (b) having lawfully acquired immovable property in the State, he has been ordinarily resident in the State for not less than ten years prior to that date.
>
> (2) Any person who, before the fourteenth day of May, 1954 was a State subject of Class I or of Class II and who, having migrated after the first day of March, 1947, to the territory -now included in Pakistan, returns to the State under a permit for resettlement in the State or for permanent return issued by or under the authority of any law made by the State Legislature shall on such return be a permanent resident of the State.
>
> (3) In this section, the expression "State subject of Class I or of Class II" shall have the same -meaning as the State Notification No I-L/84 dated the twentieth April. '1927, read with State Notification No 13/L dated the twenty- seventh June, 1932."

It is important to note that permanent residents do not possess dual citizenship – one of the State of Jammu and Kashmir and another of the Union of India. Rather, they are citizens only of one sovereign unit, that is, the Union of India.[168]

155. Part IV of the Jammu and Kashmir Constitution provides for the Directive Principles of State Policy; Part V for the Executive consisting of the Governor and the Council of Ministers headed by the Chief Minister; Part VI for the State

[168] SBI v. Santosh Gupta, (2017) 2 SCC 538

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Legislature comprising of the Legislative Assembly and the Legislative Council. Part VI provides for the High Court and the "subordinate courts". Part VIII provides for Finance, Property and Contracts; Part IX for the Public Services; Part X for Elections and Part XI for Miscellaneous Provisions; Part XII for Amendment of the Constitution. None of these provisions indicate that the State is sovereign.

156. Section 147 which provides for the amendment of the State Constitution is in the following terms:

> "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 at the House, it shall be presented to the Sadar-i-Riyasat 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 majority of the total membership of the 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;
>
> (b) the provisions of the 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."

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PART E

157. The power of the Legislative Assembly to amend the Constitution of Jammu and Kashmir was subject to the constraints provided in the second proviso in terms of which the Legislative Assembly could not amend:

a. Section 147 itself;

b. The provisions of Sections 3 and 5; and

c. The provisions of the Constitution of India as applicable in relation to the State.

158. These provisions are significant. The power of amending the State Constitution which was entrusted to the Legislative Assembly (subject to the assent of the Governor) had thus three major qualifications: *firstly*, the position that the State of Jammu and Kashmir is and shall be an integral part of the Union of India was unamendable; *secondly*, the executive and legislative domain of the State which depended upon the domain entrusted to Parliament under the provisions of the Constitution of India over which it would make laws for the State of Jammu and Kashmir was unamendable by the State Legislative Assembly; and *thirdly*, the provisions of the Constitution of India as applicable in relation to the State of Jammu and Kashmir were unamendable by the State Legislative Assembly. These restraints which were imposed on the amending power of the State Legislative Assembly made it abundantly clear that Jammu and Kashmir being an integral part of the Union of India was a matter of permanence and unalterable. Moreover, any modification in the relationship of the State of Jammu and Kashmir with the

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Union of India would have to be brought about within the framework of the Constitution of India and that Constitution alone.

159. In adopting the Constitution of India, “We, the people” constituted India into a sovereign republic. The State of Jammu and Kashmir was an integral part of the India. The Constitution of Jammu and Kashmir recognized that position by acknowledging the permanence of Jammu and Kashmir as a constituent State in the sovereign republic of India. In attempting to “further define” the relationship between the State of Jammu and Kashmir with the Union of India, the use of the expression “further” conveys the intendment that the defining characteristics of that relationship were not exclusively embodied in the Constitution of the State. The State being an integral part of the Union of India, the executive and legislative domain of the State relates to the Constitution of India. The territorial integrity of the Union of India, which encompassed as one of the constituent units, the State of Jammu and Kashmir, was beyond the domain of the authorities in the legislative and executive sphere constituted by the State Constitution. The defining contours of the relationship between the State and the Union lay beyond the framework of the State Constitution and would be governed by the Constitution of the Union.

160. Any restraints on the power to modify the relationship of the Union with the State would thus have to be traced to the Constitution of India and not the Constitution of Jammu and Kashmir. Significantly, the Constitution of the State of Jammu and Kashmir did not contain an elaboration of the subjects on which the State could legislate in view of the provisions of Section 5. The

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legislative domain of the State of Jammu and Kashmir was a remainder or the residue left after the legislative domain of Parliament to make laws for the State of Jammu and Kashmir as defined in the Constitution of India.

161. The Preamble of the Constitution of Jammu and Kashmir, Sections 3, 5 and 147 of the State Constitution, coupled with Article 1 of the Constitution of India read with the First Schedule as well as Article 370 indicate in no uncertain terms that a system of subordination (as understood by the definition of sovereignty) exists by which the State is subordinate to the Indian Constitution first and only then to its own Constitution. The Constitution of India was and is the supreme governing document of all States including the State of Jammu and Kashmir. The discussion of the provisions of the two Constitutions in the preceding paragraphs is indicative of this fact.

162. In **SBI** v. **Santosh Gupta**,[169] this Court rejected the argument that the Constitution of Jammu and Kashmir has a status that is equal to the Constitution of India:

> "12. … the State does have its own separate Constitution by which it is governed in all matters, except those surrendered to the Union of India. Amendments that are made in the Constitution of India are made to apply to the State of Jammu & Kashmir only if the President, with the concurrence of the State Government, applies such amendments to the State of Jammu & Kashmir. The distribution of powers between the Union and the State of Jammu & Kashmir reflects that matters of national importance, in which a uniform policy is desirable, is retained with the Union of India, and matters of local concern remain with the State of Jammu & Kashmir. And, even though the Jammu & Kashmir Constitution sets up the District Courts and the High Court in the State, yet, the supreme authority of courts to interpret the Constitution of India and to invalidate action violative of the Constitution is found to be fully present. Appeals from

[169] (2017) 2 SCC 538

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> the High Court of Jammu & Kashmir lie to the Supreme Court of India, and shorn of a few minor modifications, Articles 124 to 147 all apply to the State of Jammu & Kashmir, with Articles 135 and 139 being omitted. The effect of omitting Articles 135 and 139 has a very small impact, in that Article 135 only deals with jurisdiction and powers of the Federal Court to be exercised by the Supreme Court, and Article 139 deals with Parliament's power to confer on the Supreme Court the power to issue directions, orders, and writs for purposes other than those mentioned in Article 32(2). We may also add that permanent residents of the State of Jammu & Kashmir are citizens of India, and that there is no dual citizenship as is contemplated by some other federal Constitutions in other parts of the world. All this leads us to conclude that even qua the State of Jammu & Kashmir, the quasi-federal structure of the Constitution of India continues, but with the aforesaid differences. It is therefore difficult to accept the argument of Shri Hansaria that the Constitution of India and that of Jammu & Kashmir have equal status. Article 1 of the Constitution of India and Section 3 of the Jammu & Kashmir Constitution make it clear that India shall be a Union of States, and that the State of Jammu & Kashmir is and shall be an integral part of the Union of India."

163. Parliament has the power to enact laws on all matters which are not listed in Lists II and III by virtue of Article 246 read with Entry 97 of List I of the Seventh Schedule. However, Entry 97 was not extended to the State of Jammu and Kashmir by any Constitution Order issued under Article 370(1)(b). Thus, unlike other states, the State of Jammu and Kashmir had residuary legislative powers in view of Section 5 of the Constitution of Jammu and Kashmir. At this juncture, it is important to refer to the Delhi agreement where it was decided that the State of Jammu and Kashmir shall have the residuary legislative powers because of the "consistent stand taken by the Constituent Assembly of Jammu and Kashmir" that sovereignty with respect to all matters other than those stipulated in the IoA continues to reside in the State. This is not indicative of the sovereignty of Jammu and Kashmir. Residual legislative powers cannot be equated to residual sovereignty. It instead reflects the value of federalism and the federal underpinnings of the Constitution of India.

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Neither Parliament nor any of the States have the unrestricted power to make laws. Each has its own sphere of legislation, as demarcated by the three lists in the Seventh Schedule to the Constitution. Each is supreme in its own sphere. The States have the plenary power to enact laws but this alone cannot be taken as a sign of sovereignty of individual States.

164. It is true that many commentators refer to these aspects of federalism as 'internal sovereignty.' By whatever name so called, it is clear that all States in the country have legislative and executive power albeit to differing degrees. The Constitution accommodates concerns specific to a particular State by providing for arrangements which are specific to that State. Articles 371A to 371J are examples of special arrangements for different States. This is nothing but a feature of asymmetric federalism,[170] which Jammu and Kashmir too benefits from by virtue of Article 370. The State of Jammu and Kashmir does not have 'internal sovereignty' which is distinguishable from the powers and privileges enjoyed by other States in the country. In asymmetric federalism, a particular State may enjoy a degree of autonomy which another State does not. The difference, however, remains one of degree and not of kind. Different states may enjoy different benefits under the federal setup but the common thread is federalism.

165. If the position that Jammu and Kashmir has sovereignty by virtue of Article 370 were to be accepted, it would follow that other States which had special arrangements with the Union also possessed sovereignty. This is clearly not

[170] State (NCT of Delhi) v. Union of India, (2023) 9 SCC 1

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the case. As noticed by this Court in other segments of this judgment, the special circumstances in Jammu and Kashmir necessitated a special provision, that is, Article 370. Article 370 is an instance of asymmetric federalism. The people of Jammu and Kashmir, therefore, do not exercise sovereignty in a manner which is distinct from the way in which the people of other States exercise their sovereignty. In conclusion, the State of Jammu and Kashmir does not have 'internal sovereignty' which is distinguishable from that enjoyed by other States.

166. In **Prem Nath Kaul** (supra), a suit was filed by the appellant against the State of Jammu and Kashmir for a declaration that the Jammu and Kashmir Big Landed Estate Abolition Act 2007 was "void, inoperative and *ultra vires* of Yuvraj Karan Singh who enacted it" so that the appellant could retain possession of his lands. The suit was dismissed and the High Court in appeal confirmed the dismissal. The Constitution Bench, speaking through P B Gajendragadkar, J. (as the learned Chief Justice then was) noted two developments which had taken place. First, Maharaja Hari Singh who had succeeded Maharaja Pratap Singh as the Ruler of Kashmir issued Regulation 1 of 1991 (1934) in response to a public agitation in Kashmir for the establishment of responsible government. Section 3 of the Regulation provided that all powers - legislative, executive and judicial in relation to the State were declared to be inherent in and possessed and retained by the Maharaja. Section 30 provided that no measure would be deemed to be passed by the Praja Sabha until the Maharaja had signified his assent. Secondly, in 1939, the Maharaja promulgated the Jammu and Kashmir

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Constitution Act 14 of 1996 (1936). As a consequence, Regulation 1 of 1991 (1934) was overhauled. Section 5, like Section 3 of Regulation 1 of 1991, recognized and preserved all the inherent powers of the Maharaja. The Constitution Bench noted that with the passing of the Indian Independence Act 1947, the suzerainty of His Majesty over Indian States lapsed together with all agreements and treaties in force. With the lapse of British Paramountcy, Jammu and Kashmir, like other Indian States, was theoretically free from the limitations imposed by the paramountcy of the British Crown subject to the proviso to Section 7(1)(b) which prescribed that effect shall continue to be given to the provisions of any earlier agreement in relation to the subjects enumerated in the proviso until the provisions are denounced by the Rulers of the Indian States or by the Dominion on the other hand and are superseded by subsequent agreements.

167. In the course of the judgment, the Constitution Bench adverted to the events leading up to the execution of the IoA by the Maharaja on 25 October 1947, the replacement of a popular interim government by a Proclamation dated 5 March 1948 which envisaged the convening of a National Assembly which would frame a Constitution, the issuance of a Proclamation on 20 June 1949 by which he entrusted to Yuvraj Karan Singh all his functions whether legislative, judicial or executive, the Proclamation issued on 25 November 1949 by Yuvraj Karan Singh that the Constitution of India shortly to be adopted by the Constituent Assembly of India shall, insofar as it is applicable to the State of Jammu and Kashmir, govern the relationship between the State and the Union of India and shall be enforced in the State by him, his

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heirs and successors in accordance with the tenure of its provisions. Moreover, the provisions of the Constitution would, according to the Proclamation, supersede and abrogate all other constitutional provisions inconsistent with it which were then in force in the State.

168. The Proclamation was followed by the issuance of the Constitution (Application to Jammu and Kashmir) Order 1950 (CO10) on 26 January 1950. The legislation in question was promulgated by Yuvraj Karan Singh on 17 October 1950 in exercise of the powers vested in him by Section 5 of the Constitution of the State of 1934 and the proclamation of the Maharaja dated 20 June 1949. Thereafter, on 20 April 1951, the Yuvraj directed the constitution of a Constituent Assembly for the framing of a Constitution for the State of Jammu and Kashmir. An elected Constituent Assembly was constituted which framed the Constitution for the State. As a result of the Constitution, hereditary rule was abolished and a provision was made for the election of a Sadar-i-Riyasat to be the Head of the State. On 13 November 1952, the Yuvraj was elected to the office of the Sadar-i-Riyasat ending the dynastic rule in the State. The validity of the State legislation was questioned on the ground that Yuvraj Karan Singh had no authority to promulgate the Act.

169. The Constitution Bench noted that prior to the passing of the Independence Act 1947, the sovereignty of the Maharaja over the State was subject to such limitations as were constitutionally imposed by the paramountcy of the British Crown and by the treaties and agreements entered into with the British Government. However, the Maharaja was “an absolute monarch” as regards

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the internal administration and governance of the State and was vested with all executive, legislative and judicial powers. The Court rejected the submission that the sovereignty of the Maharaja was affected by the provisions of the IoA, holding:

> "26 … But it is urged that the sovereignty of the Maharaja was considerably affected by the provisions of the Instrument of Accession which he signed on October 25, 1947. This argument is clearly untenable. It is true that by clause 1 of the Instrument of Accession His Highness conceded to the authorities mentioned in the said clause the right to exercise in relation to his State such functions as may be vested in them by or under the Government of India Act, 1935 as in force in the said Dominion on August 15, 1947, but this was subject to the other terms of the Instrument of Accession of the sovereignty of His Highness in and over his State. We must therefore, reject the argument that the execution of the Instrument of Accession affected in any manner the legislative, executive and judicial powers in regard to the Government of the State which then vested in the Ruler of the State."

This Court rejected the argument that the Monarch lost plenary legislative powers upon the establishment of a popular interim government by the Proclamation dated 5 March 1948 observing that the Cabinet still had to function under the overriding powers of the Monarch:

> "… the Maharaja very wisely chose to entrust the actual administration of the Government to the charge of a popular Cabinet; but the description of the Cabinet as a popular interim Government did not make the said Cabinet a popular Cabinet in the true constitutional sense of the expression. The Cabinet had still to function under the Constitution Act 14 of 1996 (1939) and whatever policies it pursued, it had to act under the overriding powers of His Highness. It is thus clear that until the Maharaja issued his proclamation on June 20, 1949, all his powers legislative, executive and judicial as well as his right and prerogative vested in him as before. That is why the argument that Maharaja Hari Singh had surrendered his sovereign powers in favour of the Praja Sabha and the popular interim Government, thereby accepting the status of a constitutional monarch cannot be upheld."

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After analysing the provisions of Article 370, the Court observed:

> "38. On the said construction the question which falls to be determined is: Do the provisions of Article 370(1) affect the plenary powers of the Maharaja in the matter of the governance of the State? The effect of the application of the present article has to be judged in the light of its object and its terms considered in the context of the special features of the constitutional relationship between the State and India. The Constitution-makers were obviously anxious that the said relationship should be finally determined by the Constituent Assembly of the State itself; that is the main basis for, and purport of, the temporary provisions made by the present article; and so the effect of its provisions must be confined to its subject-matter. It would not be permissible or legitimate to hold that, by implication, this article sought to impose limitations on the plenary legislative powers of the Maharaja. These powers had been recognised and specifically provided by the Constitution Act of the State itself; and it was not, and could not have been, within the contemplation, or competence of the Constitution-makers to impinge even indirectly on the said powers. It would be recalled that by the Instrument of Accession these powers have been expressly recognised and preserved and neither the subsequent proclamation issued by Yuvaraj Karan Singh adopting, as far as it was applicable, the proposed Constitution of India, nor the Constitution order subsequently issued by the President, purported to impose any limitations on the said legislative powers of the Ruler. **What form of Government the State should adopt was a matter which had to be, and naturally was left to be, decided by the Constituent Assembly of the State. Until the Constituent Assembly reached its decision in that behalf, the constitutional relationship between the State and India continued to be governed basically by the Instrument of Accession.** It would therefore be unreasonable to assume that the application of Article 370 could have affected, or was intended to affect, the plenary powers of the Maharaja in the matter of the governance of the State. In our opinion, the appellant's contention based on this article must therefore be rejected."
>
> (emphasis supplied)

170. The Constitution Bench, therefore, rejected the challenge to the constitutional validity of the provisions of the State enactment. The court in **Prem Nath Kaul** (supra) had to decide on the validity of the Estate Abolition Act. The limited question before the Constitution Bench in **Prem Nath Kaul** (supra) was

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whether the Monarch held plenary legislative powers after the Constitution of India as it applied to Jammu and Kashmir was adopted in the State but before the Constitution of Jammu and Kashmir was adopted. A decision is an authority for the proposition which it decides. The question of whether the State of Jammu and Kashmir retained sovereignty upon integration with the Dominion of India did not arise in that case. The legislation in question was promulgated by Yuvraj on 17 October 1950 before the Constituent Assembly of the State was constituted and the Constitution of Jammu and Kashmir was adopted. When the Constitution of India was adopted, all the provisions of the Constitution did not automatically apply to the State of Jammu and Kashmir. By virtue of Article 370(1)(c), only Articles 1 and 370 applied to the State of Jammu and Kashmir when the Constitution was adopted. Upon the adoption of the Constitution of India, the State of Jammu and Kashmir like all other States adopted a democratic form of Government. However, in the absence of Constitutional provisions to that regard, the form of Government already in the State continued to have force. Upon the adoption of the Constitution, the provisions of the Indian Constitution relating to the establishment of a Legislative Assembly for States in Part B of the First Schedule and by which the ruler was designated as the Rajpramukh did not extend to the State of Jammu and Kashmir. Since the **form of the Government** in Jammu and Kashmir was yet to be put in force by the Government and the Constituent Assembly of the State, the form of Government already in existence continued to be in force until such necessary provisions could be made for the State. This is evident from the observation that the Monarch did not become a

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Constitutional Monarch upon the establishment of a popular interim Government by the Proclamation dated 5 March 1948 because the Cabinet still had to act under the overriding powers of the Monarch and it was only with the adoption of the Constitution of Jammu and Kashmir that hereditary rule was abolished.

ii. <u>The Constitutional validity of the Proclamations issued under Article 356 of the Constitution of India and Section 92 of the Constitution of Jammu and Kashmir</u>

171. On 19 June 2018, Mehbooba Mufti resigned as Chief Minister after the Bharatiya Janata Party withdrew from the alliance with the Jammu and Kashmir Peoples' Democratic Party. On the next day, the Governor of Jammu and Kashmir with the approval of the President imposed Governor's rule in the State of Jammu and Kashmir in exercise of power under Section 92 of the Constitution of Jammu and Kashmir. The Proclamation issued under Section 92 would cease to operate on the expiry of six months from the date on which it was issued. Section 92 of the Constitution of Jammu and Kashmir, unlike Article 356 of the Indian Constitution, does not permit the extension of the Proclamation beyond six months. Thus, Governor's rule would have come to an end on 19 December 2018. The President issued a Proclamation under Article 356 on 19 December 2018. The Proclamation was approved by the Lok Sabha on 28 December 2018 and the Rajya Sabha on 3 January 2019.

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On 28 June 2019 and 1 July 2019, the Lok Sabha and Rajya Sabha extended President's rule for another six months.

172. No challenge was mounted to the Proclamations under Section 92 of the Constitution of Jammu and Kashmir until after the tenure of the Proclamation had ended. No challenge was made to the Proclamation under Article 356 of the Constitution of India immediately after it was issued. When the Proclamation was in the force, the President issued COs 272 and 273 by which Article 370 and the special constitutional status of Jammu and Kashmir was in effect repealed. The petitioners mounted a challenge to the abrogation of the special status of Jammu and Kashmir by challenging the validity of COs 272 and 273 and to the Proclamations issued by the Governor and the President in 2018 and the extension of the Presidential Proclamation in 2019.

173. The Solicitor General of India argued that (a) neither the imposition of Governor's rule nor President's rule was challenged contemporaneously in 2018 and the petitioners have been unable explain the cause for the delay; (b) the petitioners in their writ petitions have not pleaded grounds for challenging the Proclamations; and (c) the challenges to the Proclamations were initiated only after Article 370 was abrogated. The Proclamations, it was urged, were not independently challenged and they were challenged only because the impugned actions were taken during the subsistence of the Proclamations.

174. The power of the President under Article 356 to issue a Proclamation is of an exceptional nature which has wide ramifications on the autonomy of the State

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and the federal framework at large. Thus, laches in challenging the Proclamations cannot by itself be a valid ground to reject a constitutional challenge to the Proclamations issued under Article 356 of the Constitution and Section 92 of the Constitution of Jammu and Kashmir. However, we are of the opinion that the challenge to the validity of the Proclamations does not merit adjudication because:

a. The pleadings of the petitioners in the writ petitions indicate that their principal challenge is to the abrogation of Article 370 and whether such an action could have been taken during President's rule.[171] The challenge is to actions taken **during** the subsistence of President's rule and not independently to President's rule by itself; and

b. Even if this Court holds that the Proclamation could not have been issued under Article 356, there would be no material relief which can be given in view of the fact that it was revoked on 31 October 2019. We are conscious that this Court in **SR Bommai** (supra) held that *status quo ante* can be restored upon finding that the Proclamation is invalid and the Court has the power to validate specific actions which were taken when the Proclamation was in force. The petitioners have assailed the specific actions which were taken when the Proclamation was in force on the ground that these actions breach the constitutional limitations on the

[171] WP (C) 1068 of 2019 assails the validity of the 2018 Proclamation and its extension but does not mention any grounds for the challenge. WP (C) 1099 of 2019 and WP (C) 1165 of 2019 have challenged the suspension of the proviso to Article 3 by the 2018 Proclamation but not the 2018 Proclamation itself. One of the grounds in WP (C) 1165 of 2019 is that the 2018 Proclamation is invalid but no reasons are mentioned.

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exercise of power *after* a Proclamation under Article 356 is issued. These substantive challenges which form the fulcrum of the case of the petitioners are being considered in the section below.

iii. Limitations on the exercise of power by President or Parliament under Article 356

175. It now falls upon us to address the argument of the petitioners that the impugned COs could not have been issued and the Reorganization Act could not have been enacted when Article 356 was in operation in the State of Jammu and Kashmir. The petitioners submit that the State's executive and legislative power cannot be exercised by the Union under Article 356 to: (a) take irrevocable decisions when the Proclamation has a limited shelf life. The power must be limited to actions that restore the constitutional machinery in the State along with orders which are necessary for the purposes of daily administration; and (b) unsettle constitutional safeguards in favour of States.

176. On the other hand, the Union Government contends that to read any further limitations on the exercise of the powers of the President or of Parliament under Article 356, in addition to the limitations expressly provided in the Constitution, would amount to this Court undertaking an exercise of redrafting the provision.

177. The issues that fall for consideration are whether (a) there are any limits on the exercise of executive and legislative power of the States by the Union

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after a Proclamation is issued under Article 356; and (b) if so, the scope of judicial review of such exercise of power.

a. Presidential Proclamation under Article 356

178. Article 355 provides that it is the duty of the Union to protect every State against external aggression and internal disturbance, and to "ensure that the government of every State is carried in accordance with the provisions of this Constitution."

179. Article 356 deals with a failure of constitutional machinery in a state. Clause 1 of Article 356 outlines both the substantive threshold for the invocation of President's rule and the legal powers that are delegated to the President and Parliament upon the invocation of President's rule. The relevant portion of Article 356 is extracted below:

> "356. Provisions in case of failure of constitutional machinery in States:
>
> (1) If the President, on receipt of a report from the Governor of a State or otherwise, 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 President 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 the Governor or any body or authority in the State other than the Legislature of the State;
>
> (b) declare that the powers of the Legislature of the State shall be exercisable by or under the authority of Parliament;
>
> (c) make such incidental and consequential provisions as appear to the President to be necessary or desirable for giving effect to the

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> objects of the Proclamation, including provisions for suspending in whole or in part the operation of any provisions of this Constitution relating to any body or authority in the State:
>
> Provided that nothing in this clause shall authorise the President to assume to himself any of the powers vested in or exercisable by a High Court, or to suspend in whole or in part the operation of any provision of this Constitution relating to High Courts.
>
> […]"

180. Article 356 accounts for a situation where there is a breakdown – a 'failure' as the Article states - of the constitutional machinery in the State. Though this phrase is found in the marginal note of the provision and not its text, judgments of Constitution Benches of this Court have held that Article 356 must be interpreted with reference to the marginal note.[172] For the President to issue a Proclamation under Article 356, two pre-conditions have to be fulfilled, which are: (a) the satisfaction of the President that a situation has arisen in which the government of a State cannot be carried on in accordance with the provisions of the Constitution; and (b) the satisfaction that such a situation has arisen must be formed either on the basis of a report sent by the Governor of the State or otherwise. If these two conditions have been fulfilled, the President by a Proclamation may: (a) assume to himself "all or any" functions of the Government of the State and "all or any" powers vested in or exercisable by the Governor or any other authority in the State; (b) declare that the powers of the Legislature of the State shall be exercisable by or under the authority of Parliament; and (c) make "incidental and consequential" provisions which are "necessary or desirable" for giving effect to the object of

[172] State of Rajasthan v. Union of India (1977) 3 SCC 392 and SR Bommai v. Union of India, (1994) 3 SCC 1

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the Proclamation. This would also include the power to suspend in whole or in part, a provision of the Constitution relating to any body or authority in the State. However, the President is barred from exercising the powers of High Courts or suspending any provision of the Constitution related to High Courts.

181. The subsequent clauses of Article 356 prescribe conditions relating to the tenure of the Proclamation. Every Proclamation must be laid before Houses of Parliament, and unless approved by a resolution by both the Houses shall cease to operate within two months.[173] However, where the Council of States approves the resolution in two months but the House of People is dissolved, the Proclamation ceases to operate on the expiry of thirty days from the date on which the House of People first sits after reconstitution unless a resolution approving the Proclamation is passed by the House of People before that.[174] Article 356(4) states that an approved Proclamation has a life of six months from the date of the issuance of the Proclamation (not the date of approval) unless another Proclamation approving the continuance of the Proclamation is passed. This Proclamation also has a life of six months.[175] Thus, Parliament may approve the Proclamation in the first instance (which then has a life of six months) and thereafter also approve its continuance, which shall extend the life of the Proclamation by another six months. However, Parliament shall not pass a resolution approving a Proclamation for a period beyond one year since the date of issuance of the Proclamation unless (a) a national emergency under Article 352 is in operation in the whole of India or whole or

[173] Article 356(3)
[174] Article 356(4)
[175] Article 356(4)

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any part of the State; and (b) the Election Commission of India certifies that it is necessary that the Proclamation continues to be in force because of the difficulties in holding general elections.[176] However, in no circumstances shall the Proclamation remain in force for more than three years since the date it was first issued.[177]

182. Where a Proclamation under Article 356 declares that the power of the legislature of the State shall be exercisable by or under the authority of Parliament, Article 357 enunciates the consequences. In such a situation, Parliament which has been conferred with the "powers of the legislature of the State" may confer on the President the power of the legislature to "make laws", and authorise the President to delegate the power to any other authority, subject to any conditions which the President may impose. Parliament or the President or any other authority to whom the power to make laws has been delegated may enact laws conferring powers and imposing duties upon the Union or its officers and authorities. When the House of the People is not in session, the President may authorise expenditure from the Consolidated Fund pending the sanction of Parliament. Article 357(2) states that the law enacted by Parliament or the President or any other authorised body which it otherwise would not have been competent to enact but for the Proclamation under Article 356 shall continue to remain in force even after the Proclamation ceases to operate. It shall continue to remain in force unless the State legislature or any authority alters, repeals or amends the law.

[176] Article 256(5)
[177] First proviso to Article 356(4)

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b. Interpreting Article 356 in the aftermath of SR Bommai

183. This Court has in earlier judgments interpreted the scope of the power of the President to issue a Proclamation under Article 356. The approach of this Court towards interpreting the scope of this unique power of the Union Government which correspondingly reduces the autonomy of States has undergone a sea-change from the decision of a seven-Judge Bench in **State of Rajasthan** v. **Union of India**[178] to a decision of a nine-Judge Bench in **SR Bommai** v. **Union of India**[179].

184. The factual matrix in **State of Rajasthan** (supra) was as follows: the candidates of the Congress party were defeated in the elections to the Lok Sabha in nine Congress-ruled States in the elections of 1977 held after the end of the national Emergency in 1975. The Home Minister of the Union Government which was headed by a coalition of parties under the banner of Janata alliance wrote to the Chief Minister of each of the States to consider advising the Governor to dissolve the legislative assembly. Six States (Rajasthan, Madhya Pradesh, Punjab, Bihar, Himachal Pradesh, and Orissa) filed suits seeking a declaration that the letter of the Home Minister was *ultra vires* the Constitution, and sought an injunction restraining the Union Government from resorting to Article 356 of the Constitution. This Court while dismissing the writ petitions and suits held:

[178] (1977) 3 SCC 392
[179] (1994) 3 SCC 1

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PART E

a. The actions of the Governor under Article 356 can be both "preventive or curative" because Article 355 vests the Union Government with a duty to ensure that the Government of the State is carried out in accordance with the Constitution;[180]

b. The grounds for judicial review of a Proclamation under Article 356 are limited. The Court can only interfere with the decision on grounds of *mala fides* or if there were extraneous considerations;[181]

c. The independence of States only lasts when the State executive and legislature have not violated their constitutional duties. If they have, the Union is capable of enforcing its views on such matters to enable the Constitution to work in a manner that the Union Government wants it to;[182]

d. The President while exercising power under Article 356 can "take over all the functions of the Governor" to themselves,[183] and "can do whatever the Governor could in exercise of such power."[184] It would be immaterial if the consequence of the exercise of power is final and irrevocable. This includes the power to dissolve the Legislative Assembly of a State; and

e. A resolution by both Houses of Parliament approving the Proclamation is not a condition precedent for the dissolution of the Legislative Assembly of a State. Even if such a resolution is not passed, the

[180] Chief Justice Beg (paragraph 45)
[181] Justice Bhagwati (paragraph 150)
[182] Chief Justice Beg (paragraph 37)
[183] Chief Justice Beg (paragraph 66)
[184] Justice Bhagwati (paragraph 146)

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Proclamation has a minimum shelf life of two months because immediate actions are required to be taken in urgent situations.[185] Irrevocable actions taken in those two months such as dissolving the assembly and holding fresh elections cannot be remedied even if the Proclamation is declared unconstitutional[186] In fact, the power to dissolve the State legislature is implicit in Article 356(1)(b).[187]

185. In **State of Rajasthan** (supra), the seven-Judge Bench of this Court read Article 356 widely to grant untrammelled executive power to the Union Government without Parliamentary oversight. In essence, the Union Government (acting through the President) could unilaterally remove the Government of the State and dissolve the legislative assembly of the State completely abrogating the federal interests and the democratic rights of the residents of the State. Though this Court held that the exercise of power to issue a Proclamation under Article 356 is open to judicial review, the grounds for review were limited to *mala fide* or extraneous considerations.

186. The decision of this Court in **SR Bommai** (supra) changed the position of law significantly. In this case, a nine-Judge Bench of this Court placed restraints on the exercise of power by the President under Article 356 by emphasising the significance of Parliamentary control over the Proclamation and expanding the scope of judicial review of the 'subjective satisfaction' of the President under Article 356.

[185] Chief Justice Beg (paragraph 89); Justice Bhagwati (paragraph 146)
[186] Justice YV Chandrachud (paragraphs 125 and 126)
[187] Justice Fazl Ali (paragraph 218)

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187. In **SR Bommai** (supra), this Court extensively dealt with the scope of the Presidential power under Article 356. On numerous questions of law, the Bench disagreed with the reasoning in **State of Rajasthan** (supra). One of the chief reasons which lead to the tectonic shift in the Court's approach to the scope of the President's powers under Article 356 was the abuse of the power under Article 356. When the Constituent Assembly was discussing the draft of Article 356 in the present form, Dr. BR Ambedkar observed that he hoped that the power under Article 356 would never be called into operation and that it would remain a dead letter.[188] However, by the time this Court decided **SR Bommai** (supra), the President had exercised the power under Article 356 more than ninety times.[189] While the members of the Constituent Assembly hoped that the power under Article 356 would only be used in extraordinary situations, history indicated that the power has been misused frequently to achieve political ends. In the Constituent Assembly Debates, Mr. Santhanam observed that it is only strong conventions that will prevent the misuse of power under Article 356.[190] This Court in **SR Bommai** (supra) placed limitations on the power of the President to issue a Proclamation under Article 356 and expanded the scope of judicial review of a Presidential Proclamation. This Court's interpretation of Article 356 in **SR Bommai** (supra)

[188] "In fact I share the sentiments expressed … that the proper thing we ought to expect is that such articles will never be called into operation and that they would remain a dead letter. If at all, they are brought into operation, I hope the President, who is endowed with all these powers, will take proper precautions before actually suspending the administration of the provinces. I hope the first thing he will do would be to issue a mere warning to a province that has erred, that things were not happening in the way in which they were intended to happen in the Constitution." (*Constituent Assembly Debates*, Vol. IX, p. 177)

[189] The judgments of Justice Jeevan Reddy and Justice Ahmadi expressly record this.

[190] Constituent Assembly Debates, Vol. 9, 03 Aug 1949

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has prevented its misuse, creating strong conventions on the exercise of power under the provision.

188. For the purpose of discussing the *ratio decidendi* in **SR Bommai** (supra), we will refer to the opinion of Justice Sawant who authored the opinion for himself and Justice Kuldip Singh, with whom Justice Jeevan Reddy (writing for himself and Justice Agarwal) substantially agreed except on one crucial point. Justice Pandian agreed with the opinion of Justice Jeevan Reddy. The *ratio decidendi* of the opinion of the majority is summarised below:

a. The satisfaction of the President under Article 356 must be based on objective material either through the Governor's report or 'otherwise';

b. The Proclamation issued by the President under Article 356(1) is subject to judicial review. Article 74(2) only bars the court from enquiring if **any** advice was given but does not bar scrutiny of the material which formed the basis of the advice. The Court must determine if there was any material to indicate the failure of constitutional machinery in the State. While the sufficiency of the material cannot be questioned by courts, the legitimacy of the inference drawn from such material is open to judicial review. Once the petitioner makes a *prima facie* case challenging the Proclamation, the burden shifts to the Union Government to prove that the Proclamation was backed by relevant material;

c. Article 356(3) which mandates that the Proclamation be approved by both Houses of Parliament is a check on the power of the President to issue a Proclamation. The President cannot exercise powers under

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Article 356(1) to take 'irreversible' actions unless both the Houses have approved the Proclamation. It is for this reason that the President cannot dissolve the legislative assembly (which is an irreversible action) until "at least" both Houses of Parliament approve the Proclamation;

d. Dissolution of the legislative assembly is not a "natural consequence" of the issuance of Proclamation;

e. The resolution approving the Proclamation cannot save the Proclamation and the actions taken under it if the Court holds that the Proclamation is invalid. If the Proclamation is invalid, then it would be open to the Court to restore *status quo ante* which would also include restoration of the Legislative Assembly if it has been dissolved; and

f. The Court/legislative assembly/Parliament has the power to review, repeal and modify such actions or laws which were taken when the Proclamation was in force.[191] The Court can validate specific actions which are capable of being validated such as restoring the legislative assembly.[192]

189. It is important for this Court to address the decisions in **State of Rajasthan** (supra) and **SR Bommai** (supra) at length because the shift in the approach of interpreting the power of the President to issue a Proclamation under Article 356 would also impact the determination of whether there are any limits on the power of the President and Parliament after the Proclamation has been

[191] Justice Reddy (paragraph 292)
[192] Justice Sawant (paragraph 114)

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issued. The following conclusions are drawn from the decision in **SR Bommai** (supra), which brought about a metamorphosis from the position in the **State of Rajasthan** (supra):

a. This Court in its seven-Judge decision in **State of Rajasthan** (supra) opted for an interpretation of Article 356 which had a centripetal impact, that is, it had a centralising tendency which led to an accumulation of power with the Centre and away from the federating states. This is evident from the narrow scope of judicial review of the exercise of power by the President under Article 356, and the holding that the President can take irrevocable actions (including dissolving the Legislative Assembly) even before the Proclamation is approved by both Houses of Parliament under Article 356(3). However, this Court in a larger combination of nine judges in **SR Bommai** (supra) opted for an interpretation which had a centrifugal impact, that is, an interpretation which leads to enhancing the autonomy of the federating states. In fact, the opinion of Justice Sawant expressly notes that an interpretation which preserves and not subverts the constitutional fabric must be opted. This is evident from this Court expanding the scope of judicial review of the Proclamation and the holding that irrevocable actions cannot be taken before Parliament approves the Proclamation. The interpretation of Article 356 in **SR Bommai** (supra) was in furtherance of the constitutional principles of federalism and legislative (and not executive) supremacy. The decision in **SR Bommai** (supra) holds the field because it was rendered by a Bench of nine Judges while the

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decision in **State of Rajasthan** (supra) was rendered by a Bench of seven Judges; and

b. The standard of judicial review laid down in **State of Rajasthan** (supra) of whether extraneous considerations led to the exercise of power under Article 356 focused only on the **purpose** of (or the reasons for) issuing a Proclamation. The Union did not have to show that the purpose indeed existed. The decision in **SR Bommai** (supra) by expanding the scope of judicial review of the Proclamation shifted the onus on the Union Government to **justify** the exercise of power. The Union through the submission of material was required to show that there was a breakdown of constitutional machinery as claimed. This change in the standard of review indicates a shift from a culture of deference to a culture of justification. It flows from (a) that the Court while deciding if the Union Government has justified its actions must also assess the impact of the Proclamation issued under Article 356 on the federal structure.

c. SR Bommai on validity of exercise of power after the Proclamation

190. The majority in **SR Bommai** (supra) devised a more stringent standard to test the validity of a Proclamation under Article 356. The primary focus of the decision is on the standard to be applied to judicially review the validity of a Proclamation under Article 356. However, in addition to it, this Court made certain observations on the limits on the exercise of power **after** a Proclamation is issued. One of the issues before this Court in **SR Bommai**

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(supra) was whether Article 356(1)(a) places any limitation on the exercise of legislative and executive power by the Union after a Proclamation has been issued and more specifically, whether dissolution of the Legislative Assembly of the State and the political executive is a natural consequence of the exercise of power under Article 356(1). This Court observed this question in the following manner:

a. Justice Sawant observed that it would be open to the President to only suspend the political executive and the legislature of the State and not dissolve them. This interpretation, it was held, is consistent with a reading of Article 356(1)(c) which states that incidental and consequential provisions to give effect to the objective of the Proclamation shall be made. It was further observed that it would be permissible for the President to assume some of the functions of the Government **without suspending or removing them**:

> "108. […] To appreciate the discussion on point, it is necessary to realise that the removal of Government and the dissolution of Assembly are effected by the President, if he exercises powers of the Governor under Article 164(1) and 174(2)(b) respectively under sub-clause (a) of Article 356(1), though that is neither necessary nor obligatory while issuing the Proclamation. In other words, the removal of the Ministry or the dissolution of the Legislative Assembly is not an automatic consequence of the issuance of the Proclamation. The exercise of the powers under sub-clauses (a), (b) and (c) of Article 356(1) may also co-exist with the mere suspension of the political executive and the Legislature of the State. **Sub-clause (c) of Article 356(1) makes it clear. It speaks of incidental and consequential provisions to give effect to the objects of the Proclamation including suspension in whole or part of the operation of any provision of the Constitution relating to anybody or authority in the State. […]** Legally, therefore, it is permissible under Article 356(1), firstly, only to suspend the political executive or anybody or authority of the State and also the Legislature of the State and not to remove or dissolve them.

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> Secondly, **it is also permissible for the President to assume only some of the functions of the political executive or of anybody or authority of the State other than the Legislature while neither suspending nor removing them**."
>
> (emphasis supplied)

b. Justice Reddy while answering the above issue agreed with the observations of Justice Sawant to the extent that dissolution of the Legislative Assembly is not an automatic consequence. The learned Judge observed that the President should not dissolve the legislature of the State merely because he has the power to do so. The power, in his opinion, must not be exercised invariably but only after taking into consideration all the relevant facts and circumstances:

> "288. […] The existence of power does not mean that dissolution of Legislative Assembly should either be treated as obligatory or should invariably be ordered whenever a Government of the State is dismissed. It should be a matter for the President to consider, taking into consideration all the relevant facts and circumstances, whether the Legislative Assembly should also be dissolved or not. If he thinks that it should be so dissolved, it would be appropriate, indeed highly desirable, that he states the reasons for such extraordinary step in the order itself."

However, Justice Reddy held that it would not be open to the President to exercise **some** of the powers exercised by the Government without dismissing the Government because: *first,* the President can only issue a Proclamation under Article 356(1) when the constitutional machinery as a *whole* (and not one or two functions) fails in the State; and *second,* that would introduce the concept of two Governments operating in the same sphere. The relevant observations are extracted below:

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> "293. It was suggested by Shri Ram Jethmalani that the President can "assume all or any of the functions" of the State Government without dismissing the Government. Emphasis is laid upon the words "all or any" in sub-clause (1). In particular, he submitted, where the State Government is found remiss in performing one or some of the functions, that or those functions of the State Government can be assumed by the President with a view to remedy the situation. After rectifying the situation, the counsel submitted, the President will give those functions back to the State Government and that in such a situation there would be no occasion or necessity for dismissing the State Government. The learned counsel gave the analogy of a motor car — if one or a few of the parts of a car malfunction or cease to function, one need not throw away the car. That or those particular parts can be replaced or rectified and the car would function normally again. It is difficult to agree with the said interpretation. The power under Article 356(1) can be exercised only where the President is satisfied that "the government of the State cannot be carried on in accordance with the provisions of the Constitution". The title to the article "failure of constitutional machinery in the States" also throws light upon the nature of the situation contemplated by it. It means a situation where the government of the State, — and not one or a few functions of the Government — cannot be carried on in accordance with the Constitution. **The inability or unfitness aforesaid may arise either on account of the non-performance or malperformance of one or more functions of the Government or on account of abuse or misuse of any of the powers, duties and obligations of the Government. A Proclamation under Article 356(1) necessarily contemplates the removal of the Government of the State since it is found unable or unfit to carry on the Government of the State in accordance with the provisions of the Constitution.** In our considered opinion, it is not possible to give effect to the argument of Shri Ram Jethmalani. **Acceptance of such an argument would introduce the concept of two Governments in the same sphere — the Central Government exercising one or some of the powers of the State Government and the State Government performing the rest.** Apart from its novelty, such a situation, in our opinion, does not promote the object underlying Article 356 nor is it practicable."
>
> (emphasis supplied)

191. Both Justice Sawant and Justice Reddy held that when a Proclamation is issued, the dissolution of the Legislative Assembly of the State is not an automatic consequence and whether the assembly must be suspended or dissolved must depend on the circumstances. However, they disagreed on

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the issue of whether the removal of the Government is a necessary consequence of the exercise of power under Article 356. Justice Sawant held that it is not a necessary consequence. Justice Reddy held that it is a necessary consequence because otherwise it would lead to simultaneous governance by both the Union and the State Government in the same sphere. We agree with the view of Justice Reddy. The meaning of the phrase 'all or any functions of the Government of the State" cannot be stretched to mean that the Union Government exercises some powers of the state's political executive while the remaining powers vest with the State Government. The suspension of the State Government is a necessary consequence of the exercise of the power under Article 356.

192. A Proclamation issued under Article 356 impacts federal principles on two levels. At the first level, the federal nature of States is diluted because the Union is empowered to take over the executive and legislative powers of the State. During the operation of the Proclamation, the State loses its autonomy which is a core characteristic of a federal State. At the second level, a Proclamation under Article 356 can be issued by the President on the aid and advice of the Council of Ministers without the approval of Parliament. The Proclamation has a minimum tenure of two months which is extended upon a resolution passed by Parliament approving the Proclamation. Though the approval of the Proclamation by Parliament affirms the principle of parliamentary democracy, it does not restore the principle of federalism. The majority in **SR Bommai** (supra) was conscious of the impact of the Proclamation on federal principles. This is evident from the observations of

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Justice Reddy that only those steps which are necessary for achieving the objective of the Proclamation must be taken.

193. The next issue that the Court addressed was whether the extent of power exercised by the President is justiciable. The petitioners in **SR Bommai** (supra) argued that the measures which would be needed to remedy the situation would vary depending on the nature of the situation or the degree of failure of the constitutional machinery. It was argued by the petitioners that it would be a "disproportionate and unreasonable exercise of power" if the President does not resort to different remedies in different situations. The submission is best reflected in the following extract:

> "108. […] A strong contention was raised that situations of the failure of the constitutional machinery may be varied in nature and extent, and hence measures to remedy the situations may differ both in kind and degree. It would be a disproportionate and unreasonable exercise of power if the removal of Government or dissolution of the Assembly is ordered when what the situation required, was for example only assumption of some functions or powers of the Government of the State or of anybody or authority in the State under Article 356(1)(a). The excessive use of power also amounts to illegal, irrational and mala fide exercise of power. Hence, it is urged that the doctrine of proportionality is relevant in this context and has to be applied in such circumstances."

194. The issue of whether the extent of power used by the President is justified in a particular situation is a question which in Justice Sawant's opinion "would remain debatable and beyond judicially discoverable and manageable standards unless the exercise of the excessive power is so palpably irrational or mala fide as to invite judicial intervention". Applying a more stringent standard would, in his opinion, lead to the Court adjudicating the comparative

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merits of one measure over the other which would lead to it entering the 'political-thicket':

> "108. […] Hence it is possible for the President to use only some of the requisite powers vested in him under Article 356(1) to meet the situation in question. He does not have to use all the powers to meet all the situations whatever the kind and degree of the failure of the constitutional machinery in the State. To that extent, the contention is indeed valid. However, whether in a particular situation the extent of powers used is proper and justifiable is a question which would remain debatable and beyond judicially discoverable and manageable standards unless the exercise of the excessive power is so palpably irrational or mala fide as to invite judicial intervention. In fact, once the issuance of the Proclamation is held valid, the scrutiny of the kind and degree of power used under the Proclamation, falls in a narrower compass. There is every risk and fear of the court undertaking upon itself the task of evaluating with fine scales and through its own lenses the comparative merits of one rather than the other measure. The court will thus travel unwittingly into the political arena and subject itself more readily to the charges of encroaching upon policy-making. The "political thicket" objection sticks more easily in such circumstances. Although, therefore, on the language of Article 356(1), it is legal to hold that the President may exercise only some of the powers given to him, in practice it may not always be easy to demonstrate the excessive use of the power."
>
> (emphasis supplied)

195. Justice Reddy observed that in exercise of the discretion, the President must consider the advisability and necessity of the action:

> "280. The use of the word 'may' indicates not only a discretion but an obligation to consider the advisability and necessity of the action. It also involves an obligation to consider which of the several steps specified in sub-clauses (a), (b) and (c) should be taken and to what extent? The dissolution of the Legislative Assembly – assuming that it is permissible – is not a matter of course. It should be resorted to only when it is necessary for achieving the purposes of the Proclamation.
>
> 289. […] Once Parliament places its seal of approval on the Proclamation, further steps as may be found necessary to achieve the purposes of the Proclamation, i.e., dissolution of Legislative Assembly, can be ordered. In other words, once Parliament

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> approves the initial exercise of his power, i.e., his satisfaction that a situation had arisen where the government of the State could not be carried on in accordance with the Constitution the President can go ahead and take further steps necessary for effectively achieving the objects of the Proclamation. Until the approval, he can only keep the Assembly under suspended animation but shall not dissolve it."
>
> (emphasis supplied)

196. A holistic reading of the decisions of Justice Sawant and Justice Reddy, indicates that the actions by the President *after* issuing a Proclamation are subject to judicial review. However, there were some variations in the judgments of the learned Judges on the standard needed to be applied by the Court to test the validity of exercise of power by the President *after* the issuance of the Proclamation. Justice Sawant applied the standard of whether the exercise of power was *mala fide* or palpably irrational. Justice Reddy observed that the advisability and necessity of the action must be borne in mind by the President.

d. Interpretation of Part XVIII

197. This Bench sitting in a combination of five judges is bound by the decision of the majority on the issue of whether the exercise of power by the President **after** the issuance of Proclamation is subject to judicial review. We consider it appropriate, bearing in mind the principles which emerge from the decision in **SR Bommai** (supra), to undertake a textual and purposive reading of Article 356 in particular and Part XVIII as a whole independently.

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PART E

I. Comparison of executive power held by the President under Articles 352 and 356

198. Part XVIII deals with two types of emergencies, national emergencies, and the failure of constitutional machinery in a State. The invocation of a national emergency under Article 352 and the invocation of President's rule under Article 356 represent exceptions to the ordinary operation of the Constitution where, to address an urgent internal or external threat, the Constitution temporarily delegates certain powers to the President and Parliament until the threat abates and ordinary Constitutional governance is restored. The invocation and operation of this exceptional power is itself subject to the Constitution and thus the rule of law. In the case of national emergencies, Article 353, and in the case of President's rule in a State, Article 356(1) clearly delineate the legal effects of the emergency and outline the powers that can be exercised by the Union Government and Parliament during such emergencies. As a result, the delegation of powers to the President and Parliament are also governed by the constitutional text of Part XVIII. The key consequence of the Constitution itself providing for emergency powers is a negation of the notion of any extra-legal or extra-constitutional power and the reiteration of the supremacy of the rule of law. All governmental power, even during an emergency, must be exercised subject to constitutional constraints. The task of this Court is not to infer any implied extra-constitutional limitations on the Union's power during the invocation of President's rule but rather to interpret the relevant constitutional provisions and scheme to determine if the

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Constitution places any limits on the Union's power during the invocation of President's rule are, and if so, what those limits are.

199. The powers under Articles 352 and 356 cannot be properly understood without a reference to the implications of these powers on the principle of federalism. Both national emergencies and the imposition of President's rule represent limited constitutionally sanctioned exceptions to the federal principle which ordinarily dictates that the State Governments and Legislatures are supreme within their sphere of operation. In the limited circumstances set out in Articles 352 and 356, the Constitution itself necessitates the temporary and limited delegation of power to the Union to restore the ordinary operation of the Constitution.

200. Article 352 grants the President the power to issue a Proclamation of emergency if he is satisfied that a grave emergency exists which threatens the security of India or any part of the territory is threatened by war, external aggression or armed rebellion. Similar to Article 356, the Proclamation is required to be approved by both Houses of Parliament. Article 353 stipulates when a national Emergency is in operation, the executive power of the Union shall extend to directing the States on the manner of exercising their executive power, and the power of Parliament to make laws shall extend to matters in the State list. In addition, when a national Emergency is in force, Article 19 of the Constitution,[193] and the right to move the court for the enforcement of rights under Part III (except Articles 20 and 21) is suspended.[194] Thus, any

[193] Article 358
[194] Article 359

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law or executive action cannot be challenged in court on the ground that they are violative of the provisions of Part III (other than Articles 20 and 21).

201. The executive and legislative power conferred on the Union upon the issuance of a Proclamation under Article 356 is narrow when compared to the power conferred when a Proclamation is issued under Article 352 for the following reasons:

a. The ground(s) for issuing a Proclamation under Article 352 are much graver when compared to the grounds for issuing a Proclamation under Article 356. Article 352 covers threats to the security of the nation as a whole or parts of it. The ground “internal aggression” in Article 352 was substituted with “armed rebellion” by the Constitution (Forty-fourth Amendment) Act 1978. The substitution indicates that a national Emergency which has wide repercussions including the suspension of fundamental rights can be declared only in grave situations. It is but a natural corollary that the executive and the legislative power that the Union would require to handle an emergency under Article 352 will be different from the power that would be required to handle a situation of a failure of constitutional machinery under Article 356;

b. Article 358 creates a hierarchy even amongst the grounds for declaring a national Emergency. Article 19 can only be suspended when Emergency is declared upon the territory being threatened by war or external aggression. The provision specifically excludes the ground of armed rebellion. The exclusion of the ground of armed rebellion from the

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purview of Article 358 indicates that the suspension of Article 19 is only necessary when national Emergency is declared on graver grounds. This also supports the inference that we have made above that the scope of executive and legislative power exercised by the Union relate to the ground for which emergency powers are invoked; and

c. When a national Emergency is declared, the executive power of the Union **shall** extend to giving directions to the State and Parliament to make laws on any subject notwithstanding that it is beyond the scope of its legislative powers.[195] Article 252 expressly recognises this principle. The provision states that Parliament, when a Proclamation of Emergency is in operation, shall have the power to make laws for the whole or any part of the territory of India even on matters enumerated in List II of the Seventh Schedule. However, when a Proclamation under Article 356 is issued, the President **may** assume or declare powers mentioned in sub-clauses (a), (b), and (c) of Article 356(1). Thus, while the powers mentioned in Article 353 are a natural consequence to declaring a National Emergency, the powers mentioned in sub-clauses (a), (b), and (c) of Article 356(1) do not automatically flow from the exercise of power under Article 356. Rather, the President on application of mind must decide the scope of exercise of powers.

[195] Article 353

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II. Interpretation of Article 356

202. Article 356 stipulates that when the President is satisfied that a situation has arisen in which the government of the State cannot be carried out in accordance with the provisions of the Constitution, the President **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 the Governor or any authority in the State other than the Legislature of the State;

b. Declare that the powers of the Legislature of the State shall be exercisable by or under the authority of Parliament; and

c. Make such **incidental** or **consequential** provisions as appear to the President to be **necessary or desirable** for giving effect to the **objects** of the Proclamation. This includes the power to suspend in whole or in part any of the provisions of this Constitution relating to any body or authority in the State.

203. Article 356, indicates that:

a. The powers stipulated in clauses (a), (b), and (c) of Article 356(1) are not automatically invoked when a Proclamation is issued under Article 356. The Proclamation by the President must stipulate the scope of the powers which will be exercised by the Union. This is evident from Article 356(1) which states that the President **may** by a Proclamation assume

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or declare the powers stipulated in clauses (a), (b), and (c) of Article 356(1);

b. The suspension of the State Government is a necessary consequence of issuing a Proclamation under Article 356. The President while issuing a Proclamation under Article 356 may exercise **all or any** of the functions of the State Government and the powers of the Governor. The President exercises the powers of the Governor which he holds as a constitutional head and the functions of the State Government as a political executive which he will exercise on the aid and advice of the Union Council of Ministers. However, Article 356(1)(a) does not opt for an all or none formula. The phrase "all or any" does not indicate that the Union Government can exercise a part of the functions of the State Government and the State Government can exercise the remaining because the suspension of the State Government is an automatic consequence of the Proclamation under Article 356. It rather indicates that the scope of power exercised by the Union Government must depend on the circumstances for issuing the Proclamation;

c. The President in exercise of the powers of the Governor may either dissolve the Legislative Assembly of the State or direct that the Assembly shall be in suspended animation. The President may exercise the power under Article 356(1)(b) to confer the State's legislative powers on Parliament. The power under Article 356(1)(b) is independent of the power under Article 356(1)(a);

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d. By virtue of Article 356(1)(c), the President has the power to make such incidental and consequential provisions as are necessary or desirable to give effect to the objects of the Proclamation which also includes the power to suspend provisions of Constitution relating to any body or authority in the State. However, the President can neither exercise the powers vested in the High Court nor suspend provisions related to the High Court. Three features of Article 356(1)(c) must be noted to understand the purport of the provision. *First,* unlike clauses (a) and (b) which deal with specific powers, clause (c) is worded broadly. It encapsulates the power to make "incidental and consequential provisions" to give effect to the object of the Proclamation. The phrase "incidental and consequential" qualifies the latter part of Article 356(1)(c), that is, "for giving effect to the objects of the Proclamation". *Second,* the power prescribed in Clause (c) encapsulates the power of the President to suspend a part of the Constitution related to a body but is not limited to it. *Third*, the President's power to suspend or take over the powers of "any authority" does not extend to the powers of the High Court; and

e. Clauses (a), (b), and (c) of Article 356(1) grant the President independent powers. However, the power provided under Clause (c) is broad enough to encapsulate the power of the President to assume functions under clause (a) and declare under (b) that the powers of the Legislature of the State shall be exercisable by Parliament.

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204. The principle underlying Article 356(1)(c) is that the exercise of power by the President must be "desirable or necessary" to give effect to the objects of the Proclamation. The phrases 'necessary' and 'desirable' in Article 356(1)(c) capture differing standards of relationship with the object. While 'necessary' encapsulates the meaning of that which is inevitable or unavoidable, thereby, introducing a stringent standard, the phrase 'desirable' encapsulates the meaning of possible or suitable, providing a broader standard. The commonality in both the "necessity" and "desirability" standards is that the exercise of power must have a reasonable nexus with the object of the Proclamation. Thus, the principle which runs through Article 356(1)(c) and which also guides the exercise of power under Article 356(1)(a) is that the exercise of power must have a reasonable nexus with the object of the Proclamation.

205. The Sarkaria Commission identified four situations where the exercise of power under Article 356 might be justified which include: (a) political crisis arising from the inability of any party or coalition of parties to form a workable majority; (b) internal subversion resulting from an effort of a State government to undermine responsible government; (c) physical breakdown following an inability to respond to internal disturbance; and (d) non-compliance with the Union, for example by refusing to follow the directions during war. Though the objective in each of the above situations is to restore the constitutional machinery in the State, the specific object of issuing the Proclamation differs. While applying the standard identified in the preceding paragraph, this Court

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must consider the validity of the exercise of power against the specific object or purpose for which the Proclamation under Article 356 was issued.

206. Actions which are taken during the subsistence of a Proclamation must bear a proximate relationship with the need to discharge the exigencies of governance during the period over which the Proclamation continues to remain in force in the state. The exercise of the power under Article 356 is necessitated by the failure of the constitutional machinery in the state. The ultimate object and purpose of the constitutional arrangement envisaged in the article is to restore the functioning of the constitutional machinery in the state. The tenure of the Proclamation is limited in terms of time so that the federal constitutional mechanism is eventually restored. Hence, legislative and executive action must be geared towards ensuring that the required tasks of governance are carried out during the tenure of the Proclamation. Legislative and executive action has to bear a proximate relationship to the object and purpose underlying the suspension of the constitutional machinery in the state.

207. While the actions taken after the imposition of President's rule are subject to judicial review on the grounds indicated above, the scope of review will nonetheless be limited. It will be too stringent an approach to suggest that every action of the President and Parliament must be necessary to further the objects of the proclamation. As Justice Sawant observed in **SR Bommai** (supra), when scrutinising the actions taken after the imposition of President's rule, "there is every risk and fear of the court undertaking upon itself the task

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of evaluating with fine scales and through its own lens the comparative merit of one rather than the other measure."[196] During the imposition of President's rule, there may be hundreds, if not thousands of decisions that need to be taken by the President and Parliament on behalf of the State Government to ensure the day-to-day administration of the State continues and the impact of President's rule on the daily life of citizens is reduced. If every action taken by the President and Parliament on behalf of a State was open to challenge, this would effectively bring to the Court every person who disagreed with an action taken during President's rule. Such an approach would be contrary to the express text of Articles 356(1)(a), 356(1)(b), and 356(1)(c) which entrusts the governance of the State with the Union Executive and Parliament during the period of President's rule. There is another reason why the level of judicial oversight over the actions taken during the imposition of President's rule may not be as strict as suggested by the Petitioners. Most actions taken by the President for the interim governance of the State can be reversed by the State Government when it returns to power. Any orders passed, appointments made, decisions taken by the President can subsequently be rescinded or reversed by the State Government upon a return to normalcy. Similarly, even if Parliament were to enact legislation on behalf of the State Legislature, such legislation could subsequently be repealed by the State Legislature upon the Proclamation under Article 356 ceasing to operate. Thus, the political process can correct itself and any differences that have arisen between the democratic will of the people exercised through their elected representatives in the State,

[196] S.R. Bommai v. Union of India 1994 (3) SCC 1 [108].

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and the decisions taken by the President and Parliament, can be ironed out upon a return to normalcy. For these reasons, we do not believe that the Court ought to sit in appeal over every decision taken by the President during the imposition of Article 356.

208. When a Proclamation under Article 356 is in force, there are innumerable decisions which are taken by the Union Government on behalf of the State Government for the purpose of day-to-day administration. Every decision and action taken by the Union Executive on behalf of the State is not subject to challenge. Opening up challenge to every decision would lead to chaos and uncertainty. It would in effect put the administration in the State at a standstill. This Court would enter into the question of whether it was a valid exercise of power only when the petitioner makes a *prima facie* case that exercise of power is *mala fide or extraneous*. After the petitioner makes a *prima facie* case, the onus shifts to the Union to justify that the exercise of power had a reasonable nexus with the object of the Proclamation.

III. The argument of 'irrevocability': Interpreting Article 357(2) and *Krishna Kumar Singh*

209. The petitioners submitted that the power under Article 356 does not extend towards making fundamental, permanent and irrevocable changes, which an eventually reconstituted elected assembly and government would be constitutionally unable to reverse. According to the submission, the power under Article 356 must be limited to **restorative** actions, alongside directions

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or orders that are necessary for the purpose of daily administration. To buttress this point, reference was made to Article 357(2) by which any law made in exercise of the power of the Legislature of the State (which Parliament would not have otherwise had the competent to enact) shall not cease to operate until altered, repealed or amended by a competent Legislature which is the Legislative Assembly of the State. It was argued that if **irreversible** changes are made then the Legislative Assembly of the State would be unable to undo or alter the changes in terms of Article 357(2).

210. Article 357(1)(a) stipulates that it shall be competent for Parliament to confer on the President the 'power to make laws' as well as the power to delegate this law-making power to any other authority. Before the Constitution (Forty-second Amendment) Act 1976, the text of Article 357(2) stated that any law made by Parliament or the authority authorised by it which the authority would not have had the competence to enact but for the Proclamation under Article 356, shall to the extent of incompetency cease to have effect within one year from the Proclamation ceasing to exist, unless the law is repealed, modified or re-enacted by the Legislative Assembly of that State before that period. The provision also expressly saved the things done before the expiry of one year. However, after the Constitution (Forty-second Amendment) Act 1976, Article 357(2) now stipulates that any such law made by Parliament or by the authority delegated with the power shall continue to be in force even after the Proclamation has ceased to operate until such law is repealed, altered or amended. While before the amendment, the law to the extent of incompetency would automatically cease to exist after a buffer period, an

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express repeal by the competent legislature is required for the law to cease to exist after the amendment.

211. The impact of the amendment to Article 357(2) is two-fold: *one,* Article 357(2) is an enabling provision where in spite of incompetence, the law is valid until it is altered or repealed by the State legislature. Before the amendment, an affirmative act from the State legislature after discussion was necessary for the law to continue to be in force. After the amendment, an affirmative act of approval is not required from the State legislature but it is open to it to repeal or modify the law*. Two,* Article 357(2) before the amendment contained a provision saving the things done before the expiration of the said period. This provision was necessary because the law would cease to operate after the buffer period and hence, a doubt could well arise about actions taken during the operation of the law. The savings clause has been deleted after the amendment since a law enacted during the term of the Proclamation would continue in force even after the Proclamation has ceased to exist until it is expressly repealed. The repealing statute would in such a case make provisions for actions taken during the subsistence of the legislation. Article 367(1) also applies the provisions of the General Clauses Act, 1897 to the interpretation of the Constitution.

212. A reading of Article 357(2) indicates that the principle of "irrevocability" cannot be derived from the provision for the following reasons:

    a. Article 356 by vesting the President with the power to assume the functions of the State executive and declare that Parliament shall

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exercise the power of the State legislature enables the President and Parliament to exercise functions which it is otherwise incompetent to. Article 357 states that laws which Parliament is otherwise incompetent to enact shall be valid even after the Proclamation ceases to be in force **until** the State legislature repeals or modifies such laws. Thus, until such a law is by an affirmative action either repealed or modified, such law will be valid. The provision only confers the power to the restored State legislature to restore the legislative position as it existed before the Proclamation by repealing the enacted statute. The provision does not place any limitations on the exercise of power under Article 356;

b. Article 357 only deals with the validity of **laws** after the Proclamation ceases to exist and not the validity of **executive actions** taken by the Union Government. Even if for the sake of argument, it is accepted that the principle of irrevocability runs through Article 357(2), this principle cannot be imported to limit the scope of the exercise of executive power when the Proclamation is in force; and

c. Article 357(2) encapsulates the working of the Indian federal model by providing that though the division of powers between the Union and the State legislatures which is a core component of the federal structure is capable of being altered during the subsistence of the proclamation under Article 356, the federating units would have the power to reverse or modify the changes which were brought by the Union during the

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subsistence of the Proclamation. In that sense, Article 357(2) enables the restoration of federal principles.

213. The petitioners also relied on **Krishna Kumar Singh** (supra) to argue that irrevocable actions cannot be taken after a Proclamation under Article 356 is issued. In **Krishna Kumar Singh** (supra), one of the issues before this Court was whether the legal effects or consequences of an Ordinance stand obliterated upon the lapsing of an Ordinance or upon the Legislative Assembly passing a resolution disapproving the Ordinance. Constitution Benches of this Court in **Bhupendra Kumar Bose** v. **State of Orissa**[197] and **T Venkata Reddy** v. **State of Andhra Pradesh**[198] had held that the rights created by an Ordinance have an enduring effect even after the Ordinance ceases to exist. The premise of the decision was that the effects of an Ordinance must be assessed on the basis of the same yardstick that applies to temporary enactments. One of us (Justice DY Chandrachud as he then was) writing for the majority held that there is a fundamental fallacy in equating an Ordinance with a temporary enactment because an Ordinance, though deemed to be a law in view of the deeming fiction in Article 213 comes into force through an executive action. This Court held that when an Ordinance ceases to exist, the rights and other consequences created by the Ordinance also cease to exist for three reasons: *first,* Article 213 unlike other provisions of the Constitution (such as Articles 358(1) and 359(1)) does not have a savings clause which saves the actions or things done when the

[197] AIR 1962 SC 945
[198] (1985) 3 SCC 198

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Ordinance was in force; *second,* the theory of enduring rights attributes a degree of permanence to the power to promulgate Ordinances which derogates from the principle of parliamentary supremacy; and *third,* in **SR Bommai** (supra), this Court held that irrevocable actions cannot be taken until the Proclamation issued under Article 356 is approved by Parliament. This principle was held to be applicable to Ordinance making power as well.

214. A subsequent issue which arose before this Court in **Krishna Kumar Singh** (supra) was on the question of relief. That is, what relief could the Court grant where restoration of *status quo ante* was not possible. This Court held that while deciding on the relief, this Court must decide if "undoing what had been done under the Ordinance would manifestly be contrary to public interest". This Court further observed that impracticality cannot be raised to an independent status but it can be one of the aspects which the Court must consider while assessing public interest.

215. At a preliminary level, the issue in **Krishna Kumar Singh** (supra) was whether the consequence of an Ordinance can subsist even after the Ordinance ceases to exist or whether the rights created by an Ordinance cease to exist along with the Ordinance. An Ordinance ceases to exist on the expiry of six weeks from the reassembly of the Legislature or when before the said period, a resolution disapproving the Ordinance is passed. The provisions dealing with Ordinance making power (Article 123 and 213) do not contain a clause saving actions taken under an Ordinance after it ceases to exist. As discussed above, Article 356 is placed differently by virtue of Article

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357(2), whereby laws enacted by Parliament in exercise of the State legislature's power do not cease to exist merely on the expiry of the Proclamation, and thus there was no necessity for a savings clause.

216. Finally, this Court by following the line of approach taken in **SR Bommai** (supra) interpreted the phrase 'cease to exist' in Article 213 broadly because the narrow interpretation would lead to the abrogation of the principle of parliamentary supremacy where the effects of executive action would have a permanent effect without any parliamentary oversight. To recall, in **SR Bommai** (supra), this Court held that "irreversible" changes cannot be made **before** the Proclamation under Article 356 is approved by both Houses of Parliament under Article 356(3). Otherwise, the purpose of the provision which is to place a Parliamentary check on the exercise of power by the executive would become nugatory. In this context, Justice Jeevan Reddy made the following observations:

> "290. […] The expression "approval" has an intrinsic meaning which cannot be ignored. Disapproval or non-approval means that the Houses of Parliament are saying that the President's action was not justified or warranted and that it shall no longer continue. In such a case, the Proclamation lapses, i.e., ceases to be in operation at the end of two months — the necessary consequence of which is the status quo ante revives. To say that notwithstanding the disapproval or non-approval, the status quo ante does not revive is to rob the concept of approval of its content and meaning. Such a view renders the check provided by clause (3) ineffective and of no significance whatsoever. The Executive would be telling Parliament : "I have dismissed the Government. Now, whether you approve or disapprove is of no consequence because the Government in no event can be revived. The deed is done. You better approve it because you have practically no choice." We do not think that such a course is consistent with the principle of parliamentary supremacy and parliamentary control over the Executive, the basic premise of parliamentary supremacy. It would indeed mean supremacy of the Executive over Parliament."

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217. This Court in **SR Bommai** (supra) distinguished between the exercise of power **before** a Proclamation is approved by Parliament and **after** the approval. The approval of the Proclamation by Parliament grants legislative legitimacy to the executive action under Article 356. The argument of democratic deficit fails after the Proclamation is approved by Parliament. For the above reasons, the rejection of the enduring rights theory in **Krishna Kumar Singh** (supra) cannot be transposed to the interpretation on the limits on the exercise of power under Article 356. The interpretation of neither the text of Articles 356 and 357 nor the decision of this Court in **Krishna Kumar Singh** (supra) lead to the inference that power under Article 356 cannot be exercised to create 'irreversible' consequences.

218. Any other interpretation would also lead to the Court testing the validity of **outcomes** and not the **exercise** of power. Challenging the exercise of power on the ground of irreversibility would open the way for challenging every day administrative actions against which we have cautioned above. Hence, we cannot accept the proposition which has been urged on behalf of the Petitioners that the exercise of power by the President under Article 356 of the Constitution can be challenged on the ground that it has given rise to irreversible consequences.

IV. The distinction between legislative and constitutional functions of the Legislature

219. Article 356(1)(a) states that the President may declare that the "powers of the Legislature of the State" shall be exercised by or under the authority of

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Parliament. There are two competing interpretations to the phrase "powers of the Legislature of the State". It could be read expansively to include "all" the powers of the State Legislature or narrowly to place limitations on the nature of legislative power that can be exercised by Parliament. The petitioners term it as the distinction between legislative and constituent power, or the law and non-law powers of the State legislature. However, regardless of the manner in which the distinction is drawn, the issue is whether **all** the powers of the Legislature of the State (that is, both law-making and non-law making powers) are vested in Parliament when the President issues a declaration in terms of Article 356(1)(b).

220. In addition to the legislative powers granted to the States under List II of the Seventh Schedule, the States have also been granted various non-law making powers to ensure the voice of their electorates are well represented at the constitutional plane. This is a recognition that even though Parliament has representatives from the entire country, and the Rajya Sabha is elected entirely by State Legislatures, the outlook of such a body is fundamentally national. The actual polity of Parliament is the entire nation. The Constitution recognises that this creates a risk that the interests of specific states may not be adequately represented despite such States being particularly impacted. For example, the power to abolish or create a Legislative Council in a State is conferred on Parliament under Article 169 as such a law has national consequences, such as for the election of the President. However, it is also a power that would directly impact the constitutional governance within the concerned State. Thus, despite Parliament and the Rajya Sabha possessing

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Members from the concerned State, the Constitution provides an extra layer of federal representation to the State. Article 169 states that no law for the creation of a Legislative Council in a State can be passed by Parliament without the Legislative Assembly of the State first passing a resolution by a 2/3rds majority. This ensures that the constitutional governance of the State cannot be overridden by national considerations.

221. A few of the constitutional (or non-law making) powers held by the Legislature of the State are: (a) the power of the State legislatures to ratify an amendment[199]; (b) election of the President by elected members of the Legislative Assemblies of the State[200]; (c) election of the representatives of each State to the Rajya Sabha by the elected members of the Legislative Assembly of the State[201]; and (e) the Houses of Legislatures in two or more States passing a resolution to the effect that Parliament must legislate upon certain matters in those states, matters it otherwise does not have the power to legislate upon[202].

222. As we have noted above, Article 356(1)(b) does not make a distinction between legislative and constitutional powers. Clause (b) of Article 356(1) unlike clause (a) of Article 356(1) also does not make a distinction between "all or any" powers. Clause (b) states that the President shall by a Proclamation make a declaration that the powers of the Legislature of the State shall be exercisable by or under the authority of Parliament.

[199] First proviso to Article 368(2)
[200] Article 54
[201] Article 80(4)
[202] Article 252

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223. Article 357 provides the scope of the power which can be exercised by Parliament upon a declaration being made under Article 356(1)(b). Article 357(1) is extracted below:

> "357. Exercise of legislative powers under Proclamation issued under Article 356
>
> (1) Where by a Proclamation issued under clause (1) of Article 356, it has been declared that the powers of the Legislature of the State shall be exercisable by or under the authority of Parliament, it shall be competent:
>
> (a) for Parliament to confer on the President the power of the Legislature of the State to make laws, and to authorise the President to delegate, subject to such conditions as he may think fit to impose, the power so conferred to any other authority to be specified by him in that behalf;
>
> (b) for Parliament, or for the President or other authority in whom such power to make laws is vested under sub clause (a), to make laws conferring powers and imposing duties, or authorising the conferring of powers and the imposition of duties, upon the Union or officers and authorities thereof;
>
> (c) for the President to authorise when the House of the People is not in session expenditure from the Consolidated Fund of the State pending the sanction of such expenditure by Parliament."

224. Article 357, as indicated in the marginal note, deals with the exercise of legislative powers upon the issuance of a Proclamation under Article 356. The provision states that upon a declaration being made under Article 356(1)(b), it shall be **competent**:

a. For Parliament to confer **law making powers** on the President or authorise the President to delegate the power to any other authority;

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b. For Parliament to **make laws** conferring powers and duties upon the Union or officers and authorities; and

c. For the President to authorise expenditure from the Consolidated Fund of the State when the House of People is not in session and pending sanction of such expenditure by Parliament.

225. Article 357(1) states that it shall be **competent** for Parliament to exercise the powers stipulated in the clauses. Article 357(1) confers the law-making body with powers which are otherwise not available to it. By virtue of Article 357(1)(a), Parliament can delegate the law-making function to the President and authorise the President to delegate the power to any other authority. This is a unique power granted by the provision which is an exception to the executive and legislative divide between Parliament and the executive. Under Article 357(1)(b), Parliament can (acting as the Legislative Assembly of the State) enact laws conferring powers and imposing duties upon the Union. By Article 357(1)(c), the President is granted the power to authorise expenditure in deviation from the procedure prescribed in Article 204 by which expenditure from the Consolidated fund of the State can only be authorised by a law. The phrase “competence” in Article 357(1) has an expansive and not a restrictive scope.

226. Article 357(1) dwells on the competence of Parliament and the President from a constitutional perspective, when under a Proclamation under Article 356, the “powers of the legislature of the State shall be exercisable by or under the

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authority of Parliament". The expression "powers of the legislature of the state" in Article 356(1)(b) and in the prefatory part of Article 357(1) is broader in content than "the power of the legislature of the state to make laws" in Article 357(1)(a) and 357(1)(b). The latter is the law-making power of the state legislature while the former includes but is not confined to the power to legislate. Clause (a) of Article 357(1) deals with "the power of the legislature of the state to make laws". Clause (b) refers to the same subject when it speaks of "the authority in whom such power to make laws is vested under sub-clause (a)". Article 357 uses the expression "competent" initially, in the prefatory part, to indicate certain actions which flow from the declaration under Article 356 that the power of the state legislature shall be exercisable by or under the authority of Parliament. Clause 2 also uses the expression "competent" to indicate that a law made by Parliament or the President while exercising the power of the legislature of the state during a Proclamation under Article 356 shall continue in force after the Proclamation has ceased to operate even though such a law would not have been competent in the absence of a Proclamation. The state legislature can thereafter modify or repeal the law. In Clause 1 the expression "competent" is used to signify an empowerment; an entrustment of power. In Clause 2, the same expression is used to mean the constitutional capacity to make the law.

227. Article 356(1)(b) indicates that on a Proclamation being issued, the President may declare that the powers of the legislature of the state shall be exercisable by or under the authority of Parliament. Article 357 provides for what is subsumed, when by a declaration under Article 356, the powers of the

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legislature of the State are exercisable by or under the authority of Parliament. The text of the prefatory part of Article 357 is similar to the language of Article 356(1)(b). However, the prefatory part of article 357 refers to the entirety of Clause 1 of Article 356. The ambit of Article 356(1)(b) is clearly broader than the canvas of Article 357(1). Article 356(1)(b) would comprehend both law making and non-law making powers when it uses the expression "powers exercisable by the legislature of the state". Clause (a) of Article 357(1) – and Clause (b) which refers to Clause (a) – on the other hand refer to the power of the legislature of the state to make laws. This is the legislative power referable to Articles 245 and 246. It would be difficult to read Article 357(1) as restricting the ambit of the conferment of power under Article 356(1)(b). The basic purpose of Article 357 is to ensure that while exercising the powers of the legislature of the State pursuant to a declaration under Article 356(1), Parliament, or as the case may be, the President are not impeded by an absence of competence which would have impeded the exercise of a similar power in the absence of a Proclamation under Article 356. The description in Article 357 of what could lie within the competence of Parliament or the President during a Proclamation which vests the powers of the State Legislature in Parliament cannot restrict the powers available under Article 356. Article 357 does not contain a non-obstante provision which overrides Article 356. Article 357 cannot be read to exclude everything apart from sub-clauses (a), (b) and (c) of Clause 1 from the ambit of Article 356. To interpret Article 357(1) as a restriction on Article 356(1)(b) would be to read in a restriction which the plain terms of the Constitution do not provide. To put it

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differently, acceptance of a contrary interpretation would require the court to read the expression “only” to precede the expression “competent” in the prefatory part of Article 357. This will amount to judicial rewriting of the text of the Constitution which is plainly impermissible.

228. A seven-Judge Bench of this Court in **In re Presidential Poll**[203] held that the dissolution of the Legislative Assembly is not a ground for preventing the holding of the election on the expiry of the term of the President. So, constitutional functions are not put on a hold when the Legislative Assembly of a State is dissolved. We are conscious that the constitutional powers of the State legislature are crucial facets of the principle of federalism. These provisions create a space for the States to be seen and heard and for the States to have an equal say in the democratic functioning of the Nation. It is not only the letter of the law which makes a Constitution federal but also the exercise of such power. Interpreting the phrase “powers of the legislature” to allow Parliament to exercise all constitutional powers which are vested in the Legislative Assembly of the State would reduce the power of the State. However, the Constitution recognises such reduction of federal power when the Proclamation under Article 356 is in force. As we have held above, the exercise of power after a Proclamation under Article 356 is issued is subject to judicial review. An immunity from judicial scrutiny does not attach to the exercise of Constitutional powers of the Legislature of the State. The Court while judicially reviewing the exercise of power can determine if the exercise

[203] (1974) 2 SCC 33

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of the Constitutional power of the Legislature of the State has a reasonable nexus with the object sought to be achieved by the Proclamation.

e. The standard to assess actions taken under Article 356 after the issuance of Proclamation

229. In view of the discussion above, the following standard is laid down to assess actions under Article 356 *after* the Proclamation has been issued:

a. The exercise of power by the President under Article 356 must have a reasonable nexus to the object of the Proclamation;

b. The exercise of power by the President will not be rendered invalid merely on the ground of 'irreversibility' of the actions;

c. The person challenging the exercise of power must *prima facie* establish that it is a *mala fide* or *extraneous* exercise of power. After a *prima facie* case is made, the onus shifts to the Union to justify that the exercise of power had a reasonable nexus with object of the Proclamation; and

d. The exercise of power by the President for everyday administration of the State is not ordinarily subject to judicial review.

iv. Article 370: a temporary provision?

a. The historical context to Article 370

230. In the section above, this Court has noted the historical context in which the State of Jammu and Kashmir had acceded to the Dominion of India to

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ascertain whether the State held an element of sovereignty. In this section, the historical context with respect to Jammu and Kashmir is referred to for the purpose of identifying the reason for adopting Article 370. A reference to the historical context in which Article 370 was included will aid this Court in determining whether the provision is temporary or permanent in nature.

I. Accession of Jammu and Kashmir

231. The British Parliament enacted the Indian Independence Act 1947. In terms of Section 1(1) of the Act, two independent Dominions – India and Pakistan were to be established from 15 August 1947. Section 7(1)(b) stipulated that following independence, the sovereignty of the British monarch over Indian States would lapse and return to the Rulers of those States. Consequently, as sovereign States, 562 Princely States had the choice to remain independent or to accede to either of the two Dominions established by the Act. Section 8 enunciated that as a transitional measure, the provisions of the Government of India Act 1935 would continue to apply to the two Dominions subject to conditions. In pursuance of the provisions of Section 9 of the Indian Independence Act 1947, the Governor-General of India issued the India (Provisional Constitution) Order 1947 which made certain provisions of the Government of India Act 1935 applicable to India until other provisions were made applicable by the Constituent Assembly. Section 6 of the Government of India Act 1935 became applicable through the Order which dealt with the accession of Princely States to India through the execution of IoA.

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232. Jammu and Kashmir had not executed a IoA when India had attained independence. Soon after which on 27 September 1947, a letter was addressed by Nehru to Sardar Patel noting that he had received many reports of a dangerous and deteriorating situation in Kashmir. Nehru stated that with the onset of the winter, Kashmir would be cut-off from the rest of India. Nehru stated that "the Muslim League in the Punjab and the NWFP are making preparations to enter Kashmir in considerable numbers", stating further that:

> "I understand that the Pakistan strategy is to infiltrate into Kashmir now and to take some big action as soon as Kashmir is more or less isolated because of the coming winter."

233. The letter stated that once the State acceded to India, it would become difficult for Pakistan to invade it officially or unofficially without coming into conflict with the Indian Union. If, however, there was to be delay in accession, Pakistan would go ahead without much fear of consequences "specially when the winter isolates Kashmir". Nehru concluded his letter stating:

> "I would again add that time is [of] the essence of the business and things must be done in a way so as to bring about the accession of Kashmir to the Indian Union as rapidly as possible with the co-operation of Sheikh Abdullah."

234. On 26 October 1947, Maharaja Hari Singh addressed a communication to Lord Mountbatten, the Governor-General noting that "a grave emergency has arisen" in his State leading him to "request immediate assistance" of the Government. The letter noted that the Maharaja had "wanted to take time to decide to which Dominion" he should accede or whether it would be in the best interest of both the Dominions as well as Jammu and Kashmir for the State to "stand independent". The Maharaja stated that while Pakistan had,

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responding to his request, entered into a Standstill Agreement with the State, the Dominion of India desired further discussion which could not be arranged by him in view of the grave developments which took place as elucidated in his letter. The Pakistan government, he noted, "permitted steady and increasing strangulation of supplies like food, salt and petrol" to Jammu and Kashmir in spite of the Standstill Agreement. The letter of the Maharaja spoke of the grave danger to the security and existence of Jammu and Kashmir occasioned by the infiltration of soldiers in plain clothes who were threatening to capture Srinagar. The letter contains a statement of the position which the State of Jammu and Kashmir was confronted with, in the following extracts:

> "Afridis, soldiers in plain clothes, and desperadoes with modern weapons have been allowed to infliter into the State at first in Poonch and then in Sialkot and finally in mass area adjoining Hazara District on the Ramkot side. The result has been that the limited number of troops at the disposal of the State had to be dispersed and thus had to face the enemy at the several points simultaneously, that it has become difficult to stop the wanton destruction of life and property and looting. The Mohara power-house which supplies the electric current to the whole of Srinagar has been burnt. The number of women who have been kidnapped and raped and makes my heart bleed. The wild forces thus let loose on the State are marching on with the aim of capturing Srinagar, the summer Capital of my Government, as first step to over running the whole State.

> The mass infiltration tribesman drawn from the distant areas of the North-\Vest Frontier coming regularly in motor trucks using Mansehra-Muzaffarabad Road and fully armed with up-to-date weapons cannot possibly be done without the knowing of the Provincial Government of the North-West Frontier Province and the Government of Pakistan. In spite of repeated requests made by my Government no attempt has been made to check these raiders or stop them from coming to my State. The Pakistan Radio even put out a story that a Provisional Government has been set up in Kashmir."

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235. The Maharaja sought help and recognised that India would be able to lend assistance only if the State of Jammu and Kashmir acceded to India:

> "I have accordingly decided to do so and I attach the Instrument of Accession for acceptance by your Government. The other alternative is to leave my State and my people to free-booters. On this basis no civilized Government can exist or be maintained. The alternative I will never allow to happen as long as I am Ruler of the State and I have life to defend my country."

236. The offer of accession noted that if the State of Jammu and Kashmir "has to be saved, immediate assistance must be available at Srinagar". The letter proposed the setting up of an interim government with Sheikh Abdullah being asked to carry out the responsibilities as Prime Minister "in this emergency".

237. Maharaja Hari Singh signed the IoA on 26 October 1947. The Instrument was accepted by the Governor-General on 27 October 1947. In his communication dated 27 October 1947 to the Maharaja, the Governor-General noted that "in the special circumstances mentioned by your Highness, my Government has decided to accept the accession of Kashmir State to the Dominion of India". The letter of the Governor General also noted that the policy of their Government was that in case of any State where the issue of accession is a subject of dispute, "it is my Government's wish" that the question of accession "should be decided in accordance with the wishes of the people of the State." Thus, the letter noted that in the case of Jammu and Kashmir, the question of the State's accession must be settled with reference to the people of the State:

> "[…] 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

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> 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."

238. Shri Mehr Chand Mahajan (later a judge of the Supreme Court and Chief Justice of India) had taken over as Prime Minister of Jammu and Kashmir on 15 October 1947. His Memoirs titled "Looking Back[204]" devote an entire Chapter to the "Pak invasion of Kashmir". Mehr Chand Mahajan provides a detailed account of the events commencing from 23 October 1947. The account can best be captured in his own words in the following extracts:

> "… Meanwhile the tribesmen from the frontier using Pakistan lorries, jeeps and other conveyances and armed with Pakistani weapons had entered the State on 23 October through Muzaffarabad. These tribesmen were themselves Pakistan nationals; as they advanced they were joined by other Pakistani citizens. The rail had been organised by an ex-officer of the Political Agency at Peshawar, at the instance and with the connivance of the Pakistan government. Transport, arms, ammunition and military officers were supplied by the Pakistan Government. We had tried to blow the bridge that could provide – and did provide – access to the tribesmen into Kashmir. But as related earlier, this attempt had failed for want of dynamite in the State.
>
> Now they pushed on. At Domel the Muslim officers and soldiers of the State forces who had been guarding this frontier under Col. Narain Singh deserted and joined the raiders after killing their commander in his officer at the Domel dak bungalow.
>
> Flushed with arson, loot, and murder, the tribesmen now pushed on the way to Srinagar. At Garhi, the Chief of the Dogra Army staff with his small force tried to stop their advance. He held them up for sometime but ultimately fell against enormously superior forces.
>
> …

[204] Har-Anand Publications Private Limited reprint 2023

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October 24th was the Dussehra Darbar Day on which every year the Maharaja took the salute from the army and held a Darbar. A discussion took place in the palace on the 23rd night whether or not the Darbar should be held in view of the situation that had arisen. The Maharaja was of the opinion that the Darbar should not be held as enough State forces for the ceremonial parade were not available. All that had been left of the army in Srinagar was about four companies of the cavalry. I advised otherwise, being of the opinion that cancellation of the Darbar would unnecessarily create panic in the town.

…

No sooner had we left the Darbar Hall and reached the Mirakadal Bridge, electricity failed. The city was plunged into darkness. ….

I also rang up the power house at Mahoora where a chowkidar came on the line and told me that a wounded captain of the army had come on horseback saying "The raiders have come. Run away." This, he said, had created panic and most of the men of the power house had fled from the place.

…

On 24th October, the Deputy Prime Minister left Srinagar for Delhi carrying a letter of accession to India-from the Maharaja and a personal letter to Pandit Jawaharlal Nehru and another to Sardar Patel asking for military help in men, arms and ammunition. I also wrote to both requesting them to save the State from Pakistan's unprovoked aggression.

…

After assuming office on 15th October, I had sent Col. Baldev Singh Pathani and our military adviser, Col. Kashmir Singh, to Poonch and Kotli to help our small military force there, and to inspire confidence in the citizens. Col. Baldev Singh remained at Kotli to give heart to the citizens at great personal risk while col. Kashmir Singh returned to Srinagar to apprise the Maharaja about the military situation in Poonch and in Kotli. After consulting the Officer commanding, Srinagar Forces, the Governor of Srinagar and the Inspector General of Police, we decided in the afternoon of 25th that the raiders should be given a receding battle. Every effort was to be made to secure that our depleted forces suffered as few casualties as possible. An all-out effort was to be made to check the advance of the raiders to the town of Srinagar.

…

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As we were groping for a way out, Mr V.P. Menon, Secretary of the Ministry of States, arrived in Srinagar by plane. He came straight to my residence to see me and told me that he had come there to take me to New Delhi.

…

After His Highness left at 2 A.M. an officer came from the front and informed me that the Dogra Chief of Staff had been wounded and was lying on the road with six or seven bullets in his body. He had ordered the rest of his troops to retreat to a position of vantage but did not wish to leave the place where he lay. Though fatally wounded, he was determined to give a fight as long as he was alive.

Next morning Mr. V. P. Menon and I flew to Delhi. We arrived at Safdarjung airport at about 8 A. M. where a car was waiting. I immediately drove to the Prime Minister's House on Yourd Road. The Prime Minister and Sardar Patel both were there and were apprised of the situation that had arisen. In view of the advance of the raiders towards the town of Baramula and Srinagar. I requested immediate military aid on any terms. I said somewhat emphatically that the town was taken by the tribesmen, India was strong enough to re-take it. Its recapture, however, could not have undone the damage that would have resulted. I, therefore, firmly but respectfully insisted on the acceptance of my request for immediate military aid. The Prime Minister observed that it was not easy on the spur of the moment to send troops as such an operation required considerable preparation and arrangement, the troops could not be moved without due deliberation merely on my demand. I was, however, adamant in my submission; the Prime Minister also was sticking to his own view. As a last resort I said, "Give us the military force we need. Take the accession and give whatever power you desire to the popular party. The army must fly to save Srinagar this evening or else I will go to Lahore and negotiate terms with Mr Jinnah."

When I told the Prime Minister of India that I had orders to go to Pakistan in case immediate military aid was not given he naturally became upset and in an angry tone said, "Mahajan, go away." I got up and was about to leave the room when Sardar Patel detained me by saying in my ear, "Of course, Mahajan, you are not going to Pakistan." Just then, a piece of paper was passed over the Prime Minister, He read it and in a loud voice said, "Sheikh Sahib also says the same thing." It appeared that Sheikh Abdulla had been listening to all this talk while sitting in one of the bedrooms adjoining the drawing room where we were. He now strengthened my hands by telling the Prime Minister that military help must be sent immediately.

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…

> At 12.45 p. m. Sardar Baldev Singh came and told me that a decision had been taken to send two companies of Indian troops to Srinagar. All the planes in India had been requisitioned for the purpose. He also wanted me to give the commander of this force as much information as I could about the situation in the State. Luckily I had brought with me a plan which showed where the clash between the raiders and the State forces had occurred, the deployment of the raiders and distribution of the State forces.
>
> …
>
> The Cabinet meeting in the evening affirmed the decision of the Defence Council to give military aid to the Maharaja to drive out the tribesmen. Around dinner time, the Prime Minister sent a message to me that with Mr. V. P. Menon, I should fly to Jammu to inform the Maharaja of this decision and also to get his signature on certain supplementary documents about the accession."

239. In Chapter 19, titled Kashmir's Accession to India, Mahajan notes that on 27 October 1947, he received a message that the Indian troops had landed at Srinagar and "had gone into action"[205]. Mahajan notes that on 27 October 1947, he flew to Jammu with Mr V P Menon (the Secretary in the Ministry of States). On their landing in Srinagar, the Indian troops had gone into battle with the tribesmen. Mahajan recounts what happened thereafter:

> "…After some discussion, formal documents were signed which Mr. Menon took back to New Delhi, while I stayed at Jammu. This was a narrow shave. After the failure of the Pak attempt to capture both the Maharaja and myself at Bhimber, Mr Jinnah had got impatient. He ordered his British Commander-in-Chief to move two brigades of the Pak army into Kashmir on 27 October, one form Rawalpindi and another from Sialkot. The Sialkot army was to march to Jammu, take the city and make the Maharaja a prisoner. The Rawalpindi column was to advance to Srinagar and capture the city, all this on the excuse that the State should be saved the anarchy that the tribesmen's raid had produced. The Maharaja having acceded just in time and the Indian Army being already in Kashmir, this could have meant pitting Pakistan forces against those of India. Both the dominions owing allegiance to the King and the armies of both being

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> under a Joint Defence Council, such a move, the Pak Commander-in-Chief told Mr Jinnah was unthinkable. The King as the ruler of Pakistan could not send his (Pak) armies against his own armies in India. The British Commander-in-Chief therefore, refused to issue the order and offered to resign. Mr Jinnah had to cancel his orders."

240. Mahajan has stated in his Memoir that Prime Minister Nehru indicated three conditions on which the Maharaja had been given the military help. According to him:

> "… Panditji write out briefly those terms. The first one was that His Highness should accede to India with regard to three subjects: defence, external affairs and transport. This he had already done. The second was that the internal administration of the State should be democratized and a new constitution be framed on the lines of the model already set out for the State of Mysore. The third condition was that Sheikh Abdulla should be taken in the administration and made responsible for it along with the Prime Minister."

241. Mahajan eventually states that :

> "…The Indian forces suffered heavily in the first attack but after reinforcements arrived they drove out the raiders from the neighbourhood of Srinagar where they had infiltrated after looting and destroying the town of Baramula."

242. V P Menon provides a detailed account of the events preceding the accession of Jammu and Kashmir to the Union of India in his book titled, "The Story of the Integration of the Indian States"[206]. Menon's account is illuminating on the events which took place from 22 October 1947 and needs to be extracted in the entirety:

> "The all-out invasion of Kashmir started on 22 October 1947. The main raiders' column, which had approximately two hundred to three hundred lorries, and which consisted of frontier tribesmen estimated at five thousand — Afridis, Wazirs, Mahsuds, Swathis, and soldiers

[206] Orient Longmans (1961)

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of the Pakistan Army 'on leave'—led by some regular officers who knew Kashmir well advanced from Abbottabad in the N.W.F.P. along the Jhelum Valley Road. They captured Garhi and Domel arrived at the gates of Muzaffarabad. The State battalion, consisting of Muslims and Dogras stationed at Muzaffarabad, was commanded by Lt.-Colonel Narain Singh. All the Muslims in the battalion deserted; shot the Commanding Officer and his adjutant; joined the raiders, and acted as advance-guard to the raiders' column. It may be mentioned that only a few days before Lt.-Colonel Narain Singh had been asked by the Maharajah whether he could rely on the loyalty of the Muslim half of his battalion. He unhesitatingly answered, 'More than on the Dogras'. He had been in command of this battalion for some years.

The raiders then marched towards Baramula along the road leading to Srinagar, their next destination being Uri. All the Muslims in the State Forces had deserted and many had joined the raiders. When Brigadier Rajinder Singh, the Chief of Staff of the State Forces, heard of the desertion of the Muslim personnel and the advance of the raiders, he gathered together approximately 150 men and moved towards Uri. There he engaged the raiders for two days and in the rearguard action destroyed the Uri bridge. The Brigadier himself and all his men were cut to pieces in this action. But he and his colleagues will live in history like the gallant Leonidas and his 300 men who held the Persian invaders at Thermopylae. It was but appropriate that when the *Maha Vir Chakra* decoration was instituted, the first award should have been given (posthumously) to this heroic soldier.

The raiders continued to advance and on 24 October they captured the Mahura Power House, which supplied electricity to Srinagar. Srinagar was plunged in darkness. The raiders had announced that they would reach Srinagar on 26 October in time for the Id celebrations at the Srinagar mosque.

On the evening of 24 October the Government of India received a desperate appeal for help from the Maharajah. They also received from the Supreme Commander information regarding the raiders' advance and probable intentions. On the morning of 25 October a meeting of the Defence Committee was held, presided over by Lord Mountbatten. This Committee considered the request of the Maharajah for arms and ammunition as also for reinforcements of troops. Lord Mountbatten emphasized that no precipitate action should be taken until the Government of India had fuller information. It was agreed that I should fly to Srinagar immediately in order to study the situation on the spot and to report to the Government of India.

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Accompanied by Army and Air Force officers and by the late D. N. Kachru, I flew by a B.O.A. C. plane to Srinagar. This was one of the planes which had been chartered for the evacuation of British nationals from Srinagar. When I landed at the airfield, I was oppressed by the stillness as of a graveyard all around. Over everything hung an atmosphere of impending calamity.

From the aerodrome we went straight to the residence of the Prime Minister of the State. The road leading from the aerodrome to Srinagar was deserted. At some of the street corners I noticed volunteers of the National Conference with *lathis* who challenged passers-by; but the State police were conspicuous by their absence. Mehr Chand Mahajan apprised us of the perilous situation and pleaded for the Government of India to come to the rescue of the State. Mahajan, who is usually self-possessed, seemed temporarily to have lost his equanimity. From his residence we both proceeded to the Maharajah's palace. The Maharajah was completely unnerved by the turn of events and by his sense of lone helplessness. There were practically no State Forces left and the raiders had almost reached the outskirts of Baramula. At this rate they would be in Srinagar in another day or two. It was no use harping on the past or blaming the Maharajah for his inaction. I am certain that he had never thought of the possibility of an invasion of his State by tribesmen nor of the large-scale desertions of Muslims from his army and police. By that time, Srinagar had very little contact with the mofussil areas and it was difficult to find out the real situation. The one hopeful fact was that Brigadier Rajinder Singh had promised to hold the raiders as long as possible from reaching Baramula and we knew that he would fight, if necessary, to the bitter end.

The first thing to be done was to get the Maharajah and his family out of Srinagar. The reason for this was obvious. The raiders were close to Baramula. The Maharajah was quite helpless and, if the Government of India decided not to go to his rescue, there was no doubt about the fate that would befall him and his family in Srinagar. There was also a certainty that the raiders would loot all the valuable possessions in the palace. In these circumstances I advised him to leave immediately for Jammu and to take with him his family and his valuable possessions.

After assuring myself that he would leave that night and after gathering all the information I could from people who were in a position to give it, I went to the Guest House in the early hours of the morning for a little rest. Just as I was going to sleep, Mahajan rang me up to say that there were rumours that the raiders had infiltrated into Srinagar and that it would be unsafe for us to remain any longer in the city. I could hardly believe that the raiders could have reached Srinagar, but I had to accept Mahajan's advice. The

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Maharajah had taken away all the available cars and the only transport available was an old jeep. Into this were bundled Mahajan, myself and the air crew of six or seven. When we reached the airfield, the place was filled with people, in striking contrast to its deserted appearance when I arrived there the previous evening.

We left Srinagar in the first light of the morning of 26 October and immediately on my arrival in Delhi I went straight to a meeting of the Defence Committee. I reported my impressions of the situation and pointed out the supreme necessity of saving Kashmir from the raiders. Lord Mountbatten said that it would be improper to move Indian troops into what was at the moment an independent country, as Kashmir had not yet decided to accede to either India or Pakistan. If it were true that the Maharajah was now anxious to accede to India, then Jammu and Kashmir would become part of Indian territory. This was the only basis on which Indian troops could be sent to the rescue of the State from further pillaging by the aggressors. He further expressed the strong opinion that, in view of the composition of the population, accession should be conditional on the will of the people being ascertained by a plebiscite after the raiders had been driven out of the State and law and order had been restored. This was readily agreed to by Nehru and other ministers.

Soon after the meeting of the Defence Committee, I flew to Jammu accompanied by Mahajan. On arrival at the palace I found it in a state of utter turmoil with valuable articles strewn all been driving all night. I woke him up and told him of what had taken place at the Defence Committee meeting. He was ready to accede at once. He then composed a letter to the Governor-General describing the pitiable plight of the State and reiterating his request for military help. He further informed the Governor-General that it was his intention to set up an interim government at once and to ask Sheikh Abdullah to carry the responsibilities in this emergency with Mehr Chand Mahajan, his Prime Minister. He concluded by saying that if the State was to be saved, immediate assistance must be available at Srinagar. He also signed the Intrument of Accession. Just as I was leaving, he told me that before he went to sleep, he had left instructions with his ADC that, if I came back from Delhi, he was not to be disturbed as it would mean that the Government of India had decided to come to his rescue and he should therefore be allowed to sleep in peace; but that if I failed to return, it meant that everything was lost and, in that case, his ADC was to shoot him in his sleep!

With the Instrument of Accession and. the Maharajah's letter I flew back at once to Delhi. Sardar was waiting at the aerodrome and we both went straight to a meeting of the Defence Committee which was arranged for that evening. There was a long discussion, at the end of which it was decided that the accession of Jammu and Kashmir should be accepted, subject to the proviso that a plebiscite

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> would be held in the State when the law and. order situation allowed. It was further decided that an infantry battalion should be flown to Srinagar the next day. This decision had the fullest support of Sheikh Abdullah, who was in Delhi at that time and who had been pressing the Government of India on behalf of the All-Jammu and Kashmir National Conference for immediate help to be sent to the State to resist the tribal invasion.
>
> Even after this decision had been reached Lord Mountbatten and the three British Chiefs of Staff of the Indian Army, Navy and Air Force pointed out the risks involved in the operation. But Nehru asserted that the only alternative to sending troops would be to allow a massacre in Srinagar, which would be followed by a major communal holocaust in India. Moreover, the British residents in Srinagar would certainly be murdered by the raiders, since neither the Pakistan Commander-in-Chief nor the Supreme Commander was in a position to safeguard their lives."

243. Menon adverts to the operation which took place involving the air-lifting of Indian troops into Srinagar. His account further notes:

> "As there was a difference of opinion between Sardar and Nehru the matter was naturally referred to Gandhiji. That night I had a telephone call from his secretary who told me that Gandhiji wanted to see me urgently. I went to Birla House and found Nehru and Sardar conferring with Gandhiji. Gandhiji asked me what my objections were to Nehru going to Lahore. I replied that when this was mooted to me by Lord Mountbatten I was entirely opposed to the idea and I gave reasons for my stand. While the discussions were going on we noticed that Nehru was looking flushed and tired. It was found that he was actually running a high temperature. His going to Lahore was therefore out of the question. A few days later Liaqat Ali Khan cast doubts on the genuineness of Nehru's illness, but the truth is as I have stated. It was then decided that Lord Mountbatten should go alone."

244. On 5 March 1948, Maharaja Hari Singh issued a Proclamation for the establishment of a "fully democratic constitution based on adult franchise with a hereditary Ruler from my dynasty as the Constitutional Head of an Executive responsible to the legislature". Through the Proclamation, Maharaja Hari Singh replaced the Emergency Administration by a popular

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interim Government pending the establishment of a fully democratic Constitution. The Council of Ministers, in terms of paragraph 1 of the Proclamation would consist of Sheikh Mohammad Abdullah as the Prime Minister and other Ministers who would be appointed on the advice of the Prime Minister. Para 4 noted that :

> "My Council of Ministers shall take appropriate steps, as soon as restoration of normal conditions has been completed, to convene a National Assembly based on adult suffrage, having due regard to the principle that the number of representatives from each voting area should, as far as practicable, be proportionate to the population of that area."

245. The Constitution, the Proclamation noted, would provide adequate safeguards for minorities and contain appropriate provisions guaranteeing the freedom of conscience, speech and of assembly. The National Assembly, it was envisaged, would upon the completion of the work of framing the new Constitution, submit it through the Council of Ministers for the acceptance of Maharaja and anticipated the inauguration "in the near future, of a fully democratic Constitution".

246. The events leading up to the accession of Jammu and Kashmir are summarised below:

a. Two independent Dominions of India and Pakistan were established on 15 August 1947 by the Indian Independence Act 1947. In terms of the provisions of the Act, sovereignty of the British Monarch over Indian States would lapse and return to the Rulers of those States. The States then had a choice to either be independent of or accede to either the Dominion of Pakistan or India;

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b. The State of Jammu and Kashmir acceded to the Dominion of India by executing an IoA on 26 October 1947;

c. Though the State of Jammu and Kashmir had acceded to the Dominion of India, it reserved the right to alter the terms of the arrangement in view of Clause 7 of the IoA read with Section 6(2) of the Government of India Act 1935 which was made applicable through the India (Provisional Constitution) Order 1947. In terms of Clause 7 of the IoA, the State of Jammu and Kashmir reserved the right to alter the terms of arrangement of power between India and the State of Jammu and Kashmir. The Clause specifically reserves the right of the State to "enter into agreement with the Government of India under any future constitution";

d. It was not the IoA but the response of the Governor General to the offer by the State of Jammu and Kashmir which recorded that since the issue of accession was in dispute in Jammu and Kashmir, it shall be decided finally by the people; and

e. On 5 March 1948, Maharaja Hari Singh issued a Proclamation for the establishment of a Constitution for the State of Jammu and Kashmir for the governance of the State.

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II. The constitutional integration of Indian States

a) Internal Constitutions of States

247. The Draft Constitution of India 1948[207] provided that India shall be a "Union of States". The term "State" included Part I, Part II, Part III states in the First Schedule to the Constitution. The territories known as Governors' Provinces immediately before the commencement of the Constitution were placed in Part I of the First Schedule to the Draft Constitution. This included the States of Madras, Bombay, West Bengal, United Provinces, Bihar, East Punjab, Central Provinces and Berar, Assam, and Orissa. The territories known immediately before the commencement of the Constitution as the Chief Commissioners' Provinces were placed in Part II. Part II included the states of Delhi, Ajmer-Mewara including Panth Piploda, and Coorg. Part III consisted of Indian States. The State of Jammu and Kashmir was placed in Part III.

248. The Indian States (included in Part III of the Draft Constitution) entered the Constituent Assembly of India on the basis that they would accede to the Union of India by suitable instruments, and that the Constituent Assemblies of the States would frame separate Constitutions for the States.[208] In the Covenants relating to the formation of Unions of States, a provision was made for setting up local Constituent Assemblies in each State.[209] As we have already noted above, the Maharaja of Jammu and Kashmir issued a

[207] Draft Constitution of India (May 1948); "Draft Constitution"
[208] Note by the Ministry of States explaining the decisions regarding the Indian States (July 1949)
[209] ibid

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proclamation on 5 March 1948 for the establishment of a State Constitution stipulating that the State Constitution shall be framed by the National Assembly which shall be constituted after the restoration of 'normalcy' in the State.

249. However, it was soon realised that if each of the States were to have their own Constitution without any guidance, there would be inconsistencies between the Constitutions of the States and the Constitution of the Union. To resolve this anomaly, a committee Chaired by the constitutional advisor, BN Rau, was appointed to prepare a model Constitution to serve as a guide in framing the Constitution for the States.[210] The Committee noted that if the Constitution proposed by the Committee is accepted by the Constitution-making bodies in the Indian States, then a special part in the Draft Constitution could be included on the Constitutions of Indian States. This Part would then provide that the provisions relating to the Provinces would apply to the States subject to specified variations set out in a separate Schedule to the Constitution.

250. However, certain practical difficulties arose in implementing the proposal. Constituent Assemblies had not yet been set up in a few of the States (Rajasthan, PEPSU, Vindhya Pradesh and Madhya Bharat) in Part III. But it was imperative that the Constitution for the whole of India came into force from January 1950. In a Conference held in May 1949, it was decided to not wait till Constituent Assemblies were set up in each State. Instead, the

[210] See Report of the Committee for the Drafting of a Model Constitution for the Indian States (March 22 1949)

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Constituent Assembly of India could with the "consent and concurrence" of the States frame Constitutions for all the States in consonance with the model State Constitution which was framed earlier and that these State Constitutions would be a Part of the Indian Constitution itself.[211] Sardar Vallabhbhai Patel explained the shift from the theory of two Constitutions (at the level of the Union and the States) to a single Constitution (only at the level of the Union which would incorporate State Constitutions) in the following words:

> "When the covenants establishing the various Unions of States were entered into, it was contemplated that the constitutions of the various Unions would be formed by their respective Constituent Assemblies within the framework of the covenants and the Constitution of India. **These provisions were made in the covenants at a time when we were still working under the shadow of the theory, that the assumption, by the Constituent Assembly of India, of the constitution-making authority in respect of the States would constitute an infringement of the autonomy of the States. As however, the States came closer to the Centre, it was realised that the idea of separate Constitutions being framed for the different constituent unis of the Indian Union was a legacy from the Rulers' polity and that in a people's polity there was no scope for variegated constitutional patterns.** We, therefore, discussed this matter with the Premiers of the various Unions and decided, with their concurrence, that the Constitution of the States should also form an integral part of the Constitution of India. The readiness with which the legislatures of the three States in which such bodies are functioning at present, namely, Mysore, Travancore and Cochin Union and Saurashtra, have accepted this procedure, bears testimony of the wish of the people of the States to eschew the separatist trends of the past."[212]
>
> (emphasis supplied)

251. The Constituent Assembly of India was unable to lay down the division of legislative competence between the State and the Union because the Indian States had earlier acceded legislative competence to the Dominion of India

[211] B Shiva Rao, *The Framing of India's Constitution: A Study,* Pg. 552
[212] Constituent Assembly Debates (Volume 10; 12 Oct 1949)

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only over the subjects of Defence, Foreign Affairs and Communications. The reason for the Indian States acceding legislative competence only with respect to these three specific subjects is traceable to the Cabinet Mission Plan. The Cabinet Mission examined whether a separate and fully independent sovereign State of Pakistan could be formed. It rejected the idea of a separate sovereign State of Pakistan and as a compromise recommended a three-tier basis for the Constitution. There was to be a Union of India, embracing both British India and Princely States. The Union was to deal with foreign affairs, defence, and communications. The provinces would have power over all other subjects and residuary power.[213] However, fresh IoAs were entered into by the States acceding competence to the Dominion of India over all matters specified in the Federal and Concurrent Legislative Lists of the Draft Constitution, except those relating to taxation.[214] The Raj Pramukh of Saurashtra executed a revised IoA on 22 May 1948. The Preamble to the IoA stated that a fresh IoA was being executed, replacing the IoA executed in August 1947 "accepting as matters with respect to which the Dominion Legislature may make laws for the United State all matters mentioned in List I and List III of the Seventh Schedule to the Government of India Act 1935, except matters relating to taxation." Clause 3 of the IoA read as follows:

> "I accept all matters enumerated in List I and List III of the Seventh Schedule to the Act as matters in respect of which the Dominion Legislature may make laws for the United State.

[213] Shiva Rao, Pg. 211
[214] White Paper on Indian States (July 5 1948) 77

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> Provided that nothing contained in said Lists or in any other provision of the Act shall be deemed to empower the Dominion Legislature to impose any tax or duty in the territories of the United State or to prohibit the imposition of any duty or tax by the Legislature of the United State in the said territories."

252. Similar IoAs were executed by the States of Madhya Bharat, Patiala and East Punjab States Union, Matsya Union, United State of Rajasthan, Tranvancore-Cochin, and Mysore. However, the State of Jammu and Kashmir had expressed its inability to expand the matters listed in the IoA until the Constituent Assembly of the State was formed.[215] The State of Jammu and Kashmir only acceded to Dominion control over the subjects of defence, external affairs, communication, and ancillary matters. The Schedule to the IoA executed by the State of Jammu and Kashmir is extracted below:

> "A. Defence
>
> The naval, military and air forces of the Dominion and any other armed forces raised or maintained by the Dominion; any armed forces, including forces raised or maintained by an acceding State, which are attached to, or operating with, any of the armed forces of the Dominion.
>
> Naval, military and air force works, administration of cantonment areas.
>
> Arms, fire-arms, ammunition.
>
> Explosives.
>
> B. External Affairs
>
> 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.

[215] Shiva Rao, pg. 991

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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.

Naturalisation.

C. Communications

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

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

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

Port quarantine.

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

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

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

Carriage of passengers and goods by sea or by air.

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

D. Ancillary

Election to the Dominion Legislature, subject to the provisions of the Act and of any Order made thereunder.

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

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> Inquiries and statistics for the purposes of any of the aforesaid matters.
>
> 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."

253. A separate Part was included in the Draft Constitution, numbered as Part VI-A, which provided for an "internal Constitution" for the States in Part III, except Jammu and Kashmir. A brief overview of the provisions in Part VI-A is necessary to understand the nature of the Constitution of States. Article 211A of the Draft Constitution[216] stipulated that the provisions of Part VI of the Constitution shall apply to states in Part III as they apply to the States in Part I subject to certain modifications and omissions. The modifications, *inter alia,* included: (a) the word "Governor' shall be substituted with the phrase "Rajpramukh"; and (b) provisions for the Rajpramukh to be entitled to use their residence without the payment of rent and that the Rajpramukh shall be paid such allowances as the President may by general or a special order determine. While introducing the amendment, Dr. BR Ambedkar explained that the provisions which apply to Part I States shall be applied to Part III States. However, the provisions would necessarily be modified to deal with the special circumstances of the States in Part III:

> "As will be seen, the underlying idea of this Part is that Part VI of this Constitution which deals with the Constitution of the States will now automatically apply under the provisions of article 211 - A to States in Part III. But it is realized that in applying Part VI to the Indian

[216] Article 238 of the Constitution before it was repealed by the Constitution (Seventh Amendment) Act 1956 dealt with the "internal Constitution" of the Part B States. The Article stipulated that the provisions of Part VI was applicable to States in Part B subject to the modifications listed in the provision.

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> States which will be in Part III there are special circumstances for which it is necessary to make some provision and the purpose of this particular amendment is to indicate those particular articles in which these amendments are necessary to be made in order to deal with the special circumstances of the States in Part III. Otherwise the States in Part III so far as their internal constitution is concerned will be on a par with the States in Part 1."

254. In view of the peculiar position of the State of Jammu and Kashmir, the Ministry suggested that a special provision be made as a "transitional arrangement". The Ministry suggested the following approach for the consideration of the Drafting Committee:[217]

a. Jammu and Kashmir will be placed in Part III States of Schedule I; and

b. A special provision that the power of Parliament to enact laws with respect to the State of Jammu and Kashmir shall be limited to matters specified in the IoA until Parliament by law provides that all provisions of the Constitution that apply to Part III States shall apply to Jammu and Kashmir will be incorporated.

b) Procedure for Indian States to ratify the Constitution

255. The Constituent Assembly had to decide upon the procedure to be followed by the States for ratification of the Constitution because the Draft Constitution did not contain any provision prescribing a procedure for the ratification of the Constitution by the States. The Constituent Assembly was faced with the question of whether the Indian States would be bound by the Constitution framed because of the execution of the IoA or whether the Constituent

[217] Shiva Rao, pg. 991

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Assembly would have to devise a separate procedure for ratification of the Constitution. After a detailed discussion, it was decided that the Rajpramukh or Ruler must accept the entire Constitution of India which also includes the internal Constitution of States on the basis of a resolution adopted by the Constituent Assembly of the State or the Legislature, where such a body exists. The Constituent Assemblies in the States of Mysore, Travancore and Cochin Union, and Saurashtra which were functioning at that time accepted the Constitution on behalf of the States upon an examination of the provisions of the Constitution concerning the States. In States where a Constituent Assembly was not formed, the Constitution was to be operative on the basis of the Ruler or Rajpramukh's acceptance, and the legislatures or the Constitution making bodies when constituted would have the opportunity to propose modifications to the provisions of the Constitution in so far as they applied to the States. It was decided that any such amendment proposed would receive **earnest consideration**.[218] The objective behind this formulation was expressed as under:

> "This formula has been evolved to meet the difficulty arising out of the fact that constitution-making bodies are not likely to come into existence in some of the Unions by the time the new Constitution is to come into operation The objective underlying the proposed arrangement is that whereas the whole of the Constitution will become operative in all the States and the Unions as soon as it comes into force, it will be **a good political gesture to the popular opinion in the Unions** in which no Constituent Assemblies have yet to come into existence, if their first Legislatures are enabled to express their views on such provisions of the Constitution as are not considered fundamental."[219]
>
> (emphasis supplied)

[218] White paper. Pg. 110
[219] Note by the Ministry of States explaining the decisions regarding the Indian States (July 1949)

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256. The views of the Constituent Assembly would assume the "form of recommendation and it would be open to the Union Parliament which is expected to exercise constituent powers for a period of five years or so, to accept or reject them".[220]

257. In pursuance of the procedure for ratification, all the States issued a Proclamation accepting the Constitution of India. On 25 November 1949, a Proclamation was issued by Yuvraj Karan Singh declaring that the Constitution of India shall in so far as applicable to the State of Jammu and Kashmir govern the constitutional relationship between the Union of India and the State and that the Constitution shall supersede constitutional provisions which are inconsistent with the provisions of the Indian Constitution:

> "I now hereby declare and direct-
>
> That the Constitution of India shortly to be adopted by the Constituent Assembly of India shall in so far as it is applicable to the State of Jammu and Kashmir, govern the constitutional relationship between this State and the Union of India and shall be enforced in this State by me, my heirs and successors in accordance with the tenor of its provisions.
>
> That the provisions of the said Constitution shall, as from the date of its commencement, supersede and abrogate all other constitutional provisions inconsistent therewith which are at present in force in this State."

258. The Proclamation by the ruler makes it abundantly clear that the State has ratified the Constitution of India as it is applicable to the State of Jammu and Kashmir. The Constitution would upon its commencement supersede and abrogate all other constitutional provisions which were inconsistent with the

[220] ibid

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Constitution of India and in force in the State. Thus, the embargo created by Clause 7 of the IoA by which the IoA was not deemed to be an acceptance of any future Constitution of India was lifted by the Proclamation.

259. The discussions preceding the development for a unified Constitution and the procedure for ratification of the Constitution indicate that:

a. The Indian States mentioned in Part III of the First Schedule of the Draft Constitution were placed differently when compared to the States mentioned in Part I and Part II of the Schedule because:

i. constituent assemblies were constituted by the States in Part III to frame internal constitutions for the States. Upon a steady integration of the States with the Union, it was realised that there was no place for two constitutions in a “people’s polity”; and

ii. the legislative competence of the Union over the States in Part III was limited to the subjects of defence, external affairs, and communications. Later, all States in Part III, other than Jammu and Kashmir, by expanding the scope of IoA correspondingly conferred the Union legislature competence over all entries in List I and List III. In view of the limited competence of the Constituent Assembly of India with respect to the State of Jammu and Kashmir in demarcating legislative competence between the Union and the State, a special provision had to be made for the State of Jammu

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and Kashmir in the Constitution of India; and

b. The procedure for ratification of the Constitution for the State of Jammu and Kashmir was not intended to be different when compared to the procedure for ratification of other States in Part III where the Constitution was made applicable by a Proclamation of the Rajpramukh. Maharaja Hari Singh by issuing the Proclamation on 25 November 1949 declaring that the Constitution of India when adopted would be applicable to the State of Jammu and Kashmir ratified the acceptance of the Constitution of India. The ratification could not be modified or revoked even by the Constituent Assembly of the State. The Constituent Assembly of the State could make **recommendations** for the modification of the provision as it related to Jammu and Kashmir (that is, the special provision). However, the Union was not bound to accept such a recommendation.

III. Debates in the Constituent Assembly on Article 370

260. On 17 October 1949, the Constituent Assembly took up draft Article 306A. Draft Article 306A corresponded to Article 370 of the Constitution. In introducing the Article, Shri N Gopalaswami Ayyangar stated that the history of the accession of the State of Jammu and Kashmir to the Dominion of India "is also well known". He stated that "since then, the State has had a chequered history" and "conditions are not yet normal in the State". Upon

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accession, he noted, the State "is a unit of a federal State namely, the Dominion of India" and upon the integration of the Republic on 26 November 1950, Jammu and Kashmir "has to become a unit of the new Republic of India". Ayyangar observed that the IoA "will be a thing of the past in the new Constitution". The States having integrated with the federal republic in such a manner that they do not have to accede or execute a document of accession for the purposes of becoming a unit of the republic but they would be mentioned in the Constitution itself. He stated that "in the case of practically all States other than the State of Jammu and Kashmir, their constitutions also have been embodied in the Constitution for the whole of India". All those other states, he noted, had agreed to integrate themselves "in that way and accept the Constitution provided".

261. Maulana Hasrat Mohani, a member of the Constituent Assembly queried about the reason for "this discrimination…" in relation to Jammu and Kashmir. Responding to the query, Ayyangar noted that the State of Jammu and Kashmir was not ripe for the manner of integration which was provided in the Constitution for other states:

> "The discrimination is due to the special conditions of Kashmir. That particular State is not yet ripe for this kind of integration. It is the hope of everybody here that in due course even Jammu and Kashmir will become ripe for the same sort of integration as has taken place in the case of other States. (*Cheers*) At present it is not possible to achieve that integration. There are various reasons why this is not possible now. I shall refer again to this a little later."

262. Making a reference to "Kashmir's conditions" as requiring "special treatment", he spelt out the nature of the conditions then existing in the State:

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> "In the first place, there has been a war going on within the limits of Jammu and Kashmir State.
>
> There was a cease-fire agreed to at the beginning of this year and that cease-fire is still on. But the conditions in the State are still unusual and abnormal. They have not settled down. It is therefore necessary that the administration of the State should be geared to these unusual conditions until, normal life is restored as in the case of the other States.
>
> Part of the State is still in the hands of rebels and enemies.
>
> We are entangled with the United Nations in regard to Jammu and Kashmir and it is not possible to say now when we shall be free from this entanglement. That can take place only when the Kashmir problem is satisfactorily settled."

263. Besides the situation in Jammu and Kashmir, Ayyangar also referred to the commitment made by the Government of India to the people of Kashmir "in certain respects" in terms of which "an opportunity would be given to the people of the State to decide for themselves whether they will remain with the Republic or wish to go out of it". Ayyangar also stated that the Government was committed to ascertaining the will of the people "by means of a plebiscite provided that peaceful and normal conditions are restored and the impartiality of the plebiscite could be guaranteed". Moreover, he stated that the will of the people "through the instrument of a constituent assembly" will determine the Constitution of the State as well as the sphere of Union jurisdiction over the State. Ayyangar clearly spelt out that unlike other states which had accepted the Constitution framed for states in Part I of the new Constitution; where the Centre would have power to make laws on all Union and Concurrent subjects and a uniformity of relationship had been established between the States and the Centre, the situation as it obtained in Jammu and Kashmir was different :

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> "At present, the legislature which was known as the Praja Sabha in the State is dead. Neither that legislature nor a constituent assembly can be convened or can function until complete peace comes to prevail in that State. We have therefore to deal with the Government of the State which, as represented in its Council of Ministers, reflects the opinion of the largest political party in the State. **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 the other States**."
>
> (emphasis supplied)

264. The above extract from the text of the speech of Gopalaswami Ayyangar clearly envisaged that until a Constituent Assembly for the State came into being, an interim arrangement was possible in contrast to an arrangement which could be brought in line with the constitutional arrangement for other States. Hence, he stated:

> "Now, if you remember the view points that I have mentioned, it is an inevitable conclusion that, at the present moment, we could establish only an **interim system**. Article 306A is an attempt to establish such a system."
>
> (emphasis supplied)

265. Elaborating on some of the clauses of draft Article 306, Ayyangar observed :

> "The Second portion of this article relates to the legislative authority of Parliament over the Jammu and Kashmir State. This is governed primarily by the Instrument of Accession. Broadly speaking, that legislative power is confined to the three subjects of defence, foreign affairs and communications, but as a matter of fact these broad categories include a number of items which are listed in the Instrument of Accession. I believe they number some twenty to twenty-five. Now, these items have undergone a change in description, in numbering, in arrangement, as amongst themselves, in List I and List III of the new Constitution. It is therefore necessary that the items mentioned in the Instrument of Accession should be brought into line with the changed designations of entries in Lists I and III of the new Constitution. So, clause (1) (b) of article 306A says

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> that this listing of the items as per the terms of the new Constitution should be done by the President in consultation with the Government of the State.
>
> Clause (b)(ii) refers to possible additions to the List in the Instrument of Accession, and these additions could be made according to the provisions of this article with the concurrence of the Government of the State. The idea is that even before the Constituent Assembly meets, it may be necessary in the interests of both the Centre and the State that certain items which are not included in the Instrument of Accession would be appropriately added to the List in that Instrument so that administration, legislation and executive action might be furthered, and as this may happen before the Constituent Assembly meets, the only authority from whom we can get consent for the addition is the Government of the State. That is provided for."

266. He also adverted to the explanation to the Article. Ayyangar clarified that Article 1 of the Constitution "will automatically apply" to the State of Jammu and Kashmir which was one of the States mentioned in Part III.

267. While adverting to several clauses which provide for the concurrence of the State of Jammu and Kashmir for the application of the provisions of the Constitution, Ayyangar noted:

> "Now, these relate particularly to matters which are not mentioned in the Instrument of Accession, and it is one of our commitments to the people and Government of Kashmir that no such additions should be made except with the consent of the Constituent Assembly which may be called in the State for the purpose of framing its Constitution. In other words, what we are committed to is that these additions are matters for the determination of the Constituent Assembly of the State.
>
> Now, you will recall that in some of the clauses of this article we have provided for the concurrence of the Government of the State. The Government of the State feel that in view of the commitments already entered into between the State and the Centre, they cannot be regarded as final authorities for the giving of this concurrence, though they are prepared to give it in the interim periods but if they do give this concurrence, this clause provides that that concurrence should be placed before the Constituent Assembly when it meets

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> and the Constituent Assembly may take whatever decisions it likes on those matters."

268. Ayyangar clarified the scope of the last clause of draft Article 306A and observed:

> "The last clause refers to what may happen later on. We have said article 211A will not apply to the Jammu and Kashmir State. But that cannot be a permanent feature of the Constitution of the State, and hope it will not be. So the provision is made that when the Constituent Assembly of the State has met and taken its decision both on the Constitution for the State and on the range of federal jurisdiction over the State, the President may on the recommendation of that Constituent Assembly issue an order that this article 306A shall either cease to be operative, or shall be operative only subject to such exceptions and modifications as may be specified by him. But before he issues any order of that kind the recommendation of the Constituent Assembly will be a condition precedent. That explains the whole of this article."

269. Summing up the effect of the Article, Ayyangar observed:

> "The effect of this article is that the Jammu and Kashmir State which is now a part of India will continue to be a part of India, will be a unit of the future Federal Republic of India and the Union Legislature will get jurisdiction to enact laws on matters specified either in the Instrument of Accession or by later addition with the concurrence of the Government of the State. And steps have to be taken for the purpose of convening a Constituent Assembly in due course which will go into the matters I have already referred to. When it has come to a decision on the different matters it will make a recommendation to the President who will either abrogate article 306A or direct that it shall apply with such modifications and exceptions as the Constituent Assembly may recommend."

270. The motion on Article 306A was adopted by the Constituent Assembly. The address by Gopalaswami Ayyangar before the Constituent Assembly illuminates several facets which weighed with the framers in preparing draft Article 306A. *First*, the address indicates that following the execution of the

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IoA, Jammu and Kashmir had become a part of India and would continue to be a part of the territory of the nation and a unit of the future federal republic; and *second*, the process of integrating other States in the Union was complete but the State of Jammu and Kashmir was not yet ripe for the **kind of integration which was envisaged for the rest of the states** due to the following circumstances:

a. A war was going on within the limits of the State and while a ceasefire had been agreed to, the conditions were abnormal since a part of the State was still in the hands of rebels and enemies;

b. The Dominion was “entangled with the United Nations”;

c. Neither the legislature nor the Constituent Assembly of the State could be established;

d. Pending the conclusion of this exercise, draft Article 306A postulated consultation with the State Government on matters which fell within the ambit of the Dominion under the IoA and concurrence on other matters; and

e. After the Constituent Assembly of the State met and took a decision on the Constitution for the State and the range of federal jurisdiction over the State, the President may, on the recommendation of that Constituent Assembly, issue an order that Article 306A would either cease to operate or operate subject to exceptions and modifications.

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IV. Inference

271. The IoA executed by the Maharaja of Jammu and Kashmir states that (a) he accedes to the Dominion of India; (b) the Authorities of the Dominion including the Governor General of India, the Dominion Legislature, the Federal court and any other Dominion Authority shall exercise such functions vested in the Government of India Act 1935 in relation to the State of Jammu and Kashmir; and (c) the legislative competence of the Legislature of the Union shall be limited to defence, external affairs, communication, and certain ancillary matters. The accession by the Maharaja through the IoA to the Dominion of India was not subject to any conditions. The necessary effect of the accession is also stipulated in the IoA itself: the authorities of the Dominion, that is the executive, legislature and courts of the Dominion shall exercise control over the State of Jammu and Kashmir. The limitation on the legislative competence of the Dominion Legislature in the State of Jammu and Kashmir does not in any way limit the transfer of power from the monarch to the federal institutions of Independent India.

272. Under the IoA, the Dominion Authorities were to exercise functions as vested in them by the Government of India Act 1935. Upon the adoption of the Indian Constitution and the Proclamation issued by the Maharaja of Jammu and Kashmir on 25 November 1949 ratifying the Indian Constitution, the functions of the Dominion Authorities including the legislature in Jammu and Kashmir were limited solely by the provisions of the Constitution of India and not the IoA, the Government of India Act 1935 or the Indian Independence Act 1947.

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The Proclamation issued by the Maharaja of Jammu and Kashmir ratifies the Indian Constitution as it applies to the State of Jammu and Kashmir unconditionally. The vestiges of colonial and monarchical governance were severed with the adoption and ratification of the Constitution. There was no residual sovereignty left with the State upon acceding to the Dominion of India.

273. In 1955, Justice Vivian Bose, speaking for a Constitution Bench in **Virendra Singh** v. **State of U.P.**[221] placed the constitutional position thus :

> "**Every vestige of sovereignty was abandoned by the Dominion of India and by the States and surrendered to the peoples of the land who through their representatives in the Constituent Assembly hammered out for themselves a new Constitution in which all were citizens in a new order having but one tie, and owing but one allegiance: devotion, loyalty, fidelity to the Sovereign Democratic Republic that is India.** At one stroke all other territorial allegiances were wiped out and the past was obliterated except where expressly preserved; at one moment of time the new order was born with its new allegiance springing from the same source for all, grounded on the same basis : the sovereign will of the peoples of India with no class, no caste, no race, no creed, no distinction, no reservation."
>
> (emphasis supplied)

274. In **Raghunathrao Ganpatrao** (supra), Justice Ratnavel Pandian adverted to the accession of the Indian States to the Union Government and the process through which their integration was brought about:

> "31. This accession of the Indian States to the Dominion of India established a new organic relationship between the States and the Government, the significance of which was the forging of a constitutional link or relationship between the States and the Dominion of India. The accession of the Indian States to the Dominion of India was the first phase of the process of fitting them

[221] (1955) 1 SCR 415

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> into the constitutional structure of India. The second phase involved a process of twofold integration, the consolidation of States into sizeable administrative units, and their democratisation. Though high walls of political isolation had been raised and buttressed to prevent the infiltration of the urge for freedom and democracy into the Indian States, with the advent of independence, the popular urge in the States for attaining the same measure of freedom as was enjoyed by the people in the Provinces, gained momentum and unleashed strong movements for the transfer of power from the Rulers to the people. On account of various factors working against the machinery for self-sufficient and progressive democratic set-up in the smaller States and the serious threat to law and order in those States, there was an integration of States though not in a uniform pattern in all cases. Firstly, it followed the merger of States in the provinces geographically contiguous to them. Secondly, there was a conversion of States into centrally administered areas and thirdly the integration of their territories to create new viable units known as Union of States."

275. For instance, all the other states in Part III of the Draft Constitution during the adoption of the Constitution (which were Part B States on the adoption of the Constitution) had given competence to the Dominion Legislature over all entries in List I and List III of the Seventh Schedule except taxation. However, the Constitution (as adopted) did not make any distinction between Part A and Part B states for the purpose of taxation. Entries relating to taxation are placed in both List II and List III of the Seventh Schedule to the Constitution. The Rulers of the States when they issued a Proclamation ratifying the Constitution removed the limits which were placed on the Union's legislative power by their IoAs. It is only the Constitution of India and not the IoA which limited the power of the Union and the federal units.

276. By the seventh constitutional amendment, the distinction between Part A and Part B States was abolished. All territories were consolidated under the head of "States" and "Union Territories". With this, the distinction between Governor's provinces and Indian States died a natural death. The distinction

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between Governor's Provinces and Indian States was made in the Constitution because earlier the Rulers of Indian States had given limited legislative competence to the Union through the IoA, and because of the special circumstances in the Princely States. When the distinction between Part A and Part B states was abolished and Article 238 was repealed, the argument that within Part B states, the State of Jammu and Kashmir has a special status because the IoA executed by the Maharaja was limited cannot be accepted.

277. The Constituent Assembly of India was not obligated to restrict the power of the Union legislature in the State of Jammu and Kashmir to the matters specified in the IoA. It could have taken the route that it did with other Part B States where legislative competence of the Union legislature was extended in terms of the Seventh schedule of the Constitution. The Constituent Assembly of India chose to limit the power of the Union legislature to matters specified in the IoA because of the special circumstances in the State, which were identified by Mr Ayyangar in his speech. Jammu and Kashmir had acceded to the Dominion of India. Once that was the position, there was no legal impediment on the Constituent Assembly of India providing for the exercise of powers with respect to the State of Jammu and Kashmir at par with other states. However, it was believed by the members of the Constituent Assembly that it would send a message of goodwill if the consent of the Constituent Assembly of Jammu and Kashmir is obtained before the legislative competence of the Union over the State is drawn.

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278. Thus, Article 370 was introduced to serve two purposes. *First,* an interim arrangement until the Constituent Assembly of the State was formed and could take a decision on the legislative competence of the Union on matters other than the ones stipulated in the IoA, and ratify the Constitution (the transitional purpose); and *second,* an interim arrangement because of the special circumstances in the State because of the war conditions of the State (the temporary purpose).

b. Scope of provisions in Article 370

I. Placement in Part XXI of the Constitution and Marginal Note to Article 370

279. Article 370 was a part of the Constitution as it was originally adopted on 26 January 1950. The provision was placed in Part XXI which was titled "Temporary and Transitional provisions" when the Constitution was adopted in 1950. The Chapter heading was substituted by its present form – "Temporary, Transitional and Special provisions" – by the Constitution (Thirteenth Amendment) Act 1962[222].

280. Before proceeding to analyse Article 370, it is essential to understand its contextual placement in what is described as "Temporary and Transitional

[222] The Constitution (Thirteenth Amendment) Act 1962 came into force on 1 December 1963' "Thirteenth Amendment"

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provisions" at the adoption of the Constitution; subsequently extended to incorporate "Special Provisions".

281. Article 369 entrusted Parliament, for a period of five years from the commencement of the Constitution the authority to make laws with certain specific matters as if they were enumerated in the Concurrent List. These matters were :

a. Trade and commerce within a State in and the production, supply and distribution of identified commodities including foodstuffs, cattle fodder, coal, iron, steel and mica, raw cotton, cotton seed, paper, and cotton and woollen textiles; and

b. Offences dealing with the above matters and the jurisdiction and powers of all courts except the Supreme Court together with the imposition of fees[223].

282. Article 371 stipulated temporary provisions with respect to Part B States, providing that for a period of ten years from the commencement of the

[223] 369. Temporary power to Parliament to make laws with respect to certain matters in the State List as if they were matters in the Concurrent List Notwithstanding anything in this Constitution, Parliament shall, during a period of five years from the commencement of this constitution, have power to make laws with respect to the following matters as if they were enumerated in the Concurrent List, namely:
(a) trade and commerce within a State in, and in production, supply and distribution of, cotton and woollen textiles, raw cotton (including ginned cotton and unginned cotton or kapas), cotton seed, paper (including newsprint), foodstuffs (including edible oilseeds and oil), cattle fodder (including oil cakes and other concentrates), coal (including coke and derivatives of coal), iron, steel and mica;
(b) offences against laws with respect to any of the matters mentioned in clause (a), jurisdiction and powers of all courts except the Supreme Court with respect to any of those matters, and fees in respect of any of those matters but not including fees taken in any court; but any law made by Parliament, which Parliament would not but for the provisions of this article have been competent to make, shall, to the extent of the incompetency, cease to have effect on the expiration of the said period, except as respects things done or omitted to be done before the expiration thereof

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Constitution (a period which could be extended or shortened by Parliament), the Government of a Part B State would be under the general control of and would have to comply with the directions issued by the President[224].

283. Article 372[225] provided for the continuation of all laws in force in the territory of India at the commencement of the Constitution until altered or repealed by a competent legislature. The President was also empowered to make adaptations and modifications to the law including both repeal and

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[224] Subs. By the Constitution (Seventh Amendment) Act, 1956, S. 22 (w.e.f. 1-11-1956), for the original Art. 371. Prior to substitution it read as

"371. Temporary provisions with respect to States in Part B of the First Schedule- Notwithstanding anything in this Constitution, during a period of ten years from the commencement thereof, or during such longer or shorter period as Parliament may be law provide in respect of any State, the Government of every State specified in Part B of the First Schedule shall be under the general control of, and comply with such particular directions, if any, as may from time to time be given by the President:

Provided that the President may be order direct that the provisions of this article shall not apply to any State specified in the order.

[225] 372. Continuance in force of existing laws and their adaptation.

(1) Notwithstanding the repeal by this Constitution of the enactments referred to in article 395 but subject to the other provisions of this Constitution, all the law in force in the territory of India immediately before the commencement of this Constitution shall continue in force therein until altered or repealed or amended by a competent Legislature or other competent authority.

(2) For the purpose of bringing the provisions of any law in force in the territory of India into accord with the provisions of this Constitution, the President may by order make such adaptations and modifications of such law, whether by way of repeal or amendment, as may be necessary or expedient, and provide that the law shall, as from such date as may be specified in the order, have effect subject to the adaptations and modifications so made, and any such adaptation or modification shall not be questioned in any court of law.

(3) Nothing in clause (2) shall be deemed-

(a) to empower the President to make any adaptation or modification of any law after the expiration of three years from the commencement of this Constitution; or

(b) to prevent any competent Legislature or other competent authority from repealing or amending any law adapted or modified by the President under the said clause.

Explanation I.-The expression "law in force" in this article shall include a law passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that it or parts of it may not be then in operation either at all or in particular areas.

Explanation II.-Any law passed or made by a Legislature or other competent authority in the territory of India which immediately before the commencement of this Constitution had extra-territorial effect as well as effect in the territory of India shall, subject to any such adaptations and modifications as aforesaid, continue to have such extra-territorial effect.

Explanation III.-Nothing in this article shall be construed as continuing any temporary law in force beyond the date fixed for its expiration or the date on which it would have expired if this Constitution had not come into force.

Explanation IV.-An Ordinance promulgated by the Governor of a Province under section 88 of the Government of India Act, 1935, and in force immediately before the commencement of this Constitution shall, unless withdrawn by the Governor of the corresponding State earlier, cease to operate at the expiration of six weeks from the first meeting after such commencement of the Legislative Assembly of that State functioning under clause (1) of article 382, and nothing in this article shall be construed as continuing any such Ordinance in force beyond the said period.

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amendment to bring such laws in conformity with the Constitution. Originally this period for making adaptations and modifications was two years but was substituted by the Constitution (First Amendment) Act 1951 to three years.

284. Article 373 contained transitional provisions pertaining to preventive detention. Clause (7) of Article 22 of the Constitution empowers Parliament to prescribe by law the circumstances under which and the cases in which a person may be detained for a period of more than three months under a law providing for preventive detention and the maximum period for which a person may be detained. Article 373 contained provisions which would operate until a provision was made by Parliament under clause (7) of Article 22 or for a period of one year from the commencement of the Constitution whichever was earlier. For that period, it was stipulated that the reference to Parliament in clauses (4) and (7) of Article 22 would be substituted by a reference to the President and a reference to a law enacted by Parliament would be substituted by a reference to an order made by the President.

285. Article 374 provided that the judges of the Federal Court, who held office before the commencement of the Constitution would unless they elected otherwise become judges of the Supreme Court on the commencement of the Constitution and cases pending before the Federal Court would be transferred to the jurisdiction of the Supreme Court.

286. Article 375 stipulated that all courts, authorities and officers would continue to function under the Constitution. Article 376 provided for the continuation of judges appointed to the High Courts before the commencement of the

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Constitution. In a similar manner, Article 377 and Article 378 provided for the continuation of the Auditor General of India and Members of the Public Service Commission for the Dominion of India who held office immediately before the commencement of the Constitution.

287. Article 379 contained provisions for a provisional Parliament until both Houses of Parliament were duly constituted and summoned for meeting for the first session under the provisions of the Constitution. In terms of clause (1), the Constituent Assembly for the Dominion of India immediately before the commencement of the Constitution was to function as the provisional Parliament and was entrusted with all the powers conferred by the Constitution to Parliament[226].

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[226] "379. Provisions as to provisional Parliament and the Speaker and Deputy Speaker thereof. – (1) Until both Houses of Parliament have been duly constituted and summoned to meet for the first session under the provisions of this Constitution, the body functioning as the Constituent Assembly of the Dominion of India immediately before the commencement of this Constitution shall be the provisional Parliament and shall exercise all the powers and perform all the duties conferred by the provisions of this Constitution on Parliament.
Explanation. – For the purposes of this clause, the Constituent Assembly of the Dominion of India includes –
(i) The members chosen to represent any State or other territory for which representation is provided under clause (2), and
(ii) The members chosen to fill casual vacancies in the said Assembly.
(2) The President may by rules provide for –
(a) the representation in the provisional Parliament functioning under clause (1) of any State or other territory which was not represented in the Constituent Assembly of the Dominion of India immediately before the commencement of this Constitution,
(b) the manner in which the representatives of such States or other territories in the provisional Parliament shall be chosen, and
(c) the qualifications to be possessed by such representatives.
(3) If a member of the Constituent Assembly of the Dominion of India was, on the sixth day of October ,1949, or thereafter at any time before the commencement of this Constitution, a member of a House of the Legislature of a Governor's Province or of an Indian State corresponding to any State specified in Part B of the First Schedule or a Minister for any such State, then, as from the commencement of this Constitution the seat of such member in the Constituent Assembly shall, unless he has ceased to be a member of that Assembly earlier, become vacant and every such vacancy shall be deemed to be a casual vacancy.
(4) Notwithstanding that any such vacancy in the Constituent Assembly of the Dominion of India as is mentioned in clause (3) has not occurred under that clause, steps may be taken before the commencement of this Constitution for the filling of such vacancy, but any person chosen before such commencement to fill the vacancy shall not be entitled to take his seat in the said Assembly until after the vacancy has so occurred.
(5) Any person holding office immediately before the commencement of this Constitution as Speaker or Deputy Speaker of the Constituent Assembly when functioning as the Dominion Legislature under the Government of India Act, 1935, shall on such commencement be the Speaker or, as the case may be, the Deputy Speaker of the provisional Parliament functioning under clause (1)."

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288. Article 380 provided that until a President was elected in accordance with the provisions of Chapter 1 of Part V of the Constitution, the person elected as President by the Constituent Assembly of the Dominion of India shall function as the President of India[227].

289. Article 381, empowered the President to appoint Members of the Council of Ministers and until then all persons who were holding office as Ministers for the Dominion of India before the commencement of the Constitution were to continue to hold that office[228].

290. Article 382 contained provisions for provisional legislatures for the States in Part A in terms of which the legislatures which were functioning immediately before the Constitution in the provinces were to exercise their powers and functions until the duly constituted legislature was summoned to meet for the first session under the provisions of the Constitution[229].

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[227] Repealed Art. 380 read as :
380. Provision as to President – (i) Such person as the Constituent Assembly of the Dominion of India shall have elected in that behalf shall be the President of India until a President has been elected in accordance with the provisions contained in Chapter I of Part V and has entered upon his office.
(2) In the event of the occurrence of any vacancy in the office of the President so elected by the Constituent Assembly of the Dominion of India by reason of his death, resignation, or removal or otherwise, it shall be filled by a person elected in that behalf by the provisional Parliament functioning under Article 379, and until a person is so elected, the Chief Justice of India shall act as President."

[228] Repealed Art. 381 read as :
381. Council of Ministers of the President – Such persons as the President may appoint in that behalf shall become members of the Council of Ministers of the President under this Constitution, and, until appointments are so made, all persons holding office as Ministers for the Dominion of India immediately before the commencement of this Constitution shall on such commencement become, and shall continue to hold office as, members of the Council of Ministers of the President under this Constitution.

[229] "38 Repeal Art. 382 read as:
382. Provisions as to provisional Legislatures for States in Part A of the First Schedule. – (1) Until the House or Houses of the Legislature of each State specified in Part A of the First Schedule has or have been duly constituted and summoned to meet for the first session under the provisions of this Constitution, the House or Houses of the Legislature of the corresponding Province functioning immediately before the commencem4ent of this Constitution shall exercise the powers and perform the duties conferred by the provisions of this Constitution on the House or Houses of the Legislature of such State.

(2) Notwithstanding anything in clause (1), where a general election to reconstitute the Legislative Assembly of a Province has been ordered before the commencement of this Constitution, the election may be completed after such commencement as if this Constitution had not come into operation, and the Assembly so reconstituted shall be deemed to be the Legislative Assembly of that Province for the purposes of that clause.

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PART E

291. Article 383 contained provisions for the Governors of the Provinces in terms of which persons who were functioning as Governors at the commencement of the Constitution in a corresponding Part A State would continue until a Governor was appointed[230].

292. Article 384 contained provisions for the Council of Ministers and the continuance of those who were functioning at the adoption of the Constitution.[231] Corresponding provisions for the continuance of provisional legislatures in Part B States, and the Council of Ministers in those States were made in Articles 385[232] and 386[233].

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(3) Any person holding office immediately before the commencement of this Constitution as Speaker or Deputy Speaker of the Legislative Assembly or President or Deputy President of the Legislative Council of a Province shall on such commencement be the Speaker or Deputy Speaker of the Legislative Assembly or the Chairman or Deputy Chairman of the Legislative Council, as the case may be, of the corresponding State specified in Part A of the First Schedule while such Assembly or Council functions under clause (1).

Provided that where a general election has been ordered for the reconstitution of the Legislative Assembly of a Province before the commencement of this Constitution and the first meeting of the Assembly as so reconstituted is held after such commencement, the provisions of this clause shall not apply and the Assembly as reconstituted shall elect two members of the Assembly to be respectively the Speaker and Deputy Speaker thereof."

[230] Repealed Art. 383 read as :
"383. Provision as to Governors of Provinces- Any person holding office as Governor in any Province immediately before the commencement of this Constitution shall on such commencement be the Governor of the corresponding State specified in Part A of the First Schedule until a new Governor has been appointed in accordance with the provisions of Chapter II of Part VI and has entered upon his office."

[231] Repealed Art.384 read as:
"384. Council of Ministers of Governors. - Such persons as the Governor of a State may appoint in that behalf shall become members of the Council of Ministers of the Governor under this Constitution, and, until appointment are so made, all persons holding office as Ministers for the corresponding Province immediately before the commencement of this Constitution shall on such commencement become, and shall continue to hold office as, members of the Council of Ministers of the Governor of the State under this Constitution."

[232] Repealed Art. 385 read as:
"385. Provision as to provisional Legislatures in States in Part B of the First Schedule. - Until the House or Houses of the Legislature of a State specified in Part B of the First Schedule has or have been duly constituted and summoned to meet for the first session under the provisions of this Constitution, the body or authority functioning immediately before the commencement of this Constitution as the Legislature of the corresponding Indian State shall exercise the powers and perform the duties conferred by the provisions of this Constitution on the House or Houses of the Legislature of the State so specified."

[233] Repealed Art. 386 read as:
"386. Council of Ministers for States in Part B of the First Schedule. - Such persons as the Rajpramukh of a State specified in Part B of the First Schedule may appoint in that behalf shall become members of the Council of Ministers of such Rajpramukh under the Constitution, and until appointments are so made, all persons holding office as Ministers for the corresponding Indian State immediately before the commencement of this Constitution

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293. Article 387 contained provisions for the determination of the population for the purposes of holding elections under the Constitution for a period of three years from the commencement of the Constitution under Orders of the President[234]. Article 388 made provisions for the filling up of casual vacancies in the provisional Parliament and provisional Legislatures of the States.

294. Article 389 incorporated provisions in regard to Bills which were pending in the Legislature of the Dominion of India or in the Legislature of any Province or Indian State so that they could be taken up by the corresponding Legislature[235].

295. Article 390 contained provisions in regard to money which had been received and raised for expenditure which was incurred between the commencement of the Constitution and the 31st day of March 1950[236].

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shall on such commencement become, and shall continue to hold office as, members of the Council of Ministers of such Rajpramukh under the Constitution."

[234] Repealed Art. 387 read as:
"387. Special provision as to determination of population for the purposes of certain elections.- For the purposes of elections held under any of the provisions of this Constitution during a period of three years from the commencement of this Constitution, the population of India or of any part thereof may, notwithstanding anything in this Constitution, be determined in such manner as the President may by order direct, and different provisions may be made for different States and for different purposes by such order."

[235] Repealed Art. 389 read as:
"389. – Provision as to Bills pending in the Dominion Legislature and in the Legislatures of Provinces and Indian States. – A Bill which immediately before the commencement of this Constitution was pending in the Legislature of the Dominion of India or in the Legislature of any Province or Indian State may, subject to any provision to the contrary which may be included in rules made by Parliament or the Legislature of the corresponding State under the Constitution, be continued in Parliament or the Legislature of the corresponding State, as the case may be, as if the proceedings taken with reference to the Bill in the Legislature of the Dominion of India or in the Legislature of the Province or Indian State had been taken in Parliament or in the Legislature of the corresponding State."

[236] Repealed Art. 390 read as:
"390. – Moneys received or raised or expenditure incurred between the commencement of the Constitution and the 31st day of March, 1950.- The provisions of this Constitution relating to the Consolidated Fund of India or the Consolidated Fund of any State and the appropriation of moneys out of either of such funds shall not apply in relation to moneys received or raised or expenditure incurred by the government of India or the Government of any State between the commencement of this Constitution and the thirty-first day of March, 1950, both days inclusive, and any expenditure incurred during that period shall be deemed to be duly authorized if the expenditure was specified in a schedule of authorized expenditure authenticated in accordance with the provisions of the Government of India Act, 1935, by the Governor-General of the Dominion of India or the Governor of the corresponding Province or is authorized by the Rajpramukh of the State in accordance with such rules as were

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296. Article 391 provided that if between the passing of the Constitution and its commencement any action was taken by the President under the Government of India Act 1935 which required an amendment of the First or the Fourth Schedules, the President was empowered to do so[237].

297. Article 392 empowered the President to issue orders directing that the Constitution would be subject to such adaptations whether by modification, addition and omission for the purpose of removing difficulties particularly in relation to the transition from the Government of India Act 1935 to the provisions of the Constitution. This power was to be exercised until the first meeting of Parliament[238].

298. The provisions which we have adverted to above were temporary or, as the case may be, transitional. They were designed to be temporary either with reference to time (a stipulated number of years) or with reference to the occurrence of an event (for example, the first meeting of the duly constituted

applicable to the authorization of expenditure from the revenues of the corresponding Indian State immediately before such commencement."

[237] Repealed Art. 391 read as:
"391. Power of the President to amend the First and Fourth Schedules in certain contingencies. – (1) if at any time between the passing of this Constitution and its commencement any action is taken under the provisions of the Government of India Act, 1935, which in the opinion of the President requires any amendment in the First Schedule and the Fourth Schedule, the President may, notwithstanding anything in this Constitution, by order, make such amendments in the said Schedules as may be necessary to give effect to the action so taken, and any such order may contain such supplemental incidental and consequential provisions as the President may deem necessary.
(2) When the First Schedule or the Fourth Schedule is so amended, any reference to that Schedule in this Constitution shall be construed as a reference to such Schedule as so amended.

[238] "Article 392. Power of the President to remove difficulties.- (1) The president may, for the purpose of removing any difficulties, particularly in relation to the transition from the provisions of the Government of India Act, 1935, to the provisions of this Constitution, by order direct that this Constitution shall, during such period as may be specified in the order, have effect subject to such adaptations whether by way of modification, addition or omission, as he may deem to be necessary or expedient:
(2) Every order made under clause (1) shall be laid before Parliament.
(3) The powers conferred on the President by this article, by Article 324, by clause (3) of Article 367 and by Article 391 shall, before the commencement of this Constitution, be exercisable by the Governor-General of the Dominion of India.

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elected legislature). The provisions were transitional so as to facilitate the transfer of power from the institutions of governance which were functioning under the Government of India Act 1935 to the duly constituted institutions which would take over after the commencement of the Constitution.

299. To facilitate a seamless transfer of power, the Constitution contained provisions, as we have seen, for the Constituent Assembly to function as the Parliament until Parliament met for the first time upon its constitution after the adoption of the Constitution. These temporary and transitional provisions included the appointment of the President of India through a process of election by the Constituent Assembly, the continuance of the Council of Ministers at the Centre and in the States and for the continuance of the provisional legislatures until elections were held. The temporary and transitional provisions were gradually phased out after the commencement of the Constitution, by repeal. The Constitution (Seventh Amendment) Act 1956 which came into force on 1 November 1956, repealed Article 371 and Articles 379 to 391.

300. The expansion of the ambit of Part XXI to cover special provisions took place with the Constitution (Thirteenth Amendment) Act 1962 with effect from 1 December 1963. Over a period of time, Part XXI was amended so as to incorporate special provisions in respect of the States and the Union Territories. In 1956, Article 371 was substituted by the Seventh Amendment to facilitate special provisions being made for the States of Andhra Pradesh or Punjab in terms of the constitution and functions of the Regional

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Committees of the Legislative Assemblies of the States and for special responsibilities of the Governor in order to secure the proper functioning of the Regional Committees. Punjab was omitted from the ambit of Article 371 on 1 November 1966 and clause (1) as it originally stood was also omitted by the Thirty-Second Amendment on 1 July 1974. With the reorganization of the States in 1956, Article 371 was amended by the Seventh Amendment so as to incorporate special provisions for the States of Maharashtra and Gujarat. Article 371-A was inserted by the Thirteenth Amendment of the Constitution on 1 December 1963 to incorporate special provisions with respect to the State of Nagaland. Article 371-B was introduced by way of the Twenty-Second Amendment of the Constitution on 25 September 1969 to make special provisions for the State of Assam. Article 371-C for the State of Manipur, Article 371-D for the State of Andhra Pradesh and later Telangana (following the Reorganization Act 2014), Article 371-F for the State of Sikkim, Article 371-G for the State of Mizoram, Article 371-H for the State of Arunachal Pradesh, Article 371-I for the State of Goa and Article 371-J for the State of Karnataka were brought in by constitutional amendments progressively:

a. Article 371-C – special provisions for Manipur – the Twenty-seventh Amendment with effect from 15 February 1972;

b. Article 371-D – special provisions for Andhra Pradesh – the Thirty-second Amendment with effect from 1 July 1974;

c. Article 371-D – special provisions for the reorganized States of Andhra

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Pradesh and Telangana – the Thirty-second Amendment with effect from 2 June 2014;

d. Article 371-F – special provisions for Sikkim – the Thirty-sixth Amendment with effect from 26 April 1975;

e. Article 371-G – special provisions for Mizoram – the Fifty-third Amendment with effect from 20 February 1987;

f. Article 371-H – special provisions for the State of Arunachal Pradesh – the Fifty-fifth Amendment with effect from 20 February 1987;

g. Article 371-I – special provisions for Goa – the Fifty-sixth Amendment with effect from 30 May 1987; and

h. Article 371-J – special provisions for the State of Karnataka – the Ninety-Eighth Amendment with effect from 1 October 2013.

301. Prior to the Seventh Amendment to the Constitution in 1956, Article 1(1) provided that India, that is Bharat, shall be a Union of States. Article 1(2) stipulated that the States and its territories would be those specified in Parts A, B and C of the First Schedule. Article 1(3) had originally provided that the territory of India shall comprise of:

a. the territories of the States;

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b. the territories specified in Part D of the First Schedule; and

c. such other territories as may be acquired.

302. With the Seventh Amendment in 1956, Article 1(2) was substituted to provide that the States and the territories shall be as specified in the First Schedule. Clause (3) was amended so as to substitute the Union Territories specified in the First Schedule. With the creation of new States, their special needs were comprehended, as we have seen, with the insertion of special provisions in relation to those States. Some of the temporary and transitional provisions which were made at the adoption of the Constitution were repealed, as we have seen above, as the new institutions of government under democratically elected constitutional functionaries and legislatures took effect after the adoption of the Constitution. In understanding the provisions of Article 370 which is also comprised in Part XXI, a contextual analysis, as we have carried out above, would shed some light over the nature of the provisions comprised in the Part.

303. The marginal note to Article 370 was titled “Temporary provisions with respect to the State of Jammu and Kashmir”. As we have already seen at the adoption of the Constitution, Part XXI in which Article 370 was situated dealt with ‘temporary’ and ‘transitional’ provisions. Whether a marginal note to a statutory provision can be utilised as an aid to interpretation is analysed in

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Justice G P Singh's "Principles of Statutory Interpretation[239]". According to the Treatise:

> "Although opinion is not uniform the weight of authority is in favour of the view that the marginal note appended to a section cannot be used for construing the Section. LORD MACNAGHTEN emphatically stated: "It is well-settled that marginal notes to the sections of an Act of Parliament cannot be referred to for the purpose of construing the Act. The contrary opinion originated in a mistake, and has been exploded long ago. There seems to be no reason for giving the marginal notes in an Indian statute any greater authority than the marginal notes in an English Act of Parliament".[240] PATANJALI SHASTRI, J., after referring to the above case with approval observed: "Marginal notes in an Indian statute, as in an Act of Parliament, cannot be referred to for the purpose of construing the statute."[241] At any rate, there can be no justification for restricting the section by the marginal note,[242] and the marginal note cannot certainly control the meaning of the body of the section if the language employed therein is clear.[243]"

304. Justice G P Singh however notes that :

> "Some Indian cases also show that reference to marginal notes may be permissible in exceptional cases for construing a section in a statute."

305. In **Bengal Immunity Company Limited** v. **State of Bihar**[244], Chief Justice S R Das, speaking for a seven-Judge Bench dealt with the interpretation of Article 286 of the Constitution which forms a part of Part XXI of the Constitution dealing with "Finance, Property, Contracts and Suits". The Court

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[239] 14th Edition, Pages 188-189

[240] Balraj Kunwar v. Jagatpal Singh, ILR 26 All 392, p. 406 : 31 IA 132: 1 All LJ 384 (PC)

[241] C.I.T. v. Ahmedbhai Umarbhai & Co., AIR 1950 SC 134, p. 141 : 1950 SCR 335; Board of Muslim Waqfs, Rajasthan v. Radhakishan, AIR 1979 SC 289, pp. 295, 296 : (1979) 2 SCC 468; Kalawati Bai v. Soiryabai, AIR 1991 SC 1581, p. 1586 : (1991) 3 SCC 410; Guntaiah v. Hambamma, (2005) 6 SCC 228, pp. 233, 234 (para 11) : AIR 2005 SC 4013. **But see** Uttam Das Chela Sunderdas v. Shiromani Gurdwara Prabandhak Committee, 1996 (4) Scale 608, pp. 613, 614 : AIR 1996 SC 2133, p. 2137 : (1996) 5 SCC 71 (para 16), where **contrary** view is expressed. But it appears that the court in this case was dealing with 'Heading' and not 'Marginal note' and no final opinion was expressed.

[242] Emperor v. Sadashiv, AIR 1947 PC 82, P. 84 : 74 IA 89 : 48 Cri LJ 791.

[243] Nalinakhya Bysack v. Shyam Sundar Haddar, AIR 1953 SC 148, p. 150 : 1953 SCR 533, Western India Theatres Ltd. v. Municipal Corporation, Poona, AIR 1959 Sc 586, p. 589 : 1959 Supp (2) SCR 71; Nandini Satpathy v. P.C. Dani, AIR 1978 SC 1025, p. 1039 : 1978 (2) SCC 424.

[244] (1955) 2 SCR 603

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noted that Article 286 with several Articles is grouped under the heading "miscellaneous financial provisions" in Chapter 1 of Part XXI. Moreover, it has not found place in Part XI Chapter 1 which deals with legislative relations including the distribution of legislative powers between Parliament and the legislatures of States. Referring to marginal note to Article 286, Chief Justice SR Das observed:

> "The marginal note to Article 286 is "restrictions as to imposition on tax on the sale or purchase of goods" which unlike the marginal notes in Acts of the British Parliament, is part of the Constitution as passed by the Constituent Assembly, *prima facie* furnishes some clue as to the meaning and purpose of the Article."

306. The Court, however, clarified that apart from the marginal note, the very language of Article 286 made it abundantly clear that its purpose was to place restrictions on the legislative powers of the State to impose taxes on the sale or purchase or purchases of goods. The above observations indicate that the marginal note to a provision of the Constitution being a part of the document as adopted by the Constituent Assembly was held *prima facie* to furnish some clue on the meaning and purpose of the provision.

307. Equally, the judgment can well be construed to mean that a marginal note by itself will not control the plain meaning of the words used in the provision if the language of the provision is clear in itself.[245] This was indeed the drift of the judgment of Justice K S Hegde speaking for himself and Justice A K

[245] The marginal note to Article 368 of the Constitution which was "procedure for amendment of the Constitution" was substituted by the Twenty-fourth Constitutional Amendment with effect from 5 November 1971 to read "power of Parliament to amend the Constitution and procedure therefore".

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Mukherjea in **Kesavananda Bharati Sripadagalvaru** v. **State of Kerala**[246]. Justice Hegde observed:

> "620…To restate the position, Article 368 deals with the amendment of the Constitution. The Article contains both the power and the procedure for amending the Constitution. No undue importance should be attached to the marginal note which says "Procedure for amendment of the Constitution". Marginal note plays a very little part in the construction of a statutory provision. It should have much less importance in construing a constitutional provision**. The language of Article 368 to our mind is plain and unambiguous.** Hence we need not call into aid any of the rules of construction about which there was great deal of debate at the hearing. As the power to amend under the Article as it originally stood was only implied, the marginal note rightly referred to the procedure of amendment. The reference to the procedure in the marginal note does not negative the existence of the power implied in the Article."
>
> (emphasis supplied)

308. In interpretating the provisions of Article 370 as they stood prior to abrogation, we begin with the following prefatory observations namely:

a. The heading of Part XXI in which Article 370 was comprised dealt with "temporary and transitional provisions" originally and after the amendment of the heading by the thirteenth Amendment with effect from 1 December 1963, it deals with "temporary, transitional and special provisions";

b. The marginal note to Article 370 states that the Article deals with "temporary provisions with respect to the State of Jammu and Kashmir";

c. The heading of Part XXI of the Constitution (temporary and transitional

[246] (1973) 4 SCC 225

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provisions) and the marginal note were a part of the Constitution as originally adopted by the Constituent Assembly;

d. Following well-settled principles of law, the marginal note may *prima facie* furnish some guidance on the purpose and intent underlying the adoption of the provision but it cannot control the plain meaning of Article 370 which must be deduced by interpreting all its provisions; and

e. While interpreting Article 370, regard must be had to the entire provision and its parts ought not to be construed in a manner disconnected or disjointed from the meaning and scheme of the provision in its entirety.

II. Interpretation of Article 370

309. Clause (1) of Article 370 begins with a non-obstante provision. The intent underlying the adoption of this phrase in clause (1) is that what follows in sub clauses (a) to (d) is intended to operate untrammelled by the other provisions of the Constitution.

310. Sub-clause (a) of clause (1) stipulated that the provisions of Article 238 shall not apply in relation to the State of Jammu and Kashmir. Article 238 as originally adopted was placed in Part VII of the Constitution which dealt with the States in Part B of the First Schedule. Article 238 stipulated that Part VI of the Constitution which dealt with the States in Part A of the First Schedule would apply to the Part B States subject to modifications and omissions. Part

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VI *inter alia* contained provisions for the Executive (Chapter II), the State Legislature (Chapter III), the legislative power of the Governor (Chapter IV), the High Courts in the States (Chapter V), and the Subordinate Courts (Chapter VI). Since the Constitution originally incorporated Part A and Part B States in its First Schedule separately, Part VI contained provisions for the Part A States while Article 238 which was the sole provision in Part VII stipulated that Part VI would apply to the Part B States subject to modifications and omissions. Included amongst them was that the word Governor shall stand substituted by the Rajpramukh. Once the distinction between Part A and Part B States was effaced by the Seventh Amendment to the Constitution in 1956, Part VII itself which comprised of Article 238 was repealed. Correspondingly, the title of Part VI was amended so as to delete the reference to Part A States. The effect of clause (1)(a) of Article 370 was that though the State of Jammu and Kashmir was a Part B State at the adoption of the Constitution, the provisions of Article 238 did not apply to the State. As a consequence, Part VI had no application to the State of Jammu and Kashmir. With the Seventh Amendment to the Constitution in 1956, Article 152 was amended to insert the words "does not include the State of Jammu and Kashmir"[247]. Article 152 indicated that after the obliteration of the distinction between Part A and Part B States (as a consequence of which

[247] Article 152
"In this Part, unless the context otherwise requires, the expression "State" does not include the State of Jammu and Kashmir".

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Jammu and Kashmir was classified as a State in the First Schedule), Part VI would still not apply to it.

311. Sub-clause (b) of clause (1) of Article 370 limited the power of Parliament to make laws for the State of Jammu and Kashmir. It stipulated in sub-clause (b)(i) of clause (1) that the Dominion Legislature may enact laws on those matters in the Union and the Concurrent Lists of the Seventh Schedule which as declared by the President in consultation with the Government of the State to correspond to matters specified in the IoA. Sub-clause (b)(ii) covered "such other matters" in the said Lists, that is, the Union and Concurrent Lists which the President could with the concurrence of the Government of the State 'specify by order'. Sub-clause (b), in other words, dealt with the specification of matters by the President among the subjects comprised in the Union and the Concurrent Lists over which Parliament would have power to make laws with respect to Jammu and Kashmir. Sub-clause (b)(i) provided for consultation by the President with the State Government while sub-clause (b)(ii) provided for the concurrence of the State Government.

312. Both the above sub-clauses dealt with the scope of the power of Parliament to make laws for Jammu and Kashmir with respect to matters in the Union and the Concurrent Lists. With respect to matters which were set out in the IoA, a consultative process with the State Government was envisaged. However, where the matters to be specified in the Union and the Concurrent Lists were not comprehended in the IoA as matters on which Parliament could legislate, the concurrence of the State Government was required. The IoA

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conferred power on Parliament to enact laws on four subjects namely defence, external affairs, communications and ancillary matters. The Explanation below sub-clause (b)(ii) indicated that for the purposes of the Article the Government of the State would mean the person for the time being recognized by the President as the Maharaja of Jammu and Kashmir acting on the advice of the Council of Ministers under the Proclamation of the Maharaja dated 5 March 1948. Though the Explanation appears immediately below sub-clause (b)(ii), it is evident from the use of expression "for the purposes of this Article" that the Explanation applies to the entirety of Article 370.

313. Sub-clause (c) of Article 370(1) provided that Article 1 and Article 370 "shall apply in relation to that State". As a consequence, Jammu and Kashmir became on the adoption of the Constitution on 26 January 1950 an integral part of "India that is Bharat" which as Article 1(1) stipulates "shall be a Union of States". The provisions of Article 370(1)(c) made it clear that Jammu and Kashmir was governed by Article 1. The necessary consequence of the provision is that it is an integral part of the territory of India. Likewise, sub-clause (c) of clause (1) indicates that Article 370 shall apply in relation to the State.

314. In terms of sub-clause (d) of clause (1), such of the "other provisions" of the Constitution would apply to the State of Jammu and Kashmir subject to such exceptions and modifications as the President may by order specify. Sub-clause (d) was followed by two provisos: the first proviso stipulated that a

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Presidential Order which related to matters specified in the IoA referred to in "paragraph (i) of sub-clause (b)" shall be issued only with the consultation with the Government of the State"; and the second proviso stipulated that a Presidential Order relating to matters other than those specified in the first proviso would be issued only with the concurrence of the State Government. Consultation with the State Government under the first proviso and its concurrence under the second proviso was mandatory. This is evident from the fact that both the provisos used the expression "No such order … shall be issued except …" in consultation or, as the case may be, with the concurrence of the State Government. Sub-clause (d), in other words, empowered the President to issue an order in terms of which other provisions (other than Articles 1 and 370) of the Constitution shall apply to Jammu and Kashmir. However, such other provisions would be subject to modifications and exceptions. Where the provisions corresponded to matters specified in the IoA as falling within the domain of the Dominion Legislature, consultation was envisaged while in respect of other matters concurrence of the State Government was made mandatory.

315. Clause (2) of Article 370 envisaged that where the Government of the State of Jammu and Kashmir had given its concurrence under sub-clause (b)(ii) of clause (1) or under the second proviso to sub-clause (d) "before the Constituent Assembly for the purpose of framing the Constitution of the State is convened", it shall be placed before the Constituent Assembly "for such decision as it may take thereon". Clause (2), in other words, recognized that the Constituent Assembly was being convened for framing the Constitution

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for the State of Jammu and Kashmir. If the State Government as defined in the Explanation had concurred either with (a) the proposal of the Union to specify matters in the Union or Concurrent Lists other than those recognized by the IoA as matters over which Parliament could make laws; or (b) the application of the provisions of the Constitution to the State with modifications and exceptions other than those relatable to the IoA referred to in sub-clause (b)(i), it had to be placed before the Constituent Assembly for its decision. Evidently, therefore, the concurrence of the State Government on matters falling within the ambit of sub-clause (b)(ii) or the second proviso to sub-clause (d) was not final but would be governed by the decision of the Constituent Assembly.

316. Clause (3) of Article 370 empowered the President to declare by a public notification that the Article itself "shall cease to be operative" or would only be "operative with such exceptions and modifications" as may be specified and with effect from the date as specified. The proviso to clause (3), however, required the recommendation of the Constituent Assembly of the State "referred to in clause (2)". The proviso specified that the recommendation of the Constituent Assembly "shall be necessary before the President issues such a notification". Clause (3) contains a non-obstante provision which overrides all the earlier provisions of clauses (1) and (2).

317. Several salient features emerge from Article 370, read as a whole. These features (apart from the marginal note which has been discussed earlier) must be noticed at this stage:

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a. Article 370 incorporated two non-obstante clauses. The first non-obstante clause in clause (1) operates with respect to the entirety of the Constitution ("notwithstanding anything in this Constitution"). The second non-obstante clause prefaces clause (3) and its effect is to override the earlier provisions of the Article ("notwithstanding anything in the foregoing provisions of this Article"). The effect of the non-obstante provision in clause (1) is that sub-clauses (a), (b), (c) and (d) which follow would govern the State of Jammu and Kashmir untrammelled by any of the provisions of the Constitution. The effect of the non-obstante provision in clause (3) is that the Presidential power to abrogate Article 370 either in its entirety by declaring that it shall cease to be operative or to specify that it would be operative only with such exceptions and modifications from a date that would be specified, overrides all the previous provisions contained in the Article, including the non-obstante clause in Clause 1. The plain consequence is that once the President exercises the power conferred by clause (3), the restrictions which are imposed in clauses (1) and (2) would cease to govern the State;

b. Clause (1) of Article 370 specifies:

   i. a specific provision of the Constitution which shall not apply to the State of Jammu and Kashmir (Article 238);

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ii. two specific provisions of the Constitution which shall apply to the State (Article 1 and Article 370 itself);

iii. limitations on the power of Parliament to enact laws for the State on matters which fall in the Union and Concurrent Lists of the Seventh Schedule;

iv. the requirement of consultation for one set of matters (those relatable to the IoA) and of concurrence of the State Government for the other set of matters(matters not relatable to the IoA); and

v. the Presidential power to apply other provisions of the Constitution to the State subject to exceptions and modifications with the condition of consultation for matters falling in the ambit of sub-clause (b)(i) and concurrence for all other matters. If the concurrence of the State Government was given before the convening of the Constituent Assembly for framing the Constitution of the State, it had to be placed before the Assembly for its decision.

c. Article 370 also expressly recognizes:

i. in clause (b)(i) “the Instrument of Accession governing the accession of the State to the Dominion of India”;

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ii. the convening in the future of a Constituent Assembly "for the purpose of framing the Constitution of the State" (clause (2));

iii. the recommendation in terms of the proviso to clause (3) had to be of the Constituent Assembly of the State "referred to in clause (2)" meaning thereby that it was that Constituent Assembly whose recommendation was envisaged to be necessary for the exercise of the Presidential power under the substantive part of clause (3); and

iv. that the Government of the State would be 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 5 March 1948;

d. Article 370 has used four distinct phrases in regard to the role of the State Government or, as the case may be, of the Constituent Assembly of the State antecedent to the adoption of certain action by the President, namely:

i. **consultative** role. The expression consultation with the Government of the State is used in sub-clauses (b)(i) and the first proviso to sub-clause (d);

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ii. **concurrence** of the State Government on certain matters (the expression as used in sub-clause (b)(ii) and the second proviso to clause (d));

iii. placing the concurrence of the State Government before the Constituent Assembly if it was granted before the convening of the Assembly, for its **decision**; and

iv. the **recommendation** of the Constituent Assembly of the State under the proviso to clause (3) formed for the purpose of framing the Constitution of the State.

318. The use of distinct phrases – consultation, concurrence, decision and recommendation indicates that each of these phrases has been intended by the framers to have a distinct connotation. Consultation postulates the seeking of the view of the State government. Concurrence postulates an act of affirmative acceptance of the proposal or, in other words, the agreement of the State government. A decision postulates the conclusion reached by the Constituent Assembly on the concurrence granted by the State government before its convening. Recommendation in the proviso to clause (3) would postulate the view of the Constituent Assembly being forwarded to the President before the exercise under Article 370(3).

319. Article 370 has used the expression “exceptions and modifications” at two distinct places: *first*, in sub-clause (d) of clause (1); and *second* in clause (3).

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In both cases, the power to specify exceptions and modifications is entrusted to the President; in the case of sub-clause (d) in relation to the application of the other provisions of the Constitution in relation to the State and in clause (3), if the President orders that the provisions of Article 370 shall cease to be operative. The exercise of power under sub-clause (d) of clause (1) is subject to the conditions specified in the two provisos while the exercise of the power under clause (3) is subject to the proviso of that clause.

III. Inference

320. There are intrinsic reasons in Article 370 which support the view that the provision was not intended by the framers to be a permanent feature of the Constitution at the date of the adoption of the Constitution. Part XXI of which Article 370 is a part specifies temporary and transitional provisions. In certain cases, the temporary provisions contained in Part XXI had a restriction with reference to the time over which they would operate. These include Articles 369 (specifying a five year period for Parliament to enact laws); Article 371 (as originally enacted conferring a power on Parliament to make law for a period of ten years or a shorter or longer period governing the Part B States); Article 372 (3) (giving the President a period of two years initially and later by amendment three years to make adaptations and modifications to laws in force in the Territory of India); Article 372(a) (the power of the President to make adaptations to any law in force before the Seventh Amendment by an order before 1 November 1957); Article 373 (the power of the President to make an order in respect of the persons under preventive detention until

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Parliament enacted a law under Article 22(7) or until the expiration of one year from the commencement of the Constitution). In other cases, such as under Article 392, the President was conferred with the power to remove difficulties particularly involving the transition from the Government of India Act 1935 to the Constitution in terms of which the President could direct that the Constitution itself would apply subject to such adaptations whether by way of modification, addition or omission until the first meeting of Parliament duly constituted took place. Part XXI also contained provisions for the continuation of the Federal Court and its Judges and the transfer of proceedings (Article 374), other courts, officers, and authorities (Article 375), the continuation of High Courts and the judges (Article 376), the Comptroller and Auditor General of India (Article 377), and Public Service Commissions (Article 378). Likewise, Articles 379 to 386 provided for a provisional Parliament, the election of the President by the Constituent Assembly, Council of Ministers of the President, provisional legislatures, Governors and Council of Ministers in the States. All these provisions whether defined with reference to time or otherwise were temporary or, as the case may be, transitional in nature.

321. Article 370 was couched amidst other temporary and transitional provisions with a marginal note which indicates that its provisions were temporary. Article 370 was adopted at a point of time when the Maharaja of Jammu and Kashmir had acceded to the Dominion of India by executing an IoA. Textually, Article 370(1)(c) made it abundantly clear that Article 1 was to apply in its entirety to the State unlike other provisions of the Constitution, the application of which

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was to be governed by the requirement of consultation or, as the case may be, concurrence.

322. On 26 January 1950, when the Constitution was adopted, the State of Jammu and Kashmir became an integral part of the territory of India. The mandate of Article 1 is that "India that is Bharat shall be a Union of States". The States and their territories would be those specified in Parts A, B and C of the First Schedule. The State of Jammu and Kashmir was a Part B State on the date of the adoption of the Constitution. With the adoption of the Seventh Amendment to the Constitution which obliterated the distinction between Parts A, B and C States, Jammu and Kashmir became a State in the Union of States. In other words, Article 370 of the Constitution read together with Article 1 leaves no manner of doubt that the integration of Jammu and Kashmir as a part of the nation, which in itself was a Union of States was complete. Any interpretation of Article 370 cannot postulate that the integration of Jammu and Kashmir with India was temporary.

v. <u>The effect of dissolution of the Constituent Assembly of Jammu and Kashmir on the scope of powers under Article 370(3)</u>

323. The principal argument urged by Mr Kapil Sibal, learned Senior Counsel appearing on behalf of the petitioners[248] is that Article 370 was only temporary when the Constituent Assembly of the State was in existence, that is, between 1951 to 1957. The power under Article 370(3) ceased to exist after the dissolution of the Constituent Assembly. However, the respondents argue

[248] W.P. (C) No. 1037 of 2019: **Mohd Akbar Lone & Anr.** v. **Union of India & Ors**.

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that the power under Article 370(3) to declare that the provision ceases to exist or shall exist with such modification subsisted even after the Constituent Assembly ceased to exist. The respondents argue that it is because the Constituent Assembly under the proviso to Article 370(3) only had the power to make recommendations which were not binding on the President and that the President could always unilaterally exercise the power under Article 370(3).

324. Thus, the question which needs to be addressed is whether Article 370 assumed permanency after the dissolution of the Constituent Assembly of Jammu and Kashmir or whether it was by its very nature, object and purpose temporary. This Court must take into account the inference drawn on an analysis of the historical context of including Article 370 and the text, placement and marginal note of the provision while deciding this issue. We have concluded above that:

a. Article 370 by its text, placement and marginal note is a 'temporary' provision; and

b. A special provision in the form of Article 370 was included for the State of Jammu and Kashmir because of three special circumstances, which were that (a) the Maharaja of Jammu and Kashmir had accepted the legislative competence of the Union on three limited subjects along with certain ancillary powers; (b) the Constituent Assembly of the State had not been convened before the Constitution of India was adopted to

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expand the scope of legislative competence and ratify the Constitution; and (c) the impending war in Jammu and Kashmir at the time of framing the Constitution of India.

a. The judgment in Sampath Prakash

325. In **Sampath Prakash** v. **State of Jammu and Kashmir**[249], proceedings under Article 32 of the Constitution were initiated challenging the validity of an order of detention under the Jammu and Kashmir Preventive Detention Act 1964. The detention had been continued without making a reference to the Advisory Board, the State having purported to act under Section 13A. The provisions of Article 13A were challenged on the ground that they were *ultra vires* Article 22 of the Constitution. However, Article 35-C which was introduced by CO 48 of 1954 in exercise of power under Article 370(1)(d) had granted immunity to a law relating to preventive detention in Jammu and Kashmir against invalidity on the ground that it violated any right under Part III of the Constitution for a period of five years. The period of five years was extended subsequently to ten and fifteen years by CO 59 of 1959 and CO 69 of 1964 respectively. The two modifications made in 1959 and 1964 were challenged on the ground that they were *ultra vires* the power of the President under Article 370(1).

326. The petitioner in that case argued that Article 370 contained temporary provisions which would cease to be effective after the Constituent Assembly

[249] (1969) 2 SCR 365

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of the State had ceased to exist. Reliance was placed on the speech of Shri N Gopalaswami Ayyangar when he moved Draft Article 306A in the Constituent Assembly which corresponded to Article 370. Since the Constitution of the State came into force on 26 January 1956, the two COs of 1959 and 1964 were challenged on the ground that they were *void*.

327. The historical background of Article 370, which was discernible from the speech of Gopalaswamy Ayyangar in the Constituent Assembly was summarized in the judgment of the Constitution Bench thus:

> "4…(*1*) that there had been a war going on within the limits of Jammu & Kashmir State;
>
> (*2*) that there was a cease-fire agreed to at the beginning of the year and that cease-fire was still on;
>
> (*3*) that the conditions in the State were still unusual and abnormal and had not settled down;
>
> (*4*) that part of the State was still in the hands of rebels and enemies;
>
> (*5*) that our country was entangled with the United Nations in regard to Jammu & Kashmir and it was not possible to say when we would be free from this entanglement;
>
> (*6*) that the Government of India had committed themselves to the people of Kashmir in certain respects which commitments included and undertaking that an opportunity be given to the people of the State to decide for themselves whether they would remain with the Republic or wish to go out of it; and
>
> (*7*) that the will of the people expressed through the Instrument of a Constituent Assembly would determine the Constitution of the State as well as the sphere of Union jurisdiction over the State."

Rejecting the challenge, the Court held:

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> "5. We are not impressed by either of these two arguments advanced by Mr Ramamurthy. So far as the historical background is concerned, the Attorney-General appearing on behalf of the Government also relied on it to urge that the provisions of Article 370 should be held to be continuing in force, because the situation that existed when this article was incorporated in the Constitution had not materially altered, and the purpose of introducing this article was to empower the President to exercise his discretion in applying the Indian Constitution while that situation remained unchanged. There is considerable force in this submission. The legislative history of this article cannot, in these circumstances, be of any assistance for holding that this article became ineffective after the Constituent Assembly of the State had framed the Constitution for the State."

The Constitution Bench then held that there were "much stronger reasons" for holding that the provisions of Article 370 continued in force and remained effective even after the Constituent Assembly of the State had adopted the Constitution for the State because the Constituent Assembly did not in exercise of the power under the proviso to Article 370 recommend that the provision shall cease to exist. Rather the Constituent Assembly recommended that Article 370 must operate with a modification of the Explanation to the provision:

> "7. There are, however, much stronger reasons for holding that the provisions of this article continued in force and remained effective even after the Constituent Assembly of the State had passed the Constitution of the State. The most important provision in this connection is that contained in clause (3) of the article which lays down that this article shall cease to be operative or shall be operative only with such exceptions and modifications and from such date as the President may specify by public notification, provided that the recommendation of the Constituent Assembly of the State referred to in clause (2) shall be necessary before the President issues such a notification. This clause clearly envisages that the article will continue to be operative and can cease to be operative only if, on the recommendation of the Constituent Assembly of the State, the President makes a direction to that effect. In fact, no such recommendation was made by the Constituent Assembly of the State, nor was any order made by the President declaring that the article shall cease to be operative. On the

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> contrary, it appears that the Constituent Assembly of the State made a recommendation that the article should be operative with one modification to be incorporated in the Explanation to clause (1) of the article. This modification in the article was notified by the President by Ministry of Law Order CO 44 dated 15th November, 1952, and laid down that, from 17th November, 1952, the article was to be operative with substitution of the new Explanation for the old Explanation as it existed at that time. This makes it very clear that the Constituent Assembly of the State did not desire that this article should cease to be operative and, in fact, expressed its agreement to the continued operation of this article by making a recommendation that it should be operative with this modification only."

328. The Constitution Bench also adverted to the proviso to Article 368 added by a Constitutional Order in relation to the State of Jammu and Kashmir under which an amendment to the Constitution made in accordance with Article 368 would not have any effect in relation to that State unless applied by the Order of the President under Article 370 (1). In view of these provisions, the Court held that "Article 370 of the Constitution has never ceased to be operative and there can be no challenge on this ground to the validity of the orders passed by the President in exercise of the powers conferred by this Article".

329. The petitioners also contended that once any provision of the Constitution was applied to the State of Jammu and Kashmir with modifications and exceptions under Article 370(1)(d), the power under Article 370 would not cover any modification in the Constitution as applied. That is, further modifications to the provisions as applied to the State cannot be made. Rejecting the submission, the Court held that the power under Article 370(1)(d) to issue an order applying provisions of the Constitution of India to Jammu and Kashmir included the power to make modifications. Reference was made to Section 21 of the General Clauses Act for this purpose which

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states that the power to issue a notification includes the power to amend the notification:

> "12. The legislative history of this article will also fully support this view. It was because of the special situation existing in Jammu & Kashmir that the Constituent Assembly framing the Constitution decided that the Constitution should not become applicable to Jammu & Kashmir under Article 394, under which it came into effect in the rest of India, and preferred to confer on the President the power to apply the various provisions of the Constitution with exceptions and modifications. It was envisaged that the President would have to take into account the situation existing in the State when applying a provision of the Constitution and such situations could arise from time to time. There was clearly the possibility that, when applying a particular provision, the situation might demand an exception or modification of the provision applied; but subsequent changes in the situation might justify the rescinding of those modifications or exceptions. This could only be brought about by conferring on the President the power of making orders from time to time under Article 370 and this power must, therefore, be held to have been conferred on him by applying the provisions of Section 21 of the General Clauses Act for the interpretation of the Constitution."

The Constitution Bench held that the extension of the period of five years under Article 35-C to ten years and fifteen years respectively by the C.Os of 1959 and 1964 "is justified *prima facie* by the exceptional state of affairs which continue to exist as before". Consequently, it was held that in view of the validity of COs of 1959 and 1964, the validity of the Act could not be challenged on the ground that any of its provisions were inconsistent with Article 22 of the Constitution.

330. The issue before the Constitution Bench of this Court in **Sampath Prakash** (supra) was whether Article 370 automatically ceased to exist when the Constituent Assembly of the State was dissolved after it framed the Constitution of Jammu and Kashmir. This Court held in the negative because

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the special conditions which warranted the introduction of Article 370 continued to exist and the Constituent Assembly of the State had not recommended that the provision must cease to exist in exercise of the power under the proviso to Article 370(3). In that case, the issue was whether the power under Article 370(1)(d) ceased to exist upon the Constituent Assembly ceasing to exist. The issue was answered with reference to Article 370(3), that the power under Article 370(1) continues to exist because the Constituent Assembly of the State did not in exercise of power under 370(3) recommend that Article 370 must cease to exist. However, the issue of whether the power under Article 370(3) could be exercised after the Constituent Assembly of the State ceased to exist to did not arise for the Court's consideration in that case. This issue must be decided by this Bench.

b. The limited power of the Constituent Assembly under Article 370

331. The argument of the petitioners that Article 370 has attained permanence after the Constituent Assembly of Jammu and Kashmir ceased to exist is premised on the understanding that the constitutional body had unbridled power to alter the constitutional integration of the State with the Union. In the sections below, we will be analysing if the Constituent Assembly of Jammu and Kashmir had such unrestrained power by referring to the constitutional history and structure of the provision.

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PART E

I. The structure of Article 370(1) and 370(2)

332. Article 370(1) required the concurrence of the Government of the State for both applying the provisions of the Constitution and expanding the ambit of the legislative competence of the Union over the State.

333. The power under Article 370(1)(d) had three components. *Firstly, the* President was empowered to notify which of the provisions other than Articles 1, 238 and 370 shall apply to the State of Jammu and Kashmir. *Secondly,* the provisions of the Constitution need not be applied to the State of Jammu and Kashmir in the same manner as they applied to the rest of the States since the President was conferred with the power to prescribe modifications and exceptions to the provision. *Thirdly*, such an order could be issued by the President only with either the concurrence or the consultation of the Government of the State depending on whether the provision related to the matters in the IoA or otherwise. This provision indicates that upon the adoption of the Constitution, all provisions of the Constitution did not automatically apply to the State of Jammu and Kashmir. The Government of the State had the power to grant its concurrence or otherwise on which of the other provisions would apply to the State of Jammu and Kashmir. Those other provisions could also be made applicable with such exceptions and modifications.

334. To understand the scope of power under Article 370(1)(d), it is necessary that we identify the breadth of the provision. Would it be open to the Government of the State to not give its concurrence for the application of any

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other provision other than Article 1 and 370? That is, omit all other provisions of the Constitution in its application to Jammu and Kashmir? Could the Government of the State have chosen to omit the application of Part III in the State of Jammu and Kashmir or 'modify' the provisions to the extent that the core of the provision is lost? Could a Constitutional order have been issued under Article 370(1)(d) omitting the application of Article 32 to Jammu and Kashmir or omitting the jurisdiction of the Supreme Court over the State of Jammu and Kashmir?

335. In **Puranlal Lakhanpal I** v. **President of India**[250], the State of Jammu and Kashmir detained the petitioner under Section 3 of the Jammu and Kashmir Preventive Detention Act on 4 October 1955. This gave rise to the institution of a petition seeking a writ of habeas corpus. The order of detention was issued "with a view to prevent him from acting in any manner prejudicial to the security of the State." The order of detention denied to the petitioner the grounds of detention in terms of the proviso to Section 8(1). The challenge was that the terms of the Section were inconsistent with Articles 21 and 22 of the Constitution and therefore void.

336. On 14 May 1954, the President, acting under Article 370(1) with the concurrence of the State government, issued the Constitution (Application to Jammu and Kashmir) Order 1954 applying certain specific provisions of the Constitution to the State of Jammu and Kashmir subject to modifications. In clauses (4) and (7) of Article 22, the legislature of the State of Jammu and

[250] 1955 (2) SCR 1101; "Puranlal Lakhanpal I"

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Kashmir was substituted for Parliament so that the former was competent to legislate for preventive detention. Moreover, Article 35(c) was added, the effect of which was that the provisions of the Jammu and Kashmir Preventive Detention Act, insofar as they were in consistent with Part III of the Constitution, would be valid for a period of five years from the commencement of the Order. The exception which was made by Article 35(c) was co-extensive with the life of the State legislation which had a limited life of five years. In this backdrop, Justice BP Sinha (as the learned Chief Justice then was) speaking for the Constitution Bench held that so long as the State legislation continued in force, the provisions of Articles 21 and 22 of the Constitution, insofar as they were inconsistent with the Act "are out of the way." Therefore, the Court held that the provisions of Section 8 could not be held to be unconstitutional as being inconsistent with Part III. However, it was urged on behalf of the petitioner that Article 35(c) which was inserted by the CO of 1954 was in excess of the powers conferred on the President by Article 370. Rejecting the argument, the Constitution Bench held:

> "8. … It is manifest that Article 370(1)(c) and (d) authorizes the President by Order to specify the exceptions and modifications to the provisions of the Constitution (other than Articles 1 and 370) subject to which the Constitution shall apply to the State of Jammu and Kashmir. Clause (c) as indicated above has been added to Article 35 of the Constitution only so far as the State of Jammu and Kashmir is concerned. Section 8 of the Act is not in excess of or inconsistent with the provisions of clause (c) so added to Article 35 of the Constitution. That being so the orders as served upon the petitioner are not inconsistent with or in excess of such provisions of Part III of the Constitution as apply to the State of Jammu and Kashmir. It must therefore be held that the petitioner was not entitled to know the grounds upon which he had been detained beyond what is disclosed in the order itself."

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337. The Constitution Bench, therefore, held that

a. Article 370(1) empowered the President to apply the provisions of the Constitution to the State of Jammu and Kashmir with modifications and exceptions with the concurrence of the State government;

b. The C.O of 1954 was issued in exercise of the power conferred by Article 370(1);

c. Article 35(c) was inserted by the CO of 1954 pursuant to the exercise of that power;

d. The denial of the grounds for detention in terms of the proviso to Section 8 was valid; and

e. In view of the provisions of Article 35(c) as inserted by the CO of 1954, the challenge to Section 8 of the State legislation on the ground that it was inconsistent with Articles 21 and 22 of the Constitution could not be sustained.

338. **Puranlal Lakhanpal II** v. **The President of India**[251] involved a challenge to the constitutional validity of the Constitution (Application to Jammu and Kashmir) Order 1954 made by the President under Article 370(1). The petitioner was registered as an elector in the Parliamentary Constituency of Delhi and claimed a right to stand for election from any Parliamentary Constituency in the country. The State of Jammu and Kashmir had six seats in the Lok Sabha. Ordinarily, under Article 81(1), election to these seats would have taken place by a direct election from the territorial constituencies in the

[251] 1962 (1) SCR 688; "Puranlal Lakhanpal II"

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States. However, in relation to the State of Jammu and Kashmir, Article 81(1) was modified by Paragraph 5(c) of CO of 1954 to indicate that the representatives of the State in the Lok Sabha would be appointed by the President on the recommendation of the Legislature of the State. The challenge was to the substitution of a direct election to the Lok Sabha by nomination made by the State Legislature.

339. K N Wanchoo, J. speaking for the Constitution Bench, held that Article 370 "recognizes the special position of the State of Jammu and Kashmir and that is why the President is given the power to apply the provisions of the Constitution to that State subject such exceptions and modifications as the President may by order specify". The submission was that in exercise of the power under Article 370(1), the President could not amend the Constitution so as to make a radical alteration in its provisions. In this context, reliance was placed on the judgment in **In re Delhi Laws Act**[252] to urge that the modification could not encompass a radical transformation. The Constitution Bench ruled that there was no radical alteration of Article 81; while direct election had been substituted by an indirect election by the State Legislature, the element of election still remained. But assuming that the alteration made by the CO was radical in nature, the Constitution Bench distinguished the position in **In re Delhi Laws Act** (supra) which dealt with the power of delegation to a subordinate authority which made subordinate legislation.

[252] (1951) SCR 747

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Distinguishing the power of modification conferred on the President under Article 370(1), the Court held:

> "4… In the present case we have to find out the meaning of the word "modification" used in Article 370(1) in the context of the Constitution. As we have said already the object behind enacting Article 370(1) was to recognise the special position of the State of Jammu and Kashmir and to provide for that special position by giving power to the President to apply the provisions of the Constitution to that State with such exceptions and modifications as the President might by order specify. We have already pointed out that the power to make exceptions implies that the President can provide that a particular provision of the Constitution would not apply to that State. **If therefore the power is given to the President to efface in effect any provision of the Constitution altogether in its application to the State of Jammu and Kashmir, it seems that when he is also given the power to make modifications that power should be considered in its widest possible amplitude**. If he could efface a particular provision of the Constitution altogether in its application to the State of Jammu and Kashmir, **we see no reason to think that the Constitution did not intend that he should have the power to amend a particular provision in its application to the State of Jammu and Kashmir**."
>
> (emphasis supplied)

The Court held that in the context of the Constitution it "must give the widest effect to the meaning of the word modification used in Article 370(1) and in that context, it includes an amendment" and that there was no reason to limit the expression modifications only to those which did not make a radical transformation.

340. In **Puranlal Lakhanpal II** (supra), this Court held that the power to make a 'modification' in Article 370(1) was not limited. It would include amendments to provisions in their application to the State of Jammu and Kashmir including the power to make radical transformation. Though modification includes the power to amend or radically transform the provision, there are certain implied

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limits to the power. When the State of Jammu and Kashmir acceded to the Dominion of India and the Maharaja issued a Proclamation ratifying and adopting the Indian Constitution, there was a rupture of monarchic governance and the simultaneous creation of a system of constitutional governance. The State of Jammu and Kashmir by ratifying the Constitution accepted the model of constitutional governance envisaged by the Indian Constitution. Accession to India could not be merely a matter of territorial integration to India without constitutional integration. Thus, there were certain fundamental precepts or features of the Indian Constitution which could not be abrogated by the exercise of the power of modification under Article 370(1)(d). For instance, there can be no deviation from a democratic form of governance chosen for India. Similarly, it was not open to the State Constituent Assembly to declare that the State of Jammu and Kashmir was an independent sovereign country. The Constituent Assembly of Jammu and Kashmir could fill in the details and provide a pattern of governance in the state, consistent with the basic precepts of governance under the Constitution of India. Indeed, the pattern of governance in Jammu and Kashmir mirrored the governance under the articles of the Constitution of India. Though Part VI of the Constitution was inapplicable to Jammu and Kashmir, the pattern of constitutional governance under the State Constitution drew upon basic precepts of parliamentary democracy under the Constitution of India.

341. Article 370(1) required the concurrence of the Government of the State and not the concurrence of the Constituent Assembly of the State. Article 370(2) stipulates that “if” the concurrence of the Government of the State is given

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before the Constituent Assembly of Jammu and Kashmir is convened, the concurrence shall be placed before the Assembly for its decision. The inclusion of Article 370(2) must be read with reference to the Explanation to Article 370. The Explanation states that the Government of the State means the person recognised by the President as the Maharaja of Jammu and Kashmir acting on the advice of the Council of Ministers "for the time being in office under the Maharaja's Proclamation dated fifth day of March 1948." The Maharaja of Jammu and Kashmir by a Proclamation issued on 5 March 1948 appointed Sheikh Abdullah as the Head of Emergency Administration. The Council of Ministers of the Emergency Administration was tasked to convene the National Assembly based on Adult Suffrage. The Proclamation also notes that the National Assembly would be tasked with framing the Constitution of the State. Article 370(2) effectively meant that the decision which would be taken by the Government of the State before the Constituent Assembly is convened would be the decision of the emergency administration. The purpose of Clause (2) was to subject the exercise of power by the emergency administration to the democratic will of the people exercised through the members of the Constituent Assembly. The Constitution Bench of this Court in **Sampath Prakash** (supra) has recognised that the power under Article 370 extends even after the Constituent Assembly ceased to exist.

II. The structure of Article 370(3)

342. Article 370(3) vested the President with two powers: *first,* the power to declare that Article 370 ceases to exists*;* and *second* the power to declare

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that Article 370 shall be operative with exceptions and modifications. The effect of the President declaring under Clause (3) that Article 370 ceases to exist is that provisions of the Constitution which apply to every other State in the First Schedule would equally apply to the State of Jammu and Kashmir. Article 370(3) was introduced with the purpose of enhancing constitutional integration and not disintegration. The necessary consequence of the exercise of this power is that the Constitution of Jammu and Kashmir would cease to exist. Under Clause (3), the President also has the power to modify Article 370. This includes the power of the President to remove the distinction between matters in the IoA and otherwise or the power to apply all provisions of the Constitution to the State of Jammu and Kashmir.

c. Inference

343. The proviso to Article 370(3) states that the "**recommendation** of the Constituent Assembly **referred to in Clause (2)** shall be **necessary before** the President issues such a notification". The petitioners argue that the President cannot exercise the power under Article 370(3) after the Constituent Assembly of the State has ceased to exist because:

    a. the recommendation is **necessary before** the President exercises power under Article 370(3);

    b. The recommendation of the Constituent Assembly is binding on the President; and

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c. the recommendation must be of the Constituent Assembly referred to in Clause (2) of Article 370 which refers to the Constituent Assembly convened for the "purpose of framing the Constitution of the State". Thus, the recommendation of that Constituent Assembly cannot be substituted with the recommendation of any other body.

344. The Constituent Assembly in exercise of the power under the proviso to Article 370(3) did not recommend that Article 370 should cease to exist. The Constituent Assembly recommended one modification of the Explanation to Article 370 before it ceased to exist. The Government of the State was defined as the person recognised by the President as the Maharaja of Jammu and Kashmir acting on the aid and advice of the Council of Ministers. This explanation was substituted to read that the Government of the State would mean that person recognised as the Sadar-i-Riyasat by the President on the recommendation of the Legislative Assembly of the State.

345. The petitioners argue that since the Constituent Assembly did not recommend that Article 370 must cease to exist, the provision has attained permanence. It was argued that the procedure to repeal the provision cannot be traced to Article 370 after the Constituent Assembly ceased to exist but can only be traced to Article 368 of the Constitution.

346. We do not agree with the submission for the following reasons:

a. The historical context in which Article 370 was included must be recalled. The Constitution of India did not provide for the ratification of the Constitution by the Indian States. It was decided by the Ministry of

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States that the Ruler of each Indian State must issue a Proclamation ratifying the Constitution on the recommendation of the Constituent Assembly, where such body existed. In States where the Constituent Assembly was not convened by then, the Ruler of the State was to issue a Proclamation accepting the Constitution. However, when a Constituent Assembly was convened in those States, the Constituent Assembly could make a recommendation for the modification of the Constitution as it applied to the State and such a recommendation would be "earnestly considered" by the Union. Since the Constituent Assembly of Jammu and Kashmir had not yet been constituted when the Constitution of India was adopted, the proviso to Article 370(3) merely encapsulated the ratification process as decided by the Ministry of States. The words "**recommendation** of the Constituent Assembly **referred to in Clause (2)** shall be **necessary** before the President issues such a notification" as it appears in the proviso to Article 370(3) must be read in this context. Thus, the recommendation of the Constituent Assembly was not binding on the President to begin with;

b. Article 370 was introduced to serve two purposes: the special circumstances in the State in view of the impending war and the absence of a Constituent Assembly in the State when the Constitution of India was adopted. This purpose is discernible not just from the historical context but also from the provisions of Article 370. If Article 370 was introduced only for the purpose of ratification of the

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Constitution of India and expanding the scope of legislative competence, the provision would have clearly and unequivocally granted such a power to the Constituent Assembly alone. Rather, the provision grants the power to the Government of the State in terms of Article 370(1). Similarly, Article 370 also restricts the application of the Constitution to the State of Jammu and Kashmir. This was evidently included to deal with the special circumstances in the State;

c. The Constituent Assembly, upon being convened, exercised power under Article 370. Though the body ceased to exist, only one of the special circumstances for which the provision was introduced ceased. However, the other circumstance (that is, special circumstances because of the climate in the State) for which Article 370 was introduced subsisted even after the Constituent Assembly ceased to exist. This is recognised by the judgment of the Constitution Bench in **Sampath Prakash** (supra);

d. The dissolution of the Constituent Assembly of the State would not impact the substantive power vesting in the President under Clause 3. At the time of framing of the Constitution of India, it was obviously within contemplation that the Constituent Assembly of Jammu and Kashmir was formed for framing the Constitution for the State. It was not intended to be a permanent body but a body with a specific remit and purpose. The power conferred by the proviso to Article 370(3) was

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hence something which would operate in a period of transition when the Constituent Assembly of Jammu and Kashmir was formed and was in existence, pending the drafting of the State Constitution;

e. The President in exercise of the power under Article 370(1)(d) could not make radical changes to the provisions of the Constitution of India as it applies to Jammu and Kashmir. If the President exercises the power under Article 370(3) issuing a notification that Article 370 ceases to exist, the State of Jammu and Kashmir would be fully constitutionally integrated with India similar to the other States. So, the power under Article 370(1) and Article 370(3) even when exercised to its fullest extent does not freeze the system of integration contemplated by Article 370. It was intended to enhance constitutional integration between the Union and the State of Jammu and Kashmir. Holding that the power under Article 370(3) cannot be exercised after the dissolution of the Constituent Assembly would lead to freezing of the integration contrary to the purpose of introducing the provision; and

f. If the contention of the petitioners on the interpretation of Article 370 vis-à-vis the dissolution of the Constituent Assembly is accepted then Article 370(3) would become redundant and the provision would lose its temporary character. This would be contrary to holding that Article 370 is a temporary provision.

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347. It could be argued that an interpretation which renders Article 370(3) redundant does not make the provision permanent because Parliament in exercise of its constituent power under Article 368 could repeal the provision. This argument misses the scope of temporary and transitional provisions. Article 368 states that Parliament in exercise of its constituent power may "amend by way of addition, variation or repeal **any** provision of the Constitution". Thus, all provisions of the Constitution are amenable to change. This power is only subject to the basic structure challenge. However, a provision does not attain a temporary character merely because it can be amended. A provision is temporary when the provision ceases to exist even without the exercise of the amending power either through the lapse of time or the absence of certain conditions. The provision could be temporary because of the time frame, that is, the provision states it would cease to have effect after the lapse of a particular time period or it could be temporary in view of the existence of specific circumstances. If Article 370 can only be repealed in the same manner as other provisions which are not placed within Part XXI, the distinction between temporary and other provisions is lost.

348. The petitioners also contended that reading the power under Article 370(3) independent of the proviso would lead to an internal interpretative inconsistency. It was argued that the President could not unilaterally exercise power under Article 370(1) by which the provisions of the Constitution are applied to the State of Jammu and Kashmir but the President could unilaterally extinguish the special status of the State of Jammu and Kashmir. It was argued that this would lead to a situation where greater federal

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participation would be required for the purpose of applying the provisions of the Constitution but not for extinguishing the special status which the State enjoys. This argument misses the crux of the power conferred by Article 370(1). By virtue of the power under Article 370(1), the Union and the State decide on the scope of the legislative powers of the Union in the State and the provisions of the Constitution (with such modifications) which will apply to the State of Jammu and Kashmir. Thus, the power under Article 370(1) is exercised to establish a system of governance in the State.

349. The provisions of the Constitution of Jammu and Kashmir must be referred to, to elucidate this point. The legislative and executive power of the State depends on the scope of the legislative and executive power of the Union in the State of Jammu and Kashmir. Under Section 5 of the Constitution of Jammu and Kashmir, the extent of the legislative and executive power of the State extends to those matters over which Parliament does not have legislative competence under the provisions of the Constitution of India. In other words, the residual power after excluding matters with respect to which Parliament can enact laws in relation to the State falls within the ambit of the legislative power of the State of Jammu and Kashmir.

350. Part IV of the Jammu and Kashmir Constitution contained provisions for the Directive Principles of State Policy. Part V of the Constitution of Jammu and Kashmir contained provisions for the executive including the Governor and the Council of Ministers to aid and advice the Governor. Part VI contained provisions for the State legislature including the Legislative Assembly and the

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Legislative Council. Parts IV, V, and VI of the Constitution of India were not made applicable to the State of Jammu and Kashmir through the Constitution Orders. The Constitution of Jammu and Kashmir deals with subjects which have been omitted from the Constitution of India as it is applicable to the State. In doing so, the Constitution of Jammu and Kashmir does not prescribe principles and a system of governance which are radically different from that which is prescribed by the Indian Constitution. In fact, there is more than one similarity.

351. Part IV deals with the Directive Principles of State Policy. Section 12, similar to Article 37 of the Constitution of India, states that the Directive Principles are unenforceable in Courts and that they are guiding principles. Most of the Directive Principles in the Constitution of India, find place in the Constitution of Jammu and Kashmir.[253]

352. The provisions on the scope of powers of the executive and the legislature were also similar to the provisions in the Constitution of India. Section 35 provided for a Council of Ministers with a Chief Minister at the head to aid and advice the Governor in the exercise of his functions. Sub-section (2) of Section 35 provided that all functions of the Governor except those under Sections 36, 38 and 92 shall be exercised by him only on the advice of the Council of Ministers. Under Section 36(1), the Chief Minister would be appointed by the Governor and all other Ministers would be appointed by the

[253] The duty to secure a social order, organization of village Panchayats, Right to work, to education and to public assistance, promotion of co-operative societies, early childhood care, promotion of educational, material, and cultural interests of socially and economically backward sections.

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Governor on the advice of the Chief Minister. Section 53(2) entrusts the power to the Governor to prorogue the legislature and dissolve the legislative assembly. The Legislature of the State shall consist of both the Legislative Assembly and the Legislative Council[254] and the Legislative Assembly of the State shall consist of members chosen by direct election.[255]

353. The Constitution of Jammu and Kashmir dealt with the residuary space which was available after the application of the Constitution of India. This is not only true for the legislative and executive competence of the State but also for the provisions which are necessary for the establishment of a system of governance. Thus, when an order is issued under Article 370(1)(d) applying a provision of the Constitution to the State of Jammu and Kashmir, corresponding amendments may have to be made to the Constitution of the State to either enlarge or limit the executive and legislative power. Collaboration between the Union and State units is necessary to ensure that the provisions of the Constitution of Jammu and Kashmir are not inconsistent with the provisions of the Constitution of India as applicable to the State.

354. A collaborative exercise between the Union and the State was imperative for the smooth functioning of governance in the State. The power under Article 370(3) by which the President decides if special circumstances still exist in the State is an independent inquiry unrelated to the power under Article 370(1). When the nature of power and the repercussions of the exercise of such power vary under both the provisions, the argument that the

[254] Section 46 of the Constitution of Jammu and Kashmir
[255] Section 47 of the Constitution of Jammu and Kashmir

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interpretation of one provision contradicts with the principle in another loses force.

vi. The Challenge to CO 272

355. CO 272 was issued under Article 370(1)(d) and sought to amend clause (3) of Article 370. The petitioners challenge CO 272 as being *ultra vires* Article 370(1)(d) on the grounds that:

a. It modifies Article 370, which can only be done on exercise of power under Article 370(3); and

b. Only the State Government may accord "concurrence" to the President under the second proviso to Article 370(1)(d).

356. These arguments are considered in turn.

a. Amendment of Article 370 through Article 370(1)(d)

I. The application of the Constitution to the State of Jammu and Kashmir

357. Before adverting to the issue at hand, it is necessary to understand the structure of Article 370 and the mechanism by which different provisions of the Constitution were made applicable to the State of Jammu and Kashmir.

358. Article 370(1)(a) stipulates that the provisions of Article 238 shall not apply in relation to the State of Jammu and Kashmir. Article 238 concerned the application of the provisions of Part VI of the Constitution to States in Part B of the First Schedule. Article 238 was repealed by the Constitution (Seventh

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Amendment) Act 1956, which modified the categorisation of the constituent units in the country and did away with the distinction between Part A States and Part B States. Article 370(1)(b) limits the powers of Parliament to make laws for the State of Jammu and Kashmir, as specified in sub-clauses (i) and (ii) of the provision.

359. Article 370(1)(c) stipulates that the provisions of Article 1 and "*of this article*" shall apply in relation to the State of Jammu and Kashmir. The import of Article 370(1)(c) is that Article 1 as well as "*this Article*," meaning Article 370, applies to the State of Jammu and Kashmir. Neither Article 370 nor any other provision of the Constitution contemplates a modification or amendment of the application of Article 1 to the State of Jammu and Kashmir. Article 1 is therefore applicable to the State without any exceptions, modifications, or amendments and without the possibility of any exceptions, modifications, or amendments. This is in accordance with the principle that Article 1 is founded on the territorial integrity and unity of India. As a Constitution Bench of this Court observed in **Raja Ram Pal** v. **Hon'ble Speaker, Lok Sabha**,[256] "*India is an indestructible Union of destructible units.*"[257] The indestructible nature of the Union of India[258] is underscored by its application to the State of Jammu and Kashmir, which was otherwise subject to a special federal arrangement by virtue of Article 370. The State of Jammu and Kashmir is an integral part of the Union of India.

[256] (2007) 3 SCC 184
[257] Ibid at paragraph 27.
[258] Subject to the sovereign power of the nation to acquire or cede territories, as recognized in In re Berubari Union's case (supra).

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360. Article 370, on the other hand, could be amended or modified in its application to the State. Clause (3) of Article 370 stipulates that the President may declare that "*this article*" shall cease to be operative or shall be operative only with such exceptions and modifications as he may specify:

> "(3) Notwithstanding anything in the foregoing provisions of this article, the President may, by public notification, declare that this article shall cease to be operative or shall be operative only with such **exceptions and modifications** and from such date as he may specify:
>
> Provided that the recommendation of the Constituent Assembly of the State referred to in clause (2) shall be necessary before the President issues such a notification."
>
> (emphasis supplied)

361. The President was empowered to exercise this power by issuing a public notification. The proviso to this provision provides that the recommendation of the Constituent Assembly of the State shall be necessary before the President issues such a notification. The term "*this article*" in clause (3) refers to Article 370. Clause (3), therefore, provides for the manner in which the application of Article 370 to the State of Jammu and Kashmir can be amended or abrogated.

362. Article 370(1)(d) provides that "*such of the **other provisions***" of the Constitution shall apply to the State of Jammu and Kashmir as the President may by order specify. The first proviso requires the President to issue an order which relates to the matters specified in the IoA referred to in Article 370(1)(b)(i) in consultation with the State Government. The second proviso requires the President to issue orders which relate to matters other than those

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specified in the IoA with the concurrence of the State Government. The term "other provisions" indicates that the procedure laid down by Article 370(1)(d) applies to provisions other than the ones indicated in sub-clauses (a) to (c) of clause (1) of Article 370.

363. From this standpoint of Article 370, the following position on the application of the Constitution to the State of Jammu and Kashmir emerges:

a. Article 238 (before it was repealed) did not apply to the State;

b. Article 1 applies to the State. Its application can neither be modified nor amended nor can it cease to operate;

c. Article 370 applied to the State. Its application could be modified or amended or it could cease to be operative by the issuance of a public notification in accordance with the procedure prescribed by clause (3) of Article 370; and

d. The provisions of the Constitution, other than Articles 1, 238 (before it was repealed), and 370 shall apply to the State as specified by the President by way of orders, with any exceptions and modifications. The procedure contemplated by Article 370(1)(d) must be followed in this case.

364. At this juncture, it is crucial to understand the difference between Article 370(1)(a), Article 370(1)(c) and Article 370(1)(d). Article 370 (1)(a) stipulates that the provisions of Article 238 shall not apply to Jammu and Kashmir. Article 370(1)(c) provides that Article 1 and Article 370 shall apply to Jammu

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and Kashmir. Article 370(1)(d) lays down the procedure by which any "other" provision of the Constitution can be modified or amended in its application to the State of Jammu and Kashmir. The expression "other" will exclude Articles 1, 238, and 370. Hence, recourse must be had to the procedure contemplated by Article 370(3) if Article 370 is to cease to operate or is to be amended or modified in its application to the State of Jammu and Kashmir.

365. It is trite law that a power under a statute must be exercised in accordance with the provisions of that statute and in no other manner. In **J.N. Ganatra** v. **Morvi Municipality**,[259] this Court set aside the dismissal of an employee by the respondent municipality on the ground that it had failed to comply with the procedure for dismissal set out in the relevant rule:

> "4. It is no doubt correct that the General Board of the Municipality had the power under the Act to dismiss the appellant but the said power could only be exercised in the manner indicated by Rule 35 of the Rules. Admittedly the power of dismissal has not been exercised the way it was required to be done under the Act. **It is a settled proposition of law that a power under a statute has to be exercised in accordance with the provisions of the statute and in no other manner.** In view of the categoric finding given by the High Court to the effect that the order of dismissal was on the face of it illegal and void, we have no hesitation in holding that the dismissal of the appellant was not an act done in pursuance or execution or intended execution of the Act."
>
> (emphasis supplied)

366. The same rule of construction has been used in the context of various other statutes[260] and is undoubtedly applicable to the Constitution. The principle

[259] (1996) 9 SCC 495
[260] Commissioner of Income Tax, Mumbai v. Anjum M.H. Ghaswala, (2002) 1 SCC 633; State of Uttar Pradesh v. Singhara Singh, 1963 AIR 358

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underlying this rule is that the provision may as well have not been enacted if the procedure it provides is not followed.[261]

II. Paragraph 2 of CO 272

367. CO 272 was issued in exercise of the power under Article 370(1)(d). Paragraph 2 of CO 272 is extracted below:

> "2. All provisions of the Constitution, as amended from time to time, shall apply in relation to the State of Jammu and Kashmir and the exceptions and modifications subject to which they shall so apply shall be as follows: -
>
> To article 367, there shall be added the following clause, namely: -
>
> "(4) For the purposes of this Constitution as it applies in relation to the State of Jammu and Kashmir –
>
> (a) references to this Constitution or to the provisions thereof shall be construed as references to the Constitution or the provisions thereof as applied in relation to the said State;
>
> (b) references to the person for the time being recognized by the President on the recommendation of the Legislative Assembly of the State as the Sadar-i-Riyasat of Jammu and Kashmir, acting on the advice of the Council of Ministers of the State for the time being in office, shall be construed as references to the Governor of Jammu and Kashmir;
>
> (c) references to the Government of the said State shall be construed as including references to the Governor of Jammu and Kashmir acting on the aid and 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"."**
>
> (emphasis supplied)

[261] State of Uttar Pradesh v. Singhara Singh, 1963 AIR 358

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368. Paragraph 2 of CO 272 applies the entire Constitution of India (as amended from time to time) to the State of Jammu and Kashmir. While paragraph 2 does not specify any exceptions, it sets out a modification. It adds clause (4) to Article 367. Article 367, without the modification specified by CO 272, reads as follows:

> "367. Interpretation.—(1) Unless the context otherwise requires, the General Clauses Act, 1897, shall, subject to any adaptations and modifications that may be made therein under Article 372, apply for the interpretation of this Constitution as it applies for the interpretation of an Act of the Legislature of the Dominion of India.
>
> (2) Any reference in this Constitution to Acts or laws of, or made by, Parliament, or to Acts or laws of, or made by, the Legislature of a State, shall be construed as including a reference to an Ordinance made by the President or, to an Ordinance made by a Governor, as the case may be.
>
> (3) For the purposes of this Constitution "foreign State" means any State other than India:
>
> Provided that, subject to the provisions of any law made by Parliament, the President may by order declare any State not to be a foreign State for such purposes as may be specified in the order."

369. CO 272 applies the entire Constitution to the State of Jammu and Kashmir with a 'modification' to Article 367 by way of sub-clause (d) of the newly inserted clause (4). In terms of this modification, the term "Constituent Assembly of the State referred to in clause (2)" in the proviso to Article 370(3) shall be read as "Legislative Assembly of the State." In terms of this modification, the proviso to Article 370(3) would read as follows:

> "Provided that the recommendation of the Legislative Assembly of the State shall be necessary before the President issues such a notification."

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370. The petitioners have challenged paragraph 2 of CO 272 on the ground that a Constitutional Order issued in exercise of the power under Article 370(1)(d) cannot amend Article 370 itself.

III. The substance or effect of a provision is more important than its form

371. Other similar provisions of the Constitution and the interpretation accorded to them by this Court are instructive in the exercise of assessing whether the procedure followed in this case is valid. Article 368 of the Constitution provides for the procedure by which the Constitution may be amended. Clause (2) of Article 368 is extracted below:

> "Power of Parliament to amend the Constitution and procedure therefor.—
>
> …
>
> (2) An amendment of this Constitution may be initiated only by the introduction of a Bill for the purpose in either House of Parliament, and when the Bill is passed in each House by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting, it shall be presented to the President who shall give his assent to the Bill and thereupon] the Constitution shall stand amended in accordance with the terms of the Bill:
>
> Provided that if such amendment seeks to make any **change** in—
>
> (a) Article 54, Article 55, Article 73, 566[Article 162, Article 241 or Article 279-A, or
>
> (b) Chapter IV of Part V, Chapter V of Part VI, or Chapter I of Part XI, or
>
> (c) any of the Lists in the Seventh Schedule, or

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> (d) the representation of States in Parliament, or
>
> (e) the provisions of this article,
>
> the amendment shall also require to be ratified by the Legislature of not less than one-half of the States by resolutions to that effect passed by those Legislatures before the Bill making provision for such amendment is presented to the President for assent.
>
> …"
>
> (emphasis supplied)

372. Clause (2) of Article 368 provides that the Constitution may be amended when a Bill for the purpose is passed in each House of Parliament by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting. However, an amendment which seeks to make any "change" to certain specified provisions is required to be ratified by the legislatures of not less than one-half of the States in the manner provided, before the Bill is presented to the President for assent. A long line of cases concerning Article 368 of the Constitution have prioritised the substance or effect of an amendment while testing whether the proviso to Article 368 would be attracted.

373. In **Shankari Prasad Singh Deo** v. **Union of India**,[262] this Court adjudicated whether the Constitution (First Amendment) Act 1951, by which Articles 31-A and 31-B were inserted in the Constitution of India was *ultra vires*. One of the arguments advanced by the petitioners in this case was that the concerned Bill ought to have been ratified in terms of the procedure contemplated by the proviso to Article 368(2) because the impugned articles curtailed the powers

[262] 1951 SCC 966

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of the High Courts under Article 226 and of this Court under Articles 132 and 136. Rejecting this argument, this Court held that the impugned articles did not make any change to Articles 226, 132 or 136:

> "**17.** It will be seen that these Articles do not either **in terms or in effect** seek to make any change in Article 226 or in Articles 132 and 136. …"
>
> (emphasis supplied)

374. In **Sajjan Singh** v. **State of Rajasthan**,[263] this Court adjudicated the validity of the Constitution (Seventeenth Amendment) Act 1964 by which Article 31-A was amended and forty-four statutes were added to the Ninth Schedule to the Constitution. Here too, one of the questions was whether the procedure prescribed by the proviso to Article 368 ought to have been followed. This Court rejected the challenge:

> "14. … The impugned Act does not purport to change the provisions of Article 226 and **it cannot be said even to have that effect directly or in any appreciable measure**. That is why we think that the argument that the impugned Act falls under the proviso, cannot be sustained. It is an Act the object of which is to amend the relevant Articles in Part III which confer fundamental rights on citizens and as such it falls under the substantive part of Article 368 and does not attract the provisions of clause (b) of the proviso. **If the effect of the amendment made in the fundamental rights on Article 226 is direct and not incidental and is of a very significant order, different considerations may perhaps arise**. But in the present case, there is no occasion to entertain or weigh the said considerations."
>
> (emphasis supplied)

[263] 1964 SCC OnLine SC 25

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375. Although the court relied on the object of the impugned statute, it placed equal emphasis on its effect. Its reasoning indicates that the effect must be of an appreciable or significant degree.

376. This line of precedent was consolidated in **Kihoto Hollohan** v. **Zachillhu**,[264] where a Constitution Bench of this Court was called upon to determine the constitutional validity of the Tenth Schedule to the Constitution. One of the grounds of challenge was that paragraph 7 of the Tenth Schedule brought about a change in the operation of Articles 136, 226 and 227 of the Constitution and that the concerned Bill ought to have been passed in compliance with the procedure laid down by the proviso to clause (2) of Article 368. Paragraph 7 of the Tenth Schedule is extracted below:

> "7. Bar of jurisdiction of courts. — Notwithstanding anything in this Constitution, no court shall have any jurisdiction in respect of any matter connected with the disqualification of a member of a House under this Schedule."

377. Articles 136, 226 and 227 concern the jurisdiction of this Court and the High Courts respectively and the power of judicial review. Article 136 finds a place in Chapter IV of Part V and Articles 226 and 227 are present in Chapter V of Part VI. The proviso to clause (2) of Article 368 stipulates that a constitutional amendment which seeks to make a change to these chapters must be ratified in the manner provided, before the Bill which seeks to make such amendments is presented to the President for assent. The petitioners argued that the Bill inserting the Tenth Schedule attracted the proviso to Article 368(2)

[264] 1992 Supp (2) SCC 651

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because it curtailed the power of judicial review and therefore, ought to have been ratified by the prescribed number of States before it was presented to the President for assent.

378. The majority, speaking through M N Venkatachaliah, J., rejected the challenge to the Tenth Schedule. However, it held that paragraph 7 had the effect of changing the application of Articles 136, 226, and 227, thereby attracting the proviso to Article 368(2). It found that paragraph 7 was severable from the other provisions of the Tenth Schedule and struck down paragraph 7 alone. The observations of this Court on the effect of paragraph 7 on the provisions which concerned judicial review are instructive and are extracted below:

> "61. … The changes in Chapter IV of Part V and Chapter V of Part VI envisaged by the proviso need not be direct. The change could be either "in terms of or in effect". It is not necessary to change the language of Articles 136 and 226 of the Constitution to attract the proviso. **If in effect these articles are rendered ineffective and made inapplicable where these articles could otherwise have been invoked or would, but for Paragraph 7, have operated there is 'in effect' a change in those provisions attracting the proviso.** …
>
> 62. In the present case, though the amendment does not bring in any change directly in the language of Articles 136, 226 and 227 of the Constitution, however, in effect paragraph 7 curtails the operation of those articles respecting matters falling under the Tenth Schedule. There is a change in the effect in Articles 136, 226 and 227 within the meaning of clause (*b*) of the proviso to Article 368(2). Paragraph 7, therefore, attracts the proviso and ratification was necessary. …"
>
> (emphasis supplied)

379. This Court determined the validity of paragraph 7 by considering whether it changed Articles 136, 226 and 227 "in terms of or in effect." It found that while

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the language of these provisions was not directly amended, the effect of paragraph 7 was to change the operation of these provisions. This approach indicates that this Court was concerned more with the substance of the constitutional amendment as opposed to its form. The minority judgment in **Kihoto Hollohan** (supra) concurred with the ruling of the majority on the constitutional validity of paragraph 7 but differed on the question of the validity of the entire Tenth Schedule, holding that it was constitutionally infirm in its entirety. Its approach to the interpretation of the issue concerning paragraph 7 was similar to that of the majority.[265]

380. Finally, in **Union of India** v. **Rajendra N. Shah**,[266] this Court adjudicated the vires of the Constitution (Ninety Seventh Amendment) Act 2011 which *inter alia* introduced Part IXB under a chapter titled 'The Co-operative Societies.' In particular, this Court dealt with the question of whether Part IXB was *non est* for want of ratification by half of the States under the proviso to Article 368(2). Answering the question in the affirmative, this Court held that:

> "56. A reading of the aforesaid judgments would indicate that the "change" spoken about by Article 368(2) proviso in any provision of the Constitution need not be direct in the sense of adding, subtracting, or modifying the language of the particular Article or provision spoken of in the proviso. The judgments above referred to speak of a 'change-in effect' which would mean a change which, though not in the language of any provision of the Constitution, would yet be a change which would impact a particular article and the principle contained therein in some significant way.
>
> …

[265] Paragraph 162: "…Thus, this extinction of the remedy alone without curtailing the right, since the question of disqualification of a Member on the ground of defection under the Tenth Schedule does require adjudication on enacted principles, **results in making a change** in Article 136 in Chapter IV in Part V and Articles 226 and 227 in Chapter V in Part VI of the Constitution." (emphasis supplied)
[266] 2021 SCC OnLine SC 474

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> 61. It is always important to remember that in matters affecting the Constitution of India, form always gives way to substance."

381. From the above discussion, it emerges that the following aspects are of significance when assessing whether a change has been made to a provision of the Constitution:

a. A change may be either in terms of or in its effect;

b. A change can be said to have been made even if the language of the concerned provision is not directly amended, by adding, subtracting or modifying the language. This is a change in effect;

c. If the effect of an amendment is to change a provision, such effect must be significant or appreciable; and

d. The substance of a change is more important than its form.

Although this position of law relates to the proviso to Article 368(2), it is equally applicable to Article 370(3). This is because the precedents discussed in this segment explore the manner in which a 'change' may be effected as well as what a 'change' means at its core. While Article 370(3) employs the word 'modification' and not 'change,' the two terms are synonyms. Further, both articles concern, in essence, amendments to a provision of the Constitution. Therefore, the standards which have been set out in the preceding paragraph to determine whether a 'change' was made apply to a determination of whether a 'modification' was made. It follows that an assessment of whether a Constitutional Order amounts to a 'modification' under Article 370(3) and

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consequently, whether the procedure under Article 370(1) or under Article 370(3) ought to have been followed depends on the standard set out in the preceding paragraph.

IV. The validity of modification of Article 367

382. The effect of a provision of law is as important as its form. In other words, what it actually does is as significant as what it appears to do, if not more. While the change sought to be made by paragraph 2 of CO 272 may appear to be a 'modification' or amendment of Article 367 at first blush, its **effect** is to amend Article 370 itself. Paragraph 2 couches the amendment to Article 370 in the language of an amendment or modification to Article 367 but its true import is to amend Article 370.

383. CO 272 purports to add Clause 4 to Article 367 and stipulates that the expression 'Constituent Assembly' in the proviso to Article 370(3) shall be read as 'Legislative Assembly.' The proviso to Article 370(3) states that the recommendation of the Constituent Assembly referred to in Clause 2 is necessary. Clause 2 of Article 370 refers to the Constituent Assembly for the purpose of framing the Constitution of the State. Thus, the proviso to Article 370(3) confers the power to make recommendations to that specific Constituent Assembly. CO 272 changes the language to the proviso to Article 370(3) in two ways. First, it changes the recommending body from the Constituent Assembly to the Legislative Assembly; and second, it makes a new arrangement at variance with that specific Constituent Assembly.

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384. Both these changes are not insignificant because they modify the essential character of the proviso by substituting a particular type or kind of body with another type or kind entirely. There are myriad differences between a Constituent Assembly and Legislative Assembly. A Constituent Assembly is tasked with framing a Constitution in exercise of constituent power. The power to amend a Constitution is a derived constituent power – 'derived' because it originates in the Constitution. Not having been entrusted with the responsibility to do this, the Legislative Assembly cannot be equated to the Constituent Assembly. Statutes and other laws (which fall within the domain of the Legislative Assembly) are not comparable to a Constitution because they are framed and enacted in exercise of legislative power. The Constitution is the grundnorm or the basic law, from which all other laws derive their validity and legitimacy. Indeed, the Legislative Assembly is itself constituted and constrained to operate in terms of the Constitution and is bound by it. This is not true of a Constituent Assembly, which has a free reign to frame a Constitution. As the scholar Martin Loughlin writes,

> "…constituent power is not the expression of the nation operating in accordance with some law of nature; it is a modern concept expressing the evolving precepts of political conduct which breathe life into the constitution."[267]

385. This remains true despite the Legislative Assembly of Jammu and Kashmir having the power to amend the Constitution of Jammu and Kashmir under Section 147. The difference between the plenary power to frame a

[267] Martin Loughlin, 'On constituent power' in Michael W. Dowdle and Michael A. Wilkinson (eds.) *Constitutionalism Beyond Liberalism*, Cambridge University Press, 2017

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Constitution and the power to amend a Constitution was recognized by this Court in **I.R. Coelho** v. **State of T.N.**:[268]

> "54. … No provision of the Constitution framed in exercise of plenary law-making power can be ultra vires because there is no touchstone outside the Constitution by which the validity of provision of the Constitution can be adjudged. The power for amendment cannot be equated with such power of framing the Constitution. The amending power has to be within the Constitution and not outside it."

386. In **Indira Nehru Gandhi** v**. Raj Narain**,[269] this Court expounded the meaning of constituent power:

> "48. When the constituent power exercises powers the constituent power comprises legislative, executive and judicial powers. All powers flow from the constituent power through the Constitution to the various departments or heads. In the hands of the constituent authority there is no demarcation of powers. It is only when the constituent authority defines the authorities or demarcates the areas that separation of power is discussed. The constituent power is independent of the doctrine of separation of powers. The constituent power is sovereign. It is the power which creates the organs and distributes the powers.
>
> 49. The constituent power is sui generis. It is different from legislative power. The position of unlimited law-making power is the criterion of legal sovereignty. The constituent power is sovereign because the Constitution flows from the constituent power."

387. In framing a Constitution, which is basic law, Constituent Assemblies deliberate upon and determine the mode and mechanism of governance, the rights of the people, the restrictions on state power, the scope of functioning of various institutions, the yardstick for the legality of state action, and other matters, all of which go to the heart of its vision and mission for the nation or the constituent unit (that is, the State) in question. A Constituent Assembly

[268] (2007) 2 SCC 1
[269] 1975 Supp SCC 1

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lays the foundation upon which the government will be built for ages to come. In contrast, the Legislative Assembly is concerned with statutes, rules, and regulations by which it responds to developments in society in real time. It is concerned with the day-to-day functioning of the state, which are short-term concerns relative to the concerns accounted for by a Constituent Assembly. The mode of appointment of the members of these bodies, too, is not similar.

388. Article 366 of the Constitution lays down the definition of the phrases used in the Constitution. These definitions shall apply **unless the context** requires otherwise. Article 367(1) of the Constitution states that **unless the context** otherwise requires, the General Clauses Act 1897 shall subject to any adaptations and modifications made under Article 372 apply for the interpretation of the Constitution as it applies for the interpretation of an Act of the Legislature of the Dominion of India. Article 372(2) grants the President the power to issue an order to make adaptations and modifications to any law which was in force immediately before the commencement of the Constitution to bring such law in accordance with the provisions of this Constitution. Clause 2 of Article 367 states that a reference to an Act of the Legislature of the State or Parliament shall be "construed" as including a reference to an Ordinance made by the Governor in exercise of power under Article 223 and the President in exercise of power under Article 123. Clause 2 of Article 367 merely reiterates the position of law in Articles 123 and 213 that an Ordinance shall have the same force and effect as an Act passed by a Legislature. Clause 3 to Article 367 states that for the purpose of the Constitution, "foreign State" means any State other than India. It must be noted that both Articles

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366 and 367 begin with the phrase "unless the context otherwise requires". The purpose of including this phrase is that the general definitions which are provided in Article 366 and the General Clauses Act must not render the constitutional provision otiose or alter the purpose of the provision itself. This is itself indicative that neither the interpretation clause nor the definition clause can be used to substantively alter any of the provisions of the Constitution.

389. It is trite law that there is no bar on legislative bodies defining a word or term in an 'interpretation' clause artificially[270] such that the term is stretched or shrunk or otherwise given an artificial projection to make it more meaningful or to subserve the objective of the statute.[271] The fundamental difference between a Constituent Assembly and a Legislative Assembly renders the modification of Article 367 a modification of Article 370(3), which has an effect that is appreciable and substantive. The difference is of a magnitude as to change the essential character of the proviso to Article 370. While the 'interpretation' clause can be used to define or give meaning to particular terms, it cannot be deployed to amend a provision by bypassing the specific procedure laid down for its amendment. This would defeat the purpose of having a procedure for making an amendment.

390. The consequence of permitting amendments through the circuitous manner would be disastrous. Many provisions of the Constitution would be susceptible to amendments which evade the procedure stipulated by Article 368 or other

[270] Kishan Lal v. State of Rajasthan, 1990 Supp SCC 742; Feroze N. Dotivala v. P.M. Wadhwani, (2003) 1 SCC 433
[271] CIT v. Sundaram Spinning Mills, (2000) 1 SCC 466

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provisions. For instance, Articles 243D, 243T, 330 and 332 provide for the reservation of seats for Scheduled Castes in Panchayats, Municipalities, the Lok Sabha and the Legislative Assemblies of States respectively. Each of these provisions uses the word "shall" while prescribing reservation. This is indicative of the mandatory nature of the provision. Article 341 stipulates that the President may specify the castes, races or tribes or parts of or groups within castes, races or tribes which shall be deemed to be Scheduled Castes for the purposes of the Constitution. Theoretically, can a public notification which deletes all castes, races or tribes or parts of or groups within them from the list of Scheduled Castes be contemplated? The consequence would be that no caste, race or tribe would be considered a Scheduled Caste for the purposes of the Constitution and the mandate of Articles 243D, 243T, 330 and 332 would be obviated without following the procedure prescribed by Article 368. Hence, amendments cannot be carried out by bypassing a procedure which has been laid down for that purpose.

391. The decision of this Court in **Madhav Rao Jivaji Rao Scindia** v. **Union of India**[272] supports this interpretation. Article 291 of the Constitution stipulated that where under any covenant or agreement entered into by the Ruler of any Indian State before the commencement of the Constitution, the payment of any sums free of tax has been guaranteed or assured by the Government of the Dominion of India to any Ruler of the State as a Privy Purse, such sums would be:

[272] (1971) 1 SCC 85

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a. charged on and paid out of the Consolidated Fund; and

b. be exempt from all taxes on income.

392. Article 366(21) as originally enacted and before its deletion by the Seventh Amendment contained a definition of the expression 'Rajpramukh':

> "(21) 'Rajpramukh' means—
>
> (*a*) in relation to the State of Hyderabad, the person who for the time being is recognised by the President as the Nizam of Hyderabad;
>
> (*b*) in relation to the State of Jammu and Kashmir or the State of Mysore, the person who for the time being is recognised by the President as the Maharaja of that State; and
>
> (*c*) in relation to any other State specified in Part B of the First Schedule, the person who for the time being is recognised by the President as the Rajpramukh of that State, and includes in relation to any of the said States any person for the time being recognised by the President as competent to exercise the powers of the Rajpramukh in relation to that State,"

393. With the reorganization of the States in 1956 and the deletion of classification of States to Part A, Part B, and Part C States, the definition became obsolete and was deleted. Clause (22) of Article 366 defined the expression 'Ruler' in relation to an Indian State to mean the Prince, Chief or other person by whom a covenant or agreement referred to in Article 291(1) was entered into and who, for the time being, was recognized as the Ruler of the State by the President. The definition extended to any person who was recognised by the President as being the successor of the Ruler.

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394. Before Article 362 was repealed in 1971,[273] it provided that in making laws or in exercise of their executive powers, Parliament and the Union and States shall have due regard to the guarantees or assurances given under any covenant under clause (1) of Article 291 with respect to the personal rights, privileges and dignities of the Ruler of an Indian State. The Privy Purses and the privileges of the Rulers of the Indian States were continued until 6 September 1970. The Twenty-fourth Amendment Bill for terminating the Privy Purses was moved in the Lok Sabha. While the Lok Sabha passed the Bill with a 2/3rd majority, the requisite majority was not attained in the Rajya Sabha. When the Bill to amend the Constitution to delete the Privy Purses failed to pass muster, the President issued an Order withdrawing recognition of all the Rulers of Indian States on 6 September 1970. This gave rise to the petitions under Article 32 of the Constitution.

395. Chief Justice M Hidayatullah, speaking for a eleven-Judge Bench, rejected the contention of the Union of India that the petitions ought to fail in view of the bar contained in Article 363 of the Constitution. This was because the petitions sought to enforce the provisions of the Constitution relating to the covenants and agreements entered into by the erstwhile Rulers. Construing the provisions of Article 291, Hidayatullah, J. held that the immediate and dominant purpose of Article 291 was to ensure payment of Privy Purses, charge them under the Consolidated Fund and make them free of taxes on income. What was sought to be enforced was not the covenants of the

[273] The Constitution (Twenty-sixth) Amendment Act 1971

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instruments or agreements which were entered into with the Rulers by the Dominion but the mandate of Article 291 itself. The Orders of the President were held to be *ultra vires*. J C Shah, J. held that by the provisions enacted in Articles 366(22), 291 and 362, the privileges of the Rulers were made an integral part of the constitutional scheme by which a class of citizens, for historical reasons, was accorded special privileges. These privileges, the learned Judge held, could not be withdrawn arbitrarily by merely exercising the power under Article 366(22) to withdraw recognition. Article 291 was held to raise an obligation of the Union to pay the Privy Purses. K S Hegde, J. noted that the power under Article 366(22) was being exercised for a collateral purpose after the Bill to amend the Constitution to delete Articles 291, 362 and 366(22) had failed. The learned Judge held that it was not open to the Union Government to obviate complying with the provisions of the Constitution by taking recourse to the power under Article 366(22).

396. The decision of the Constitution Bench in **Raghunathrao Ganpatrao** v. **Union of India**[274] arose from a challenge to the constitutional validity of the Twenty-sixth constitutional Amendment.[275] Articles 291 and 362 of the Constitution stood repealed by constitutional amendment and a new Article, Article 363A, was inserted resulting in the deprivation of the recognition accorded to the Rulers, declaring the abolition of the Privy Purses, and extinguishing the rights and obligations in respect of the Privy Purses.

[274] 1994 Supp (1) SCC 191
[275] Constitution (Twenty-sixth Amendment) Act 1971

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397. Adverting to the earlier decision in **Madhav Rao Scindia** (supra), the Constitution Bench noted that the obligation to pay Privy Purses emanated from the Constitution and not in the covenants and agreements which were executed by the erstwhile Rulers. The Court held that the guarantees and assurances given under the Constitution were independent of the documents relating to their accession. Hence, after the introduction of Articles 291 and 362, the agreements and covenants had no existence at all and no obligation emanated from them. Rejecting the argument that the Privy Purses constituted an essential part of the constitutional structure so as to be a part of the basic structure, the Court held that the permanent retention of the Privy Purses and the privileges and rights "would be incompatible with the sovereign and republican form of Government." The Constitution Bench rejected the submission that the grant of the Privy Purses was a consideration for the surrender of sovereignty by the Rulers of the Indian States. L M Sharma, J. noted:

> "97. A serious argument has been advanced that the privy purse was a just quid pro quo to the Rulers of the Indian States for surrendering their sovereignty and rights over their territories and that move for integration began on a positive promising note but it soon degenerated into a game of manoeuvre presumably as a deceptive plan or action. This argument based on the ground of breaking of solemn pledges and breach of promise cannot stand much scrutiny. To say that without voluntary accession, India i.e. Bharat would be fundamentally different from that Bharat that came into being prior to the accession is untenable much less inconceivable … the integration could have been achieved even otherwise. One should not lose sight of the fact that neither because of their antipathy towards the Rulers nor due to any xenophobia, did the Indian Government entertain the idea of integration but because of the will of the people. It was the people of the States who were basically instrumental in the integration of India."

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398. The Court held that "the attitude of the princes towards joining a united India was one of resistance, reluctance and high bargain and it was the people of the States who forced them to accede to the new United India." The States, in other words, "were free but not stable because of the stress and strain they underwent both from inside and outside." Through the process of integration and democratisation (or unionization, as Sardar Patel called it), multiple forces – political, economic and geographic, and the democratic movement within the States accelerated the process of integration. The removal of Articles 291 and 362 was held not to infringe the basic structure of the Constitution. S Mohan, J. noted that though in **Madhav Rao Scindia** (supra), Articles 291 and 366(22) were held to be an "integral part of the Constitution", this statement by itself in the judgment of J C Shah, J. did not elevate those articles to be a part of the basic structure of the Constitution. Mohan, J. held:

> "198. No doubt, unity and integrity of India would constitute the basic structure as laid down in *Kesavananda Bharati case* [*Kesavananda Bharati* v. *State of Kerala*, (1973) 4 SCC 225] but it is too far-fetched a claim to state that the guarantees and assurances in these articles have gone into the process of unification and integration of the country. One cannot lose sight of the fact that it was the will of the people and the urge to breathe free air of independent India as equal citizens that brought about the merger of these princely States. Therefore, the contention that the Articles 291 and 362 facilitated the organic unity of India is unacceptable."

399. Having discussed the two judgments (of the 11-judge Bench in **Madhav Rao Scindia** (supra) and of the Constitution Bench in **Raghunathrao Ganpatrao** (supra)), it becomes necessary to summarise the principles which are relevant to the present controversy:

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a. The guarantee of Privy Purses to the rulers of the erstwhile Indian states who had acceded to or merged with the Union emanated from the text of the Constitution (Article 291 and Article 366(22)) and not from the agreements antecedent to the adoption of the Constitution entered into by the rulers with the Dominion of India;

b. So long as Article 291 continued to subsist, the abrogation of the Privy Purses could not be brought about by an executive act of de-recognition of the rulers;

c. Once the Constitution was itself amended so as to delete the entitlement of the erstwhile Rulers to receive Privy Purses and the corresponding obligation of the Union to pay Privy Purses, both the right and the obligation embodied in Article 291 came to an end;

d. The payment of Privy Purses could not be regarded as a *quid pro quo* or consideration for the surrender of sovereignty by the erstwhile rulers of Indian states. Integration into the Union of India was a complex historical process which was shaped by history, politics, economics and geography as well as by the internal and external strains which were faced by the rulers and above all by the process of democratisation which was taking place in the Union of India;

e. Article 291 and Article 366 (22) were not a part of the basic features of the Constitution. J C Shah, J. in **Madhav Rao Jivaji Rao Scindia** (supra) held that these Articles were an “integral part” of the Constitution. Tested on the anvil of the basic structure doctrine which was evolved in

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Kesavananda Bharati v. **State of Kerala**,[276] this decision being subsequent to **Madhav Rao Scindia** (supra), the Constitution Bench held in **Raghunathrao Ganpatrao** (supra) that those observations could not be elevated to construe Articles 291 and 366(22) to be a part of the basic features;

f. The abrogation of Articles 291 and 366(22) by a constitutional amendment was as much a part of the political process which had commenced with the integration of the erstwhile princely States into the Union of India and the ultimate act of abrogation was a part of that political process designed to bring about substantive equality by doing away with the privileges which were extended to the erstwhile Indian rulers; and

g. While the decision in **Madhav Rao Scindia** (supra) held that the guarantee under Article 291 could not be abrogated by a mere executive act of de-recognising the erstwhile rulers of the Indian states, the subsequent decision in **Raghunathrao Ganpatrao** (supra) upheld the act of abrogation once it was backed by a constitutional amendment which deleted the provisions for the payment of Privy Purses.

400. The discussion of the decisions in these two cases makes it evident that in **Madhav Rao Scindia** (supra), this Court held that the power under Article 366(22) could not be used for a collateral purpose, to obviate the procedure under Article 368. This position of law was not diluted by **Ragunathrao**

[276] (1973) 4 SCC 225

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Ganpatrao (supra). In the present case, Article 370(1)(c) read with the proviso to Article 370(3) provides a procedure by which Article 370 may be modified. Articles 370(1)(d) and 367 cannot be used for a collateral purpose in effect to modify or obliterate Article 370.

V. Previous Constitutional Orders which modified Article 367

401. The Union of India argued that CO 272 was not the first Constitutional Order issued to modify Article 370 through Article 367. It flagged that this mechanism has been followed consistently in the past. The following Constitutional Orders were issued from time to time, which appear to modify or alter Article 370:

a. Constitutional Order 44,[277] issued in 1952;

b. Constitutional Order 48,[278] issued in 1954;

c. Constitutional Order 56,[279] issued in 1958; and

d. Constitutional Order 74,[280] issued in 1965.

402. The manner in which these Constitutional Orders sought to modify Article 370 is germane to this Court's enquiry as to the validity of paragraph 2 of CO 272. They are considered in turn.

[277] "CO 44"
[278] "CO 48"
[279] "CO 56"
[280] "CO 74"

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403. CO 44 was issued by the President in exercise of the power under Article 370(3). The relevant part reads thus

> "In exercise of the powers conferred by clause (3) of article 370 of the Constitution of India, the President, **on the recommendation of the Constituent Assembly of the State of Jammu and Kashmir**, is pleased to declare that, as from the 17th day of November, 1952, the said article 370 shall be operative with the modification that for the "Explanation" in clause (1) thereof the following Explanation is substituted, namely: -
>
> "Explanation - For the purposes of this article, the Government of the State means the person for the time being recognised 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."
>
> (emphasis supplied)

404. CO 44 modified the application of Article 370 by substituting the Explanation in sub-clause (b) of clause (1). Significantly, CO 44 was issued on the recommendation of the Constituent Assembly of Jammu and Kashmir. At that time, the Constituent Assembly was functioning. It was dissolved only in 1957 and until then, the procedure contemplated by the proviso to Article 370(3) could be (and was) followed. The modification of CO 44 was therefore valid and not comparable to paragraph 2 of CO 272.

405. The President issued CO 48 in exercise of the power under Article 370(1)(d). This Constitutional Order applied various provisions of the Constitution of India, with some modifications, to the State of Jammu and Kashmir. One of the modifications was sought to be effected by adding a provision to Article 367:

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> "(14) PART XIX.
>
> …
>
> (d) To article 367, there shall be added the following clause, namely:
>
> "(4) For the purposes of this Constitution as it applies in relation to the State of Jammu and Kashmir-
>
> (a) references to this Constitution or to the provisions thereof shall be construed as references to the Constitution or the provisions thereof as applied in relation to the said State;
>
> (b) references to the Government of the said State shall be construed as including references to the Sadar-i-Riyasat acting on the advice of his Council of Ministers;
>
> (c) references to a High Court shall include references to the High Court of Jammu and Kashmir;
>
> (d) references to the Legislature or the Legislative Assembly of the said State shall be construed as including references to the Constituent Assembly of the said State;
>
> (e) references to the permanent residents of the said State shall be construed as meaning persons who, before the commencement of the Constitution (Application to Jammu and Kashmir) Order, 1954, were recognised as State subjects under the laws in force in the State or who are recognised by any law made by the Legislature of the State as permanent residents of the State; and
>
> (f) references to the Rajpramukh shall be construed as references to the person for the time being recognised by the President as the Sadar-i-Riyasat of Jammu and Kashmir and as including references to any person for the time being recognised by the President as being competent io exercise the powers of the Sadar-i-Riyasat."

406. The route utilised by CO 48 and CO 272 are similar in that both Constitutional Orders modify Article 367 in its application to the State of Jammu and Kashmir. The similarities end there. The changes that CO 48 made by virtue of the addition of clause (4) to Article 367 do not amount to a 'modification' of

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Article 370 itself. This is because the changes are in the nature of clarifications:

a. CO 48 made large parts of the Constitution applicable to the State. However, considerable portions continued to remain inapplicable. Sub-clause (a) therefore clarified the extent of applicability and obviated confusion by providing that references to the Constitution or its provisions were to be construed as references to the Constitution as it applied to the State;

b. Sub-clause (b) merely reiterated what had already been achieved by CO 44, which followed the procedure prescribed by Article 370(3). It did not have any effect on the law as it then stood;

c. Sub-clause (d), which clarified that references to the Legislature of the State were to be construed as including the Constituent Assembly of the State, was necessitated by the fact that the latter had functioned as a legislature for the State and enacted several laws. Some of them were:

NAME OF THE ACT	ACT NO.	YEAR
Immovable Properties Requirement Orders (Validation) Act, 2009	V	Samvat, 2009
Vegetable Seeds Act, 2009	XII	Samvat, 2009
Prohibition of Smoking (Cinema and Theatre Halls) Act, 2009	XVIII	Samvat, 2009
Utilization of Lands Act, 2010	IV	Samvat, 2010
Enemy (Confiscation of Property)] Ordinance (Repeal) Act, 2011	III	Samvat, 2011
Anand Marriage Act, 2011	IX	Samvat, 2011

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Town Area Act, 2011	XVII	Samvat, 2011
Kahcharai Act, 2011	XVIII	Samvat, 2011
Transfer of Land (Validating) Act, 2011	XXVI	Samvat, 2011
Village Panchayat (Levy of Dharat) Validation Act, 2011	XXVII	Samvat, 2011
Opium Smoking Act, 2011	XXXVII	Samvat, 2011
Natural Calamities Destroyed Areas Improvement Act, 2011	XXXVIII	Samvat, 2011
Pharmacy Act, 2011	LIII	Samvat, 2011
Registration (Amendment and Validation of Transfer of Property) Act, 1955	VI	1955
Hindu Marriage Act, 1955	IV	1955
Legislative Assembly (Speakers Emoluments) Act, 1956	IV	1956
Ministers and Ministers of State Salaries Act, 1956	VI	1956

PARTICULARS		
Habitual Offenders (Control and Reform) Act, 1956	XI	1956
Prize Competitions Act, 1956	XII	1956
Civil Servants (Removal Doubts and Declaration of Rights) Act, 1956	XIV	1956
Government Servants (Held in Detention) Act, 1956	XV	1956
Registration of Deeds (Validation) Act, 1956	XXI	1956
Deputy Speakers and Deputy Chairman's Emoluments Act, 1956	XXIV	1956
Common Lands (Regulation) Act, 1956	XXIV	1956
Chowkidari Act, 1956	XXXVII	1956
Hindu Succession Act, 1956	XXXVIII	1956
Nurses, Midwives and Health Visitors Registration Act, 1956	XLI	1956
Christian Marriage and Divorce Act, 1957	III	1957

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Representation of People Act, 1957	IV	1957
Deputy Ministers Salaries and Allowance Act, 1957	VI	1957
Hindu Minority and Guardianship Act, 1957	VII	1957

407. Any provision which referred to the Legislative Assembly of the State would therefore be applicable to the Constituent Assembly which was filling the shoes of the former until its dissolution in 1957. The Constituent Assembly of Jammu and Kashmir continued to be treated as the Legislative Assembly and the provision enabling this was subsequently removed by CO 56 on 26 February 1958 after the Constituent Assembly ceased to exist; and

d. Sub-clauses (c) and (e), too, merely clarified the meaning to be accorded to certain terms without modifying their fundamental nature.

408. Hence, the modifications made by CO 48 to Article 367 were in the nature of clarifications. They did not amount to a modification of Article 370 itself either in terms or in effect, to a significant or appreciable extent.

409. The Union of India suggested that the insertion of sub-clause (d) was indicative of the fact that the terms ‘Legislative Assembly’ and ‘Constituent Assembly’ were used synonymously. It averred that the two organs were co-equal in the context of the State of Jammu and Kashmir. This argument cannot be accepted. Sub-clause (d) was inserted in recognition of the state of affairs which existed at the time, namely, that the Constituent Assembly had enacted certain laws for the State prior to the constitution of the

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Legislative Assembly. This does not indicate that the two organs were at par with one another. While the Constituent Assembly may have discharged the functions of the Legislature for some time, its role did not end there. The task of framing a Constitution is different from the function of enacting laws. The other differences between the two bodies have been discussed in detail in the preceding segments of this judgment.

410. CO 56 modified CO 48 *inter alia* by substituting the word “Rajpramukh” with the word “Governor” in the following terms:

> “(b) clause (c) shall be omitted', and clause (d) shall be re-lettered as clause (c);
>
> (c) in clause (c) as so re-lettered, in new clause (4) of Article 367, -
>
> (i) sub-clause (d) shall be omitted, and sub-clauses (e) and (f) shall be re-lettered as sub-clauses (d) and (e) respectively;
>
> (ii) in sub-clause (e) as so re-lettered, for the word "Rajpramukh", the word "Governor" shall be substituted”

411. The Constitution (Seventh Amendment) Act 1956 did away with the position of ‘Rajpramukh’ and introduced the ‘Governor’ in its place. The portion of CO 56 extracted above, like CO 48, was a clarificatory provision introduced to recognise the state of affairs which existed at the time. Both CO 48 and CO 56 did not attempt to change or modify the law as it then existed. Rather, they clarified that the law would continue to apply in the same manner even after certain changes to the Constitution had been effected by other Amending Acts. They are most accurately classified as consequential amendments to the Constitution, which bring it in line with an existing state of affairs.

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412. CO 74 modified paragraph 2 of CO 48 for the second time by *inter alia* substituting the following sub-clauses of clause (4) of Article 367 as it applied to the State of Jammu and Kashmir:

> "(i) for sub-clause (b), the following sub-clauses shall be substituted, namely: -
>
> "(aa) references to the person for the time being recognized by the President on the recommendation of the Legislative Assembly of the State as the Sadar-i-Riyasat of Jammu and Kashmir, acting on the advice of the Council of Ministers of the State for the time being in office shall be construed as references to the Governor of Jammu and Kashmir;
>
> (b) 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:
>
> …
>
> (ii) for sub-clause (e), the following sub-clause shall be substituted, namely: -
>
> (e) references to a Governor shall include references to the Governor of Jammu and Kashmir:
>
> …" "

413. It is evident from a plain reading of these substituted clauses that the effect of CO 74 was to clarify that references to the Sadar-i-Riyasat must be read as meaning references to the Governor of the State. **Mohd. Maqbool Damnoo** v. **State of Jammu and Kashmir**[281] involved a petition challenging an order of preventive detention under the Jammu and Kashmir Preventive Detention Act 1964. The District Magistrate passed an order under Section 13A that it was against the public interest to disclose the grounds of detention

[281] (1972) 1 SCC 536

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to the petitioner. Among the grounds which were urged in support of the petition was that the Amending Act by which amendments were made to the Preventive Detection Act in the State was invalid since it was not assented to by the Sadar-i-Riyasat. Chief Justice S M Sikri speaking for the Constitution Bench noted that CO 44 was issued by the President on 16 November 1952 on the recommendation of the Constituent Assembly of the State of Jammu and Kashmir under Article 370 by which an explanation was introduced for the purposes of Article 370. The explanation stated that the Government of the State means the person recognised by the President as Sadar-i-Riyasat of Jammu and Kashmir on the recommendation of the Legislative Assembly, acting on the advice of the Council of Ministers for the State.

414. Clause (4) was added to Article 367 so as to provide that for the purpose of the Constitution as it applies in relation to Jammu and Kashmir, references to the Government of the State would be construed as including references to the Sadar-i-Riyasat acting on the advice of his Council of Ministers. Thereafter, on 24 November 1965, the President with the concurrence of the State Government issued CO 74. Under this Constitutional Order, Article 367 in its application to the State was modified so as to provide that references to the Sadar-i-Riyasat acting on the aid and advise of the Council of Ministers shall be construed as references to the Governor of Jammu and Kashmir acting on the aid and advice of the Council of Ministers. The petitioner challenged the replacement of the Sadar-i-Riyasat by the Governor on the ground that it was *ultra vires*. Rejecting the challenge, Chief Justice Sikri held that what the State Government is at a particular time had to be determined

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in the context of the Constitution of Jammu and Kashmir. The Explanation did no more than recognise the constitutional position as it existed on that date:

> "24. …We are concerned with the situation where the explanation ceased to operate. It had ceased to operate because there is no longer any Sadar-i-Riyasat of Jammu and Kashmir. If the definition contained in the Explanation cannot apply to the words "government of the State" then the meaning given in Article 367(4), as amended, will have to be given to it. If this meaning is given, it is quite clear that the Governor is competent to give the concurrence stipulated in Article 370 and perform other functions laid down by the Jammu and Kashmir Constitution."

415. This court held that the Governor was the successor of the Sadar-i-Riyasat and that the latter was only the name given to the head of the State. This perfectly encapsulates the reasons for which CO 74's modification of Article 367 was clarificatory. Moreover, CO 74 did not modify Article 370 in terms or in effect, to a significant or appreciable extent. In fact, the Court in **Damnoo** (supra) held that CO 74 did not amount to an amendment of Article 370(1) "by the back-door":

> "28. Mr Garg drew our attention to clauses (*aa*) and (*b*) of Article 367 (4), as substituted by CO 74 … He said that this was amendment of Article 370(1) by the back-door and the President could not exercise these powers under Article 370(1) when he had not purported to exercise these powers under Article 370(3). But, as we have already said, the explanation had become otiose and references to the Sadar-i-Riyasat in other parts of the Constitution had also become otiose. There were two alternatives; first, either to leave the courts to interpret the words "government of the State" and give it its legal meaning, or secondly, to give the legal meaning in a definition clause. What has been done is that by adding clauses (*aa*) and (*b*) a definition is supplied which the Courts would have in any event given. Therefore, we do not agree that there has been any amendment of Article 370(1) by the backdoor.
>
> 29. If we had regarded this as an amendment to Article 370(1), then we would have to consider whether the amendatory powers had been validly exercised or not, but as we have said, we are not concerned with this question."

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416. Hence, the changes made by CO 74 were also clarificatory and consequential in nature. They did not have the effect of amending Article 370.

417. Convention certainly does not stand in the way of this Court's adjudication as to the legal validity of an impugned provision of law including a Constitutional Order. However, in this case, three of the four Constitutional Orders which have been issued in the past and which modify Article 367 do not amount to modifications of Article 370, either in terms or in effect, in a manner that is appreciable or significant. These are CO 48, CO 56 and CO 74. The argument of the Union of India that these Constitutional Orders are indicative of the validity of CO 272 cannot be accepted. CO 44, which modified Article 370 by amending its language, was issued in a valid exercise of the power under Article 370(3) and hence does not come to the aid of the Union of India.

b. Applying the entire Constitution to Jammu and Kashmir through exercise of power under Article 370(1)(d)

418. Article 370(1)(c) applies the provisions of Articles 1 and 370 to the State of Jammu and Kashmir. Article 370(1)(d) confers the President with the power to apply "other" provisions of the Constitution subject to "exceptions and modifications". The President issued CO 272 in exercise of power under Article 370(1)(d) by which all the provisions of the Constitution were applied to Jammu and Kashmir. The petitioners argue that Article 370(1)(d) only contemplates a piece-meal approach, that is the application of specific provisions of the Constitution and not the application of the Constitution as a whole. They argue that the entire Constitution can only be applied by the

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exercise of power under Article 370(3) by issuing a declaration that Article 370 shall cease to exist.

419. We do not agree with the argument of the petitioners. Article 370(1)(d) states that "such other provisions" shall apply. The power under Article 370(1)(d) can be used to apply one provision, more than one provision, an entire Part of the Constitution, or all the provisions of the Constitution (that is, the entire Constitution). The provision does not make a distinction between one or all provisions of the Constitution. Non-application of mind cannot be claimed merely because the Constitution Order applies all provisions of the Constitution to Jammu and Kashmir in one go.

420. The application of all the provisions of the Constitution has the same effect as exercising power under Article 370(3) declaring that Article 370 ceases to exist because when Article 370 ceases to exist, all the provisions of the Constitution automatically apply to Jammu and Kashmir. However, there is a crucial difference. The exercise of power under Article 370(1)(d) to apply all provisions of the Constitution is reversible and modifiable. That is, the President could issue another order omitting or modifying certain provisions of the Constitution in its application to Jammu and Kashmir. This Court in **Sampath Prakash** (supra) held that the power of the President to issue a Constitutional order under Article 370(1)(d) includes the power to modify or amend the order in terms of Section 21 of the General Clauses Act 1897. Thus, an order issued Article 370(1)(d) applying all the provisions of the Constitution to the State can be amended, rescinded or modified. However,

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the exercise of power under Article 370(3) is irreversible. Once issued, the special status of the State ceases to exist. Thus, while applying all the provisions of the Constitution by exercising power under Article 370(1)(d), a conscious decision is being made to apply the entire Constitution but not abrogate the special provision. In the subsequent section, we have elucidated the Constitutional Orders issued in exercise of power under Article 370(1)(d) applying the provisions of the Constitution to Jammu and Kashmir to bring out the point that CO 273 is the culmination of the process of integration. The observations equally apply to the exercise of power to issue CO 272.

c. Securing the concurrence of the Union Government under the second proviso to Article 370(1)(d)

421. Article 370(1)(d) states that the President may by order specify which of the provisions of the Constitution other than Articles 1 and 370 shall apply to Jammu and Kashmir. The second proviso to Article 370(1)(d) stipulates that if the provision does not relate to matters in the IoA, the President must issue the order with the concurrence of the Government of the State of Jammu and Kashmir. In exercise of the power under Article 370(1)(d), the President issued CO 272 by which all provisions of the Constitution of India were applied to the State of Jammu and Kashmir. The CO states that the President issued the CO "with the concurrence of the Government of the State of Jammu and Kashmir". The phrase Government of the State as it occurs in Article 370 was defined in CO 1965 to mean the Governor on the aid and advice of the Council of Ministers. However, it was the President giving concurrence since the

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Governor had by then dissolved the Legislative Assembly of State and the President by the 2018 Proclamation assumed to himself "all the functions of the Government of the said State and all powers vested in or exercisable by the Governor of that State under the Constitution". The petitioners have challenged CO 272 on the ground that the Union Government (acting through the President) could not have given concurrence for issuing a CO 272.

422. Applying the standard devised above to test the validity of exercise of power by the President when the Proclamation is in force, the petitioner has to first prove that the exercise of power was *mala fide.*

423. The effect of applying all the provisions of the Constitution without any modifications or exceptions is that the Constitution as a whole applies to Jammu and Kashmir in a manner similar to other States. Thus, the distinction that Article 370 sought to bring between Jammu and Kashmir and the other states in the First Schedule would cease to exist. As already observed, an order applying all the provisions of the Constitution in exercise of power under Article 370(1)(b) has the same effect of declaring that Article 370 ceases to exist in exercise of the power under Article 370(3).

424. The Explanation to Article 370 at the time of the adoption of the Constitution stated that the Maharaja of the State shall be the Government of the State for the purposes of the provision. The President issued CO 44 in exercise of the power under Article 370(3) upon the recommendation of the Constituent Assembly to amend the Explanation to Article 370. In the amended Explanation to Article 370, Government of the State meant the Sadar-i-

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Riyasat. The President then issued CO 1965 in exercise of power under Article 370(1)(b) by which Article 367 (the interpretation provision) was amended in its application to Jammu and Kashmir. A provision was added to Article 367 that reference to Sadar-i-Riyasat in the Explanation to Article 370 shall mean the Governor. The petitioners in **Damnoo** (supra) challenged the CO on the ground that it brought an amendment of Article 370 in exercise of the power under Article 370(1)(d) instead of Article 370(3). It was argued that Article 370 can only be amended through Article 370(3) by constituting a fresh constituent assembly or through Article 368.

425. This Court while rejecting the argument of the petitioner observed that the Explanation only recognised the constitutional position as it existed in the State. This Court observed that the Governor, similar to the Sadar-i-Riyasat, is the head of the State and though the Governor is not elected as was the Sadar-i-Riyasat, he exercises the power under the aid and advice of the Government of the State. Hence, the "fundamental character of representative government" is not altered.

426. The judgment of the Constitution Bench in **Damnoo** (supra) holds that the fundamental character of representative democracy underlines the provisos to Article 370(1)(d) and 370(1)(b) by which the concurrence and consultation of the Government of the State is required before the President issues an order expanding the legislative powers of the Union in the State or applying the provisions of the Constitution of India to Jammu and Kashmir. As discussed in the preceding section of this judgment, the power under Article

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370(1)(b) and 370(1)(d) could only be exercised with the collaboration between the Union and the State. The purpose which the condition seeks to serve (collaboration between the federal units and representative democracy) would be lost if the President secures his own concurrence while exercising the power.

427. However, in the present case, the President seeking the concurrence of the Union Government instead of the Government of the State to issue CO 272 is not invalid because:

a. The effect of applying all the provisions of the Constitution to the State through the exercise of power under Article 370(1)(d) is the same as an exercise of power under Article 370(3) notifying that Article 370 shall cease to exist, that is, all provisions of the Constitution of India will apply to the State of Jammu and Kashmir, except for the fact that the former can be reversed while the latter cannot;

b. The President has the power under Article 370(3) to unilaterally notify that Article 370 shall cease to exist;

c. Consultation and collaboration between both the units will only be necessary where the application of the provisions of the Indian Constitution to the State would require amendments to the State Constitution because as explained above the purpose of the requirements of consultation and collaboration is for the smooth

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functioning of governance in the State and to ensure that the provisions of the Constitution of Jammu and Kashmir are not inconsistent with the provisions of the Constitution of India;

d. The principle of consultation and collaboration underlying the provisos to Article 370(1)(d) would not be applicable where the effect of the provision is the same as Article 370(3). Since the effect of applying all the provisions of the Constitution to Jammu and Kashmir through the exercise of power under Article 370(1)(d) is the same as issuing a notification under Article 370(3) that Article 370 ceases to exist, the principle of consultation and collaboration are not required to be followed;

e. The President in exercise of the power under Article 370(1)(d) issued CO 272 applying all the provisions of the Constitution to the State of Jammu and Kashmir. Thus, the concurrence of the Government of the State under the second proviso to Article 370(1)(d) was not required to be secured in the first place; and

f. The exercise of power is *mala fide* only if power was exercised with an intent to deceive. Deception can only be proved if the power which is otherwise unavailable to the authority or body is exercised or if the power that is available is improperly exercised. Since the concurrence of the State Government was not required for the exercise power under

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Article 370(1)(d) to apply all provisions of the Constitution to the State, the President securing the concurrence of the Union of India (on behalf of the State Government) is not *mala fide*.

428. In view of the above discussion, the concurrence of the Government of the State was not necessary for the President to exercise power under Article 370(1)(d) to apply all provisions of the Constitution to Jammu and Kashmir. The exercise of power by the President under Article 370(1)(d) to issue CO 272 is not *mala fide.* Thus, CO 272 is valid to the extent that it applies all the provisions of the Constitution of India to the State of Jammu and Kashmir.

vii. <u>The Challenge to CO 273</u>

429. The President in exercise of the power under Article 370(3) and upon the recommendation of Parliament declared that Article 370 shall cease to exist. The provision was substituted with a clause which stipulated that all provisions of the Constitution as amended from time to time, without any modifications or exceptions shall apply to the State of Jammu and Kashmir notwithstanding anything contrary in any provision of the Constitution of India or Jammu and Kashmir or any law. We have in the preceding segment of the judgment held the substitution of the phrase Constituent Assembly of the State with Legislative Assembly of the State by CO 272 is invalid. The Union of India made an alternative argument that the power under Article 370(3) subsists independent of the proviso after the Constituent Assembly of the State was dissolved in 1957. If this contention is accepted then the invalidity

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of the substitution to the proviso to Article 370(3) would not affect the exercise of power by the President under the provision to CO 273.

430. We have in the preceding portion of this judgment held that the President has the power to unilaterally issue a notification under Article 370(3) declaring that Article 370 shall cease to exist or that it shall exist with such modifications and that the dissolution of the Constituent Assembly does not affect the scope of power held by the President under Article 370(3). The next issue that falls for the consideration of this Court is whether the exercise of power under Article 370(3) in issuing CO 273 was justified. The President while deciding if the power under Article 370(3) must be exercised determines if the special circumstances which warranted a special solution in the form of Article 370 have ceased to exist. This is a policy decision which completely falls within the realm of the executive. The Court cannot sit in review of the decision of the President on whether the special circumstances which led to the arrangement under article 370 have ceased to exist. However, the decision is not beyond the scope of judicial review. It is settled law that the exercise of executive power can be challenged on the ground that it is *mala fide.*

431. The petitioners have referred to the questions which were asked in Parliament after the Proclamation under Article 356 was issued about whether the Government proposed to repeal Article 370.[282] The Union Government did not give a categorical answer to the questions which were raised in

[282] Question asked by Shri Prabhat Jha answered on 26.6.2019; Question asked by Shri Sanjay Sethi answered on 10.7.2019; Question posed by Shri Jai Prakash answered on 23.7.2019

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Parliament. This in itself does not lead to the conclusion that the exercise of power was *mala fide,* irrational and without application of mind.

432. At this stage, the Constitutional orders which were issued by the President in exercise of powers under Article 370(1) applying the provisions of the Constitution must be referred to.

433. On 26 January 1950, the President issued the Constitution (Application to Jammu and Kashmir) Order 1950[283] in consultation with the Government of Jammu and Kashmir. Paragraph 2 to CO 10 states that Parliament may enact laws for Jammu and Kashmir with respect to matters specified in the First Schedule to the CO which corresponds to the matters specified in the IoA. Paragraph 3 states that in addition to Articles 1 and 370, the provisions in the Second Schedule shall apply to Jammu and Kashmir subject to such modifications and exceptions as specified. The subjects in List I of the Seventh Schedule on which Parliament could make laws were Entries 1-6, 9-22, 25-31, 41, 72-77, 80, 93-96. The constitutional provisions which were made applicable with exceptions and modifications were:

- Part V [**The Union**],
- Part XI [**Relations between the Union and the States**],
- Part XII [**Finance, Property, Contracts and Suits**],

[283] "CO 10"

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• Part XV [**Elections**],

• Part XVI [**Special Provisions relating to certain classes**],

• Part XVII [**Official language**],

• Part XIX [**Miscellaneous**],

• Part XX [**Amendment of the Constitution**],

• Part XXI [**Temporary Transitional and Special Provisions**],

• Part XXII [**Short Title, Commencement, Authoritative Text in Hindi and Repeals**],

• First Schedule, Second Schedule, Third Schedule, Fourth Schedule and Eight Schedule.

434. On 14 May 1954, the President issued with the concurrence of the Jammu and Kashmir government, the Constitution (Application to Jammu and Kashmir) Order 1954[284], in supersession of CO 10 as amended from time to time. Paragraph 2 set out those provisions of the Constitution which in addition to Article 1 and Article 370 would be applicable to the State of Jammu

[284] 'CO 48"

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and Kashmir with exceptions and modifications. In Article 3 of the Constitution, the following proviso was introduced:

> "Provided further that no Bill providing for increasing or diminishing the area or 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."

435. CO 48 amended Article 35 and introduced Article 35A as a new Article into the Constitution in the following terms:

> "In article 35-
>
> References to the commencement of the Constitution shall be construed as references to the commencement of this Order;
>
> In clause (a) (i), the words, figures and brackets "clause (3) of article 16, clause (3) of article 32" shall be omitted; and
>
> After clause (b), the following clause shall be added, namely :-
>
> "(c) no law with respect to preventive detention made by the Legislature of the State of Jammu and Kashmir, whether before or after the commencement of the Constitution (Application to Jammu and Kashmir) Order, 1954, shall be void on the ground that it is inconsistent with any of the provisions of this Part, but any such law shall, to the extent of such inconsistency, cease to have effect on the expiration of five years from the commencement of the said Order, except as respects things done or omitted to be done before the expiration thereof".
>
> After article 35, the following new article shall be added, namely:-
>
> "35A. Saving of laws with respect to permanent residents and their rights – Notwithstanding anything contained in this Constitution, no existing law in force in the State of Jammu and Kashmir, and no law here-after enacted by the Legislature of the State-
>
> defining the classes of persons who are, or shall be, permanent residents of the State of Jammu and Kashmir; or

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conferring on such permanent residents any special rights and privileges or imposing upon other persons any restrictions as respects-

employment under the State Government;

Acquisition of immovable property in the State;

Settlement in the State; or

Right to scholarships and such other forms of aid as the State Government may provide.

Shall be void on the ground that it is inconsistent with or takes away or abridges any rights conferred on the other citizens of India by any provision of this Part."

CO 48 also added clause (4) into Article 367 of the Constitution in the following terms:

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

References to this Constitution or to the provision thereof shall be construed as references to the Constitution or the provisions thereof as applied in relation to the said State;

References to the Government of the said State shall be construed as including references to the Sadar-i-Riyasat acting on the advice of this Court of Ministers ;

References to a High Court shall include references to the High Court of Jammu and Kashmir;

References to the Legislature or the Legislative Assembly of the said State shall be construed as including references to the Constituent Assembly of the said State;

References to the permanent residents of the said State shall be construed as meaning persons who, before the commencement of the Constitution (Application to Jammu and Kashmir) Order, 1954, were recognised as State subjects under the laws in force in the

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> State or who are recognised by any law made by the Legislature of the State as permanent residents of the State; and
>
> References of the Rajpramukh shall be construed as references to the person for the time being recognised by the President as the Sadar-i-Riyasat of Jammu and Kashmir and as including references to any person for the time being recognised by the President as being competent to exercise the powers of the Sadar-i-Riyasat."

436. The amending power under Article 368 of the Constitution was modified in relation to the State of Jammu and Kashmir by the insertion of the following proviso:

> "Provided further that no such amendment shall have effect in relation to the State of Jammu and Kashmir unless applied by order of the President under clause (1) of article 370."

437. CO 48 applied some Parts of the Constitution to Jammu and Kashmir but with exceptions and modifications. These Parts were:

- Part I [**Union and its Territory**],
- II [**Citizenship**],
- III [**Fundamental Rights**],
- V [**The Union**],
- XI [**Relations between the Union and the States**],
- XII [**Finance, Property, Contracts and Suits**],

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- XIII [**Trade, Commerce and Intercourse within the territory of India**],

- XIV [**Services under the Union and the States**],

- XV [**Elections**],

- XVI [**Special Provisions relating to certain classes**],

- XVII [**Official language**],

- XVIII [**Emergency provisions**],

- XIX [**Miscellaneous**],

- XX [**Amendment of the Constitution**],

- XXI [**Temporary Transitional and Special Provisions**],

- XXII [**Short Title, Commencement, Authoritative Text in Hindi and Repeals**],

- First Schedule, Second Schedule, Third Schedule, Fourth Schedule, Seventh Schedule, Eight Schedule, Ninth Schedule.

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Other notable features of CO 48 were:

a. The introduction of a separate provision for permanent residents under Article 7;

b. The removal of references to Scheduled Tribes from Article 15(4);

c. Application of Articles 19, 22, 31, 31A and 32 with some modifications. Clause (7) was added by CO 48 to Article 19 of the Constitution in the following terms:

> "(7) The words "reasonable restrictions" occurring in clauses (2), (3), (4) and (5) shall be construed as meaning such restrictions as the appropriate Legislature deems reasonable."

438. The CO also specified that List II and List III of the Seventh Schedule shall be omitted. With respect to List I, a few entries were substituted (entries 3, 43, 81, 53, 72 and 76) and omitted (entries 44, 50, 52, 55, 60, 67, 69, 78, 79, and 97). Entry 97 of List I which grants Parliament the residuary power to enact laws with respect to any matter not enumerated in List II or List III including any tax not mentioned in either of those lists was omitted.

439. On 16 January 1958, the President issued CO 55 so as to expand the powers of the Central government in matters pertaining to the taxation of inter-state commerce. CO 55 modified the application of Articles 269 and 286 and inserted a new entry into the Seventh Schedule.

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PART E

440. On 26 February 1958, the Constitution of India as in force on 15 February 1958 was applied with exceptions and modifications. The following provisions of the Constitution were also applied to Jammu and Kashmir with suitable modifications:

- Article 149, 150 and 151 were applied [relating to CAG, forms of accounts and audit]

- Article 266 [consolidated funds],

- Article 267(2) [contingency fund],

- Article 273 [Grant in lieu of exports duty on jute and jute products],

- Article 282 [grants from revenues],

- Article 283 [law to be made for withdrawal from contingency fund],

- Article 284 [custody of deposits with public servants and courts],

- Article 298 [Power to carry on trade],

- Article 299 [contractual powers of the State in the name of Governor]

- Article 300 [suits and proceedings] were applied to Jammu and Kashmir.

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- Part XIV relating to services under the State was applied with suitable modifications.

- The Union List of the Seventh Schedule was modified as under :

> "(i) for entry 3, the entry '3. Administration of cantonments' shall be substituted;
>
> (ii) entries 8, 9 and 34, the words 'trading corporations including' in entry 43, entries 44, 50, 52, 55 and 60, the words 'and records' in entry 67, entries 69, 78 and 79, the words 'inter-State migration' in entry 81, and entry 97 shall be omitted; and
>
> (iii) in entry 72, the reference to the States shall be construed as not including a reference to the State of Jammu and Kashmir."

441. CO 56 deleted in clause 4(d) of Article 367, the reference to the Legislative Assembly as including references to the Constituent Assembly. The clause was added in 1954 and, following the adoption of the Jammu and Kashmir Constitution, the clause came to be deleted. On 9 February 1959, CO 57 which was issued by the President made the provisions of Entry 69 of the Union List (cultivation, manufacture and sale for export of opium) available for Parliament in its legislative domain.

442. On 23 April 1959, as a consequence of CO 59, the exceptions and modifications to Article 19 and Article 35(C) made by C.O of 1954 were extended from five to ten years. On 20 January 1960, Part VI of the Constitution ("the states") was applied with suitable modifications (to the exclusion of Articles 153-217, 219, 221, 223 and 237). The provision was added to enable the transfer of judges on the recommendation of the Sardar-

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i-Riyasat. A new clause was introduced into Article 229 of the Constitution to provide that transfers to or from State of Jammu and Kashmir shall be made after consultation with the Sadar-i-Riyasat.

443. On 22 June 1960, Entry 50 of the Union List in the Seventh Schedule (Establishment of Standards of Weight and Measure) was made available to Parliament. On 2 May 1961, as a consequence of CO 62, Entry 50 ("Industries, the control of which by the Union is declared by Parliament by law to be expedient in the public interest") was brought within the legislative domain of Parliament in relation to Jammu and Kashmir.

444. On 26 September 1963, CO 66 was issued. Article 246 of the Constitution which originally applied with one clause by virtue of CO 48 of 1954 was applied with the modification that Parliament would have the power to make laws in respect of those Entries in the Union List and in the Concurrent List which were applicable to Jammu and Kashmir. Article 254 was also applied so as to ensure the supremacy of Parliamentary legislation in the case of a repugnancy with State legislation on areas which fell within the domain of Parliament. The Seventh Schedule was made applicable with certain modifications in the following terms:

> "(a) In the Union List -
>
> (i) for entry 3, the entry "3. Administration of cantonments" shall be substituted;
>
> (ii) entries 8, 9 and 34, the words "trading corporations, including" in entry 43, entries 55 and 60, the words "and records" in entry 67, entries 78 and 79, the words "Inter-State migration" in entry 81, and entry 97 shall be omitted.

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(iii) in Entry 44, after the words "but not including universities", the words "in so far as such corporations relate to the legal and medical professions" shall be inserted and

(iv) in entry 72, the references to the States shall be construed as not excluding a reference to the State of Jammu and Kashmir.

(b) The State List shall be omitted."

The Concurrent List was applied for the first time in the following

form :

"(c) In the Concurrent List-

(i) for entry 26, the entry "26 Legal and medical professions." shall be substituted;

(ii) entries 1 to 25 (both inclusive) and entries 27 to 44 (both inclusive) shall be omitted; and

(iii) in entry 45, for the words and figures "List II or List III', the words

"this List" shall be substituted"

445. On 6 March 1964, by the issuance of CO 69, the exceptions and modifications which were made to Article 19 and Article 35(C) by C.Os 48 and 59 were extended from 10 to 15 years. Changes were earlier made in the Concurrent List, to the following effect:

"(c) In the Concurrent List..

(a) for entry 1, the following entry shall he substituted, namely:

"1. Criminal law (excluding offences against laws with respect to any of the matters specified in List I and excluding the use of naval, military or air forces or any other armed forces of the Union in aid of the civil power) in so far as such criminal law relates to offences against laws with respect to trade and commerce in. and the production, supply and distribution and price control of gold.":

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> (ii) in entry 24, after the words and maternity benefits", the words "bar only with respect to labour employed in the cool-mining industry" shall be inserted.
>
> (iii) tor entry 26, the entry "26. Legal and medical professions" shall be substituted:
>
> (iv) for entry 33, the following entry shall he substituted, namely:
>
> “33. Trade and commerce in, and the production. supply and distribution of, the products of any industry where the control of such industry by the Union is declared by Parliament by law io be expedient in the public interest, in so far as such industry relates to gold, and imported goods of the same kind as such products.";
>
> (v) for entry 34, the entry "34. Price control of gold." shall be substituted,
>
> (vi) entries 2 to 23 (both inclusive). entry 25, entries 27 to 32 (both inclusive) and entries 35 to 44 (both inclusive) shall be omitted; and
>
> (vii) in entry 45, for the words and figures "List II or List III", the words "this List' shall be substituted.”

446. On 2 October 1964, further Entries in the Union List and the Concurrent List were made applicable as a result of CO 70. In the Union List, Entry 55 (Regulation of Labour and Safety in mines and oilfields) and Entry 60 (Sanctioning of cinematograph films for exhibition) were made applicable. In the Concurrent List, Entry 1 was substituted so as to read:

> “Criminal law (excluding offences against laws with respect to any of the matters specified in List I and excluding the use of naval, military or air force or any other armed forces of the Union in aid of the civil power) in so far as such criminal law relates to offences against laws with respects to any of the matter specified in this List”

Entry 30 was substituted to read as “vital statistics in so far as they relate to births and deaths including registration of births and deaths”. Entries 25

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(Education), 39 (Newspapers, books and printing presses) became available in the Concurrent List.

447. On 21 November 1964, by CO 71, CO 48 of 1954 was amended. As a consequence, Article 356 of the Constitution was applied in a modified form so that references to the Constitution would include the Constitution of Jammu and Kashmir.

448. On 10 April 1965, the Legislative Assembly passed the Constitution of Jammu and Kashmir (Sixth Amendment) Act 1965 as a consequence of which the expression "Sadar-i-Riyasat" and "Prime Minister" in the Constitution of the State were to be substituted with the expressions "Governor" and "Chief Minister".

449. On 17 May 1965, further changes were made in the applicability of the Seventh Schedule to the Constitution by CO 72. As a result, additional Entries in the Union List : Entry 43, (incorporation, regulation and winding up of trading corporations, including banking, insurance and financial corporations but not including co-operative societies) and Entry 78 (Constitution and organisation of the High Courts except provisions as to officers and servants of High Courts; persons entitled to practise before the High Court) became available to Parliament in the Union List. In the Concurrent List, Entries 33[285]

[285] 33. Trade and Commerce in, and the production, supply and distribution of,-
(a) the products of any industry where the control of such industry by the Union is declared by Parliament by law to be expedient in public interest, and imported goods of the same kind as such products;
(b) foodstuffs, including edible oilseeds and oils;
(c) cattle fodder, including oilcakes and other concentrates;
(d) raw cotton, whether ginned or unginned, and cotton seed; and
(e) raw jute.

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and 34[286] became available within the Legislative domain of Parliament without modifications. Entries 4[287], 11[288] and 35[289] were made applicable.

450. On 24 November 1966, CO 74 was issued as a consequence of which the Constitution as in force on 20 June 1964 was applied with exceptions and modifications. The application of Article 222 of the Constitution was modified so as to provide for consultation with the Governor while transferring the judges of the High Court. CO 74 modified the application of CO 48, insofar as Article 367(4) was concerned so as to provide for the following:

> "(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;
>
> (aa) references to the person for the time being recognised 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;
>
> (b) 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;
>
> Provided that in respect of any period prior to the 10th day of April, 1955, such references shall be construed as including references to the Sadar-i-Riyasat acting on the advice of his Council of Ministers;
>
> (c) references to a High Court shall include references to the High Court of Jammu and Kashmir;

[286] Price control.
[287] Removal from one State to another State of prisoners, accused persons and persons subjected to preventive detention for reasons specified in Entry 3 of this List.
[288] Administrators-general and official trustees.
[289] Mechanically propelled vehicles including the principles on which taxes on such vehicles are to be levied.

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> (d) references to the legislature or the legislative assembly of the said state shall be construed as including references to the constituent assembly of the said state;
>
> (d) references to the permanent residents of the said State shall be construed as meaning persons who, before the commencement of the Constitution (Application to Jammu and Kashmir) Order, 1954, were recognised as State subjects under the laws in force in the State or who are recognised by any law made by the Legislature of the State as permanent residents of the State; and
>
> (e) references to a Rajpramukh Governor shall include references to the Governor of Jammu and Kashmir:
>
> Provided that in respect of any period prior to the 10th day of April, 1555, such references shall be construed as references to the persons recognised by the President as the Sadar -Riyasat of Jammu and Kashmir and as including references to a person recognised by the President as being competent to exercise the powers of the Sadar-i-Riyasat."

In the Union List, Entry 44[290] was made available to Parliament. In the Concurrent List, Entries 24[291] and 26[292] were applied.

On 29 June 1966, CO 75 was issued as a result of which the application of Article 81 of the Constitution in regard to the delimitation of seats was provided. The provisions of Article 81 were modified by the insertion of the following clause:

> "In article 81 for clauses (2) and (3), the following clause shall be substituted, namely :-
>
> (2) For the purposes of sub-clause (a) of clause (1), -
>
> there shall be allotted to the State six seats in the House of the People;
>
> the State shall be divided into single-member territorial constituencies by the Delimitation Commission constituted under

[290] Incorporation, regulation and winding up of corporations whether trading or not, with objects not confined to one State but not including universities.
[291] Welfare of labour including conditions of work, provident funds, employers' liability, workmen's compensation, invalidity and old age pensions and maternity benefits.
[292] Legal, medical and other professions.

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> the Delimitation Commission Act, 1962, in accordance with such procedure as the Commission may deem fit;
>
> the constituencies shall, as far as practicable, be geographically compact areas, and in delimiting them regard shall be had to physical features, existing boundaries of administrative units, facilities of communication and public convenience;
>
> the constituencies into which the State is divided shall not comprise the area under the occupation of Pakistan; and
>
> until the dissolution of the existing House of the People, the representatives of the State in that House shall be appointed by the President on the recommendation of the Legislature of the State."

On 13 February 1967, as a result of the issuance of CO76 the Constitution in force after the 19th Amendment was applied with suitable exceptions and modifications. On 5 May 1967, certain incidental changes were made in regard to the applicability of the Seventh Schedule in terms of which Entry 19[293] of the Concurrent List was applied. On 11 August 1967, CO 79 was issued as a consequence of which the Constitution in force after the 21st Amendment was applied with suitable exceptions and modifications as on date.

451. On 26 December 1967, Entries 16[294] and 18[295] of the Concurrent List were applied by CO 80 and on 9 February 1968, Entry 72 of the Union List was modified in its application from CO 48 of 1954. On 17 February 1969, CO 85

[293] Drugs and poisons, subject to the provisions of Entry 59 of List I with respect to opium.
[294] Lunacy and mental deficiency, including places for the reception or treatment of lunatics and mental deficients.
[295] Adulteration of foodstuffs and other goods.

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applied the provisions of Article 248 of the Constitution in a substituted form, giving exclusive power to Parliament to make laws in the following domain:

> "248. Residuary powers of legislation.- Parliament has exclusive power to make any law with respect to prevention of activities directed towards disclaiming questioning or disrupting the sovereignty and territorial integrity of India or secession of a part of the territory of India from the Union or causing insult to the Indian National Flag, the Indian National Anthem and this Constitution."
>
> The above CO hence provided Parliament with the residuary powers to legislation in the sphere dealing with the sovereignty and integrity of India."

452. On 31 March 1969, CO 86 extended from 15 to 20 years the exceptions and modifications which were made to Articles 19 and 35C by COs 48 and 59. On 24 August 1971, as a result of CO 89, the 21st Amendment to the Constitution and Section 5 of the 23rd Amendment came to be applied. Clause 3 of Article 32 of the Constitution was omitted and Part VI was applied with suitable modifications[296]. On 8 November 1971, as a consequence of CO 90 a minor change was made to the Concurrent List and Entry 43[297]. On 29 November 1971, the 24th Amendment to the Constitution was applied by CO 91.

453. On 24 February 1972, as a result of CO 92, Entry 60[298] of the Union List was applied. On 6 May 1972, upon the issuance of CO 93, the scope of Article 248 of the Constitution was widened so as to enable Parliament to exclusively legislate for imposing taxes on foreign travel by sea or air, Inland air travel,

[296] Articles 153-217, 219, 221, 223, 224, 224A, 225, 227-237 were omitted.
[297] Recovery in a State of claims in respect of taxes and other public demands, including arrears of land-revenue and sums recoverable as such arrears, arising outside that State.
[298] Sanctioning of cinematograph films for exhibition.

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postal articles, including money orders, phonograms and telegrams[299]. As a consequence Entry 97, the residuary entry in the Union List was applied in a modified form[300].

454. As a result of CO 94 issued in 1972, the amendments to the Constitution until the 26th Amendment were applied. Article 290 of the Constitution dealing with the adjustment in respect of certain expenses and pensions was applied. Certain changes were made in the application of Entry 2 (Criminal Law), Entry 12 (Evidence) and Entry 13 (Civil Procedure) of the Concurrent List.

455. On 10 August 1972 as a result of CO 95, Entry 67 of the Union List[301] was applied without modifications while Entries 36 (Factories), 40 (Archaeological sites and remains other than those declared by or under law made by Parliament) and 42 (Acquisition and requisitioning of property) were applied with modifications.

456. On 1 May 1974 as a result of CO 97, the exceptions and modifications which were made to Article 19 and Article 35C by C.Os 48 and 59 were extended from twenty to twenty-five years. On 26 June 1974 as a result of CO 98, the

[299] Article 248 as substituted by CO 93 read as follows:
248. Residuary powers of legislation- Parliament has exclusive power to make any law with respect to –
(a) prevention of activities directed towards disclaiming questioning or disrupting the sovereignty and territorial integrity of India or bringing about cession of a part of the territory of India or session of a part of the territory of India from Union or causing insult to the Indian National Flag, the Indian National Anthem and this Constitution; and
(b) taxes on –
(i) foreign travel by sea or air;
(ii) inland air travel;
(iii) postal articles, including money orders, phonograms and telegrams.

[300] Prevention of activities directed toward disclaiming, questioning or disrupting the sovereignty and territorial integrity of India or bringing about cession of a part of the territory of India or secession of a part of the territory of India from the Union or causing insult to the Indian National Flag, the Indian National Anthem and this Constitution taxes on foreign travel by sea or air, or inland air travel and on postal articles, including money orders, phonograms and telegrams.

[301] Ancient and historical monuments and records, and archaeological sites and remains, [declared by or under law made by Parliament] to be of national importance.

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26th Amendment and Section 2 of the 30th and 31st Constitutional Amendments were applied. The provisions with regard to delimitation were updated.

457. The provisions of Article 352 of the Constitution dealing with the proclamation of emergency as modified in their application by CO 48 of 1954 were further modified on 29 June 1975 by CO 100 so as to provide for an *ex post facto* request or concurrence. By CO 101 which was issued on 23 July 1975, the application of Article 368 of the Constitution was modified to provide for restrictions on the power of the State Legislative Assembly to amend the Constitution of Jammu and Kashmir regarding the terms of service and the privileges and immunities of the Governor and the superintendence, direction and control of elections by the Election Commission of India[302]. By CO 103 which was issued on 2 March 1976 and CO 104 which was issued on 25 May 1976, provisions were made for the applicability of the 26th, 30th, 31st, 33rd and 38th Amendments to the Constitution as specified.

458. On 12 October 1976 upon the issuance of CO 105, the application of the 26th, 30th, 31st, 33rd, 38th and 39th Amendments was envisaged to the extent as specified. On 31 December 1976, the Ninth Schedule was amended by CO 106. On 31 December 1977 as a result of CO 108, Section 2 of the 25th

[302] clause 4 of Article 368 as added by CO 101 read as follows:
(4) No Law made by the Legislature of the State of Jammu and Kashmir seeking to make any change in or in the effect of any provision of the Constitution of Jammu and Kashmir relating to-
(a) appointment, powers, functions, duties, emoluments, allowances, privileges or immunities of the Governor; or
(b) superintendence, direction and control of elections by the Election Commission of India, eligibility for inclusion in the electoral rolls, without discrimination, adult suffrage and composition of the Legislative Council being matters specified in sections 138, 139, 140 and 50 of the Constitution of Jammu and Kashmir.
shall have any effect unless such law has after having been reserved for the consideration of the President received his assent.

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Amendment and the 40th Amendment were applied to the State of Jammu and Kashmir.

459. On 4 June 1985 as a result of CO 122, Article 248 of the Constitution as it applied to the State of Jammu and Kashmir was modified by empowering Parliament to make law for prevention of terrorist activities and the Union List as they applied to the State was amended so as to empower Parliament to legislate on the subject. Similar changes were made to Entry 97 of the Union List. Entries 2 (Criminal Law) and 12 (Evidence) of the Concurrent List were applied with modifications.

460. On 4 December 1985, CO 124 was issued in terms of which Articles 339 and 342 of the Constitution were applied to the State of Jammu and Kashmir to allow the President to appoint a Commission for the welfare of Scheduled Tribes in the State and to notify Scheduled Tribes.

461. During the prevalence of Governor's rule, CO 129 was issued on 30 July 1986 to provide for the modified application of Article 249. In terms of the modification, it was envisaged that the Rajya Sabha could by passing a resolution with a two-thirds majority empower Parliament to make laws on "any matter specified in the resolution being a matter which is not enumerated in the Union List or the Concurrent List". As a consequence, Parliament could legislate on any subject which would have otherwise been under the sole competence of the State legislature.

462. The provisions of the anti-defection Law were extended to the State of Jammu and Kashmir by CO 136 on 20 January 1989. The 61st constitutional

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amendment which lowered the voting age from twenty-one to eighteen years was extended to the State of Jammu and Kashmir by CO 141 on 25 July 1989.

463. On 6 July 2017, CO 269 harmonised the tax administration of the State of Jammu and Kashmir with the Goods and Services Tax regime as was prevalent in the rest of the country. As a consequence, Entry 82 of the Union List[303] was applied with modifications. As a consequence of CO 269, the Jammu and Kashmir Goods and Services Tax Act 2017, the Central Goods and Services Tax (Extension to Jammu and Kashmir) Ordinance 2017 and the Integrated and Goods and Services Tax[304] (Extension to Jammu and Kashmir) Ordinance 2017, resulted in the CGST[305], SGST[306] and IGST[307] regime being applicable in Jammu and Kashmir.

464. Since the first Constitution Order issued under Article 370(1)(d) in 1950, the President has used the power to issue Constitution Orders more than forty times. As the Constitution of India applied to the State of Jammu and Kashmir before CO 272 was issued, the following Parts or provisions of the Constitution were not applied to Jammu and Kashmir:

a. Part IV dealing with the Directive Principles of State Policy;

b. Articles 153 to 213 dealing with the executive power of States, the State Legislature, and the legislative power of the Governor;

[303] Taxes on income other than agricultural income.
[304] IGST
[305] Central Goods and Services Tax
[306] State Goods and Services Tax
[307] Integrated and Goods and Services Tax

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c. Articles 214 to 217, 219, 221, 223 to 225 dealing with the power of appointing judges to High Court of Jammu and Kashmir and their conditions of service;

i. Part VII dealing with the States in Part B of Schedule 1;

ii. Part VIII dealing with Union Territories;

iii. Part X dealing with the Scheduled and Tribal Areas; and

iv. The Fifth and Sixth Schedules.

465. The slew of Constitutional orders issued by the President under Article 370(1)(d) applying various provisions of the Constitution and applying provisions with modification indicate that over the course of the last seventy years, the Union and the State has through a collaborative exercise constitutionally integrated the State with the Union. This is not a case where only Articles 1 and 370 of the Constitution were applied to the State of Jammu and Kashmir and suddenly after seventy years the entire Constitution was being made applicable. The continuous exercise of power under Article 370(1) by the President indicates that the gradual process of constitutional integration was ongoing. The declaration issued by the President in exercise of the power under Article 370(3) is a culmination of the process of integration. Thus, we do not find that the President's exercise of power under Article 370(3) was *mala fide.*

viii. <u>The status of the Constitution of Jammu and Kashmir</u>

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PART E

466. It is necessary to determine the status and applicability of the Constitution of Jammu and Kashmir, in view of COs 272 and 273. In the segment of the judgment on whether the State of Jammu and Kashmir possesses sovereignty, this Court analysed the provisions of the Constitution of India and the Constitution of Jammu and Kashmir and arrived at the conclusion that the latter is subordinate to the former.

467. Paragraph 2 of CO 272 stipulated that the provisions of the Constitution of India (as amended from time to time) shall apply in relation to the State of Jammu and Kashmir. In the preceding segments of the judgment, this Court has struck down the portion of paragraph 2 of CO 272 which seeks to amend Article 370 by specifying a modification to Article 367. It was, however, held that the application of the entire Constitution of India to the State is a valid exercise of power. CO 273 was issued a day after CO 272 was issued. It stated that all clauses of Article 370 shall cease to be operative except the following:

> "370. **All provisions of this Constitution, as amended from time to time, without any modifications or exceptions, shall apply to the State of Jammu and Kashmir notwithstanding anything contrary contained in** article 152 or article 308 or any other article of this Constitution or **any other provision of the Constitution of Jammu and Kashmir** or any law, document, judgement, ordinance, order, by-law, rule, regulation, notification, custom or usage having the force of law in the territory of India, or any other instrument, treaty or agreement as envisaged under article 363 or otherwise."
>
> (emphasis supplied)

468. While the modified version of Article 370 provided that all the provisions of the Constitution of India shall apply to the State of Jammu and Kashmir, CO 272

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had already accomplished this. The new provision reiterated CO 272 and clarified that the Constitution would apply notwithstanding certain provisions which may have suggested otherwise. This Court has upheld the validity of CO 273. Significantly, Article 370 (as it now stands) provides that the Constitution of India shall apply to the State:

a. Without any modifications and exceptions;

b. Notwithstanding anything contrary contained in Article 152 or Article 308 or any other article of the Indian Constitution;

c. Notwithstanding anything contrary contained in any other provision of the Constitution of Jammu and Kashmir; and

d. Notwithstanding anything contrary contained in any law, document, judgement, ordinance, order, by-law, rule, regulation, notification, custom or usage having the force of law in the territory of India, or any other instrument, treaty or agreement as envisaged under article 363 or otherwise.

The stipulation that the Constitution of India shall apply to the State notwithstanding anything contrary contained in any other provision of the Constitution of Jammu and Kashmir is significant because it clarifies beyond a shadow of doubt that it is the Constitution of India which is the supreme governing document in relation to every aspect of governance in the State.

469. The Constitution of India is a complete code for constitutional governance. It provides for the establishment and scope of powers of the legislature, the

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executive, and the judiciary at the level of the Union and the States. It delineates the Fundamental Rights and the Directive Principles of State Policy. It regulates aspects of finance and property and provides for Public Service Commissions. The country and all the States are governed in accordance with the provisions of the Constitution. Upon the application of the entire Constitution to the State of Jammu and Kashmir, Jammu and Kashmir too is liable to be governed in the same manner.

470. The Constitution of Jammu and Kashmir, though subordinate to the Constitution of India, provided for many of these aspects of governance. This was necessitated by Article 370 in terms of which it was to apply in parts and in a gradual manner to the State. The gaps left by the non-application of some parts of the Constitution of India were filled by the Constitution of the State. After the abrogation of Article 370 (as it stood before the issuance of CO 272 and CO 273) and the application of the entirety of the Constitution of India to the State, the Constitution of the State does not fulfil any purpose or serve any function. Hence, the implicit but necessary consequence of the application of the Constitution of India in its entirety to the State of Jammu and Kashmir is that the Constitution of the State is inoperative.

ix. <u>The challenge to the Reorganisation Act on substantive grounds</u>

471. Parliament enacted the Reorganisation Act 2019 in exercise of the power under Article 3. The Act received the assent of the President on 9 August 2019. Part II of the Reorganisation Act reorganises the State of Jammu and Kashmir into two Union territories – the Union Territory of Ladakh without a

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legislature[308] and the Union Territory of Jammu and Kashmir with a legislature.[309] The territories of the former comprise Kargil and Leh whereas the territories of the latter comprise territories other than Kargil and Leh.[310] Section 103 of the Reorganisation Act empowers the President to issue an order removing any difficulties which arise in giving effect to the provisions of the statute. In exercise of this power, the President issued the Jammu and Kashmir Reorganisation (Removal of Difficulties) Second Order 2019 which states that the territory of Leh district comprises of Gilgit, Gilgit Wazarat, Chilas, tribal territory and 'Leh and Ladakh' except the "present territory of Kargil."[311]

472. The petitioners' challenge to the constitutional validity of the Reorganisation Act is on the following grounds:

a. The Reorganisation Act was enacted without fulfilling the prerequisites in Article 3; and

b. Article 3 does not empower Parliament to extinguish the character of a state in its entirety.

In response, the Union of India contended that this Court is not the appropriate authority to examine the desirability of the exercise of the power under Article 3 because administrative and other considerations have a bearing on Parliament's decision. The Union of India also submitted that the

[308] Section 3, Reorganisation Act
[309] Section 4, Reorganisation Act
[310] Sections 3, 4 Reorganisation Act
[311] Section 2, Jammu and Kashmir Reorganisation (Removal of Difficulties) Second Order 2019

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sufficiency of the material or the circumstances which necessitated the exercise of the power under Article 3 lie beyond the realm of judicial review. Finally, it submitted that Parliament possesses the power to convert a State into two Union territories.

473. The submissions of the petitioners require this Court to adjudicate on (a) the scope of the powers of Parliament under Article 3; and (b) whether the procedure contemplated by Article 3 was complied. In the sections below we have highlighted a few aspects which must weigh on Courts while determining the scope of the powers under Article 3.

a. The constitutional history of States and Union territories and the reason for the existence of Article 3

474. When the Constitution was adopted, the constituent political units in the country consisted of different types of States (albeit with different structures, powers, and relationships with the Union Government) and not of States and Union territories, as we now understand them. At that time, India consisted of Part A, Part B, and Part C States as detailed in the First Schedule to the Constitution. Part A States consisted of former Governors' Provinces (prior to Independence) and some princely states. The former were governed by elected legislative bodies as well as a Governor. Part B States consisted largely of the former princely states and were governed by elected legislative bodies and the Rajpramukh. Part C States were formerly the Chief Commissioners' Provinces[312] (and some princely states) which were

[312] Under the Government of India Act 1935

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governed by a Chief Commissioner appointed by the President. Additionally, the Andaman and Nicobar Islands alone found a place in Part D of the First Schedule. A Lieutenant Governor appointed by the Union Government oversaw the administration of this territory.

475. Evidently, the constitutional classification of the constituent units in the country at the time of Independence mirrored their classification by the colonial power. This was not intended to be a permanent feature. Accordingly, Article 3 of the Constitution was intended to subserve an arrangement in place until a reclassification which was suited to the needs of the local populace and which was based on a careful evaluation of administrative, cultural, linguistic, financial, and other relevant considerations rather than on the expediency of the colonial government.[313] The Constituent Assembly was also cognizant that certain princely states were yet to be integrated into the country and that some segments of society demanded the organisation of states on the basis of language. Article 3 therefore empowered Parliament to reorganise the constituent units of the newly-formed country.

476. Conscious of the imperial basis for the organisation of states and in view of the growing demand for the organisation of states on a linguistic basis, the Union Government appointed the States Reorganisation Commission[314] to

[313] See the speech of KT Shah, Constituent Assembly Debates, Volume 7, 17 November 1948 – "… We are all aware that the existing Units which make up this Federation are not equal inter se are not logical, are not happily constructed so as to minister to the development of the country or even of the areas themselves. It is necessary, and it will soon perhaps have to be implemented in some form or another, that these areas be reconstructed. That would mean that their boundaries, perhaps even their name, and their territories, may be altered, upwards or downwards …"
[314] "Commission"

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gauge public opinion and assess the manner in which constituent political units ought to be rationalised. The Commission was formed to:

> "…investigate the conditions of the problem, the historical background, the existing situation and the bearing of all important and relevant factors thereon. They will be free to consider any proposal relating to such reorganisation. The Government expect that the Commission would, in the first instance, not go into the details, but make recommendations in regard to the broad principles which should govern the solution of this problem and, if they, so choose, the broad lines on which particular States should be reorganised, and submit interim reports for the consideration of Government."[315]

477. The Commission submitted its report after undertaking extensive consultations with members of the public from all States. It found that the demarcation of the States at the time was based almost entirely on colonial interests:

> "To the extent, therefore, there was a conscious or deliberate design behind the demarcation of the territories of administrative units, it was grounded in imperial interests or the exigencies of a foreign government and not in the actual needs, wishes or affinities of the people."[316]

478. Based on its analysis of the demarcation of States, the Commission found that the distinction between the States which existed at that time could not be maintained. The Commission recommended that:

a. A balanced approach which accounted for all relevant factors (and not solely language or culture) be adopted to reorganise the States;

b. Part A States and Part B States be of an equal status;

[315] Ministry of Home Affairs, Resolution dated 29 December 1953
[316] Paragraph 20, Report of the States Reorganisation Commission 1955

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c. Part C States be merged with the adjoining States or retained as independent units with temporary control by the Union Government; and

d. Overall, the constituent units of the country ought to consist of 'States' and 'Territories' with the latter being centrally administered.[317]

479. The Constitution (Seventh Amendment) Act 1956 amended the First Schedule and modified the categorisation of the constituent units in the country, largely in accordance with the recommendations made by the Commission. It removed the distinction between the States. Currently, the administrative or federal units consist solely of States and Union Territories. The States Reorganisation Act 1956 was enacted in pursuance of this amendment to the Constitution. It provided for the territorial changes and the formation of new States as well as for other matters connected with or incidental to these changes.

b. The contours of the power under Article 3

480. It is necessary to advert to the principles which animate the Constitution in general and Article 3 in particular and the Constituent Assembly Debates on Statehood.

I. Federalism, representative democracy, and the significance of States

481. Democracy and federalism are basic features of the Constitution. The term 'federal' is used to indicate the division of powers between the Union or

[317] *Summary and Conclusions*, Report of the States Reorganisation Commission 1955

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Central Government and the State Governments. While there are certain 'unitary' characteristics present in the constitutional structure in terms of which the Union Government has overriding powers in some situations, the existence of federal elements in the form of governments envisaged by the Constitution is a cornerstone of the polity. This set-up has been described as quasi-federal, asymmetric federalism or cooperative federalism. This Court need not engage in a comprehensive discussion of the nature of federalism postulated by the Indian Constitution. The judgments of this Court in **Bommai** (supra), **Kuldip Nayar** v. **Union of India**,[318] **State (NCT of Delhi)** v. **Union of India**,[319] and **Swaraj Abhiyan (V)** v. **Union of India**[320] extensively discuss the principles of federalism embodied in the Constitution.

482. The States neither derive their powers from the Union Government nor do they depend upon the Union Government to exercise their powers under the structure of the Constitution. Part V of the Constitution *inter alia* provides for the structure, functions and powers of the Union Government. Part VI *inter alia* provides for the structure, functions and powers of the States. The Constituent Assembly Debates reveal that the federal nature of our Constitution was considered to be one of its significant features. Dr. B R Ambedkar observed:

> "… dual polity under the proposed Constitution will consist of the Union at the Centre and the States at the periphery each endowed with sovereign powers to be exercised in the field assigned to them respectively by the Constitution. … the Indian Constitution proposed

[318] (2006) 7 SCC 1
[319] (2023) 9 SCC 1
[320] (2018) 12 SCC 170

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> in the Draft Constitution is not a league of States **nor are the States administrative units or agencies of the Union Government**."[321]
>
> (emphasis supplied)

In response to a remark complaining that the Constitution favoured too strong a Centre, Dr. B R Ambedkar stated in no uncertain terms that the States were not dependent upon the Centre for their legislative or executive authority:

> "A serious complaint is made on the ground that there is too much of centralisation and that the States have been reduced to municipalities. It is clear that this view is not only an exaggeration, but is also founded on a misunderstanding of what exactly the Constitution contrives to do. As to the relation between the Centre and the States, it is necessary to bear in mind the fundamental principle on which it rests. The basic principle of federalism is that the legislative and executive authority is partitioned between the Centre and the States not by any law to be made by the Centre but by the Constitution itself. This is what Constitution does. **The States under our Constitution are in no way dependent upon the Centre for their legislative or executive authority. The Centre and the States are coequal in this matter.** It is difficult to see how such a Constitution can be called centralism."
>
> (emphasis supplied)

483. The division of legislative and executive competence between the Union and the federating States and the independence conferred on the federating States in their own sphere furthers representative democracy. The electorate elects their representatives to the State Legislature. The State Government (through the Council of Ministers) is accountable to the Legislative Assembly, which in turn is accountable to the citizenry. In this manner, the existence of the States breathes life into democracy by empowering citizens to participate

[321] Constituent Assembly Debates, Volume 7, 4 November 1948

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in governance. This conception of democracy is fortified by Article 1(1), which states:

> "1. Name and territory of the Union. –
>
> (1) India, that is Bharat, shall be a Union of States.
>
> …"[322]

Article 1(1) indicates that the States are essential and indispensable to the constitutional structure of the country. The Union cannot exist without the existence of the States.

484. In **State (NCT of Delhi)** v. **Union of India**,[323] a Constitution Bench of this Court described the importance of States in the federal structure in the following terms:

> "131. The interest of the States inherent in a federal form of Government gains more importance in a democratic form of Government as it is absolutely necessary in a democracy that the will of the people is given effect to. To subject the people of a particular State/region to the governance of the Union, that too, with respect to matters which can be best legislated at the State level goes against the very basic tenet of a democracy."

The existence of States is therefore essential to the constitutional project of democracy and federalism. Why, then, does the Constitution envisage Union territories? What purpose do they serve? The following segment considers these questions.

[322] Article 1(1), Constitution of India
[323] (2018) 8 SCC 501

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II. The reason for the creation of Union territories

485. Despite the centrality of the States to the Constitution and the structure of governance that it envisages, Union Territories (which are administered by the Union Government) exist within the constitutional scheme. Every State has a Legislative Assembly[324] (and some have Legislative Councils[325] in addition) with a Governor who acts on the aid and advice of the Council of Ministers.[326] In contrast, only some Union territories have a Legislative Assembly.[327] The Union territories are administered by the President acting, to such extent as he thinks fit, through an Administrator.[328] The President also has the power to make regulations for certain Union territories.[329] There are many other differences between these constituent units. In essence, States are governed by their own governments and are directly accountable to the citizenry whereas Union territories are governed by the Union Government. There is no gainsaying that the relationship that the States have with the Union is different from the relationship that the Union Territories have with the Union. Generally, States have a degree of autonomy in comparison to Union Territories. This remains true even if a Union Territory like Puducherry has a legislative assembly. However, there is no homogenous class of Union territories. They each have differing levels of autonomy.

[324] Article 168
[325] Ibid
[326] Articles 153 and 163,
[327] Article 239A, Constitution of India. Delhi is a *sui generis* unit which also has a Legislative Assembly and a Chief Minister; See Article 239AA.
[328] Article 239
[329] Article 240

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486. The Report of the States Reorganisation Commission formed the basis for the Constitution (Seventh Amendment) Act 1956 by which the constituent units of India were organised into States and Union territories. The report is therefore an authoritative source in the endeavour to understand the reasons for the creation of two categories of constituent units and the reasons for the creation of Union Territories in particular.

487. The report recommended the creation of two categories of constituent units – states and territories. States would be the "primary constituent units" and "cover virtually the entire country" while the territories would be centrally administered.[330] The report indicated that for the States to enjoy a uniform status, it was necessary that each of them is capable of surviving as a "viable administrative unit" which has the financial, administrative and technical resources to sustain itself.[331] It stated that each state should be able to establish and maintain institutions to educate and equip its people to carry out the various functions that it would be required to undertake.[332] It recommended the creation of centrally administered territories (or, as we now know them, Union Territories) if, for "strategic, security or other compelling reasons," it was not practical to integrate a small territory with an adjoining State.[333]

488. The report recommended that most of the Part C States merge with adjoining States *inter alia* because:

[330] Paragraph 285, Report of the States Reorganisation Commission 1955
[331] Paragraph 238, Report of the States Reorganisation Commission 1955
[332] Ibid
[333] Paragraph 237, Report of the States Reorganisation Commission 1955

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a. Of the six Part C States with legislatures, only Coorg was in a position to administer itself without assistance from the Centre and that the other five were highly dependent on financial assistance from the Centre;

b. The administrative services in the Part C States were inadequate and had anomalies; and

c. Part C States continued to have close economic links with the adjacent areas.[334]

In addition, for three Part C States – Himachal Pradesh, Kutch, and Tripura – it recommended that the Union Government should retain supervisory power for some time to maintain the pace of development.[335]

489. The Commission recommended that three constituent units or areas be retained as territories administered by the Union Government:

> "1. Delhi.—Delhi should be constituted into such a centrally-administered territory; **the question of creating a municipal Corporation with substantial powers should be considered**. (Paragraphs 580 to, 594).
>
> 2. Manipur.—Manipur should be a centrally-administered territory for the time being. **The ultimate merger of this State in Assam should be kept in view**. (Paragraphs 723 to 732).
>
> 3. Andaman and Nicobar Islands.—The status quo in the Andaman and Nicobar Islands should continue. (Paragraph 753)."[336]
>
> (emphasis supplied)

[334] Paragraph 246 to 268, Report of the States Reorganisation Commission 1955
[335] Paragraphs 270, 271 Report of the States Reorganisation Commission 1955
[336] *Summary and Conclusions*, Report of the States Reorganisation Commission 1955

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490. From the information noticed in these paragraphs, the following aspects need to be underscored:

a. The Commission recommended that the constituent units which were "viable administrative units" with financial, administrative and technical resources be classified as States. The States were to be the primary constituent units and were **autonomous**;

b. The Commission recommended that some Part C States which were **not** viable administrative units merge with adjoining States. Such mergers resulted in the retention or development of the features of federalism and representative democracy for the unit which was absorbed because the State into which that unit was absorbed had these features. Crucially, this had the effect of **imparting autonomy** to the territory which was absorbed;

c. Where the Commission recommended that certain constituent units be centrally administered, it largely envisaged the **development of autonomy** through eventual mergers with other States or the conferral of State-like characteristics. It recommended the creation of a municipal corporation with substantial powers for Delhi. It envisaged the merger of Manipur with the State of Assam. As for the Andaman and Nicobar Islands, it noted that some time may elapse before they *de jure* became

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a part of India and that it was not desirable to fetter the discretion of the Union Government at the stage at which it submitted its report;[337] and

d. The Commission recommended that some territories remain under **temporary** central supervision and envisaged that they too would **become fully autonomous** (either by merging with an adjoining state or otherwise).

491. Union territories were, therefore, created when certain areas were not "viable administrative units" and did not have requisite resources to sustain themselves. In addition, strategic, security, or other compelling reasons could play a role in the decision to create a Union territory. Regardless of the category into which they were initially slotted, the recommendations of the Commission evince its opinion that most Union territories or other centrally supervised territories were on a **journey towards becoming viable administrative units and attaining autonomy**. It appears that the report submitted by the Commission was accepted – the Constitution (Seventh Amendment) Act 1956 and the States Reorganisation Act 1956 implemented most of its recommendations. The view of the Commission that most Union territories were on the journey towards becoming viable administrative units and attaining autonomy is borne out by their journey in the decades after its report.

[337] Paragraph 753, Report of the States Reorganisation Commission 1955

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III. The journey of Union territories: 1956 to 2023

492. It is useful to examine the journey of the constitutional status of various Union territories. We preface this historical journey with the preface that there is no homogenous class of Union territories since the Constitution envisages a unique relationship of each of them with the Union.

493. The Constitution (Seventh Amendment) Act 1956 created six Union territories: Delhi, Himachal Pradesh, Manipur, Tripura, the Andaman and Nicobar Islands, and the Laccadive, Minicoy and Amindivi Islands.[338] Delhi attained a distinct, *sui generis* status with the insertion of Article 239AA in 1991 by the Sixty-ninth constitutional amendment and is not similar to other Union territories.[339] Himachal Pradesh was granted statehood with the enactment of the State of Himachal Pradesh Act 1970. Manipur and Tripura became States upon the enactment of the North-Eastern Areas (Reorganisation) Act 1971. This statute also established the Union territories of Mizoram and Arunachal Pradesh, which were granted statehood in 1986.[340] The Andaman and Nicobar Islands continue to be Union territories as do the Laccadive, Minicoy and Amindivi Islands, the name of which was changed to Lakshadweep.[341]

494. Goa, Daman and Diu were added to the First Schedule as a Union Territory in 1962[342] as was Puducherry (previously known as Pondicherry).[343] In 1966,

[338] Section 2, Constitution (Seventh Amendment) Act 1956
[339] State (NCT of Delhi) v. Union of India, (2023) 9 SCC 1
[340] State of Mizoram Act 1986; State of Arunachal Pradesh Act 1986
[341] Laccadive, Minicoy and Amindivi Islands (Alteration of Name) Act 1973
[342] Constitution (Twelfth Amendment) Act 1962
[343] Constitution (Fourteenth Amendment) Act 1962

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Chandigarh was also made a Union territory.[344] A couple of decades later, the State of Goa was formed with the enactment of the Goa, Daman and Diu Reorganisation Act 1987. Daman and Diu continued to be a single Union Territory. It was eventually merged with Dadra and Nagar Haveli.[345]

495. Of all the Union territories in the history of the country, Himachal Pradesh, Manipur, Tripura, Goa, Mizoram and Arunachal Pradesh attained full statehood and Delhi attained significant autonomy with its *sui generis* status. As each of these territories (except Delhi in view of its status as the National Capital) became viable administrative units, they found a place in the constitutional structure as States. However, other areas continued to remain as Union Territories because they were not considered to be viable administrative units or because of other strategic or security-based reasons. These Union territories are smaller than those which eventually attained statehood.

496. The relevance of this discussion is elucidated by the observations of one of us (DY Chandrachud, CJI) in **State (NCT of Delhi)** v. **Union of India**:[346]

> "303. … The words of the Constitution cannot be construed merely by alluding to what a dictionary of the language would explain. While its language is of relevance to the content of its words, the text of the Constitution needs to be understood in the context of the history of the movement for political freedom. Constitutional history embodies events which predate the adoption of the Constitution. Constitutional history also incorporates our experiences in the unfolding of the Constitution over the past sixty-eight years while confronting complex social and political problems. Words in a constitutional text have linkages with the provisions in which they appear. It is well to remember that each provision is linked to other

[344] Punjab Reorganisation Act 1966
[345] Dadra and Nagar Haveli and Daman and Diu (Merger of Union Territories) Act 2019
[346] (2018) 8 SCC 501

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> segments of the document. It is only when they are placed in the wide canvas of constitutional values that a true understanding of the text can emerge … ”

IV. The scope of Article 3

497. Article 2 of the Constitution provides that Parliament may admit new States into the Union or establish new States:

> “2. Admission or establishment of new States. – Parliament may by law admit into the Union, or establish, new States on such terms and conditions as it thinks fit.”

Article 3, as it now stands,[347] is extracted below:

> “3. **Formation** of new States and **alteration** of areas, boundaries or names of existing States.— Parliament may by law—
>
> (a) **form** a new State by **separation of territory** from any State or by **uniting** two or more States or parts of States or by **uniting** any territory to a part of any State;
>
> (b) **increase the area** of any State;
>
> I **diminish the area** of any State;
>
> (d) alter the boundaries of any State;
>
> (e) **alter** the name of any State:
>
> Provided that no Bill for the purpose shall be introduced in either House of Parliament except on the recommendation of the President and unless, where the proposal contained in the Bill affects the area, boundaries or name of any of the States, the Bill has been referred by the President to the Legislature of that State for expressing its views thereon within such period as may be specified in the reference or within such further period as the

[347] Article 3 was amended multiple times. The proviso was substituted in 1955. Explanations I and II were added in 1966.

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> President may allow and the period so specified or allowed has expired.
>
> Explanation I.—In this article, in clauses (a) to (e), "State" includes a Union territory, but in the proviso, "State" does not include a Union territory.
>
> Explanation II.—The power conferred on Parliament by clause (a) includes the power to form a new State or Union territory by uniting a part of any State or Union territory to any other State or Union territory."[348]
>
> (emphasis supplied)

498. In exercise of the power under Article 3, Parliament has enacted legislations which reorganised the constituent units of the country at various points in time. It has altered the names of Karnataka (previously Mysore), Tamil Nadu (previously Madras), Uttarakhand (previously Uttaranchal) and Odisha (previously Orissa).[349] The erstwhile State of Bombay was divided into Gujarat and Maharashtra.[350] The State of Nagaland was carved out from the State of Assam.[351] The State of Meghalaya was established,[352] which was previously an autonomous state within the State of Assam.[353] The State of Haryana was carved out of the State of Punjab.[354] The State of Chhattisgarh was carved out of the State of Madhya Pradesh.[355] Sikkim was admitted into the Union of India in 1975 and was granted the status of a full State.[356] Uttarakhand (previously Uttaranchal) was carved out of the State of Uttar

[348] Article 3, Constitution of India
[349] Mysore State (Alteration of Name) Act 1973, Madras State (Alteration of Name) Act 1973, Uttaranchal (Alteration of Name) Act 2006, Orissa (Alteration of Name) Act 2011.
[350] Bombay Reorganisation Act 1960
[351] State of Nagaland Act 1962
[352] North-Eastern Areas (Reorganisation) Act 1971
[353] Assam Reorganisation (Meghalaya) Act 1969
[354] Punjab Reorganisation Act 1966
[355] Madhya Pradesh Reorganisation Act 2000
[356] Constitution (Thirty-sixth Amendment) Act 1975

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Pradesh.[357] Similarly, Jharkhand was carved out of the State of Bihar.[358] Most recently, the State of Telangana was carved out of the State of Andhra Pradesh.[359]

499. It is evident from these examples that Parliament admitted and established new States in India. In the process, some States such as the State of Bombay appear to be "extinguished" (so to speak). Some may argue that the alteration of names of the States similarly "extinguishes" the older State. However, the difference between extinguishing a State and extinguishing the **character** of a constituent unit as a State is of great consequence. A particular State may cease to exist because it is divided to create two (or more) new States. Similarly, a particular State may cease to exist because it is divided to create a State (or more than one State) and a Union territory (or more than one Union territory). In both cases, the alteration of the area (or at least some part of the area) does not result in it losing its character as a State, with the attendant constitutional implications. A constituent unit can be said to lose its character as a State only if it is converted into a Union territory in full, with no part of it retaining statehood. A change in the boundaries or the name of a State does not result in the change of its character as a State because such a character is derived not from its name or boundaries but from its relationship with the Union Government – one characterised by autonomy. As discussed in the previous segment, the Constitution confers legislative and executive powers on the States, which play an indispensable role in our democratic set-up.

[357] Uttar Pradesh Reorganisation Act 2000
[358] Bihar Reorganisation Act 2000
[359] Andhra Pradesh Reorganisation Act 2014

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These characteristics of States are not usually lost when its boundaries, size, or name are changed.

500. States under the Indian Constitution have their own independent constitutional existence. The various organs of governance such as the State Governor, the State Legislature, the High Courts, the Public Service Commissions, the State Elections Commissions are all creatures of the Constitution. As Dr Ambedkar noted in the Constituent Assembly:

> "As to the relation between the Centre and the States, it is necessary to bear in mind the fundamental principle on which it rests. The basic principle of federalism is **that the legislative and executive authority is partitioned between the Centre and the States not by any law to be made by the Centre but by the Constitution itself. This is what the Constitution does. The States under our Constitution are in no way dependent upon the Centre for their legislative or executive authority. The centre and the States are coequal in this matter.**"[360]
>
> (emphasis supplied)

501. Dr Ambedkar highlighted that power of the States to govern emanated from the Constitution and not Parliament. The exact significance of this understanding of States' powers may be demonstrated by reference to the decision in **State of Himachal Pradesh** v. **Union of India.**[361] That case concerned an inter-State dispute over the sharing of power from a hydro-electric plant between the States of Punjab and Himachal Pradesh. The State of Himachal Pradesh argued that it was entitled to 12% free power based on

[360] Kuldip Nayar v. Union of India 2006 (7) SCC 1 [52]

[361] 2011 (13) SCC 344.

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its status as the 'mother-State' of the power project. The State of Punjab sought to repel this argument by contending that Himachal Pradesh's claim of 12% free power was based on a notion that Himachal Pradesh had some pre-existing rights over the land and water, which could not be accepted as the territory of States, and potentially the very existence of States, owed their existence to Parliamentary legislation under Article 3. If Parliament could unilaterally alter the territory of Himachal, how could Himachal claim any pre-existing rights over its land and water? Rejecting this argument, the Division Bench in *State of Himachal* held:

> "**93.** We find that under the provisions of Article 3 of the Constitution, Parliament has the power to form a new State by separation of territory from any State or by uniting two or more States or parts of States or by uniting any territory to a part of any State, increase the area of any State, diminish the area of any State, alter the boundaries of any State and alter the name of any State, but **under Article 3, Parliament cannot take away the powers of the State executive or the State legislature in respect of matters enumerated in List II of the Seventh Schedule to the Constitution."**
>
> (emphasis supplied)

502. As Dr Ambedkar explained to the Constituent Assembly, the division of executive and legislative authority between the Union and the States, the hallmark of a federal constitution, is enshrined in constitutional text. As a result of this, the Union cannot alter the division of powers between the Union and the States absent a constitutional amendment which would require ratification by a majority of the States.[362] In **State of Himachal Pradesh** (supra), the Division Bench highlights an important corollary of this logic. If

[362] Constitution of India (1950), Article 368(2).

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Parliament cannot alter the division of powers between the Union and *all* States absent a constitutional amendment, can it logically alter the division of powers between the Union and *one* State by extinguishing its territory (and hence existence) under Article 3? The Division Bench held it cannot.

503. The Solicitor General (for the Union of India) submitted that statehood will be restored to Jammu and Kashmir and that its status as a Union territory is temporary. The Solicitor General submitted that the status of the Union Territory of Ladakh will not be affected by the restoration of statehood to Jammu and Kashmir. In view of the submission made by the Solicitor General that statehood would be restored of Jammu and Kashmir, we do not find it necessary to determine whether the reorganisation of the State of Jammu and Kashmir into two Union Territories of Ladakh and Jammu and Kashmir is permissible under Article 3. The status of Ladakh as a Union Territory is upheld because Article 3(a) read with Explanation I permits forming a Union Territory by separation of a territory from any State. This Court is alive to the security concerns in the territory. Direct elections to the Legislative Assemblies which is one of the paramount features of representative democracy in India cannot be put on hold until statehood is restored. We direct that steps shall be taken by the Election Commission of India to conduct elections to the Legislative Assembly of Jammu and Kashmir constituted under Section 14 of the Reorganisation Act by 30 September 2024. Restoration of statehood shall take place at the earliest and as soon as possible.

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504. The question of whether Parliament can extinguish the character of statehood by converting a State into one or more Union Territories in exercise of power under Article 3 is left open. In an appropriate case, this Court must construe the scope of powers under Article 3 in light of the consequences highlighted above, the historical context for the creation of federating units, and its impact on the principles of federalism and representative democracy.

x. The Challenge to the Reorganization Act on procedural grounds

a. Parliament's exercise of power under the first proviso to Article 3

505. The Proclamation issued by the President under Article 356 on 19 December 2018 states that the President had received a report from the Governor of the State of Jammu and Kashmir and after considering the report and other information received , the President is satisfied that a situation has arisen in which the government of the State cannot be carried out in accordance with the provisions of the Constitution of India as applicable to the State of Jammu and Kashmir and the Constitution of Jammu and Kashmir. In exercise of the power under Article 356, the President, *inter alia*:

a. assumed to himself all the functions of the Government of the State and all the powers exercisable by the Governor of Jammu and Kashmir;

b. declared that the powers of the Legislature shall be exercisable by or under the authority of Parliament; and

c. suspended the first and second proviso to Article 3.

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506. In the present case, the proviso to Article 3 was suspended by the Proclamation dated 19 December 2018 and the act of Parliament expressed its views in support of the Reorganisation Act. The Union of India has argued that as the views expressed by States under the proviso to Article 3 are non-binding, there is no substantial constitutional violation that can result in the invalidation of the Reorganisation Act even if the proviso was not strictly complied with.

507. The first proviso to Article 3 stipulates that where the proposal contained in the Bill affects the area, boundaries or name of any of the States, the President must refer the Bill to the Legislature of that State for expressing their views. The President referred the Reorganisation Bill to the Lok Sabha and the Rajya Sabha for their views since Parliament exercised the "powers of the Legislature" of the State of Jammu and Kashmir in view of the Proclamation issued under Article 356. On 5 August 2019, the Lok Sabha and Rajya Sabha expressed the view in favour of the acceptance of the proposal in the Reorganisation Bill. The resolution reads thus:

> "That the President of India has referred the Jammu and Kashmir Reorganisation Bill, 2019 to this House under the proviso to article 3 of the Constitution of India for its views as this House is vested with the powers of the State Legislature of Jammu and Kashmir, as per proclamation of the President of India dated 19th December, 2018. This House resolves to express the view to accept the Jammu and Kashmir Reorganisation Bill, 2019."

508. The issue that arises for consideration is whether the procedure which was followed in passing the Reorganisation Bill 2019 is valid. That is, could Parliament have substituted its own views for the views of the State legislature

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as required under the proviso to Article 3 in view of the power conferred upon it by the Proclamation issued under Article 356?

509. Applying the standard laid above to test the exercise of power after a Proclamation under Article 356 is issued, the petitioners must first prove that the exercise of power was *mala fide.* We have in the preceding section of this judgment held that the scope of the powers of Parliament under Article 356(1)(b) cannot be restricted to only law-making powers of the Legislature of the State. Thus, the exercise of power cannot be held *mala fide* merely because it is a non-law making power or that it furthers an important federal principle.

510. The decision of the five-Judge Bench of this Court in **Babulal Parate** v. **State of Bombay**[363] must be referred to. It was held that the views expressed by the State Legislature under the proviso to Article 3 are not binding on Parliament. In that case, the States Reorganisation Bill 1956 was introduced in the Lok Sabha. The Bill had a proposal for the formation of three separate states namely, the Union Territory of Bombay, the State of Maharashtra including Marathwada and Vidharbha, and the State of Gujarat including Saurashtra and Cutch. The Bill was referred to a Joint Select Committee. Pursuant to the recommendations of the Joint Select Committee, an amended version of the Bill was introduced in both Houses. Both Houses of Parliament passed the Bill. According to the States Reorganisation Act 1956, a new Part A State known as the State of Bombay was formed. The appellant initiated

[363] AIR 1960 SC 51

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proceedings under Article 226 on the ground that the Legislature of the State of Bombay had no opportunity of expressing its views on the formation of a composite State instead of three separate units as proposed earlier. This Court held that the views of the State Legislature are only recommendatory and that it is not necessary that, the views of the concerned State Legislature have to be secured on every occasion that a bill is amended:

> "5. […] Nor is there anything in the proviso to indicate that Parliament must accept or act upon the views of the State Legislature. Indeed, two State Legislatures may express totally divergent views. […] It was pointed out in the course of arguments that if the second proviso required fresh reference and a fresh bill for every amendment, it might result in an interminable process, because any and every amendment of the original proposal contained in the Bill would then necessitate a fresh Bill and a fresh reference to the State Legislature. Other difficulties might also arise if such a construction were put on the proviso; for example, in a case where two or three States were involved, different views might be expressed by the Legislatures of different States. If Parliament were to accept the views of one of the Legislatures and not of the other, a fresh reference would still be necessary by reason of any amendment in the original proposal contained in the Bill."

511. If the views of the State Legislature were binding on Parliament (which is not the case), there would be scope for debate on whether Parliament in exercise of powers under Article 356(1)(b) could have substituted its views for the views of the Legislative Assembly of the State. However, the views of the Legislature of the State are not binding on Parliament in terms of the first proviso to Article 3. The views of the Legislature of the State under the first proviso to Article 3 are recommendatory to begin with. Thus, Parliament's exercise of power under the first proviso to Article 3 is valid and not *mala fide.*

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b. Suspension of the second proviso to Article 3 as applicable to Jammu and Kashmir

512. The petitioners have challenged the suspension of the second proviso to Article 3 which was inserted in Article 3 in its application to the State of Jammu and Kashmir by CO 48 of 1954. By the second proviso (as it applies to the State of Jammu and Kashmir) a Bill providing for increasing or diminishing the area of the State of Jammu and Kashmir or altering the name or boundary of the State cannot be introduced in Parliament without the consent of the legislature of the State.

513. Once this court has come to the conclusion that CO 272 is valid, all the provisions of the Constitution of India apply to the State of Jammu and Kashmir. The exceptions and modifications to the provisions of the Constitution in its application to Jammu and Kashmir ceased to exist. CO 272 was issued by the President on 5 August 2019. On the same day, the Reorganization Bill was sent to the Rajya Sabha and Lok Sabha for securing their views under the first proviso to Article 3 and the Rajya Sabha passed the Reorganization Act. The next day, the Lok Sabha passed the Reorganization Act. Thus, when the Reorganisation Bill was introduced, that is 5 August 2019, the second proviso to Article 3 as it applied to the State of Jammu and Kashmir ceased to exist because of CO 272. Thus, the issue of whether the second proviso to Article 3 could have been suspended in exercise of the power under Article 356(1)(c) no longer survives.

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F. Conclusion

514. In view of the above discussion, the following are the conclusions:

a. The State of Jammu and Kashmir does not retain any element of sovereignty after the execution of the IoA and the issuance of the Proclamation dated 25 November 1949 by which the Constitution of India was adopted. The State of Jammu and Kashmir does not have 'internal sovereignty' which is distinguishable from the powers and privileges enjoyed by other States in the country. Article 370 was a feature of asymmetric federalism and not sovereignty;

b. The petitioners did not challenge the issuance of the Proclamations under Section 92 of the Jammu and Kashmir Constitution and Article 356 of the Indian Constitution until the special status of Jammu and Kashmir was abrogated. The challenge to the Proclamations does not merit adjudication because the principal challenge is to the actions which were taken **after** the Proclamation was issued;

c. The exercise of power by the President **after** the Proclamation under Article 356 is issued is subject to judicial review. The exercise of power by the President must have a reasonable nexus with the object of the Proclamation. The person challenging the exercise of power must *prima facie* establish that it is a *mala fide* or *extraneous* exercise of power. Once a *prima facie* case is made, the onus shifts to the Union to justify the exercise of such power;

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d. The power of Parliament under Article 356(1)(b) to exercise the powers of the Legislature of the State cannot be restricted to law-making power thereby excluding non-law making power of the Legislature of the State. Such an interpretation would amount to reading in a limitation into the provision contrary to the text of the Article;

e. It can be garnered from the historical context for the inclusion of Article 370 and the placement of Article 370 in Part XXI of the Constitution that it is a temporary provision;

f. The power under Article 370(3) did not cease to exist upon the dissolution of the Constituent Assembly of Jammu and Kashmir. When the Constituent Assembly was dissolved, only the transitional power recognised in the proviso to Article 370(3) which empowered the Constituent Assembly to make its recommendations ceased to exist. It did not affect the power held by the President under Article 370(3);

g. Article 370 cannot be amended by exercise of power under Article 370(1)(d). Recourse must have been taken to the procedure contemplated by Article 370(3) if Article 370 is to cease to operate or is to be amended or modified in its application to the State of Jammu and Kashmir. Paragraph 2 of CO 272 by which Article 370 was amended through Article 367 is *ultra vires* Article 370(1)(d) because it modifies Article 370, in effect, without following the procedure prescribed to modify Article 370. An interpretation clause cannot be used to bypass the procedure laid down for amendment;

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h. The exercise of power by the President under Article 370(1)(d) to issue CO 272 is not *mala fide.* The President in exercise of power under Article 370(3) can unilaterally issue a notification that Article 370 ceases to exist. The President did not have to secure the concurrence of the Government of the State or Union Government acting on behalf of the State Government under the second proviso to Article 370(1)(d) while applying all the provisions of the Constitution to Jammu and Kashmir because such an exercise of power has the same effect as an exercise of power under Article 370(3) for which the concurrence or collaboration with the State Government was not required;

i. Paragraph 2 of CO 272 issued by the President in exercise of power under Article 370(1)(d) applying all the provisions of the Constitution of India to the State of Jammu and Kashmir is valid. Such an exercise of power is not *mala fide* merely because all the provisions were applied together without following a piece-meal approach;

j. The President had the power to issue a notification declaring that Article 370(3) ceases to operate without the recommendation of the Constituent Assembly. The continuous exercise of power under Article 370(1) by the President indicates that the gradual process of constitutional integration was ongoing. The declaration issued by the President under Article 370(3) is a culmination of the process of integration and as such is a valid exercise of power. Thus, CO 273 is valid;

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k. The Constitution of India is a complete code for constitutional governance. Following the application of the Constitution of India in its entirety to the State of Jammu and Kashmir by CO 273, the Constitution of the State of Jammu and Kashmir is inoperative and is declared to have become redundant;

l. The views of the Legislature of the State under the first proviso to Article 3 are recommendatory. Thus, Parliament's exercise of power under the first proviso to Article 3 under the Proclamation was valid and not *mala fide;*

m. The Solicitor General stated that the statehood of Jammu and Kashmir will be restored (except for the carving out of the Union Territory of Ladakh). In view of the statement we do not find it necessary to determine whether the reorganisation of the State of Jammu and Kashmir into two Union Territories of Ladakh and Jammu and Kashmir is permissible under Article 3. However, we uphold the validity of the decision to carve out the Union Territory of Ladakh in view of Article 3(a) read with Explanation I which permits forming a Union Territory by separation of a territory from any State; and

n. We direct that steps shall be taken by the Election Commission of India to conduct elections to the Legislative Assembly of Jammu and Kashmir constituted under Section 14 of the Reorganisation Act by 30 September 2024. Restoration of statehood shall take place at the earliest and as soon as possible.

515. The writ petition and special leave petitions are disposed of in the above terms.

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PART F

516. Pending application(s), if any, stand disposed of.

……CJI
[Dr Dhananjaya Y Chandrachud]

……J
[B R Gavai]

……J
[Surya Kant]

New Delhi;
December 11, 2023

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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)

WITH W.P.(C) No. 871/2015

(WITH IA No. 38200/2019 – INTERVENTION/IMPLEADMENT, IA No. 34489/2019 – INTERVENTION/IMPLEADMENT, IA No. 1/2015 - PERMISSION TO FILE SYNOPSIS AND LIST OF DATES)

W.P.(C) No. 722/2014

(WITH IA No. 120574/2018 - INTERVENTION APPLICATION, IA No. 106447/2018 - INTERVENTION APPLICATION, IA No. 120250/2018 INTERVENTION APPLICATION, IA No. 95744/2017 - INTERVENTION APPLICATION, IA No. 108743/2018 - INTERVENTION APPLICATION, IA No. 108652/2018 - INTERVENTION APPLICATION, IA No. 79897/2017 INTERVENTION APPLICATION, IA No. 79570/2017 - INTERVENTION APPLICATION, IA No. 106824/2018 – INTERVENTION/IMPLEADMENT, IA No. 103006/2018 – INTERVENTION/IMPLEADMENT, IA No. 120075/2018

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INTERVENTION/IMPLEADMENT, IA No. 110782/2017
INTERVENTION/IMPLEADMENT, IA No. 114320/2018
INTERVENTION/IMPLEADMENT, IA No. 55540/2019
INTERVENTION/IMPLEADMENT, IA No. 81485/2017
INTERVENTION/IMPLEADMENT, IA No. 52137/2019
INTERVENTION/IMPLEADMENT, IA No. 108303/2018
INTERVENTION/IMPLEADMENT, IA No. 121757/2018
INTERVENTION/IMPLEADMENT, IA No. 108287/2018
INTERVENTION/IMPLEADMENT, IA No. 121124/2018
INTERVENTION/IMPLEADMENT, IA No. 55541/2019 - PERMISSION TO APPEAR AND ARGUE IN PERSON)2 SLP(C) No. 19618/2017 (XIV) (WITH IA No. 182696/2018 - INTERVENTION APPLICATION)

W.P.(C) No. 1013/2019

(WITH IA 169328/2019 FOR INTERVENTION APPLICATION ON IA 180145/2019, IA No. 145853/2019 – CLARIFICATION/DIRECTION, IA No. 118588/2019 - EX-PARTE STAY, IA No. 154967/2019 - INTERVENTION APPLICATION, IA No. 143833/2019 - INTERVENTION APPLICATION, IA No. 180145/2019 - INTERVENTION APPLICATION, IA No. 142338/2019 INTERVENTION APPLICATION, IA No. 164975/2019 - INTERVENTION APPLICATION, IA No. 164876/2019 - INTERVENTION APPLICATION, IA No. 155795/2019 - INTERVENTION APPLICATION, IA No. 169328/2019 INTERVENTION/IMPLEADMENT, IA No. 136293/2019 INTERVENTION/IMPLEADMENT, IA No. 160049/2019 INTERVENTION/IMPLEADMENT, IA No. 142343/2019 - PERMISSION TO APPEAR AND ARGUE IN PERSON, IA No. 118589/2019 - PERMISSION TO APPEAR AND ARGUE IN PERSON)

W.P.(C) No. 1082/2019

(WITH IA No. 171000/2019 – INTERVENTION/IMPLEADMENT, IA No. 136299/2019 - INTERVENTION/IMPLEADMENT)

W.P.(C) No. 1068/2019

(WITH IA No. 136304/2019 – INTERVENTION/IMPLEADMENT, IA No. 125260/2019 - STAY APPLICATION)

W.P.(C) No. 1037/2019

(WITH IA No. 95994/2021 - EXEMPTION FROM FILING AFFIDAVIT, IA No. 96178/2021 - EXEMPTION FROM FILING AFFIDAVIT, IA No. 96173/2021 INTERVENTION APPLICATION, IA No. 9596/2020 - INTERVENTION

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W.P.(C) No. 1062/2019

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W.P.(C) No. 1104/2019

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W.P.(C) No. 1165/2019

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W.P.(C) No. 1210/2019

(WITH IA No. 125359/2020 – CLARIFICATION/DIRECTION, IA No. 107217/2021 - EARLY HEARING APPLICATION)

W.P.(C) No. 1222/2019

W.P.(C) No. 396/2017

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W.P.(C) No. 756/2017

W.P.(C) No. 398/2018
(WITH IA No. 71210/2018 - GRANT OF INTERIM RELIEF, IA No. 49481/2018 - PERMISSION TO FILE SYNOPSIS AND LIST OF DATES)

W.P.(C) No. 924/2018
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W.P.(C) No. 1092/2018

W.P.(C) No. 1162/2018

W.P.(C) No. 1048/2019
(WITH IA No. 188819/2022 - APPROPRIATE ORDERS/DIRECTIONS, IA No. 112494/2020 - EARLY HEARING APPLICATION, IA No. 136357/2019 INTERVENTION/IMPLEADMENT, IA No. 122866/2019 - PERMISSION TO APPEAR AND ARGUE IN PERSON, IA No. 188822/2022 - PERMISSION TO FILE ADDITIONAL DOCUMENTS/FACTS/ANNEXURES, IA No. 188813/2022 PERMISSION TO PLACE ADDITIONAL FACTS AND GROUNDS)

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W.P.(C) No. 1368/2019

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SANJAY KISHAN KAUL, J.

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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

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[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.

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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

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[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.

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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]

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[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.

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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, Bhauttas, 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 *Bhautta Rincana*. About two centuries later, Mirza

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[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.

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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*

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[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.

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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

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[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.

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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

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[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.

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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]

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[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.

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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

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[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.

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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

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[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.

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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.

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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 Deshadhipatti, 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

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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

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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.

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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.

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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***

I. 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

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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>.

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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 Gopalaswami 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. Gopalaswami 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) Not withstanding 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

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[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.

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(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:

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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

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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.

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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 &

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

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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

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[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.

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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

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[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.

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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 & Kasmir, 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,

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[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.

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"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;

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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.

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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

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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

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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 &

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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 &

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[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.

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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

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[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.

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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).

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[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>.

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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.

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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

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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

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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.

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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

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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

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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 Gopalaswami 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.

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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.

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[73] 1994 Supp (1) SCC 324

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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

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[74] 1969 (2) SCR 365

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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

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[75] (1973) 4 SCC 225

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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.

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[76] supra
[77] (2020) 4 SCC 1
[78] 1969 Supp (2) SCR 270
[79] supra

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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 Gopalaswami

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

ii. The petitioners referred to Article 370(3), submiting 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,

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[80] supra
[81] Prem Nath Kaul (Para 38)

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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.

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[82] 1962 Supp (1) SCR 405
[83] (1971) 1 SCC 85

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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:

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[84] (supra) para 2072
[85] (2017) 2 SCC 538
[86] supra

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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).

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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

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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

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[88] 1951 SCC 568
[89] supra
[90] (1962) 1 SCR 688
[91] (supra) para 2072
[92] (supra)

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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 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 State[93]. The mechanism of Article 356 of the Constitution was confined to

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

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a method for restoration of elected Government i.e., restoration of the democracy[94].

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 subsist[95].

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*'.

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[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*

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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

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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

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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.

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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.

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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],

[96] 1994 Supp (1) SCC 191

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which upheld the Constitutional validity of the Constitution (Twenty-sixth Amendment) Act of 1971. This judgment in ***Madhavrao Scindia's*** case[97] 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 M*inister', activation of 94 out of 97 Entries

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[97] supra
[98] (1964) 1 SCR 371

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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. Gopalaswami 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.

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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.

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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.

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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.

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[99] (supra)
[100] (supra)

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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.

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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

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[101] *(1972) 1 SCC 536*

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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 welcomed[102].

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[102] **Raghunath Ganpatrao's** *case (supra)*

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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

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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***

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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 State[104].

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 amendment[105]. 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 Legislature[106].

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 concurrence[107]. In effect, views are to be taken from the entire nation *via* the

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[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)

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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.

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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:

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[108] AIR 1970 Del 178

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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

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[109] supra

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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

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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

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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. Gopalaswami 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

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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*

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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 respective 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

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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;

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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 a port 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 christan 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

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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.

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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.

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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)

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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,

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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,

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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).

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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

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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).

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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"*"

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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

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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

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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*

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[114] (supra).
[115] (supra).

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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)

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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

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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. 136[117] was issued. The Solicitor General also drew our attention to other Constitutional Orders 151,[118] 154,[119] 160[120] and 162[121] 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.

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[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.

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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.

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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

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[122] (1972) 4 SCC 733
[123] (supra)
[124] (supra)

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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.

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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

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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

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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.

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[126] (supra)
[127] (2006) 2 SCC 1

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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.

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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

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[128] (1964) 1 SCR

[129] (1960) 1 SCR 605

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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

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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;

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[130] (supra)

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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

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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

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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

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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.

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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.

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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.

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

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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

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

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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*

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[135] Velasquez Rodriguez v Honduras, (Ser. C) No. 4 (IACHR) 1988.
[136] (1997) 6 SCC 241

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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

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[137] (supra)

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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.

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IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

WRIT PETITION (CIVIL) NO. 1099 OF 2019
AND
OTHER CONNECTED MATTERS

IN RE.: ARTICLE 370 OF THE CONSTITUTION

SANJIV KHANNA, J.

A judgment is a decision which gives reasons to arrive at and reach the conclusion. We have two judgments.

2. The judgment of Hon'ble Dr. Justice D.Y. Chandrachud, the Chief Justice, is scholarly and it elaborately annotates the complex legal issues. The judgment authored by Hon'ble Mr. Justice Sanjay Kishan Kaul pragmatically demystifies the factual and legal position. Both judgments are in seriatim and uniformly agree that Article 370 of the Constitution of India was a feature of asymmetric federalism and not sovereignty. Article 370 was enacted as a transitional provision and did not have permanent character. The abrogation of Article 370 does not negate the federal structure, as the citizens living in Jammu and Kashmir do and will enjoy same status and rights as given to citizens residing in other parts of the

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country.[1] Paragraph (2) of C.O. 272 by which Article 370 was amended by taking recourse to Article 367 is *ultra vires* and bad in law, *albeit* can be sustained in view of the corresponding power under Article 370(1)(d). Most importantly, Article 370 has been made inoperative in terms of clause (3) to Article 370. Lastly, C.O. 273 is valid.

3. I find it difficult to state that I agree with the reasoning in one and not the other. I, therefore, respectfully concur with the two judgments. However, I would add with particularisation.

4. Dr. Justice D.Y. Chandrachud has elaborately examined and interpreted the power of the President of India under Article 356 of the Constitution of India and disseminated the opinions of Mr. Justice B.P. Jeevan Reddy and Mr. Justice P.B. Sawant in ***S.R. Bommai and Others*** v. ***Union of India and Others***.[2] Reference can also be made to ***Rameshwar Prasad and Others (VI)*** v. ***Union of India and Another.***[3] I respectfully agree.

5. I also agree with the observations recorded by Dr. Justice D.Y. Chandrachud taking record of the statement on behalf of the Union of India for restoration of the statehood of the Union Territory of

[1] *See* Paragraph 5.
[2] (1994) 3 SCC 1.
[3] (2006) 2 SCC 1.

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Jammu and Kashmir, while upholding the creation of the Union Territory of Ladakh.[4]

6. Union Territories are normally geographically small territories, or may be created for aberrant reasons or causes. Conversion of a State into Union Territory has grave consequences, amongst others, it denies the citizens of the State an elected state government and impinges on federalism. Conversion/creation of a Union Territory from a State has to be justified by giving very strong and cogent grounds. It must be in strict compliance with Article 3 of the Constitution of India.

7. Mr. Justice Sanjay Kishan Kaul has explained the effect of Article 370(3) and why it continued to operate after dissolution of the Constituent Assembly of the State. I respectfully agree with the detailed reasoning given by Mr. Justice Sanjay Kishan Kaul on this aspect.

.....J.
(SANJIV KHANNA)

NEW DELHI;
DECEMBER 11, 2023.

[4] Mr. Justice Sanjay Kishan Kaul has noted alike.

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