INDEX

S.No.	PARTICULARS	PAGE NOS.
1.	Rejoinder with Affidavit	1-52

1

IN THE SUPREME COURT OF INDIA

CIVIL WRIT JURISDICTION

W.P (CIVIL) 1099 OF 2019

DR. SHAH FAESAL & ORS ...PETITIONERS

Versus

UNION OF INDIA & ANR ...PETITIONERS

REJOINDER ON BEHALF OF THE PETITIONERS TO THE COMMON COUNTER-AFFIDAVIT DT. 09.11.2019 FILED BY THE RESPONDENT NO.1 IN W.P.(C) 1037 OF 2019

MOST RESPECTFULLY SHOWTH THAT:

1. The present rejoinder is filed by the Petitioners in the captioned Writ Petition in response to the counter-affidavit dt. 09.11.2019 (hereinafter, "Limited Reply") filed by the Respondent No.1 Union of India in W.P.(C) 1037 of 2019,but has been fashioned as a common counter-affidavit in all the connected matters, one of which is the captioned Writ Petition.

2. The Limited Reply does not deal with any of the averments or grounds in the captioned Writ Petition in detail and the Respondent has chosen not to file a para-wise reply to the captioned Writ Petition. This Hon'ble Court may be pleased consider the Respondents as having waived their right to file a para-wise reply to the Captioned Writ Petition and to have accepted all consequences that flow therefrom including the

Petitioner's right to set up pleas of *non-traverse*on appropriate averments.

3. All averments, pleadings and submissions in the Limited Reply are denied except to the extent specifically admitted hereinafter.
4. In its Limited Reply, the Respondent has controverted the Petitioners' challenge to Presidential Order (C.O.) 272, Presidential Order (C.O.) 273, and the Jammu and Kashmir Reorganisation Act of 2019. The Petitioners respectfully submit that the Limited Reply fails to engage with the core of the constitutional challenge, ignores the true character of the dispute, and advances several claims that are solely designed to raise prejudice against the Petitioners' case.
5. The Petitioners respectfully reiterate that at the heart of this dispute are two fundamental - and intertwined - constitutional principles: democratic government and federalism. This is not a case about the desirability of Article 370 of the Indian Constitution, the policy arguments for or against its existence, or about the politics of the state of Jammu and Kashmir. Rather, the questions raised in the case are far simpler: can the central government, using the *temporary* cover of President's Rule, effect a fundamental, permanent, and irreversible alteration in the federal structure, without any participation by the elected representatives of the state, or for that matter, the participation of any of the institutions of the state duly established under the law? And can it do so by departing from the very process that was envisaged by the Constitution - a process that envisaged the *active* participation of state and its elected representatives?

This case, therefore, requires this Hon'ble Court to rule upon nature, scope, and limitations of President's Rule (i.e., rule by centre) in a federal and democratic Constitution.

6. In this Rejoinder, the Petitioners' shall address the main contentions raised in the Limited Reply, in the following sequence: *first*, it shall be argued that the Respondent has presented inaccurate and misleading facts to this Hon'ble Court and how the Respondent has failed to address the Petitioner's argument on the nature of India's federalism being a pluralistic one(**A.**); *secondly*, the three precedents that the Respondent relies upon to support its use of Article 370(1)(d) to effectively amend Article 370(3) do not help its case (**B.**); *thirdly*, the Respondent has failed to address the Petitioners' arguments in support of implied limitations upon Presidential power under President's Rule (**C.**); *fourthly*, the Respondent has misunderstood - and misrepresented - the Petitioners' arguments on Section 147 of the Constitution of Jammu and Kashmir (**D.**); *fifthly*, notwithstanding the Respondent's arguments to the contrary, thereorganisation of the state of Jammu and Kashmir into two union territories is illegal and unconstitutional (**E.**); and *finally*, certain miscellaneous arguments advanced by the Respondent are addressed (**F.**).

A. The Respondent's Factual Case

1. The Respondent begins its case by making certain assertions that have been presented as indisputable facts, but which are vigorously disputed. These assertions are:

(a) The existence of Article 370 has been an impediment to the full integration of the State of J&K into India.

(b) The existence of Article 370 provided succor to separatists and militants and has created secessionism amongst the populace of J&K.

(c) Article 370 prevented the people of J&K from enjoying the benefits of schemes of the central government and various rights available to other citizens.

(d) Laws and Constitutional provisions were not applicable *per se*.

(e) Special provisions available for other states are distinct, as all other provisions of the Constitution are applicable to them, whereas they are allegedly not applicable to J&K

(f) Article 370 was supposed to be a temporary provision

(g) Article 35A created a discriminatory scheme against Kashmiri residents and other Indians, and impacted the economic development of the state despite huge expenditure by the Union of India

(h) Terrorism - attributed to Article 370 - has resulted in the deaths of lakhs of persons, including thousands of Indian servicemen and others.

2. The Petitioners submit that these assertions are red herrings. They ought not to prejudice the straightforward case for the unconstitutionality of the manner in which Article 370 has been effectively abrogated. For the sake of convenience, the Petitioners answer each assertion *seriatem*.

3. (a)- (d) and (h): The integration of the former princely state of J&K has been indisputable since 1950. Article 1 of the Constitution has always applied to J&K, *as set out in Article 370 itself*. The existence of the Constitution of J&K does not impact this essential fact, as Section 3 of the Constitution of J&K stipulates that J&K is an integral part of India (indeed, this provision cannot be amended by either the J&K Legislative Assembly, or the Legislative Council, as per Section 147.

4. Indeed, as Justice R.F. Nariman recorded in **paragraph 2** of his judgment in ***SBI v. Santosh Kumar***, (2017) 2 SCC 538, J&K is indisputably a part of the federal structure of India, but has been accorded a special provision due to historical reasons. Furthermore, as Nariman J. went on to note in **paragraphs 11 and 12** of the same judgment, the legislative relations between the state of J&K and the Union of India, within the framework of Article 370, conform to the principles of federalism as laid

down in ***West Bengal v. Union of India***, (1964) 1 SCR 371 at 396-397.

5. Not only that, but the Presidential Order of 1954 - passed under the framework of Article 370 - adopts virtually the whole of the Constitution of India to J&K, with exceptions as specified in **paragraph 26** of Nariman J.'s judgment. It is respectfully submitted, therefore, that the question of "integration" is moot.

6. It is true that under Article 370, the consent or concurrence of the State Government was a condition pre-requisite for central legislation to apply to the State. However, such an arrangement is not out of step with federal structures prevalent across the world. Furthermore, in effect, this only meant that the representatives of the people of J&K would democratically decide upon acceptance or denial of particular benefits. The Petitioners note that there has never been any movement in Kashmir protesting the absence of central government schemes or benefits, or against delayed implementation of legislation.

7. Petitioners respectfully submit that the focus of separatists and secessionists is on either the independence of J&K, or its merger with Pakistan. As indicated above, neither of these eventualities can be *legally* attained within the framework of Article 370 of the Constitution of India, or the Constitution of Jammu and Kashmir.

8. (e) As a matter of fact, nearly all provisions of the Indian Constitution are applicable to J&K under the Presidential Order of 1954 as amended from time to time.

9. (f) The so-called temporary nature of Article 370 has been discussed below.

10. (g) Article 35A was a partial exception to the complete application of the fundamental rights chapter to the State of Jammu & Kashmir. There is nothing untoward or extraordinary about this, within the scheme of the Indian Constitution. The Constitution recognises mechanisms through which legislation could be protected from fundamental rights challenges (e.g., Schedule IX), and also stipulates other territories where there are restrictions on the sale and purchase of property (for example, the Sixth Schedule). In any event, the validity of Article 35A was already before this Hon'ble Court, and it could have been struck down without any impact on Article 370.

11. Furthermore, it is respectfully pointed out that the Hon'ble High Court of Jammu and Kashmir has already held that the daughter of a permanent resident married to an outsider would not lose her status post marriage.

12. Lastly, to the extent it is claimed that 35A caused dissatisfaction or impeded economic development, it is urged that there is not an iota of evidence to support such a

submission. Indeed, and contrary to the Respondent's insinuations, on most economic and social indicators, the State of Jammu and Kashmir has always been on par with the better-performing states of the Indion Union. The Petitioners respectfully request leave of this Hon'ble Court to produce the relevant statistics and figures, and material in support thereof as and when required and if so directed by this Hon'ble Court. A sample of such figures on key development figures compiled for recent years from various publicly available sources is given below.

Poverty rate

J&K stood eighth in terms of poverty rate (10.35)%. Goa had the lowest poverty rate of 5.09%, while Chhattisgarh had the highest poverty rate of 39.93%. The national average was 21.92%.

Infant mortality rate

The former State had an infant mortality rate (IMR) of 24 and was placed 10th in the country in 2016. Goa had the lowest IMR (8 infant deaths per 1000) while Madhya Pradesh had the highest (47 infant deaths per 1000). The national average for IMR was 31.

Per capita net State GDP (2016-17)

In 2016-17, Jammu and Kashmir had per capita net State GDP of ₹62,145. Goa was the top-ranked State (₹3,08,823) while Bihar (₹25,950) was the lowest ranked State.

Human development index

In 2017, Jammu and Kashmir's Human Development Index (HDI) was 0.68, higher than even States like Andhra Pradesh and Gujarat. Kerala had the highest HDI (0.77) while Bihar had the least (0.57). The Human Development Index (HDI) is a composite index of life expectancy, education, and per capita income indicators.

People served per government doctor

3,060 persons were served by one government doctor in J&K in 2018. Only six States have had lesser people served by one doctor. The best State was Delhi (2,203 people per government doctor) while the worst State was Bihar (28,391 persons served by one government doctor).

Rural unemployment rate

Jammu and Kashmir was placed 21st for rural unemployment rate in 2011-12. Out of every 1,000 people, 25 were unemployed in the rural areas of J&K. The best State was Gujarat (3 out of every 1000 people were unemployed) while Nagaland was the worst (151 were unemployed out of every 1000 people). The national average was 17.

Life expectancy

Jammu and Kashmir ranked third out of 22 States in terms of life expectancy. The former State had an average life expectancy of 73.5 between 2012-16. Kerala had the highest life expectancy of 75.1, while Uttar Pradesh had the lowest (64.8). The national average was 68.7.

13. In sum, it is respectfully submitted that Article 370 had enormous symbolic value. It signified that that the sovereign democratic republic of India honored the promises made in its Constitution, to respect the will of the people of Kashmir. It showed that the state of Jammu and Kashmir was not a territory, subject to domination and subjugation by an imperial power, but a constituent unit of India's federal structure, with a role to play in determining the character of that federal relationship. Negotiations and parleys with separatists and lapsed terrorists were conducted on the basis of the framework of Article 370: this Article, therefore, firmly linked the fate of Jammu and Kashmir with India, while also providing flexibility with respect to states' rights, within the bounds of Indian

federalism. It was, therefore, a shining example of the "pluralistic federalism" that is the hallmark of Indian Constitutionalism.

B. The Use of Article 370(1)(d) to Effectively Amend Article 370(3)

14. In their several petitions, the Petitioners have argued that Article 370(3) cannot be effectively amended by the mechanism set out under Article 370(1)(d). In response, the Respondent has made two arguments: *first*, it has set out three instances where - it alleges - this has been done before. The Petitioners respectfully submit that none of these examples support the Respondent's case. Either the method used was fundamentally different, or the nature of the change was merely interpretive, and not substantive (as in this case) (**I**); and *secondly*, it has argued that the powers of "modification" under Article 370 are very wide. The Petitioners respectfully submit that no matter how wide, the word "modification" does not cover the creation of substantive new powers altogether (**II**).

The precedents cited by the Respondent are inapplicable to this case

15. **Presidential order C.O. 44 dt. 15.11.1952**: This Order amended the provisions of Article 370(1) using the mechanism of Article 370(3), and after taking the approval of the Constituent Assembly of J&K. This is precisely the *envisioned* mechanism prescribed for amending Article 370, as the

Petitioners have pointed out in their several Petitioners. Accordingly, this example only furthers the contention of the Petitioners, i.e., that changes to Article 370 can only be made by scrupulously following the mechanism prescribed in Article 370(3). To this extent, C.O. 44 cannot be invoked as precedent to justify the impugned C.O. 272, which was issued under Article 370(1)(d).

16. **Presidential order C.O. 48 dt. 14.05.1954**. The Constitution (Application to Jammu and Kashmir) Order, 1954 ("C.O. 48") **didnot** directly amend Article 370. This is indicated in the text of the order in the following terms:

> "2. *The provisions of the Constitution which, in addition to Article 1 and Article 370, 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..*"

17. C.O. 48 added sub-clause (4) to Article 367 as an interpretive aid to provide guidance on how to *construeterms* of the Constitution as applied to the State of Jammu and Kashmir. No indirect substantive change to Article 370 was made through a change in Article 367 as is clear from the terms of the sub sections added:

> *...(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 to exercise the powers of the Sadar-i-Riyasat'.

18. It is evident that the interpretation inserted is in the nature of a clarification due to the differing terminologies in the

constitutional schemes of J&K and the rest of the Indian Union. It did not alter the text, character or purpose of Article 370 through Article 367(4), indirectly. Accordingly, C.O. 48 also cannot be called upon to support the C.O. 272. It is also pertinent to note that the Constituent Assembly of J&K had approved of the contents of C.O. 48 on 15.02.1954, i.e. three months before its enactment. To this extent, the factual averment in paragraph 34 of the Respondent's Counter Affidavit, stating "*I state and submit that since there was no Constituent Assembly at that particular time, the mechanism under Article 367 and Article 370(1)(d) was used*" is incorrect.

*19.*It is also pertinent to note that in ***Sampat Prakash v. State of J&K,* 1969 SCC (1) 562**it was held by this Hon'ble Court that Article 370 could have ceased to operate only on the recommendation of the Constituent Assembly; thus, given that the Constituent Assembly ratified the Constitution, decided against a recommendation to that effect, and then ended its mandate, it was no longer possible for anyone to declare that Article 370(3) had ceased to operate :-

> ***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 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 No. C.O. 44 dated 15th November, 1952, and laid down that, from the 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.***" (emphasis supplied)

20. **Presidential order C.O. 74 dated 24.11.1965.** This Constitution (Application to Jammu and Kashmir) Order 1965 ("C.O. 74") was issued under Article 370(1)(d) but it did not directly alter the provisions of Article 370. It did alter the provisions of Article 367 as follows:

> *2. In paragraph 2 of the Constitution (Application to Jammu and Kashmir) Order, 1954:—*
>
> ...
>
> *(3) in sub-paragraph (14) (relating to Part XIX):—*
>
> *(a) clause (a) shall be omitted;*
>
> *(b) clauses (b) and (c) shall be re-lettered as clauses (a) and (b) respectively;*
>
> *(c) in clause (b) as so re-lettered, in clause (4) of Article 367:—*
>
> *(i) for sub-clause (b) the following sub-clauses shall be substituted, namely:— (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, 1965, such references shall be construed as including references to the Sadar-i-Riyasat 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:— Provided that in respect of any period prior to the 10th day of April, 1965, such references shall be construed as references to the person recognised by the President as the Sadar-i-Riyasat of Jammu and Kashmir and as including references to any person recognised by the President as being competent to exercise the powers of the Sadar-i-Riyasat;"

21. It is crucial to note that this change also was merely an *interpretive one*, because the Constitution of Jammu and Kashmir had itself removed references to the Sadar-i-Riyasat (a post no longer in existence). The interpretive guidance in Article 367 was, therefore, by nature of a clarification and/or incorporation of a change that the State had itself done. No real or substantive change in powers of the head of the Government were effected by virtue of C.O. 74's modification to Article 367. In fact this is specifically recorded in the decision of this

Hon'ble Court in ***Mohd Maqbool Damnoo*(1972) 2 SCC 732.**

In **Para 28**, the Court found that

> "*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.*"

22. Further, in Para's 24-27 of ***Damnoo***, the Hon'ble Court also found that in the absence of the change in Article 367, the same interpretation would have been arrived at under the General Clauses Act; thus, no *substantive* change was made to Article 370, using the indirect mechanism of Article 367.

23. It is respectfully submitted, therefore, that C.O. 74 does not assist the Respondent. The impugned change to Article 367 in that case was specifically held not to be an amendment of Article 370 through the backdoor. This is in stark contrast to the present case: the replacement of "Constituent Assembly" by "Legislative Assembly" under Article 370 - which is what the impugned Presidential Order seeks to do - is a change that is consequential, substantive, and not one that Courts could *interpret*,had this change never been made.

24. The Petitioners' submission is buttressed by the fact that the Constitution of Jammu and Kashmir specifically states, in, Section 147 that "*...no Bill or amendment seeking to make any change in- ...(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" This prohibition is also referenced in paragraph 23 of the judgment in ***Damnoo***. Thus, the Constitution of Jammu and Kashmir itself draws a sharp distinction between the powers of the legislative assembly and council of the State, and the Constituent Assembly of the State - specifically with regard to the power to initiate changes in Article 370.

25. In sum, therefore, past instances of using the power under Article 370(1)(d) to modify Article 370 via Article 367(4) exhibited the following features:

a. They were not oriented at modifying Article 370 targetedly, but instead were intended to provide a *lateral* interpretive guidance wherever certain terms appeared in the Constitution.

b. When they were oriented towards terms that happen to appear solely in the text of Article 370, they merely effected a terminological, interpretive change, and were not intended to substantively alter the character or nature of powers, rights or duties of actors under Article 370 (C.O. 74 dt. 24.11.1965.

26. **Impugned C.O. 272 dated 05.08.2019.:** By comparison,what is sought to be achieved in the impugned Presidential Orders is fundamentally different from C.O. 48 and C.O. 74, as it effects a substantive change targetedly in the text of Article 370, through the route of modifying Article 367(4)(d). The relevant text is extracted below:

"2. All the 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 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"."

27. The modification of sub-clause (d) is historically unprecedented. The text of Article 370 has never been - and indeed cannot be - amended substantively through the route of Article 367(4). For reasons explained above, the Constituent Assembly cannot, as a mere interpretive matter, be construed as Legislative Assembly. The character and nature of power wielded by a Constituent Assembly is fundamentally different from the character and nature of legislative powers of a Legislative Assembly. The former is a "constituent power" to "constitute", while the latter is a legislative power that is subservient to constituent power; it is derived from and operates within the confines of the Constitution created by the constituent power. It is respectfully submitted that this distinction is made absolutely clear in ***Kesavananda Bharati v State of Kerala,* (1973) 4 SCC 225.**

28. Such a substantive change in powers is thus textually unsupported, historically unprecedented, and structurally unsound under the scheme of the Indian Constitution (a point that the Petitioners have argued at length in their several writ petitions, and that has gone completely unrebutted in the Respondent's Limited Reply). It is by the force of Article 370(1)(c) that Article 370 applies in the same terms to both the State of J&K and the Union of India, and it is only by the force

of Article 370(3) that this constitutional mandate can be changed.

29. Further, it is respectfully submitted that neither C.O. 48 dt. 14.05. 1954 nor C.O. 74 dt. 24.11.1965 serve as precedents for obtaining the concurrence of the democratically elected State Government in the State of Jammu and Kashmir, since they were issued when the State Governments were either dismissed (1953) or suspended due to President's rule (1964). C.O. 48 dt. 14.05.1954 - which was issued under Article 370(1)(d) - received the concurrence of the Constituent Assembly which was extant at the time. Such concurrence - necessitated as a matter of fact due to the dismissal of the State Government in 1954 - fulfilled the purpose underlying Article 370(2), which states that the Constituent Assembly of the State would finally approve of concurrences given by the State Government under Article 370(1) prior to it being convened. The understanding that the Constituent Assembly of the State of J&K was to be the final authority to ratify the applications of the Indian Constitution to the State is borne out in historical materials, such as the framing records of the Indian Constitution (**see the speech of N GopalaswamiAyyangar on 17.10.1949, CAD Vol X**) as well as the framing records of the J&K Constitution (see the speech of **Sheikh Abdullah on August 11, 1952**). The jurisprudence of the Supreme Court in ***Prem Nath Kaul v. State of J&K,* 1959 SCR Supl. (2) 270** supports this reading: the Constitution Bench of this Hon'ble Court noted that "*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." However, a coequal bench in *Sampat Prakash,* which was considering the question of Article 370(1)(d) after the dissolution of the Constituent Assembly of J&K, did not distinguish or even cite *Prem Nath Kaul* on the manner in which Article 370 was to be worked by the Indian Union and the State of J&K.

30.Furthermore, when C.O. 74 dt. 24.11.1965 was reviewed in ***Damnoo,*** the Supreme Court, in upholding C.O. 74's underlying basis, failed to take note of the judgment of the Constitution Bench in ***Prem Nath Kaul,*** and repeated the error committed by the Court in ***Sampat Prakash***. Thus, in both ***Damnoo***and ***Sampat Prakash***, ***Prem Nath Kaul***went uncited and undistinguished. Since ***Damnoo***and ***Sampat Prakash***were both laid down by Constitution Benches comprising 5 judges, ***Prem Nath Kaul***has not been overruled either explicitly or sub-silencio. The Respondent's Counter Affidavit also does not refer to or distinguish ***Prem Nath Kaul,*** but instead relies on a series of judgments that built on the weight of ***Sampath Prakash,*** such as ***Damnoo,*** and ***Santosh Gupta*** **(2017) 2 SCC 538.** It is respectfully submitted that this violates the principle of *stare decisis* which is of utmost importance to the stability of the legal system and for upholding the rule of law under the

Constitution of India as held in***Union of India v. Raghubir Singh (1989) 2 SCC 754.***

II. The Word "Modification" does not Cover the Creation of Substantive New Powers

31. It is further reiterated that the provisions of Article 370(1)(d) permit only for "*exceptions and modifications*" and do not permit the addition of new constitutional obligations that are distinct from the obligations as are applicable to the rest of India.

32. The Respondent has cited the case of ***Puranpal Lakhanpal v President of India*, (1962) 1 SCR 688,** where this Hon'ble Court held that the power to modify included the power to make radical changes. This position also seems to have been referred to in ***SBI v. Santosh Gupta***, (2017) 2 SCC 538. However, the Petitioners reiterate:

(a) Despite the wide amplitude given to the term "modify", it has never been suggested - explicitly or implicitly, including in ***Puranlal Lakhanpal*** - that it includes the power to create a fresh constitutional obligation out of whole cloth.

(b) The ability to create new constitutional obligations is not vested in any single functionary in our Constitutional scheme.

(c) In any event, and without prejudice to the above contentions, the categorical finding in ***Puranpal Lakhanpal*** (1962) merits a revisit in the light of the ***Kesavananda Bharati case***. In all circumstances, the basic structure acts as an implied limitation upon the power of Parliament to amend the Constitution. Furthermore, in ***R C Poudyal v. Union of India*** (1994) Sup. (1) SCC 324, the majority judgment in para 102 held that "the provisions of clause (*f*) of Article 371-F and Article 2 have to be construed harmoniously consistent with the foundational principles and basic features of the Constitution."

33. The Petitioners respectfully reiterate their submission which had been elaborated in the captioned Writ Petition (Ground S) that the distinction between legislative power and constituent power is precisely on of those "foundational principles" of the Constitution, as set out in ***Kesavananda Bharati.*** Consequently, *even if* it were to be held that the power of "modification" under Article 370 includes the power to create substantive new rights and obligations, that power is limited by the "foundational principles" of the Constitution, as outlined above; that power, thus, cannot be used to collapse constituent power into legislative power.

34. It is respectfully submitted that this proposition may also be found in **Cooley,** in his treatise on ***Constitutional Limitations***. Thus, the Constitution as applicable to the State of Jammu and Kashmir must conform with and not derogate from the general principles of Indian Constitutional law.

C. Implied Limitations under President's Rule

35. In paragraph 46(vi) of its Limited Reply, Respondent argues that "*during the currency of President's Rule in a State, orders passed by the President of India, either himself or acting through the Governor of the State, are equivalent to orders that might have been passed by an elected Government. In such a scenario, the President of India can exercise all the powers of the State Government.*" (emphasis Supplied) The Respondent relies upon this proposition to argue that the President's consent to C.O. 272, delivered a substitute of the government of Jammu and Kashmir, cannot be called into question.

36. The Respondent has, however, apparently misunderstood the Petitioners' argument. To recapitulate, in brief: the Petitioners contend that the Constitution grants to the President certain powers that are to be exercised during President's Rule. A study of the Constitution's text, structure, and history indicates that these powers are granted for a specific purpose (i.e., to ensure stable continuity of administration) until an elected government can be restored. It is a well-established proposition of

administrative and constitutional law that the purpose for which a power is granted also places *limitations* upon its exercise. Consequently, the Petitioners submit that the very articles that authorize and regulate President's Rule (Articles 356 and 357) place *implied limitations* upon its exercise. One of those limitations is that the President cannot bring about fundamental and permanent alterations to the very structure – and federal architecture – of the concerned State, *in a manner that cannot be undone or reversed* by a subsequent elected government. Article 357(2) makes this understanding explicit when it states that legislation enacted under emergency powers can be altered, repealed or amended by a competent legislature or other authority. Article 250(2) states that laws made by Parliament on matters in a State List during an emergency shall cease to have effect after expiry of 6 months after the proclamation ceases to operate.

37. The general proposition of law that governs this issue is universal in character, was restated most recently by the eleven-judge bench of the United Kingdom Supreme Court in ***Miller v The Prime Minister*, [2019] UKSC 41**. In *Miller*, the question before the UK Supreme Court was whether the power of the Prime Minister to prorogue the Parliament was unlimited in character. The eleven-judge bench noted that parliamentary accountability was a fundamental constitutional principle under the Westminster system of democracy (**paragraph 47**). In this context, the UK Supreme Court answered the questions of

whether – and what – legal limits existed upon the Prime Minister's prorogation powers in the following manner:

> *"... it is of some assistance to consider how the courts have dealt with situations where the exercise of a power conferred by statute, rather than one arising under the prerogative, was liable to affect the operation of a constitutional principle. The approach which they have adopted has concentrated on the effect of the exercise of the power upon the operation of the relevant constitutional principle. Unless the terms of the statute indicate a contrary intention, the courts have set a limit to the lawful exercise of the power by holding that the extent to which the measure impedes or frustrates the operation of the relevant principle must have a reasonable justification ... For the purposes of the present case, therefore, the relevant limit upon the power to prorogue can be expressed in this way: that a decision to prorogue Parliament (or to advise the monarch to prorogue Parliament) will be unlawful if the prorogation has the effect of frustrating or preventing, without reasonable justification, the ability of Parliament to carry out its constitutional functions as a legislature and as the body responsible for the supervision of the executive."* **(Paragraphs 49 – 50)**

38. As the *Miller* case correctly notes, therefore, there is no unlimited power under a constitutional system. Limitations upon the exercise of State power is determined by constitutional principles, and the relevant test is whether the exercise of power will have the *effect* of frustrating the constitutional principle at issue.

39. It is respectfully submitted that the same principle is well-known to Indian constitutional law. Its most famous exposition was in ***Kesavananda Bharati v State of Kerala*, (1973) 4 SCC 225**. In that case, this Hon'ble Court held that the power to amend the Constitution was limited to the extent that the power could not be used to destroy the very source from which it flowed (i.e., the Constitution itself).

40. Applying the principles stated in both ***Kesavananda Bharati*** and ***Miller***, it is respectfully reiterated that the power under Article 356 has been granted for a specific purpose, and cannot be extended beyond that purpose, to a point where its operation frustrates the very reason for its existence. The Petitioners rely upon the arguments that have already been set out in the captioned Writ Petition (Grounds I-N, CC, GG and LL) and restate them briefly here.

41. *First*, the text of the Constitution: Article 356 states President's Rule is to be proclaimed "*if the President ... is satisfied that a situation has arisen in which the government of the State cannot be carried on in accordance with the provisions of this Constitution...*" (emphasis supplied) The Headnote states that Article 356 is a provision in case of "*failure of constitutional*

machinery in State." The text of Article 356 makes it clear that President's Rule – which is a departure from the fundamental constitutional principles of federalism and representative government – is meant to be a temporary situation designed to tide over a constitutional failure, until such time that an elected government is ready to resume its functions. The words "this Constitution" suggest that the role of the President is to ensure that governance continues under the Constitution – not to use the opportunity to alter the structure of the Constitutional relationship pertaining to the State. Article 356 (1) as applied to Jammu and Kashmir prevented the President from suspending the operation of any provision of the State's Constitution relating to the High Court. Judges of the High Court of the State had sworn an oath to *"bear true faith and allegiance to the Constitution of the State"* and *"uphold the Constitution and the laws"*. However, through C.O. 273, the President had effectively declared that all provisions of the State's Constitution relating to the High Court would be suspended in perpetuity.

42. *Secondly*, the structure of the Constitution: Article 356 follows Article 355. Article 355 provides that "*it shall be 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 on in accordance with the provisions of this Constitution*." (emphasis supplied) Article 355 – which was Article 277A in the Draft Constitution – was discussed

extensively in the Constituent Assembly. Its purpose was explained by Dr. B.R. Ambedkar in the following way:

> *I think it is agreed that our Constitution, notwithstanding the many provisions which are contained in it whereby the Centre has been given powers to override the Provinces, nonetheless is a Federal Constitution and when we say that the Constitution is a Federal Constitution it means this, that the Provinces are as sovereign in their field which is left to them by the Constitution as the Centre is in the field which is assigned to it. In other words, barring the provisions which permit the Centre to override any legislation that may be passed by the Provinces, the Provinces have a plenary authority to make any law for the peace, order and good government of that Province. Now, when once the Constitution makes the provinces sovereign and gives them Plenary powers to make any law for the peace, order and good government of the province, really speaking, the intervention of the Centre or any other authority must be deemed to be barred, because that would be an invasion of the sovereign authority of the province. That is a fundamental proposition which, I think, we must accept by reason of the fact that we have a Federal Constitution. That being so, if the Centre is to interfere in the administration of*

provincial affairs, as we propose to authorise the Centre by virtue of Articles 278 and 278-A, it must be by and under some obligation which the Constitution imposes upon the Centre. The invasion must not be an invasion which is wanton, arbitrary and unauthorised by law. Therefore, in order to make it quite clear that Articles 278 and 278-A are not to be deemed as a wanton invasion by the Centre upon the authority of the province, we, propose to introduce Article 277-A. As Members will see, Article 277-A says that it shall be the duty of the Union to protect every unit, and also to maintain the Constitution. So far as such obligation is concerned, it will be found that it is not our Constitution alone which is going to create this duty and this obligation. Similar clauses appear in the American Constitution. They also occur in the Australian Constitution, where the constitution, in express terms, provides that it shall be the duty of the Central Government to protect the units or the States from external aggression or internal commotion. All that we propose to do is to add one more clause to the principle enunciated in the American and Australian Constitutions, namely, that it shall also be the duty of the Union to maintain the Constitution in the provinces as enacted by this law. There is nothing new in this and as I said, in view of the fact that we are endowing the provinces with plenary powers and

making them sovereign within their own field, it is necessary to provide that if any invasion of the provincial field is done by the Centre it is in virtue of this obligation. It win be an act in fulfilment of the duty and the obligation and it cannot be treated, so far as the Constitution is concerned, as a wanton, arbitrary, unauthorised act. That is the reason why we have introduced Article 277-A. **(Constituent Assembly Debates, Vol. IX, 3rd August, 1949)** (Emphasis Supplied)

43. The following propositions emerge from Dr. Ambedkar's speech:

a. The Constitution is a federal Constitution, where the respective States are sovereign in their own domains.

b. Federal intervention into the otherwise plenary power of the States is an exception, and can only be undertaken when specifically authorised by the Constitution, for a specific purpose, and for a specific duration.

c. That purpose is spelt out in (what eventually became) Article 355: the purpose is to ensure that, in cases of constitutional breakdown, "*the government of every State is carried on in accordance with the provisions of this Constitution*." (emphasis supplied) Or, as Dr.

Ambedkar put it, to "*maintain the Constitution in the provinces as enacted by this law.*" (emphasis supplied)

d. Article 355, therefore, sets out the "fundamental constitutional principles" (as stated in *Miller*) that justify the grant of power to the President under Article 356, and that therefore – by necessarily implication – constrain and condition it. As the text of Article 355, and Dr. Ambedkar's speech make clear, the constraints flow from (a) the federal principle, and (b) the obligation upon the Union to "maintain" the "government" in accordance with "this Constitution." It is clear, therefore, that the grant of power is to ensure the continuity of *governance* under *the existing constitutional structure* – and not to bring about a radical and permanent alteration in that structure itself.

44. This structural point is buttressed by the point that President's Rule is, by its very nature, a temporary affair – a departure from the principles of federalism and representative government, in order to tide over an emergency situation. Articles 356 and 357 envisage the eventual restoration of an elected government – noting, for example, that laws made during the pendency of the Proclamation shall remain in force under "altered or repealed or amended." What this constitutional scheme emphatically *does not envisage* is that the situation of President's Rule is used to cut down and diminish the powers of the State legislature itself

(that is temporarily not in existence), in a manner that what is done *cannot* be subsequently "altered or repealed or amended", as that power has been taken away from the competent body altogether. In effect, this would amount to the President and Parliament (acting as substitutes for the State legislature and executive) to *permanently bind the hands of future State parliaments*, by bringing about an alteration to their constituent powers themselves. It is a well-established principle that a law-making body cannot undertake an action that binds its successor; any such attempt is *ipso facto* void. However, that is exactly what C.O. 272 seeks to do: by altering the terms of Article 370 and the federal relationship between Jammu and Kashmir and the Union of India, it makes it impossible for a future elected state legislature to *undo* that change.

45. *Thirdly,* precedent and principle: the above arguments are supported in numerous judgments of the Supreme Court, such as ***S.R. Bommai v Union of India,* (1994) 3 SCC 1**, where the limited and purpose-specific nature of President's Rule has been spelt out in great detail. In the interests of brevity, the Petitioners will not here repeat the long and consistent line of case-law that culminates in the judgment in ***Bommai.***

46. The Respondent has failed utterly to engage with the above arguments. It has contented itself by noting merely that the order of the President under President's Rule are "equivalent" to those of the elected government. With respect, this proves nothing. Petitioners respectfully draw the attention of this Hon'ble Court to the recent decision of a seven-judge bench in

Krishna Kumar Singh v State of Bihar* (2017) 3 SCC 1** . In ***Krishna Kumar Singh, a direct question arose about the legal status of Presidential Ordinances. Article 123 of the Constitution stipulates that Ordinances have the same "force and effect" as law. This Hon'ble Court held, however, that the words "force and effect" did not mean that Presidential Ordinances were "*equivalent*" in every respect to temporary statutes. Rather, as the Ordinance-making power was a departure from ordinary principles of representative government – and exercised only in situations of imminent urgency – the words "force and effect" were to be construed narrowly; unlike a temporary statute, therefore, the legal impact of an Ordinance would lapse with the lapse of the Ordinance (apart from some special situations).

47. The Petitioners respectfully submit that the same logic applies to the present case. In ***Krishna Kumar Singh***, this Hon'ble Court applied the overarching principles of democracy and representative government to constrain and limit the Ordinance-making power, without – of course – diluting the fact that Ordinances retained the "force and effect" of law. Similarly, in this case, the Petitioners request this Hon'ble Court to find that the principles of federalism and representative government limit the scope of the President's powers while acting under President's Rule – without – of course – diluting the fact that *within* the domain of those constrained powers, Presidential orders are "equivalent" to the orders of an elected government. In fact in ***Krishna Kumar Singh***, the Court in paragraphs 84, 85

and 86 discussed the applicability of the principles to emergency powers as well.

48. The two judgments cited by the Respondent do nothing to advance its case. The Respondent's first judgment is **Badrinath v Govt of Tamil Nadu, (2000) 8 SCC 395.** This case involved ongoing enquiries against certain government servants. The proceedings were dropped while the State of Tamil Nadu was under President's Rule. It was while adjudicating a challenge to *this* that the Hon'ble Supreme Court noted that "*when an elected Government is not in office, the orders of the Governor under Article 356(1)(a) as an agent of the President of India are equivalent to the orders that might have been passed by an elected Government in office.*" It should be immediately obvious that this is mere restatement of the existing law, and does not even begin to address the Petitioners' contentions, set out above; the questions that have been addressed above were not even remotely at issue in ***Badrinath***.

49. The Respondent's second judgment is ***Gokulananda Roy v TarapadaMukharjee,*** **AIR 1973 Cal 233.** This judgment is even more irrelevant to the case at hand, as it involved a dispute about whether, during President's Rule, the President or the Governor was empowered to appoint a Commission of Enquiry. It was in this context that the High Court of Calcutta discussed the scheme of Article 356, which has been quoted by the Respondent. It should be clear – once again – that this does not in any way answer the Petitioners' case.

50. To sum up, briefly, the Petitioners' arguments on this issue:

a. Under a constitutional democracy, in which all power flows from the Constitution, no power is absolute or untrammeled in character.

b. The purpose for which the Constitution grants power to a constitutional functionary also serves to limit or constrain its scope.

c. The scheme of Articles 355 and 356 – their text, structure, and the interpretation accorded to them by this Hon'ble Court – reveals that:

i. The constitutional purpose is to ensure continuity of administration under "this Constitution" during a temporary period of emergency, and pending the restoration of an elected government.

ii. The overarching principles of federalism and representative democracy imply that departures (such as President's Rule) are meant to be treated as exceptions, construed strictly, and not interpreted in a way that would frustrate or extinguish those principles themselves.

iii. A combination of (i) and (ii) makes it clear that the power of the President under President's Rule is hedged in by implied limitations that prevent the President from (a) making a permanent alteration to the federal structure – to "this" Constitution – involving that State, and (b) making a change that a future elected

government will be constitutionally prevented from undoing – such as diminishing its own powers; or (iii) usurup or transfer any *constituent* power that vests with the States.

d. The "equivalence" between the orders of the President and the orders of an elected Government during a period of President's Rules does not advance the Respondent's case; as this Hon'ble Court has observed in ***Krishna Kumar Singh***, functional equivalence does not necessarily imply that Presidential orders are supposed to be treated as *identical* to the orders of an elected Government; indeed, quite the contrary.

e. The Respondent's citation of cases where generic discussions of Article 356 were undertaken do nothing to advance its case; the core contentions of the Petitioners therefore remain unaddressed in this Limited Reply.

D. The Importance of Section 147 of the Constitution of Jammu and Kashmir

51. The Petitioners have pointed out that C.O. 272 also fails as it arrogates to the legislature of Jammu and Kashmir a power that is denied to it under Section 147 of its own Constitution. The Respondent has purportedly answered this contention by stating that:

"Section 147, it is submitted, cannot in any manner affect, dilute, or control the power conferred on the President of India under Article 370 of the Constitution of India, and the exercise thereof by the President. Equally, it cannot fetter Parliament in the exercise of its functions under the Constitution of India. The provisions of the Constitution of India, including article 370(1)(d) and 370(3) are not subject to, or subservient to, section 147 of the Constitution of Jammu and Kashmir." (**paragraph 46(ix), Limited Reply**)

52. This argument, however, grossly misunderstands – and misrepresents – the Petitioners' case. The Petitioners have not – and indeed, could not – argue that the provisions of the Constitution of India are "subject" or "subservient" to Section 147 of the Constitution of Jammu and Kashmir. But what the Respondent appears to have forgotten is that alterations to the status of Jammu and Kashmir require the participation of *two* parties: the President of India (acting under 370(1)(d) or 370(3), as the case may be), and the government of Jammu and Kashmir or the Constituent Assembly of Jammu and Kashmir (acting under 370(1)(d) or 370(3), as the case may be). And just as the President of India is bound by the provisions of the Constitution of India, the constitutional functionaries of the State of Jammu and Kashmir are bound by both the

Constitution of India (to the extent applicable), and by the Constitution of Jammu and Kashmir.

53. This being the case, it becomes crucial to understand the limitations placed upon the constitutional functionaries of Jammu and Kashmir, under the Constitution of Jammu and Kashmir. One such limitation is set out under Section 147, which proscribes the legislative Assembly of Jammu and Kashmir from initiating – through a bill or an amendment – "any change in the provisions of the Constitution of India as applicable in relation to the State." (emphasis supplied) In simple language, the Jammu and Kashmir legislature is barred – by its own Constitution – from initiating a change on the above subject-matter.

54. However, by replacing "Constituent Assembly" in Article 370(3) by "legislative assembly", Presidential Order C.O. 272 does indeed seek to vest in the Jammu and Kashmir legislative assembly a power that it cannot validly exercise *under its own Constitution*. This, in turn, indicates that C.O. 273 – which is issued under the (amended) Article 370(3), and upon the recommendation of Parliament – temporarily exercising the functions of the Jammu and Kashmir legislative assembly under President's Rule – is invalid. The Respondent cannot in one breath argue that under President's Rule, Parliament's orders or resolutions have become "equivalent" to that of the state legislature's, while also arguing that *for the purposes of Article 370(3)*, Parliament's recommendation is not to be treated as having emanated from the state legislature. Or, to put it another

way: insofar as there exist constitutional limitations upon the state legislature of J&K, the union Parliament *inherits* precisely those limitations when standing in the shoes of the state legislature. One such limitation – as pointed out above – is set out in Section 147. The Respondent, thus, has failed to dislodge the central relevance of Section 147 to this dispute.

55. The Petitioners reiterate that their contention is that J&K Legislative Assembly was expressly barred from altering or assenting to any alteration of the relationship between the State of J&K and the Union of India by virtue of Section 147 of the Constitution of J&K. This bar would also extend to assenting to any change to Article 370 under the Constitution of India. The Union, in its stead, was thus also not empowered to assent to any such alteration and acted *ultra vires* its powers by so assenting.

E. The Unconstitutionality of the Jammu and Kashmir Reorganisation Act

56. It is respectfully submitted that the Limited Reply does not address the arguments relating to the unconstitutionality of the J&K Reorganisation Act, except to assert without any evidence that such a power exists under Article 3 based on its text. The Petitioners respectfully submit that this is a misreading of Article 3. The position of the Union of India has no basis in the text or the purpose of Article 3. Petitioners reiterate the basic argument, made in their several writ petitions, that interpreting

Article 3 in the manner that the Respondent suggests would effectively amount to reading into it a power to convert India from a federal polity into a unitary polity (a "Union of Union Territories"). Such an interpretation is clearly at odds with the intent of the framers, as well as contrary to the basic feature of federalism. If, therefore, more than one interpretation of the text of Article 3 is available (as the Petitioners suggest there is), then this Hon'ble Court ought to reject the interpretation suggesetd by the Respondent.

57. On the text itself, the Petitioners respectfully suggest that Article 3 provides for "Formation of New States and alteration of areas, boundaries or names of existing states. Firstly, neither the language nor the marginal heading provide for the express power to convert the status of a state to a union territory – merely its boundaries, areas or name.

58. This interpretation is also strengthened by the Proviso which provides for consultation in case the bill affects the **areas, boundaries** or **names** of any of the States. Seervai also discusses this power as being the power of Parliament to "*alter the boundaries of states, or to distribute the territories of a State among other states*" (Para 5.16 at p. 290 Volume I 4th edn, 1991 and para 6.24 at p. 312)

59. Under the Constitution, the distinction between a state (governed under Part VI of the Constitution) and union territories (Part VIII of the Constitution) is real and profound. States are sovereign in their sphere (as specified by Dr. Ambedkar in the Constituent Assembly Debates quoted above)

as well as by this Hon'ble Court in ***SR Bommai*** v. ***Union of India***, (1994) 3 SCC 1, amongst others. Primarily, union territories are governed under Article 239 by which they are administered as the President acting through an administrator. Article 240 provides the President to make regulations for peace, progress and good governance of Andaman & Nicobar Islands, Lakshwadeep, Dadra and Nagar Haveli, Daman and Diu and for Puducherry when the legislature is dissolved. Article 239A, brought about by the 14th amendment provided for the creation of legislative councils in Puducherry (Earlier territories such as Goa, HP, Manipur, Tripura, Mizoram, Arunachal Pradesh and Mizoram were removed as they became states). Article 239B provides for the administrator of Puducherry to make ordinances when the legislature is not in session. Delhi had a special regime created under Article 239AA.

60. A perusal of Part VIII of the Constitution read with Article 3 makes it clear that (a) union territories have considerably fewer powers than states. (b) Union territories do not have legislative assemblies unless created by a special constitutional amendment such as Article 239A. Thus a conversion of a State to a Union Territory reduces the powers of its democratically elected government. There is no example of a state being converted into a union territory and no example of a union territory with a legislature being created without a constitutional amendment.

61. For purposes of Article 3, it is not believable that while consultation is required for changing the name, for example, it is not specifically prescribed for a constitutional change of enormous significance that has a direct impact on the federal structure of the Constitution, particularly when the freedom struggle and the entire purpose of the Constitution was for self government and freedom. The fact that consultation is not required for change in Constitutional status is further proof that such a change was never envisaged under Article 3. Considering that federalism is part of the basic structure of the Constitution and that such an interpretation should be had that furthers the federal principle, the Court should not give such a wide interpretation to Article 3 so as to permit a degradation of Constitutional status of its constituent units from states to union territories. Such an interpretation would be in violation also of the principles of Article 1 which provides that India is a union of states not a potential union of territories that may be States upon the whims and fancies of Parliament. This has also been the consistent view of the Supreme Court in cases such as ***Automobile Transport*** v. ***State of Rajasthan***, AIR 1962 SC 1406 (at 1416) as well as the view taken by Seervai.

62. Article 3 should be read in conjunction with Article 2 of the Constitution, which provides Parliament the power to admit new states into the Union. Our Constitution prescribes only the addition of new states, on such terms as Parliament may prescribe and not the destruction of such units. If a state has been "extinguished" because of reorganisation under Article 3,

its component parts have either been made states in their own right or have been merged with other states. For example, under the Bombay Reorganisation Act 1960, section 3 provided for the creation of a new state of Gujarat "*and the residuary state of Bombay shall be known as Maharashtra*". Similarly sections 3-6 of the Punjab Reorganisation Act recognised the new state of Haryana, the new union territory of Chandigarh, ceding of territory to the then Union Territory of Himachal Pradesh while the remainder of state remained Punjab. In the States Reorganisation Act, 1956, the old State of Travancore Cochin was extinguished but in its place came Kerala and the ceding of some territory to the then State of Madras.

63. Secondly, the reading espoused by the Respondent is a-historical and contrary to continuous and long standing Constitutional practice and convention, not to mention completely contrary to the intention behind Article 3 in the first place.

64. In the Constituent Assembly Debates, the present Articles 3 and 4 were discussed on November 17 and 18, 1948. The discussion entirely relates only to alteration of state boundaries and to new proposed states based on language or demand from people. The reason for the insertion of the proviso was to consult with the people who would be directly impacted by the change even if their views were not determinative. The reason why concurrence was not accepted, after spirited debate, was to avoid circumstances when smaller communities could not get their own state because of opposition by the majority in that

state. There is nothing to envisage that the power under Article 3 extended to degrading the state to a territory. In fact even under the Government of India Act 1935, when the equivalent of power was with the Governor-General under section 290, it was only ever used to alter the boundaries of states such as Bombay and /Hyderabad and not for effecting a change in constitutional status.

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

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

(b) In independent India, there were 3 categories of States Part A , Part B and Part C in addition to Part D territories. Part A corresponded to the provinces of British India. Part B states included the former Princely States that merged with India and had Rajpramukhs and were subject to additional supervision by the Union of India. Part C states were governed by the Union in a unitary manner. Andaman and Nicobar Islands

constituted s Part D state which had been a chief commissioner's province under British India under the Acts of 1919 and 1935. (para 28-31, 33 of the SR Report)

(c) The SR Report found that the disparate status of the states as Part A, B, C and D was unsustainable and was contrary to overwhelming public opinion. It proposed that the majority of Part C states should be merged with other contiguous states while the remainder, which could not be merged due to vital, strategic or other considerations, be treated as territories. Following this paradigm, the 7th Constitutional Amendment removed the distinctions between states and introduced the concept of union territories in the place of non-merged Part C states ad for Andaman and Nicobar Islands. (para 236-268, 237, 285-286 of the SR Report)

(d) From 1955 onwards, Goa, Himachal Pradesh, Manipur, Tripura, Arunachal Pradesh, and Mizoram converted from union territories to States. This was done through legislation under Article 2 and 3. The 14th amendment provided for the creation of legislatures for Puducherry and for other union territories of the

time. For Delhi, the 69th amendment Act provided for an insertion of special provisions which brought it closer to a state. At no time has the status of any state been reduced to a union territory.

66. There can be little doubt that conversion of a State into a Union territory involves a retrogression of the democratic rights of people. Therefore, while there have been plenty of political demands for the conversion of a union territory into a state (or for the break up or separation of existing states to create such an entity), there has never been a demand for a state to completely devolve into a union territory. Indeed, the existing territories such as Daman and Diu, Dadra and Nagar Haveli, Lakshadweep, Chandigarh and the Andaman and Nicobar Islands exist as union territories because of reasons such as history, and administrative expediency.

67. While the boundaries and the names of states can be altered by Parliament, the principle of federalism does not permit the degradation of existing states into union territories. This does not mean that union cannot interfere in the affairs of the state when there is an emergency situation like terrorism or external aggression. The Union of India has dealt with serious insurgencies without the need to dissolve the states of Nagaland, or Assam or Mizoram or Punjab or even the State of Jammu and Kashmir when extremism was at its peak.

68. Permitting the union to alter the constitutional status of a state merely because it does not like certain laws (such as the residency requirements) or objects to the political leadership of the state or feels that removal of certain laws would', in the Union's view, improve the prospects of that state would completely destroy the concept of federalism. The powers of the states cannot be subordinated to the will of Parliament except to the extent permissible under the Constitution. This is by design. Article 357 and Article 250 limit the powers of the Union to enact laws for state subjects. Such protections of state rights would become entirely meaningless if the Union could simply dissolve the state, convert it into a union territory and ensure that laws to the contrary are passed.

69. Continuous constitutional practice, constitutionalism and the principle of non-retrogression militate against the conversion of Article 3 into a charter of Union despotism designed to convert States into Union Territories upon the whims and fancies of transient Parliamentary majorities. It is submitted that to interpret Article 3 as including the power to extinguish a State would lead to absurd results: (i) 'federalism' was a part of the Constitution's unamendable basic structure, (ii) Article 368(2) prevented Parliament from amending certain provisions of the Constitution in the absence of ratification from at least one-half of the States, and (iii) Article 169 barred Parliament from abolishing the Legislative Council of a State unless the State's Legislative Assembly passed a resolution to such effect by a

majority of its total membership and of not less than two-thirds of the members present and voting. The Union's construction of the scope of Article 3 would suggest that despite (i), (ii) and (iii) above, Parliament could, unilaterally, relegate all States to Union Territories.

70. Even assuming that Article 3 does permit such conversion of a state into a union territory (though this is strenuously denied), it is respectfully submitted that such a conversion must take place after the examination of an issue through experts and after a detailed study. Such plenary powers cannot be exercised on the whims and fancies of Parliament without any study or inquiry.

F. The Respondent's Miscellaneous Arguments

I. Temporary character of Article 370

71. The fact that Article 370 has been described as "temporary" is of no significance to the analysis of the current *lis*. This Hon'ble Court in ***Sampath Prakash v. State of J&K, (1969) 2 SCC 365*** and in ***SBI v. Santosh Gupta (2017) 2 SCC 378*** has made abundantly clear that 370 could **only** be removed through the mechanism prescribed under Article 370(3) and not otherwise.

II. Part III violations not shown

72. In its Limited Reply, the Respondent has argued that *"...The sphere of constitutional challenge is to be limited to part III of the Constitution and the pleadings of the Petitioners with regard to the rationality or the wisdom of the impugned*

decision/legislative measures are to be rejected by this Hon'ble Court."

73. It is submitted that all the grounds taken in the captioned Writ Petitions relate to Articles 14, 19 and 21 and other rights under Part III and democracy and federalism, which are basic features of the Constitution.

74. The Respondents have failed to notice or appreciate the pleadings advanced by the Petitioner from para KKK to RRR in the captioned Writ Petition. The grounds enumerated in the Petition are not repeated herein for the sake of brevity and the Petitioner craves leave of this Hon'ble Court to refer to the same during the course of arguments at the appropriate stage as required. It is respectfully submitted that the Respondent has failed to address the pleadings of the Petitioner herein that the action of the Respondent in issuing the impugned constitution orders is violative of the principles laid down by this Hon'ble Court in *IR Coelho v. State of Tamil Nadu* (2007) 2 SCC 1, the *Madras Bar Association v. Union of India* (2014) 10SCC1 wherein it has been held that any exercise of power of any nature constituent, legislative or executive shall be subject to implied limitations of the test of the Basic structure doctrine.

75. It is respectfully submitted that this Hon'ble court in Coelho (supra) gave the following conclusions inter alia that find relevance to the present case before this Hon'ble court, *"A law that abrogates or abridges rights guaranteed by Part III of the Constitution may violate the basic structure doctrine or it may not. If former is the consequence of law, whether by amendment*

of any Article of Part III or by an insertion in the Ninth Schedule, such law will have to be invalidated in exercise of judicial review power of the Court. The validity or invalidity would be tested on the principles laid down in this judgment.The majority judgment inKesavananda Bharati's case read with Indira Gandhi's case, requires the validity of each new constitutional amendment to be judged on its own merits. The actual effect and impact of the law on the rights guaranteed under Part III has to be taken into account for determining whether or not it destroys basic structure. The impact test would determine the validity of the challenge..."

76.In light of clear precedent, therefore, it is respectfully submitted that the Respondent's objections on this count are meritless.

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