

IN THE HON'BLE SUPREME COURT OF INDIA
CIVIL ORIGINAL JURISDICTION
(UNDER ARTICLE 32 OF THE CONSTITUTION OF INDIA)

WRIT PETITION (CIVIL) NO. OF 2019

IN THE MATTER OF:

MOHAMMED YOUSUF TARIGAMI ... PETITIONER

VERSUS

UNION OF INDIA & ORS. ... RESPONDENTS

PAPER BOOK

(FOR INDEX KINDLY SEE INSIDE)

ADVOCATE FOR THE PETITIONER: P.V.DINESH

INDEX

| Sl.No | Particulars of Document | Page No. of part to which it belongs | | Remarks |
|-------|---|--------------------------------------|-------------------------------------|---------|
| | | Part I (Contents of Paper Book) | Part II (Contents of file alone) | |
| (I) | (II) | (III) | (IV) | (V) |
| 1. | Court Fees | Rs. | | |
| 2. | Office Report | A | A | |
| 3. | Listing Performa | A1 – A2 | A1 – A2 | |
| 4. | Cover Page of Paper Book | | A3 | |
| 5. | Index of Record of Proceeding | | A4 | |
| 6. | Defect List | | A5 – A9 | |
| 7. | Note Sheet | | NS 1 to | |
| 8. | Synopsis and List of Dates | B-D | | |
| 9. | Writ Petition with affidavit. | | | |
| 10. | <u>Annexure-P/1:-</u> True copy of the Instrument of Accession of Jammu and Kashmir dated 26.10.1947 | | | |
| 11. | <u>Annexure-P/2:-</u> True copy of the Delhi Agreement, 1952 dated NIL. | | | |
| 12. | <u>Annexure-P/3:-</u> True copy of the Presidential Order dated 14.05.1954. | | | |
| 13. | <u>Annexure-P/4:-</u> True copy of the “Sheikh-Indira Accord, 1975” dated 13.11.1974 | | | |
| 14. | <u>Annexure-P/5:-</u> True copy of the notification GSR 1223 (E) dated 19.12.2018 issued by the Ministry of Home Affairs | | | |
| 15. | <u>Annexure-P/6:-</u> True copy of the Presidential Order CO 272 dated 05.08.2019 issued by the Ministry of Law & Justice, Government of India (Respondent No.2) on behalf | | | |

| | | | | |
|-----|--|--|--|--|
| | of the President of India | | | |
| 16. | <u>Annexure-P/7</u> :- True copy of the Declaration CO 273 dated 05.08.2019 issued by the Ministry of Law & Justice in the name of President of India | | | |
| 17 | <u>Annexure-P/8</u> :- True copy of the Jammu and Kashmir (Reorganization) Act, 2019 dated 09.08.2019 | | | |
| 18. | Filing Memo | | | |
| 19. | Vakalatnama | | | |

SYNOPSIS

The present Writ Petition is filed in public interest under Article 32 of the Constitution of India.

Briefly about the petitioner:

The petitioner is a member of Communist Party of India (Marxist) (hereinafter "CPI(M)") and a four-time Member of Legislative Assembly representing Kulgam Legislative Constituency of the now dissolved Jammu and Kashmir Legislative Assembly. He is a member of the Jammu and Kashmir State Committee and the Central Committee of CPI(M). As a political leader, he has been actively involved in voicing the concerns of the people of Jammu and Kashmir and in resolving various issues affecting daily lives through people's struggles and agitations.

Challenge mounted through this writ petition

By way of the present writ petition, the petitioner seeks to challenge the constitutionality of the following:

1. The Constitution (Application to Jammu and Kashmir) Order, 2019 CO 272 issued by the President of India notified by the Ministry of Law and Justice, in the Official Gazette on 05.08.2019 (hereinafter "Presidential Order CO 272");
2. The Declaration under Article 370(3) of the Constitution "CO 273" (hereinafter "Declaration CO 273") issued by the President of India notified by the Ministry of Law and Justice, in the Official Gazette on 06.08.2019 (hereinafter "Presidential Order CO 272");
3. The Jammu and Kashmir Reorganization Act, 2019 passed by the Houses of the Parliament and given assent by the President on

09.08.2019 and having come into force by way of notification in the Official Gazette on the same day;

Article 370 of the Constitution

The Constitution of India provided for Article 370 which is a self-contained Code that defined and regulated the relationship between the state of Jammu and Kashmir and the Union of India. Apart from Article 370, Article 1 of the Constitution of India would apply to the state of Jammu and Kashmir. From time to time, the President of Jammu and Kashmir could, with concurrence of the Government of the State of Jammu and Kashmir, pass orders applying – with exceptions and modifications – specific provisions of the Constitution of India to the State of Jammu and Kashmir, based upon exigencies of the situation. Article 370 of the Constitution of India is as follow:

“370. Temporary provisions with respect to the State of Jammu and Kashmir

(1) Notwithstanding anything in this Constitution,

(a) the provisions of Article 238 shall not apply in relation to the State of Jammu and Kashmir;

(b) the power of Parliament to make laws for the said 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 as the matters with respect to which the Dominion Legislature may make laws for that State; and

(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 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 Maharajas Proclamation dated the fifth day of March, 1948 ;

(c) the provisions of Article 1 and of this article shall apply in relation to that State;

(d) such of the other provisions of this Constitution shall apply in relation to that State subject to such exceptions and modifications as the President may by order specify: Provided that no such order which relates to the matters specified in the Instrument of Accession of the State referred to in paragraph (i) of sub clause (b) 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 paragraph (ii) of sub clause (b) of clause (1) or in the second proviso to sub clause (d) of that clause be 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 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”

Article 35A of the Constitution

Article 35A was introduced into the Constitution of India by way of a Presidential Order 1954 that provided that the laws in force in the state of Jammu and Kashmir shall be rendered invalid on account of it being inconsistent with the provisions of the Constitution of India. The provision is extracted as follows:

"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 hereafter enacted by the Legislature of the State:

(a) defining the classes of persons who are, or shall be, permanent residents of the State of Jammu and Kashmir; or

(b) conferring on such permanent residents any special rights and privileges or imposing upon other persons any restrictions as respects—

(i) employment under the State Government;
(ii) acquisition of immovable property in the State;
(iii) settlement in the State; or
(iv) 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."

Presidential Order CO 272 dated 05.08.2019

- It is submitted that the President of India passed the above order on 05.08.2019 purportedly under Article 370(1)(d) of the Constitution whereby it superseded another Presidential Order viz. Constitution (Application to Jammu and Kashmir) Order, 1954 that introduced Article 35A into the Constitution of India.
- It further stated that the provisions of the Constitution of India shall apply to the state of Jammu and Kashmir.
- Since Article 370(3) states that changes could be brought to the said Article only after recommendation thereof is made by the Constituent Assembly of the Jammu and Kashmir, the Presidential Order CO 272 herein purported to get over the requirement of recommendation of Constituent Assembly, that ceased to operate in the year 1956.
- For getting over the requirement of recommendation of Constituent Assembly for making Article 370 inoperative, Presidential Order CO 272, which is in the nature of an executive order purportedly made under Article 370, introduced new clauses under Article 367 of the Constitution. Clause 2 of Presidential Order 272 is as follows::

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”.

- In sum and substance, what Presidential Order CO 272 intends to perform is to make changes in the Constitution of India whereby certain words used could be construed as certain other words. For example, as is clear from above, it states that references to the Constituent Assembly of the State shall be construed as references to the Legislative Assembly of the State. It states that the 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 the Jammu and Kashmir. It states that the references to the

Government of the state shall be construed as including references to the Governor of Jammu and Kashmir acting on the advice of Council of Ministers.

- Effectively, the Presidential Order CO 272 paved the way for the Central Government to make changes in Article 370 or to make it inoperative by merely obtaining concurrence of the Governor, who shall in turn act in aid and advice of the Council of Ministers of the Central Government. Therefore, the Central Government could make changes to Article 370 by obtaining consent or concurrence of itself.

Declaration Order CO 273 dated 06.08.2019

- After having made amendment to Article 367, by way of an Executive Order, through which the reading of the Article 370(3) was changed, another Presidential Order in the guise of a Declaration was issued whereby it held as follows:

"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 Parliament, is pleased to declare that, as from the 6th August, 2019, all clauses of the said article 370 shall cease to be operative except the following which shall read as under, namely :—

"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."

- It is submitted that except for 370(1), rest of the said provision was made ineffective or inoperative by riding on the back of Presidential Order CO 272 that was in turn passed under Article 370 of the Constitution itself.

Jammu and Kashmir Reorganization Act, 2019 having come into force on 09.08.2019

- Jammu and Kashmir (Reorganization) Act, 2019 officially came into force on 09.08.2019 whereby the existing state of Jammu & Kashmir is bifurcated into two Union-Territories – (1) the Union Territory of Jammu & Kashmir with a Legislative Assembly, and (2) the Union Territory of Ladakh without a Legislative Assembly.

It is submitted that the Presidential Order CO 272 dated 05.08.2019, Declaration CO 273 dated 06.08.2019 and Jammu & Kashmir (Reorganization) Act, 2019 passed by the Parliament on 05.08.2019 are unconstitutional and violative of petitioner's fundamental rights under Article 14 and 21 of the Constitution of India.

In such circumstances, the petitioner, as a public spirited citizen, is constrained to file this public interest litigation, with such grounds as provided in the present writ petition.

LIST OF DATES

- 16.03.1846 It is submitted that the Treaty of Amritsar was signed between the East India Company and a Dogra Ruler, Maharaja Gulab Singh, on 16.03.1846 whereby the independent possession of the Jammu & Kashmir region was transferred to Maharaja Gulab Singh and the heirs male of his body. Ever since then, the princely state of Jammu & Kashmir as ruled by the Jamwal Dogra Dynasty.
- 1925 The last ruling Maharaja of the princely State of Jammu & Kashmir, Hari Singh, ascended to the throne in 1925 and continued to rule till 1949.
- 1939 Jammu and Kashmir Constitution Act was promulgated in the year 1939. Jammu and Kashmir was governed under this constitutional scheme until the Constitution of 1957, unlike the relationship between the rest of the princely states and the Indian Union.
- 18.07.1947 The Indian Independence Act, 1947 was passed by the
& Parliament of United Kingdom dividing the then British India
15.08.1947 into two independent Dominions i.e., India and Pakistan and the said Act received its royal assent on 18.07.1947. The independent India came into being on the midnight of 15.08.1947. The princely states joined the Dominion of India or the Dominion of Pakistan. The then Maharaja of Jammu & Kashmir, Hari Singh, opted to remain independent.
- 26.10.1947 The princely State of Jammu & Kashmir was invaded by tribesmen from the Northwest Frontier Province, supported by Pakistan. Maharaja Hari Singh sought military help from

India, which eventually resulted in him signing of 'Instrument of Accession of Jammu & Kashmir' with India on 26.10.1947. It was stated in the 'Instrument of Accession' *inter alia* that:

"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 purpose of the Dominion shall, by virtue of this my 'Instrument of Accession', but subject always to the terms therefore and for the purpose only of the Dominion, exercise in relation to the State of Jammu and Kashmir.... such functions 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. ...

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.

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”.

- 20.06.1949 On 20.06.1949, Maharaja Hari Singh abdicated in favour of this son Dr. Yuvraj Karan Singh, who was made head of the State and subsequently served as *Sadr-i-Riyasat* and Governor of Jammu and Kashmir.
- 27.05.1949 The original draft of Article 270 was drawn up by the Government of Jammu and Kashmir. A modified version of the draft was passed in the Constituent Assembly of India on 27.05.1949.
- 17.10.1949 Article 370 was included in the Constitution of India by the Constituent Assembly on 17.10.1949 after extensive discussions.

Article 370 in The Constitution Of India 1949

370. Temporary provisions with respect to the State of Jammu and Kashmir

(1) Notwithstanding anything in this Constitution,

(a) the provisions of Article 238 shall not apply in relation to the State of Jammu and Kashmir;

(b) the power of Parliament to make laws for the said 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 as the matters with respect to which the Dominion Legislature may make laws for that State; and

(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 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 Maharajas

Proclamation dated the fifth day of March, 1948 ;

(c) the provisions of Article 1 and of this article shall apply in relation to that State;

(d) such of the other provisions of this Constitution shall apply in relation to that State subject to such exceptions and modifications as the President may by order specify: Provided that no such order which relates to the matters specified in the Instrument of Accession of the State referred to in paragraph (i) of sub clause (b) 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 paragraph (ii) of sub clause (b) of clause (1) or in the second proviso to sub clause (d) of that clause be 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 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

- 26.01.1950 The Constitution of India came into force on 26.01.1950. Article 1(2) and Schedule I thereof identifies Jammu & Kashmir as a state of India. Article 370 provides for temporary provisions with respect to the State of Jammu and Kashmir.
- 01.05.1951 On 01.05.1951, Dr. Yuvraj Karan Singh issued a proclamation for the election of the Constituent Assembly for the State of Jammu and Kashmir. The Constituent Assembly for the State of Jammu and Kashmir which is the body responsible for creating the state's constitution, convened its session on 31.10.1951.
- 1952 The Constituent Assembly of Jammu and Kashmir came out

with a comprehensive agreement titled “Delhi Agreement, 1952” which defines the relationship of the State with the Union. It was agreed inter alia that :

“(i) 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, Government of India agreed that, while the residuary powers of legislature vested in Centre in respect of all states other Jammu and Kashmir, in the case of the latter they vested in the State itself;

(v) there was complete agreement with regard to the position of the Sadar-i-Riyasat; though the Sadar-i-Riyasat was to be elected by the State Legislature he had to be recognized by the President of India before his installation as such; in other Indian States the Head of the State was appointed by the President and was such his nominee but the person to be appointed as the Head, had to be a person acceptable to the Government of that State; no person who is not acceptable to the State Government can be thrust on the State as the Head. The difference in the case of Kashmir lies only in the fact that Sadar-i-Riyasat will in the first place be elected by the

State legislature itself instead of being a nominee of the Government and the President of India....

(vi) With regard to the fundamental rights, some basic principles agreed between the parties were enunciated; it was accepted that the people of the State were to have fundamental rights. But in the view of the peculiar situation in which the State was placed, the whole chapter relating to 'Fundamental Rights' of the Indian Constitution could not be made applicable to the State, the question which remained to be determined was whether the chapter on fundamental rights should form a part of the State Constitution of the Constitution of India as applicable to the State;

(viii) here was a great deal of discussion with regard to the "Emergency Powers"; the Government of India insisted on the application of Article 352, empowering the President to proclaim a general emergency in the State; the State Government argued that in the exercise of its powers over defence (Item 1 on the Union List), in the event of war or external aggression, the Government of India would have full authority to take steps and proclaim emergency but the State delegation was, however, averse to the President exercising the power to proclaim a general

emergency on account of internal disturbance

Both the parties agreed that the application of Article 356, dealing with suspension of the State Constitution and 360, dealing with financial emergency, was not necessary”

- 14.05.1954 A Presidential Order by the President of India, viz. 'The Constitution (Application to Jammu and Kashmir) Order, 1954' was passed on 14.05.1954. It introduced Article 35A, which protects laws passed by the state legislature regarding the permanent residents from any challenge the ground that they are in violation of the Fundamental Rights. Also, a proviso was inserted in Article 3, which provides that no Bill altering the name/boundary of the State of Jammu & Kashmir shall be introduced in the Parliament without consent of the Legislature of the State
- 1957 The first legislative elections for the State of Jammu & Kashmir were held in 1957 where its constituent assembly was dissolved and replaced by a legislative assembly.
- May 1965 The titles of Prime Minister and *Sadar-i-Riyasat* were officially changed to Chief Minister and Governor, respectively in the State of Jammu & Kashmir in May, 1965.
- 13.11.1974 On 13.11.1974, the then Prime Minister, Indira Gandhi and Shiekh Abdulla signed '*Kashmir Accord*' known as 'Shiekh-Indira Accord, 1975', re-emphasising Article 370 as:

“1. The State of Jammu and Kashmir which is a constituent unit of the Union of India, shall, in its relation with Union, continue to be governed by

Article 370 of the Constitution of India”

- 1977-2016 The Presidential Rule was seven times imposed in the State of Jammu & Kashmir between 1977 and 2016.
- 20.06.2018 On 20.06.2018, the Governor’s Rule was imposed in the State of Jammu & Kashmir as the State Government collapsed. Subsequently, the Legislative Assembly for the State of Jammu and Kashmir was dissolved by the Governor on 21.11.2018.
- 19.12.2018 As the six months of Governor Rule in the State of Jammu and Kashmir got over on 19.12.2018, the Presidential Rule was imposed in the State of Jammu & Kashmir for the 8th time, which was subsequently approved by the Lok Sabha and Rajya Sabha.
- 05.08.2019 A Presidential Order, viz. – ‘The Constitution (Application to Jammu and Kashmir) Order, 2019 CO 272’ was passed by the President on 05.08.2019. The said Order supersedes the Constitution (Application to Jammu and Kashmir) Order, 1954. Also, it has added Clause (4) to Article 367, making the Constitution of India applicable to the State of Jammu and Kashmir.
- The above Presidential Order was in purportedly issued under the powers conferred by Article 370(1) of the Constitution of India, with the concurrence of Government of State of Jammu & Kashmir
- 05.08.2019 On the same day, i.e., 05.08.2018, the Rajya Sabha passed Jammu and Kashmir (Reorganization) Bill, 2019 unanimously. Vide the said Bill, the existing state of Jammu

& Kashmir is bifurcated into two Union-Territories – (1) the Union Territory of Jammu & Kashmir with a Legislative Assembly, and (2) the Union Territory of Ladakh without a Legislative Assembly.

06.08.2019

Another Presidential Order, in the form of a Declaration, viz, 'Declaration under Article 370(3) of the Constitution CO 273' (hereinafter "Declaration CO 273") was issued by the Government of India, Ministry of Law and Justice, in the name of President of India under Article 370(3) of the Constitution of India on 06.08.2019 stating that:

"..as and from the 6th August,2019, all clauses of the said Article 370 shall cease to be operative except the following which shall read as under, namely:-

370. All provisions of this Constitution as amended from time to time, without any modification 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, judgment, ordinance, order, by-law, rule, regulation, notification, custom, or usage having the force of law in the territory of India, or any instrument, treaty or agreement as

envisaged under Article 363 or otherwise.”

09.08.2019 That on 09.08.2019, the President having given assent, the impugned Jammu and Kashmir (Reorganization) Act, 2019 came into being.

___.09.2019 It is submitted that the Presidential Order CO 272 dated 05.08.2019, Declaration CO 273 dated 06.08.2019 and Jammu & Kashmir (Reorganization) Act, 2019 passed by the Parliament on 05.08.2019 are unconstitutional and violative of petitioner's fundamental rights under Article 14 and 21 of the Constitution of India.

In such circumstances, the petitioner, as a public spirited citizen, is constrained to file this public interest litigation, with the following among other Grounds.

IN THE HON'BLE SUPREME COURT OF INDIA
CIVIL ORIGINAL JURISDICTION
(UNDER ARTICLE 32 OF THE CONSTITUTION OF INDIA)
WRIT PETITION (CIVIL) NO. _____ OF 2019

IN THE MATTER OF:

1. Mohammed Yousuf Tarigami,
S/o Late Ghulam Rasool Rather,
Aged 72 years,
Residing at
H-1, Gupkar Road, Srinagar,
Jammu & Kashmir- 190001 .. Petitioner

VERSUS

1. Union of India,
Through its Secretary,
Ministry of Home Affairs,
Central Secretariat,
North Block,
New Delhi 110001 ..Respondent No.1

2. Union of India,
Through its Secretary,
Ministry of Law & Justice,
Shastri Bhavan,
New Delhi – 110001 ...Respondent No.2
3. State Of Jammu & Kashmir,
Represented By Its Chief Secretary,
R. No. 2/16, 2nd Floor Main Building, Civil...Respondent No.3
Secretariat, Jammu & Kashmir

To

The Hon'ble Chief Justice of India
And His companion Judges of the
Hon'ble Supreme Court of India

The Humble petition of the
Petitioner above – named

MOST RESPECTFULLY SHEWETH:-

1. The petitioner is filing the present Writ Petition in public interest under Article 32 of the Constitution of India inasmuch as the fundamental rights enshrined in the Part III of the Constitution are violated.
- 1A. The petitioner is a member of Communist Party of India (Marxist) (hereinafter "CPI(M)") and a four-time Member of Legislative Assembly representing Kulgam Legislative Constituency of the now dissolved Jammu and Kashmir Legislative Assembly. He is a member of the Jammu and Kashmir State Committee and the Central Committee of CPI(M). As a political leader, he has been actively involved in voicing the concerns of the people of Jammu

and Kashmir and in resolving various issues affecting daily lives through people's struggles and agitations.

1B. It is submitted that the petitioner has not approached any other court in the country on the facts and grounds canvassed herein. The petitioner is approaching this Hon'ble Court as there has been a violation of various provisions of the Part III of the Constitution of India enabling the petitioner to approach this Hon'ble Court under Article 32 of the Constitution.

2. The petitioner is aged about 69 , S/o Late Ghulam Rasool Rather, having permanent address at H1, Gupkar Raod, Srinagar, Jammu & Kashmir. The petitioner is available for communication and correspondence at tarigami@gmail.com. His PAN Card Number is _____ and AADHAR Card Number is _____. The petitioner's income is about _____.

3. The petitioner is before this Hon'ble Court seeking issuance of appropriate, writ, direction or order declaring the Presidential Order G.S.R 551(E) (CO 272) dated 05.08.2019, Presidential Order G.S.R 562(E) (CO 273) dated 05.08.2019 and Jammu & Kashmir (Reorganization) Act, 2019 passed by the Parliament as unconstitutional and being violative of petitioner's fundamental rights under Article 14 and 21 of the Constitution of India; and for issuance of consequential writ quashing the same.

4. It is submitted that the respondent-Union of India, particularly the Ministry of Home Affairs, is responsible for maintaining, sustaining and working of the constitutional provisions of both the Constitution

of State of Jammu and Kashmir and the Constitution of India; and their mutual independence and interplay.

5. It is submitted that the State of Jammu and Kashmir is being arrayed as Respondent No.3 as the impugned Presidential Orders and the Act of Parliament as having the effect of a constitutional upheaval is of grave public importance which specifically concerns the State of Jammu & Kashmir inasmuch as the constitutional rights of the State of Jammu & Kashmir and its citizens have been taken away without the mandate of the people of the State of Jammu & Kashmir.

BRIEF FACTS OF THE CASE:-

- a) It is submitted that the Treaty of Amritsar was signed between the East India Company and a Dogra Ruler, Maharaja Gulab Singh, on 16.03.1846 whereby the independent possession of the Jammu & Kashmir region was transferred to Maharaja Gulab Singh and to his male heirs. Ever since then, the princely state of Jammu & Kashmir as ruled by the Jamwal Dogra Dynasty.
- b) The last ruling Maharaja of the princely State of Jammu & Kashmir, Hari Singh, ascended to the throne in 1925 and continued to rule till 1949.
- c) It is submitted that Jammu and Kashmir Constitution Act was promulgated in the year 1939. Jammu and Kashmir was governed under this constitutional scheme until the Constitution of 1957, unlike the relationship between the rest of the princely states and the Indian Union.

- d) The Indian Independence Act, 1947 was passed by the Parliament of United Kingdom dividing the then British India into two independent Dominions i.e., India and Pakistan and the said Act received its royal assent on 18.07.1947. The independent India came into being on the midnight of 15.08.1947. The princely states joined the Dominion of India or the Dominion of Pakistan. The then Maharaja of Jammu & Kashmir, Hari Singh, opted to remain independent.
- e) The princely State of Jammu & Kashmir was invaded by tribesmen from the Northwest Frontier Province, supported by Pakistan. Maharaja Hari Singh sought military help from India, which eventually resulted in him signing of 'Instrument of Accession of Jammu & Kashmir' with India on 26.10.1947. It was stated in the 'Instrument of Accession' *inter alia* that:

"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 purpose of the Dominion shall, by virtue of this my 'Instrument of Accession', but subject always to the terms therefore and for the purpose only of the Dominion, exercise in relation to the State of Jammu and Kashmir.... such functions 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. ...

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.

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”.

True copy of the Instrument of Accession of Jammu and Kashmir dated 26.10.1947 is annexed with and marked as **Annexure P1 at pages (___) to (___)**.

- f)** On 20.06.1949, Maharaja Hari Singh abdicated in favour of this son Dr. Yuvraj Karan Singh, who was made head of the State and subsequently served as *Sadr-i-Riyasat* and Governor of Jammu and Kashmir.
- g)** The original draft of Article 270 was drawn up by the Government of Jammu and Kashmir. A modified version of the draft was passed in the Constituent Assembly of India on 27.05.1949.
- h)** Article 370 was included in the Constitution of India by the Constituent Assembly on 17.10.1949 after extensive discussions.

The said provision is as follows:

“Article 370 in The Constitution Of India 1949

370. Temporary provisions with respect to the State of Jammu and Kashmir

(1) Notwithstanding anything in this Constitution,

(a) the provisions of Article 238 shall not apply in relation to the State of Jammu and Kashmir;

(b) the power of Parliament to make laws for the said 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 as the matters with respect to which the Dominion Legislature may make laws for that State; and

(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 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 Maharajas Proclamation dated the fifth day of March, 1948 ;

(c) the provisions of Article 1 and of this article shall apply in relation to that State;

(d) such of the other provisions of this Constitution shall apply in relation to that State subject to such exceptions and modifications as the President may by order specify: Provided that no such order which relates to the matters specified in the Instrument of Accession of the State referred to in paragraph (i) of sub clause (b) 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 paragraph (ii) of sub clause (b) of clause (1) or in the second proviso to sub clause (d) of that clause be 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 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”

- i) The Constitution of India came into force on 26.01.1950. Article 1(2) and Schedule I thereof identifies Jammu & Kashmir as a state of India. Article 370 provides for temporary provisions with respect to the State of Jammu and Kashmir.
- j) On 01.05.1951, Dr. Yuvraj Karan Singh issued a proclamation for the election of the Constituent Assembly for the State of Jammu and Kashmir. The Constituent Assembly for the State of Jammu and Kashmir which is the body responsible for creating the state's constitution, convened its session on 31.10.1951.
- k) The Constituent Assembly of Jammu and Kashmir came out with a comprehensive agreement titled "Delhi Agreement, 1952" which defines the relationship of the State with the Union. It was agreed inter alia that :

“(i) 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, Government of India agreed that, while the residuary powers of legislature vested in Centre in respect of all states other Jammu and Kashmir, in the case of the latter they vested in the State itself;

(v) there was complete agreement with regard to the position of the Sadar-i-Riyasat; though the Sadar-i-Riyasat was to be elected by the State Legislature he had to be recognized by the President of India before his installation as such; in other Indian States the Head of the State was appointed by the President and was such his nominee but the person to be appointed as

the Head, had to be a person acceptable to the Government of that State; no person who is not acceptable to the State Government can be thrust on the State as the Head. The difference in the case of Kashmir lies only in the fact that Sadar-i-Riyasat will in the first place be elected by the State legislature itself instead of being a nominee of the Government and the President of India....

(vi) With regard to the fundamental rights, some basic principles agreed between the parties were enunciated; it was accepted that the people of the State were to have fundamental rights. But in the view of the peculiar situation in which the State was placed, the whole chapter relating to 'Fundamental Rights' of the Indian Constitution could not be made applicable to the State, the question which remained to be determined was whether the chapter on fundamental rights should form a part of the State Constitution of the Constitution of India as applicable to the State;

(viii) here was a great deal of discussion with regard to the "Emergency Powers"; the Government of India insisted on the application of Article 352, empowering the President to proclaim a general emergency in the State; the State Government argued that in the exercise of its powers over defence (Item 1 on the Union List), in the event of war or external aggression, the Government of India would have full authority to take steps and proclaim emergency but the State delegation was, however, averse to the President exercising the power to

proclaim a general emergency on account of internal disturbance Both the parties agreed that the application of Article 356, dealing with suspension of the State Constitution and 360, dealing with financial emergency, was not necessary”

True copy of the Delhi Agreement, 1952 dated NIL is annexed herewith and marked as **Annexure P2 at pages (___) to (___)**.

- l)** A Presidential Order issued by the President of India, viz. ‘The Constitution (Application to Jammu and Kashmir) Order, 1954’ was passed on 14.05.1954. It introduced Article 35A, which protects laws passed by the state legislature regarding the permanent residents from any challenge the ground that they are in violation of the Fundamental Rights. Also, a proviso was inserted in Article 3, which provides that no Bill altering the name/boundary of the State of Jammu & Kashmir shall be introduced in the Parliament without consent of the Legislature of the State. True copy of the Presidential Order dated 14.05.1954 is annexed herewith and marked as **Annexure P3 at pages (___) to (___)**.
- m)** The Constitution of State of Jammu and Kashmir was adopted on 17.11.1956 and came into effect on 26.01.1957. It was made clear that the State of Jammu and Kashmir is and shall remain integral part of the Union of India.
- n)** The first legislative elections for the State of Jammu & Kashmir were held in 1957 where its constituent assembly was dissolved and replaced by a legislative assembly.

- o)** The titles of Prime Minister and Sadar-i-Riyasat were officially changed to Chief Minister and Governor, respectively in the State of Jammu & Kashmir in May, 1965.
- p)** On 13.11.1974, the then Prime Minister, Indira Gandhi and Shiekh Abdulla signed 'Kashmir Accord' known as 'Shiekh-Indira Accord, 1975', re-emphasising Article 370 as:

“1. The State of Jammu and Kashmir which is a constituent unit of the Union of India, shall, in its relation with Union, continue to be governed by Article 370 of the Constitution of India”

True copy of the “Sheikh-Indira Accord, 1975” dated 13.11.1974 is annexed herewith and marked as **Annexure P4 at pages (___) to (___)**.

- q)** The Presidential Rule was seven times imposed in the State of Jammu & Kashmir between 1977 and 2016.
- r)** On 20.06.2018, the Governor's Rule was imposed in the State of Jammu & Kashmir as the State Government collapsed. Subsequently, the Legislative Assembly for the State of Jammu and Kashmir was dissolved by the Governor on 21.11.2018.
- s)** As the six months of Governor Rule in the State of Jammu and Kashmir got over on 19.12.2018, the Presidential Rule was imposed in the State of Jammu & Kashmir for the 8th time, which was subsequently approved by the Lok Sabha and Rajya Sabha. True copy of the notification GSR 1223 (E) dated 19.12.2018 issued by

the Ministry of Home Affairs is annexed herewith and marked as **Annexure P5 at pages (____) to (____)**.

- t)** A Presidential Order, viz. – ‘The Constitution (Application to Jammu and Kashmir) Order, 2019 CO 272’ was passed by the President on 05.08.2019. The said Order supersedes the Constitution (Application to Jammu and Kashmir) Order, 1954. Also, it has added Clause (4) to Article 367, making the Constitution of India applicable to the State of Jammu and Kashmir. True copy of the Presidential Order CO 272 dated 05.08.2019 issued by the Ministry of Law & Justice, Government of India (Respondent No.2) on behalf of the President of India is annexed herewith and marked as **Annexure P6 at pages (____) to (____)**.
- u)** On the same day, i.e., 05.08.2018, the Rajya Sabha passed Jammu and Kashmir (Reorganization) Bill, 2019 unanimously. Vide the said Bill, the existing state of Jammu & Kashmir is bifurcated into two Union-Territories – (1) the Union Territory of Jammu & Kashmir with a Legislative Assembly, and (2) the Union Territory of Ladakh without a Legislative Assembly.
- v)** Another Presidential Order, in the form of a Declaration, viz, ‘Declaration under Article 370(3) of the Constitution CO 273’ (hereinafter “Declaration CO 273”) was issued by the Government of India, Ministry of Law and Justice, in the name of President of India under Article 370(3) of the Constitution of India on 06.08.2019 stating that:

“..as and from the 6th August,2019, all clauses of the said Article 370 shall cease to be operative except the following which shall read as under, namely:-

370. All provisions of this Constitution as amended from time to time, without any modification 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, judgment, ordinance, order, by-law, rule, regulation, notification, custom, or usage having the force of law in the territory of India, or any instrument, treaty or agreement as envisaged under Article 363 or otherwise.”

True copy of the Declaration CO 273 dated 05.08.2019 issued by the Ministry of Law & Justice in the name of President of India is annexed herewith and marked as **Annexure P7 at pages (___) to (___)**

- w) That on 09.08.2019, the President having given assent, the impugned Jammu and Kashmir (Reorganization) Act, 2019 came into being. True copy of the Jammu and Kashmir (Reorganization) Act, 2019 dated 09.08.2019 is annexed herewith and marked as **Annexure P8 at pages (___) to (___)**.
- x) It is submitted that the Presidential Order CO 272 dated 05.08.2019, Declaration CO 273 dated 06.08.2019 and Jammu & Kashmir (Reorganization) Act, 2019 passed by the Parliament on 05.08.2019 are unconstitutional and violative of petitioner's

fundamental rights under Article 14 and 21 of the Constitution of India.

y) In such circumstances, the petitioner, as a public spirited citizen, is constrained to file this public interest litigation, with the following among other Grounds.

6. The petitioner has not filed any other petition or similar petition for similar reliefs before any other court or this Hon'ble Court

GROUND

I. THE PRESIDENTIAL ORDER CO 272 INCORRECTLY INVOKES ARTICLE 370(1)(D) TO EFFECTIVELY AMEND THE PROVISIO TO ARTICLE 370(3)

- A. It is submitted that the respondents have violated of the Constitution by the notifying Presidential Order CO 272 since Clause (2) of the Presidential Order CO 272 attempts to amend a provision viz. Article 367 that is outside of its ambit by erroneously invoking powers under Article 370(1) of the Constitution. By introducing the Clause 4(d) into Article 367, the effect thereof is to bring about changes in the reading of Article 370 of the Constitution It is submitted that sub-clause (d) of Clause 2 of the Presidential Order states that "in proviso to clause (3) of Article 370 of this Constitution, the expression '*Constituent Assembly of the State referred to in Clause 2*' shall read "Legislative Assembly of the State". It is respectfully submitted that Presidential Order, in effect, amends Article 370 of the Constitution, by introducing Clause 4(d) to Article 367 of the Constitution. It is a well-established principle

that *“what cannot be done directly cannot be done indirectly”*.

Therefore, it is submitted that neither can Article 370 be directly amended through a Presidential Order nor can it be amended by way of inserting a new provision into Article 367, in relation to the State of Jammu and Kashmir.

B. It is submitted that Article 370(1)(c) of the Constitution stipulates that *“notwithstanding anything in this Constitution, the provisions of Article 1 and of “this article” shall apply in relation to that State (i.e. in the present case, the State of Jammu and Kashmir). Article 370 (1)(c) of the Constitution stipulates that “.. such other provisions of this Constitution” shall apply in relation to that State subject to such exceptions and modifications as the President may by order specify*”. It is submitted that Article 370(1)(d) provides constitutional authority to the President – by order- to amend or modify the application of all provisions of the Constitution in relation to the State of Jammu and Kashmir ‘except’ Articles 1 and 370 itself. Therefore, the Article 370 cannot be made inoperative by the President as the Constitution does not permit so according to the said provision itself.

C. It is submitted that Article 370(3) authorizes the President to *“declare that this Article shall cease to be operative or shall be operative only with such exceptions and modifications.. as he may specify”*. Consequently, the power to alter the terms of Article 370 of the Constitution are contained within Article 370(3); to vest that power in Article 370(1)(d) would render Article 370(3) and its proviso otiose. Therefore, the action of the respondents in

introducing Presidential Order CO 272 by making amendments to Article 370 lacks merit. It is submitted that the respondents have erred in not taking into consideration the dictum laid down in the famous Privy Council decision viz. *Nazeer Ahmed v. King-Emperor* AIR 1936 PC 253, 257 wherein it was laid down that “where a power is given to do a certain thing in a certain way the thing must be done in that way or not at all. Other methods of performance are necessarily forbidden”.

- D.** It is submitted that the doctrine of legislative intent has not been considered by the respondents in employing Article 370(1)(d) to make changes to the said provision especially since the framers of the Constitution clearly provided Article 370(3) to be used in case other provisions of the Constitution of India are to be made applicable to the State of Jammu and Kashmir. It is submitted that during the debates on Draft Article 306A (and later Article 370) on 17.10.1949, Shri Gopaldaswami Ayyangar – the mover of the Article - made it clear that the terms of the relationship between the State of Kashmir and the Indian Union could *only* be altered following the method set down in clause (3) of the Article. It is submitted that the intention of the framers of the Constitution are not taken into consideration in the present case.
- E.** Because Article 370(1)(d) only authorizes the President to “*apply in relation to that State subject to exceptions and modifications*”.. “*such of other provisions of this Constitution.*” The power under Article 370(1)(d) therefore, extends to amending or modifying the application of the provisions of the Constitution to the State of

Jammu and Kashmir. It is submitted that the power does not extend to creating a fresh constitution provision (in this case, Article 367(4)) which is then applied solely to the State of Jammu and Kashmir. It is respectfully submitted that in *Puranlal Lakhanpal v. The President of India* 1962 SCR (1) 688 this Hon'ble Court, while according a wide amplitude to the meaning of the word "modification", refrained from using the word "create". In *Puranlal Lakhanpal v. The President of India* 1962 SCR (1) 688, this Hon'ble Court held that the word "modify" means "to vary" and "may even mean to extend or enlarge". It is clear that the underlying premise of this definition is the existence of a constitutional provision that then "varied", "extended", or "enlarged" in its specific application to the State of Jammu and Kashmir; as submitted above. It is submitted that Section 370(1)(d) does not contemplate a situation where a new constitutional provision laid down and made applicable afresh. It is submitted that a Presidential Order cannot create a new constitutional right, liability or disability. The President cannot by himself alone make laws as the same necessarily will have to be made at the floors of the Parliament.

II. CONCURRENCE HAS NOT BEEN VALIDLY OBTAINED FOR PASSING PRESIDENTIAL ORDER CO 272

F. It is submitted that Article 370 itself defines the "Government of the State" in the Explanation which reads thus:

"Explanation. – For the purposes of this Article, the Government of the State means the person for the time being recognized by the President as 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".

It is submitted that Maharaja gave way to *Sadar-i-Riyasat* and he to the Governor. Thus, the Governor cannot act under Article 370 singly as "the Government of the State". The object of the provision is to buttress the State's autonomy. It is submitted that the appointee of the respondents viz. the Governor cannot give his concurrence to the respondents as has been done in this case.

G. It is submitted that Article 370 limits the President's power to apply to apply to the state only items in the Union and Concurrent Lists, after consultation with the State if they are already comprised in the 'Instrument of Accession', namely those comprised in the defence, foreign affairs and communications. But if they go beyond these, the concurrence of the State's Constituent Assembly is necessary. However, until it was "convened", the government of the state could give concurrence, but that would be subject to ratification by the Constituent Assembly as has been provided in Article 370(2) of the Constitution. Article 370(3) further states that:

"Notwithstanding anything in the forgoing provisions of this Article, the President may, by 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.”

It is submitted that Article 368 on the Parliament's power to amend Constitution of India does not apply to Jammu and Kashmir unless the amendment is applied to the State by the President under Article 370. Once the Constituent Assembly of Jammu and Kashmir was “convened”, the State Government lost its interim power to accord its concurrence. When this body dispersed on 26.01.1957, after adopting the State's Constitution, the power of the President under Article 370 to add more legislative powers to the Union Government in respect of Jammu and Kashmir or extend to the state any other provision of the Constitution of India. Therefore, the concurrence obtained from Governor to pass Presidential Order CO 272 and Declaration CO 273 is illegal and invalid in the face of the Constitution.

H. It is submitted that the interpretation introduced by the Presidential Order 272 to construe Jammu and Kashmir Constituent Assembly to be read as Jammu and Kashmir Legislative Assembly is legally untenable especially since a Legislative Assembly cannot be conferred with powers that are constituent in nature. It is submitted Jammu and Kashmir Constituent Assembly ceased to exist on 25.01.1957. The Legislative Assembly it created, although dissolved, is in existence. The Legislative Assembly cannot be conferred with constituent powers to accord its concurrence to the respondents-Union of India to take away the autonomy of the state.

- I. It is submitted that the respondents have erred in interpreting the second proviso to Article 370 (1)(d) that stipulates that for matters that do not relate to those specified in the Instrument of Accession, the consent of the Government of the State (of Jammu & Kashmir) is required. This Hon'ble Court has held that the constitutional right to consent to presidential orders is the essential feature of Article 370(1)(b) and 370(1)(d) and further, that the State of Jammu and Kashmir is entitled to decide who will consent on its behalf according to the judgment of this Hon'ble Court in *Mohd Maqbool Damnoo v. State of J&K* (1972 1 SCC 536)). The establishment of the Government of Jammu & Kashmir cannot be superseded by the President to take concurrence from the Governor as the Governor does not represent the will of the people as he is merely a titular head.
- J. It is submitted that the Presidential Order CO 272 states that it has been made with the "concurrence of the Government of State of Jammu and Kashmir". However, as the State of Jammu and Kashmir has been under President's Rule since 19.12.2018, the consent is that of the President himself, acting on the advice of the Union Cabinet. This, effectively, amounts to the same constitutional functionary taking its own consent to effect a fundamental structural change without consultation or concurrence of the persons affected by that change, or their elected representatives. It is submitted that this is contrary to the rule of law and is manifestly arbitrary.
- K. It is submitted that in any event, "Government" cannot be equated with "Governor" in matters involving the fundamental and

permanent restructuring of the state itself. According to the judgment of this Hon'ble Court in *S.R Bommai v. Union of India* (1994) 3 SCC 1, it has been held that the President's Rule is a temporary and exceptional phenomenon designed to address an emergent situation until such time that an elected government is restored to power. Therefore, in the context of Article 370, this Hon'ble Court ought not to read "Government" to include "Governor", more so in the in cases involving irreversible alteration of the relationship between the State and the Union of India.

- L. It is respectfully submitted that in *State of NCT of Delhi v. Union of India* (2018) 8 SCC 501, this Hon'ble Court made it clear that representative democracy is a basic feature of the Constitution and that the Constitution should be interpreted to advance and not retard this principle. It is submitted that an interpretation of Article 370(1)(d) that would include "Governor" within the meaning of "Government" during the imposition of President's Rule would destroy the principle of representative government, for the reasons stated above.

III. THE POWER UNDER ARTICLE 370(1)(D) DOES NOT CONTEMPLATE SWEEPING APPLICATION OF "ALL PROVISIONS OF THE INDIAN CONSTITUTION APPLY IN RELATION TO THE STATE OF JAMMU AND KASHMIR".

- M. It is submitted that the power under Article 370(1)(d) does not contemplate sweeping application of "all provisions of the Indian Constitution apply in relation to the state of Jammu and Kashmir". It

is submitted that Clause 2 of the Presidential Order that seeks to extend “all the provisions of this Constitution, as amended from time to time”, ipso facto and in perpetuity, is ultra vires and beyond the authority conferred by Article 370(1)(d) of the Constitution.

N. Because any grant of power under the Constitution of India carried within it implied limitations upon the exercise of that power, consistent with the reasons as has been provided in *Kesavananda Bharati v. Union of India* (1973) 4 SCC 225. It is submitted that, as the debates in the Constituent Assembly indicate, the purpose of the Article 370(3) of the Constitution was to extend certain provisions of the Constitution of India to the State of Jammu and Kashmir, from time to time, based upon the exigencies of the situation. It is submitted that the intention of the framers of the Constitution was not to apply the Constitution of India as a whole, through a single order, and until perpetuity, to the State of Jammu and Kashmir (thus making the Constitution of Jammu and Kashmir redundant through a legislative back-door). Such a situation is contemplated only under the process outlined in Article 370(3).

O. It is submitted that Article 370(1)(d) requires application of mind by the President about which provisions shall be made to apply to Jammu and Kashmir as held in *Sampath Prakash v. State of Jammu and Kashmir & Anr.* (1969) SCC 1 562 by this Hon'ble Court. The Constitution (Application to J&K) Order 1954 applied all the provisions of the Constitution of India in force as of 20.06.1964 but subject to the modifications and exceptions detailed in that

order. The power to apply provisions with modifications and exceptions does not imply a power to apply the provisions without any modifications or exceptions, because doing so forecloses the possibility of future reconsideration by President from time to time, which is constitutionally required, as per *Sampath Prakash v. State of Jammu and Kashmir & Anr.* (1969) SCC 1 562:

"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."

IV. THE LEGISLATIVE ASSEMBLY OF THE STATE OF JAMMU AND KASHMIR HAS NO POWER UNDER THE CONSTITUTION OF JAMMU AND KASHMIR TO BRING ABOUT AN AMENDMENT TO ANY PROVISION UNDER THE CONSTITUTION OF INDIA.

P. It is submitted that the “consent” to Presidential Order CO 272 was invalidly given, as powers under President’s Rule are co-terminus with that of the legislative assembly of the State of the Jammu and Kashmir. However, under the proviso to Article 147 of the Constitution of Jammu and Kashmir, the legislative assembly of the State of Jammu and Kashmir is barred from “seeking to make any change in provisions of the Constitution of India as applicable in relation to the State”. Therefore, it is very clear that the legislative assembly could not have given its consent to Presidential Order No. 272, nor could the Governor, in its absence.

Q. It is submitted that insofar as it seeks to vest in the legislative assembly of the State of Jammu and Kashmir powers that it is expressly barred from exercising under the Constitution of Jammu and Kashmir, Presidential Order 272 is to that extent invalid and inoperative.

R. It is submitted that in any event, the Constituent Assembly of Jammu and Kashmir was aware of its power and authority to recommend amendment, modification, or abrogation of Article 370 upon the conclusion of its proceedings. However, the Constituent Assembly did not do so, and clearly intended Article 370 to remain intact. It is submitted that the legislative assembly standing alone is not an automatic successor to the Constituent Assembly, as the distinction between constituent power and legislative power is well-established in Indian constitutional jurisprudence.

V. DECLARATION CO 273 DATED 06.08.2019 IS ULTRA VIRES THE CONSTITUTION OF INDIA

- S.** It is submitted that Declaration CO 273 passed by the President of India under Article 370(3) to abrogate all clauses of Article 370 (except clause(1)) is constitutionally invalid. A Presidential Order under Article 370(3) of the Constitution requires the Constituent Assembly of Jammu and Kashmir to recommend a presidential notification under Article 370(3) declaring that Article 370 shall cease to be operative. It is respectfully submitted that J&K Constituent Assembly no longer exists and thus could not have made a recommendation to that effect. Furthermore, no recommendation was made by any legislative body in Jammu and Kashmir in exercise of its constituent power or otherwise to state that that Article 370 ceases to have effect.
- T.** It is submitted that the invalidity of Declaration CO 273 follows from the invalidity of Presidential Order CO 272. It is submitted that the Declaration CO 273 is based upon the consent of the Parliament, standing in for the (temporarily non-existent) legislative assembly of the State of Jammu and Kashmir. This authorisation, in turn, flows from Presidential Order CO 272, which substitutes "*legislative assembly*" for "*Constituent Assembly*", under Article 370(3) (which itself has been shown to be impermissible above). It is therefore follows that Declaration CO 273 cannot stand without the authority of Presidential Order 272.
- U.** It is submitted that in any event, the Presidential Order CO 272 cannot save Declaration CO 273 since Presidential Order CO 272 was passed under the powers granted to the President under Article 370(1)(d) to apply the provisions of the Constitution to the

State of Jammu and Kashmir. It is submitted that the modification of Article 367 – and thus of Article 370 – carried out in CO 272 applies only *qua* the State of Jammu and Kashmir. It is submitted that the plain textual intent of Article 370(1)(c) is to apply Article 1 and Article 370 to the State Jammu and Kashmir *in the same manner in which they apply* the Constitution of India. However, even if it were constitutionally permissible to apply Article 370 in a modified form via Article 367 as applied to Jammu and Kashmir, Article 370 of the Constitution would remain untouched by CO 272. Since CO 272 does not amend Article 370 *qua* India, a Presidential Order under Article 370(3) continues to be bound by Article 370(3) and requires a recommendation by the Constituent Assembly of Jammu and Kashmir, or some equivalent constituent power in the State of Jammu and Kashmir. Thus, Declaration CO 273 is *ultra vires* Article 370(3) of the Constitution of India.

V. It is submitted that treating Declaration CO 273 as validly passed under Article 370(3) of the Constitution of India, as it binds India, is to legitimize amendment of the text of Article 370(3) through Presidential Order 272 passed under Article 370(1)(d). While the President's powers under Article 370(1)(d) –exercised in Presidential Order 272 – permitting applying the Constitution's provision in modified form to Jammu and Kashmir, they do not extend to amending Article 370(3) of the Constitution of India, as it applies *qua* India. The only constitutionally permissible route to amending Article 370(3) of the Constitution of India as it applies to India, is by following the procedure expressly laid down in Article

370(3) for ceasing, modifying or excepting its operation qua India and the State of Jammu and Kashmir.

VI. THE PRESIDENTIAL ORDERS CO 272 AND 273 ENACT CONSTITUTIONAL CHANGE IN THE STATE OF JAMMU AND KASHMIR AND ARE THUS ULTRA VIRES ARTICLE 256 READ WITH 357 OF THE CONSTITUTION OF INDIA.

W. It is submitted that the President does not have the power to change the provisions of the Constitution of India, as applied to Jammu and Kashmir, during President's rule under Article 356(1). The President can issue a proclamation under Article 356(1), as applied to the State of Jammu and Kashmir by Constitution (Application to Jammu and Kashmir) Order 1954, if he is "satisfied that a situation has arisen in which the Government of the State cannot be carried on in accordance with the provisions of the Constitution of the State of Jammu and Kashmir. Therefore, by necessary inference, President's intervention under Article 356 must be to ensure that Government in Jammu and Kashmir can be carried out in accordance with the provisions of the Constitution of Jammu and Kashmir, and towards restoring constitutional machinery in the state. As a corollary, the President ought not amend the provisions of the Constitution of Jammu and Kashmir through the powers under Article 356(1) as applied to Jammu and Kashmir.

X. It is submitted that the President has completely eliminated the Constitution of Jammu and Kashmir by altogether superseding the Constitution (Application to Jammu and Kashmir) Order 1954 in the

Presidential Order CO 272 and Declaration CO 273 respectively. In doing so, the President conflated powers under Article 370(1)(d) with the powers under Article 356 of the Constitution of India as applied to the State of Jammu and Kashmir. It is submitted that the power of the President under Article 370(1)(d) is under the Constitution of India qua India, while the power of the President under Article 356 is under the Constitution of India as applied to Jammu and Kashmir, and that the merger of powers granted to the President in two separate capacities is unconstitutional.

Y. It is submitted that the power of the President under Article 356(1)(c) to suspend “in whole or in part the operation of any provisions of the Constitution of Jammu and Kashmir relating to anybody or authority in the State..” does not save the impugned orders for two reasons: first, the power under Article 356(1)(c) can only be exercised to “*make such incidental and consequential provisions as appear to the President to be necessary or desirable for giving effect to the objects of the Proclamation*”; and second, the power under Article 356(1)(c) ought to be read with Article 356(1)(c) and Article 357 as applied to Jammu and Kashmir. By such a holistic reading, the President is only empowered to transfer the “*legislative powers*” of the State Legislature to the Parliament/the President under Article 357(1)(a). By way of Presidential Order CO 272, the President effectively repeals the Constitution of Jammu and Kashmir altogether, by superseding the Presidential Order of 1954 which made provision for application of the Constitution of Jammu and Kashmir in the State of Jammu and Kashmir

altogether, by superseding Constitution (Application to Jammu and Kashmir) Order 1954 which made provision for application of the Constitution of Jammu and Kashmir in the State of Jammu and Kashmir. Thus, Presidential Order 272 enacts a constitutional change that is ultra vires the legislative powers transferred to the President under Article 356(1)(b) read with Article 357 and is hence unconstitutional.

VII. THE JAMMU AND KASHMIR (REORGANIZATION) ACT, 2019 IS CONSTITUTIONALLY INVALID

Z. It is submitted that in seeking to downgrade the status of the State of Jammu and Kashmir into a Union Territory (with legislature), the J&K (Reorganization) Act is *ultra vires* of Article 3 of the Constitution of India which authorizes the formation of new States, and the alteration of areas, boundaries or names of existing states, but it does not authorize the *degradation of status of an existing state into a Union Territory*. This is made even clearer by Explanations I and II to Article 3, where the word “State” is to be read to include a “union territory”, and Parliament’s power is deemed to include “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”. It is submitted that Article 3 provides a range of powers involving the inter se alteration of states, the inter se alteration of Union Territories, but conspicuously does not authorise the degradation of the status of a state into a Union Territory.

AA. It is submitted that the interpretation is supported by the principle of non-retrogression, that was set out by this Hon'ble Court in *Navtej Johar v. Union of India* (2018) 10 SCC 1. According to the principle of non-retrogression, "*the State should not take measures of steps that deliberately lead to retrogression on the enjoyment of rights either under the Constitution or otherwise*". It is submitted that the crucial right at stake here is the right to representation, and to be governed by one's elected representatives, as set out by this Hon'ble Court in *State of NCT of Delhi v. Union of India* (2018) 8 SCC 501. Consequently, having once achieved the degree of representation offered by state hood, the people of a state cannot be retrograded to the lesser degree of representation offered by a Union Territory.

BB. It is submitted that Article 1 of the Constitution of India stipulates that "India, that is Bharat, shall be a Union of States". Article 1(3) of the Constitution further stipulates that "the territory of India shall comprise – (a) the territories of the States". It is therefore submitted that for the purposes of Article 1, "states" and "union territories" are treated differently, and "states" remain the constituent units of the Indian Union. Consequently, it is respectfully submitted that the Article 3 of the Constitution cannot be read to grant the power to the Union to convert the status of states into Union Territories, as this power carries with it the necessary implication that the Union could – if it chose- convert the status of states into Union Territories instead of a "Union of States". It is submitted that the framers of the

Constitution could not have and did not vest so wide and untrammelled a power in the Union Government.

- CC.** It is submitted that the interpretation of Article 1 and 3 is buttressed by the judgment of this Hon'ble Court in *S.R Bommai v. Union of India* (1994) 3 SCC 1 where it has been clearly held that "the Courts should not adopt an approach, an interpretation, which has the effect of or tends to have the effect of whittling down the powers reserved to the states...let it be said that the federalism in the Constitution is not matter of administrative convenience, but one of the principle- the outcome of our own historical process and a recognition of the ground realities". It is submitted that the interpretation is supported by the consistent history of our Nation, where the movement has always been from the status of Union Territory to Statehood, and never the other way around. It is submitted that this interpretation is further supported by the fact that Union Territories (with legislatures) have always been the creations of Constitutional *amendment*, and not under the plenary power of Article 3. Examples include Pondicherry (Article 239A) and the National Capital Territory of Delhi (NCT) (Article 239AA). Indeed, at the time of framing of the Constitution, the concept of a Union Territory with a legislature did not even exist. It is therefore submitted that Article 3 could not have been intended to authorize⁴ the degradation of a state into a Union Territory.
- DD.** It is submitted that the respondents have not taken into consideration the proviso to Article 3 of the Constitution of India where it has been provided as follows:

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

It is submitted that the above proviso to Article 3 was an additional safeguard promised to all the other States; namely, the President had to refer the Bill to affected State’s Legislature and the Bill could be introduced in Parliament only after the President’s recommendation. In regard to Jammu and Kashmir, its consent was necessary which has been omitted in the present case. It is submitted that the Resolution passed by the Treasury side of the Parliament discards even the requirement of consultation, if not consent. The Resolution reads as follows:

“That the President of India has referred the Jammu and Kashmir Reorganization 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 19.12.2018. This House resolved to express the view to accept the Jammu and Kashmir Reorganization Bill, 2019”

It is submitted that the provisos to Article 3 are intended to protect the foundations of the federal structure. However, the resolution passed by the Houses holds that since the Parliament is vested

with the powers of Jammu and Kashmir Legislative Assembly when it is under the President's Rule, it can give its consent to the President as if it was the State Assembly itself.

EE. It is submitted that this Hon'ble Court has held, on multiple occasions, federalism is a basic feature of the Constitution of India. It is respectfully submitted that the model of federalism followed by our Nation is *sui generis* (*Durga Das Basu, Constitution of India, 9th Ed, Vol.1, p. 622*). It is *sui generis* in the sense of being a pluralistic federation where different constituent units of the federation can have a different relationship with the Union, based upon their terms of accession, historical, social, political, and cultural circumstances (*R.C Poudyal v. Union of India, 1994 Supp 1 SCC 324*). This is reflected in Article 371A to 371J, which provide a special status –in different respects- to the states of Nagaland, Mizoram, Manipur, Maharashtra, Karnataka, Sikkim and others. It is submitted that the principle of pluralistic federalism would be set at nought if one of the two parties to the federal relationship (i.e., the Union) can unilaterally amend the terms of their relationship, without even passing through the rigours of the amending process under Article 368.

FF. Because the right to autonomous self government and the right to an identity within the federal framework are fundamental rights flowing from the right to life and other provisions contained in Part III of the Constitution. Their removal in a manner that has made a mockery of the "procedure established by law" is clearly in violation of fundamental rights and out to be struck down forthwith.

GG. Because the promulgation of CO 272 and CO 273 are arbitrary exercises of government power in violation of fundamental rights and further, are in violation of fundamental rights and further, are in violation of constitutional morality.

HH. Because Jammu and Kashmir (Reorganization) Act, 2019 violates fundamental rights contained inter alia in Articles 14, 19 and 21 of the Constitution.

PRAYER:

In view of the above facts and circumstances, it is humbly prayed that this Hon'ble Court may be pleased to:

- a) issue an appropriate order declaring Presidential Order GSR 551(E) (CO 272) unconstitutional, void, and inoperative;
- b) Issue an appropriate order declaring Presidential Order GSR 562(E) (CO 273) unconstitutional, void, and inoperative;
- c) Issue an appropriate order declaring The Jammu and Kashmir (Reorganization) Act, 2019 as unconstitutional, void and inoperative; and/ or
- d) Pleased to issue any other writ or direction(s) or Order(s) as the Hon'ble Court may deem fit and proper in view of the facts and circumstances of the case and in the interest of justice.

**FOR THIS ACT OF KINDNESS THE HUMBLE PETITIONER
SHALL AS IN DUTY BOUND EVER PRAY.**

DRAWN & FILED BY

**(P.V.DINESH)
ADVOCATE FOR THE PETITIONER**

DRAWN ON: .09.2019
FILED ON: .09.2019
New Delhi.

IN THE HON'BLE SUPREME COURT OF INDIA
CIVIL ORIGINAL JURISDICTION
(UNDER ARTICLE 32 OF THE CONSTITUTION OF INDIA)

WRIT PETITION (CIVIL) NO. OF 2019

IN THE MATTER OF:

MOHAMMED YOUSUF TARIGAMI

... PETITIONER

VERSUS

UNION OF INDIA & ORS.

... RESPONDENTS

AFFIDAVIT

I, Mohammed Yousuf Tarigami, aged about 72, S/o Late Ghulam Rasool Rather, Aged 72 years, Residing at H-1, Gupkar Road, Srinagar, Jammu & Kashmir- 190001 presently at New Delhi, do hereby solemnly affirms and state as follows:

1. I am Petitioner in the accompanying writ petition and fully conversant with the facts and circumstances of the case, as such I am competent to swear this affidavit.
2. I have read and understood the contents of the Writ Petition at pages to and Synopsis and List of Dates at pages, B to , and I say that the contents thereof are true and correct to the best of my knowledge and the legal submissions are based on the advice received from my counsel which I believe to be true.
3. That I have read and understood the contents of Interlocutory Applications and I say that the contents thereof are true and correct to the best of my knowledge.
4. That the Annexures filed with the Writ Petition are true and correct copies of the originals.
5. That I have not filed any other Writ Petition in this Hon'ble Court with regard to the subject matter of the present Writ Petition.

DEPONENT

I, the above named deponent do hereby verify that the contents made in para Nos.1 to 5 of the above affidavit are true and correct to the best of my knowledge and belief. Nothing material has been concealed there from. Verified by me on this day of September, 2019.

DEPONENT