

IN THE SUPREME COURT OF INDIA  
CIVIL WRIT JURISDICTION  
W.P. (C) 1099 OF 2019

**IN THE MATTER OF:**

Dr. SHAH FAESAL & ORS.

...PETITIONERS

Vs

UNION OF INDIA & ANR

...RESPONDENTS

**OUTLINE OF SUBMISSIONS ON BEHALF OF THE PETITIONERS BY RAJU**

**RAMACHANDRAN, SENIOR ADVOCATE<sup>1</sup>**

**IMPUGNED STATE ACTIONS:**

1. Para (c)(ii) of the Proclamation of President's Rule in the State of Jammu and Kashmir vide. GSR 1223(E) dated 19.12.2018, and extended for a further period with effect from 03.07.2019. (Vol.3, p.487)
2. Concurrence given by the Respondent No.2 State enabling the President of India to issue Constitution of India (Application to the State of Jammu and Kashmir), Order 2019, numbered C.O. 272, dt. 05.08.2019. (Concurrence not available in the public domain)
3. Constitution of India (Application to the State of Jammu and Kashmir), Order 2019 numbered C.O. No. 272, dated 05.08.2019. (Vol. 3, p. 494)
4. Declaration Under Article 370(3) Of the Constitution numbered C.O. No. 273 dated 06.08.2019. (Vol. 3, p. 496)-
5. The Jammu and Kashmir Reorganisation Act, 2019 (Act No. 34 of 2019) which received the assent of the President on 09.08.2019. (Vol.3, p.505)

**CASE IN A NUTSHELL:**

Whether the Union Government, using the temporary cover of the President's Rule can:

*firstly*, effect a fundamental, permanent and irreversible alteration in the federal structure without any participation by the elected representatives of the concerned state, or for that matter, the participation of any of the institutions of that state duly established under the law; and

*secondly*, in the case of the state of Jammu and Kashmir, could it do so in a manner violating the constitutionally prescribed procedure for bringing about any change to Article 370?

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<sup>1</sup> Tendered on 10.12.2109. Assisted by Mr.Aakarsh Kamra, AOR; Mr. Shankar Narayanan, Mr. Prasanna S, Mr. Shadan Farasat, Ms. Malavika Prasad, Mr.Gautam Bhatia, Ms. Jahnavi Sindhu, Ms. Shruti Narayanan – Advocates.

**I. Constitutional Order 272 (hereinafter 'C.O. 272'), Constitutional Order. 273 (hereinafter 'C.O.273'), and the Jammu and Kashmir Reorganisation Act, 2019 (hereinafter, "Impugned Act" or "Reorganisation Act") are unconstitutional for impermissible use of powers under Article 356**

1. The power of the President and Parliament during the period when a proclamation under Article 356 is in force is in its very nature temporary and restorative in character. The Constitution has conferred this power on the President in order to remedy a situation where the Government of a state cannot be carried on in accordance with the provisions of the Constitution. The object of the exercise of power under this Article can only be to ensure that a situation obtains again where constitutional government is possible in the state.
2. Various provisions of the Constitution point to the temporary nature of the powers conferred by the Emergency Provisions in Part XVIII of the Constitution. For instance, Article 357 (2) makes it clear that legislative changes made in exercise of powers of the legislature of the state by Parliament is reversible by the competent state legislature. Similarly, Article 250 (2) states that laws made by Parliament on matters in a state list during an Emergency shall cease to have effect after six months after the proclamation ceases to operate. The power under Article 356, therefore, cannot be used to bring about irreversible constitutional changes.
3. Article 356 of the Constitution, even though it contemplates transfer of legislative and executive powers of the State to Parliament and the President respectively, does not contemplate the transfer of any constituent power. The nature of constituent power is such that it is incapable of being transferred unless the Constitution of Jammu & Kashmir provided a mechanism under which such power could be transferred thus. The President does not acquire the constituent powers of the Government of the State of Jammu & Kashmir under Article 370(1)(d), to give concurrence to a modification of the Constitution as applied to the State. Hence such power to give concurrence cannot be exercised by the Governor either, as he is merely a delegate of the President in the State, under President's Rule.
4. Likewise, Parliament under Article 356 does not acquire the constituent power of the legislative assembly of the State of Jammu & Kashmir under Article 370(3) to recommend a presidential notification, (assuming but not conceding the validity of Impugned Order

C.O. 272 redefining “constituent assembly” to mean “legislative assembly”). Consequently, the resolutions passed by both Houses of Parliament, recommending the issue of an Article 370(3) presidential notification, purportedly in exercise of powers that vest in the “legislative assembly” of the State of Jammu & Kashmir is invalid and *non est* in the eyes of law.

5. In any event, the President under Article 356 as applied to the State under the 1954 Order, must act to run the Government in the State in accordance with the provisions of the Constitution of India and the “Constitution of Jammu & Kashmir” and thus cannot abrogate the latter during President’s Rule.
6. The Reorganisation Act, 2019 is manifestly *ultra vires* the Constitution of Jammu & Kashmir, which not only recognises and mandates the status of Jammu and Kashmir as a “State” but also defines its territory under Article 4.

**II. C.O. 272 and C.O.273 are unconstitutional for being passed in disregard of the consent of the people of Jammu & Kashmir, as expressed through their chosen form of government – a popularly elected, republican form of government.**

1. **Absence of concurrence of the State Government:** The State of Jammu & Kashmir was under the President’s Rule under Article 356 of the Constitution of India (as applied under the 1954 Order) from 19.12.2018 till 31.10 2019 and all decisions were taken by the Governor, who is a delegate of the President.
2. Therefore, the will of the people finds no expression in the concurrence of the government of the State provided by the Governor, who is merely substituting for a popularly elected government as an emergency measure under Article 356 of the Constitution. Without an Article 356 proclamation in operation, such concurrence could have been provided only pursuant to aid and advice of the Council of Ministers of a government that is popularly elected.
3. Absent that, the concurrence is invalid and liable to be set aside, for want of due process. The purported concurrence of the Government of the State of Jammu and Kashmir is not the concurrence contemplated by Article 370 (1), but the concurrence of an agent or delegate under Article 356 of the President giving his consent.
4. The concurrence is not only undemocratic for want of public will, but also undemocratic for want of public reason. The record indicates that neither the President nor the Governor held any consultations on the issue either with the public at large or with

members of the legislative council. The concurrence ought to be set aside for violating Article 14 of the Constitution for non-consideration of relevant factors and for not giving a hearing to affected parties – including the people of Jammu and Kashmir.

5. C.O. 273 is similarly undemocratic for want of a “recommendation” from a representative body competent to issue such recommendation under Article 370(3).

### III. C.O. 272 is *ultra vires* Article 370:

1. The impugned order issued under Article 370(I)(d) attempts to modify the text of Article 370(3) as applied to the State of Jammu & Kashmir (via Article 367(4) by stipulating that “Constituent Assembly” shall mean “Legislative Assembly” in Article 370. This is unconstitutional because –
2. Article 370(I)(c) mandates that Article 370 (and Article I) shall apply to Jammu & Kashmir by virtue of the text itself, and that only “other” provisions can be modified and applied under Article 370(I)(d).
3. Article 367 of the Constitution of India defines the manner of interpretation of provisions of the Constitution of India, and thus can be used to modify merely the *interpretation of constitutional provisions* generally, when applied to the State of Jammu & Kashmir. However, C.O. 272 goes much beyond merely modifying the interpretation provision. Insofar as it seeks to alter the *substantive nature of the power under Article 370(3)* to recommend a presidential notification. In effect, C.O. 272 vests power of a certain kind, only exercisable by one body, and under Article 370 alone, *in a wholly different body* that lacks the competence to exercise such powers.
4. The creation of a new substantive power in the hands of the legislative assembly in supersession of the 1954 Order and the full application of the Constitution of India to Jammu & Kashmir, and the consequent abrogation of the Constitution of Jammu & Kashmir, would only be possible under C.O. 272 if Article 370(I)(d)’s power to modify and apply provisions was a constituent power. However, the President’s power under Art. 370(I)(d) is not a “constituent power” but is merely a power to “apply” provisions with “modifications and exceptions” under Article 370(I)(d) and is hence inherently a limited power.

### IV. C.O. 273 is *ultra vires* Article 370:

- 1.** A presidential notification such as C.O. 273 can be issued only if the proposal for the cessation of Article 370 *emanates from the State's Constituent Assembly* (or its successor in law, if any). The Jammu & Kashmir Constituent Assembly does not exist at the current time and thus could not have made a recommendation to that effect. Furthermore, no recommendation was made by any legislative body in exercise of its constituent power in Jammu & Kashmir that Article 370 shall cease to have effect. The state of Jammu & Kashmir not having validly initiated the process of abrogation of Article 370 (which, absent a mechanism to do so under the Constitution of Jammu & Kashmir could have been provided in the future by a suitable amendment made to the Constitution of Jammu & Kashmir the Union of India could not have initiated any process of substantive change under Article 370(3) either.
- 2.** The power to “recommend” cessation of operation of the Article 370 or to modify Article 370 under Article 370(3) is exclusively with the Constituent Assembly of the State of Jammu and Kashmir. Even if one were to assume that C.O. 272 is valid to the extent that the Constituent Assembly stood substituted by the legislative assembly, this power cannot be transferred to the President under Article 356. Even the text of the proclamation dt. 19.12.2018, by the use of the phrase “unless the context otherwise requires”, clearly contemplates certain powers and functions of the legislature which are beyond transfer under Article 356.
- 3.** This power to recommend such alteration in the relationship of the State with the Union is in the nature of *constituent power* which is both expressly limited (under Section 147 of the Jammu and Kashmir Constitution), and impliedly limited (under the principles of democracy and federalism and the text of the proclamation).
- 4.** Moreover, the recommendation made by Parliament on behalf of the Constituent Assembly of the State (and by implication, Legislative Assembly of the State) is undemocratic not only for want of will of the people of the State but also undemocratic for want of public reason. The haste and the perfunctory nature of the proceedings in Parliament of a change of this nature clearly violate the principle of deliberative democracy. Given the lockdown and prohibitory orders in place in the state from the previous days, it could not have been possible for the people to either express their views on the matter in public, enabling the Members of Parliament to reflect on deliberate on them, nor reach out to their representatives in Parliament for appropriate deliberations.

**V. Para (c)(ii) of The Presidential proclamation dt. 19.12.2018 is Unconstitutional for being violative of the principle of Federalism:**

1. The Impugned proclamation is unconstitutional to the extent that it suspends the proviso to Article 3 of the Constitution, which is a necessary safeguard protecting federalism and democracy which are basic features of the Constitution.
2. The device of President's Rule, which by its very nature is meant to be a temporary provision until the restoration of the elected government of the state, cannot be used to irreversibly and permanently alter the character of the state.
3. President's Rule represents a temporary suspension of the federal structure vis-à-vis the centre and the affected federal unit. During that time, therefore, the centre's actions must be oriented towards the eventual restoration of the federal unit. Federalism, therefore, places an implied limitation upon the powers of the President during President's Rule, namely, a limitation upon the President's power to change the status of the federal unit itself.

**VI. The Jammu & Kashmir Reorganisation Act 2019 violates Article 3 of the Constitution of India :**

1. The Impugned Act is clearly in violation of Article 3 of the Constitution, as the character of a state cannot be extinguished in its entirety in to two union territories.
2. There is no precedent in our constitutional history, after the concept of Union Territories was introduced in the Seventh Amendment to the Constitution of India, in which a State was completely extinguished, and reduced only to Union Territories.
3. To do so impinges on the federal character of the constitution because Article 3 limits the extent to which the federal nature of the union can be reduced. While states can be carved out from existing states, like Telangana was carve out from Andhra Pradesh, states cannot be entirely reduced into UTs as sought to be done under the impugned Act.
4. Article 2 in contrast, confers an almost unlimited power on the Parliament to create new states, as the creation of new states, by further federating the union, advances federalism.
5. If the impugned Constitution orders and impugned Act are upheld, India can be reduced to a "Union of Union Territories" merely by parliamentary legislations, which is neither permitted by the text nor the spirit of the Constitution.

6. The terms of entry of Jammu & Kashmir into the Indian Union, recognised in the 1954 Order accord protection to the territorial integrity of Jammu & Kashmir by making the powers of by Parliament, under Article 3 of the Indian Constitution, contingent on the consent by the state's legislature.
7. Thus, the extent of the State of Jammu & Kashmir can only be changed subject to strict federal and democratic guarantees – to the extent that Jammu & Kashmir's legislature and Constituent Assembly earmarked "empty" seats for absent representatives of the will of the people residing in those regions of the State not under India's control. The breakup of Jammu and Kashmir is a violation of this recognition.
8. The proviso to Article 3 provides that "*no bill for the purpose of .... shall be introduced in either house of Parliament...unless.. the Bill has been referred by the President to the Legislature of that State for expressing its views thereon within such period as may be specified in the reference or within such time further period as the President may allow and the period so specified or allowed has expired.*" In the present case, the Bill was introduced in Parliament before both houses had completed voting upon the Statutory Resolution purportedly moved in respect of obtaining the views of both houses of Parliament (exercising powers of the State Legislature).
9. The perfunctory nature of deliberations in Parliament violates principle of deliberative democracy. Therefore, the Reorganisation Act ought not to be considered as having the backing of the "wisdom" of Parliament and no *presumption of constitutionality* ought to attach thereto.

**VII. All the Impugned Orders, the Impugned Act and the Impugned actions violate the basic structure of India's Constitution**

1. The Impugned Orders and the Act violate the principles of federalism, democracy and the Rule of Law – each of which forms part of the basic structure of the Indian Constitution.
2. They effect a complete and a wholesale supersession of the Constitution of Jammu & Kashmir even to the extent of Jammu & Kashmir ceasing to be State, as demonstrated by the passage of the Jammu & Kashmir Reorganization Act, 2019 in Parliament. The series of actions are therefore in clear violation of this right to autonomy of the State that inhere in its residents under Part III and destructive of the basic structure of the

Constitution of India as applied to the State of Jammu & Kashmir and are therefore liable to be held to be void and inoperative under Article 13, by this Hon'ble Court.

- 3.** It is pertinent to point out that the State of Jammu and Kashmir acceded to India and has been an integral part of India since the accession. This was also affirmed by the Constituent Assembly of Jammu and Kashmir in the Jammu and Kashmir Constitution which in Article 3 declares that State of Jammu and Kashmir is an integral part of India. In altering the constitutional relationship of a State with the Union, every principle of constitutionalism has to be scrupulously followed and this Hon'ble Court is being approached to enforce the letter and spirit of the relevant constitutional provisions strictly.

TENDERED ON: 10.12.2019