

# THE ABROGATION OF ARTICLE 370 AND BIFURCATION OF JAMMU AND KASHMIR – A BRIDGE TOO FAR

*Kashish Mahajan<sup>†</sup>*

## **Abstract**

*On 5th August 2019, the State of Jammu and Kashmir, while under President's rule, witnessed unprecedented and potentially historic changes that fundamentally redefined its constitutional relationship with the Union of India. Broadly, these landmark changes include the effective abrogation of Article 370 of the Constitution of India and the reorganisation of the State of Jammu and Kashmir into two Union territories, Jammu and Kashmir and Ladakh, thus, bringing to an end the special status of Jammu and Kashmir under the Constitution of India. This paper outlines the legal measures adopted to effectuate these changes and then proceeds to examine their constitutional validity. The paper contends that the Legislative Assembly of the State can be construed to mean the Constituent Assembly of the State thereby keeping the mechanism for the abrogation of Article 370 alive. The paper also lays down a legal standard for the kinds of decisions that may be taken by the President and the Parliament during the operation of President's rule and argues that the actions of abrogating Article 370 and bifurcating the State of Jammu and Kashmir are unconstitutional when tested against this standard. Lastly, the paper discusses the scope of judicial review in the instant case by analysing previous decisions of the Supreme Court on matters of executive and legislative policy.*

*Keywords: Jammu and Kashmir, reorganization, Article 370, abrogation, President's rule*

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<sup>†</sup> Graduate of the National Law Institute University, Bhopal (B.A.LL.B. (Hons.) – Batch of 2020).

## 1. Introduction

The State of Jammu and Kashmir holds a unique place in modern Indian history and its polity. As is well known, the origin of the dispute between India and Pakistan over Jammu and Kashmir dates back to the initial years of Indian independence. The princely state of Jammu and Kashmir had the peculiar distinction of having a Hindu ruler with a Muslim majority populace. By August 15, 1947, it was the only one of three princely states which was yet to take a decision on whether to accede to the Dominion of India or to Pakistan.<sup>1</sup> However, in October 1947, a number of tribesmen from Pakistan invaded the State, prompting Maharaja Hari Singh, the then ruler of Jammu and Kashmir, to sign the Instrument of Accession in return for military assistance from the Indian Government.<sup>2</sup>

The Instrument of Accession conferred on the Dominion Legislature the power to legislate on the subjects of Defence, External Affairs and Communications in relation to the State.<sup>3</sup> Given that war continued to prevail in the State till 1949, the drafters of the Constitution of India (“the Constitution”) sought to incorporate some of the terms of the Instrument of Accession into the Constitution in order to reflect the legal relationship between the Union and the State as it existed at the time.<sup>4</sup> This ultimately led to the crystallization of Article 370, which gave recognition to the special status of Jammu and Kashmir within the framework of the Constitution. This special status (as it stood prior to its de-operationalisation) is evident from the following *sui generis* aspects of Article 370:

- (i) The power of Parliament to make laws for the State is limited to the matters in the Union List and Concurrent List which correspond to the matters specified in the Instrument of Accession (defence, foreign affairs and communications) as declared by the President in consultation with the Government of the State;<sup>5</sup>
- (ii) The power of Parliament to make laws on others matters in the above Lists is contingent on the concurrence of the Government of the State;<sup>6</sup>
- (iii) Article 1 and Article 370 aside, other provisions of the Constitution may be extended to the State (with possible exceptions and modifications) only by way of a Presidential Order issued either in consultation with or in concurrence of the Government of the State;<sup>7</sup>
- (iv) Specific recognition is given to the existence of a separate Constitution for the State of Jammu and Kashmir;<sup>8</sup>
- (v) Provides for its own abrogation / amendment procedure which requires a mere declaration by the President pursuant to a recommendation of the Constituent Assembly of the State.<sup>9</sup>

Against this backdrop, the paper seeks to analyse the constitutionality of the legal measures adopted to effectively abrogate Article 370 and divide Jammu and Kashmir into two separate Union Territories. Part II of this paper outlines in detail the legal steps taken by the President and Parliament to effectuate the said changes which raises key issues of constitutional law. In light of these legal measures (2), Part III focuses on whether the Constituent Assembly

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<sup>1</sup> V.P. Menon, *Integration of the Indian States*, 109 (1956).

<sup>2</sup> Sarvepalli Gopal, *Selected Works of Jawaharlal Nehru: Second Series*, 274 (1987).

<sup>3</sup> Schedule, Instrument of Accession of Jammu and Kashmir.

<sup>4</sup> B. S. Rao, *The Framing of India's Constitution: Select Documents*, 567 (1967).

<sup>5</sup> Art. 370(1)(b)(i), the Constitution of India.

<sup>6</sup> Art. 370(1)(b)(ii), the Constitution of India.

<sup>7</sup> Art. 370(1)(d), the Constitution of India.

<sup>8</sup> Art. 370(2), the Constitution of India.

<sup>9</sup> Art. 370(3), the Constitution of India.

of Jammu and Kashmir can be validly succeeded by the Legislative Assembly of Jammu and Kashmir for the purpose of complying with the requirements for abrogation of Article 370 as laid down in clause (3) (3). Part IV discusses the basic structure doctrine in relation to Article 370 (4). Part V analyses the contours of the powers of the President and the Parliament during President's rule with specific reference to the Proclamation in Jammu and Kashmir (5). Part VI comments on the power of the Parliament to enact the Jammu and Kashmir Reorganisation Act, 2019 which provides for the bifurcation of the (erstwhile) State of Jammu and Kashmir into two Union Territories (6). Part VII analyses the scope of judicial review in the present case (7). Part VIII concludes (8).

## 2. The Impugned Legal Measures

At the outset, it is imperative to expound on the legal measures executed to abrogate Article 370 and bifurcate the State of Jammu and Kashmir in order to assess the same on the touchstone of the Constitution. The foremost among them is the Constitution (Application to Jammu and Kashmir) Order, 2019 ("C.O. 272") issued by the President under sub-clause (d) of clause (1) of Article 370 with the "concurrence of the Government of the State of Jammu and Kashmir", which acts as the lynchpin for all subsequent legal measures. However, since the State of Jammu and Kashmir was under President's rule in accordance with Article 356 of the Constitution at the time,<sup>10</sup> the concurrence obtained as per C.O. 272 was in reality the concurrence of the Governor of Jammu and Kashmir acting on behalf of the President.<sup>11</sup>

C.O. 272 contains three significant clauses: (i) It supersedes all previous Presidential Orders that had extended various provisions of the Constitution to the State of Jammu and Kashmir; (ii) It extends all provisions of the Constitution, as amended from time to time, to the State of Jammu and Kashmir; (iii) It modifies Article 367 of the Constitution in relation to the State of Jammu and Kashmir by replacing the expression "Constituent Assembly of the State" with "Legislative Assembly of the State" in the proviso to clause (3) of Article 370.

Consequently, on the recommendation of Parliament, acting on behalf of the Legislative Assembly of the State under Article 356, the President issued a notification ("C.O. 273")<sup>12</sup> declaring that Article 370 had ceased to be operative barring an amended clause which provided that all provisions of the Constitution, as amended from time to time, and without any modifications or exceptions would be applicable to the State of Jammu and Kashmir. Additionally, Parliament expressed its "views"<sup>13</sup> on behalf of the Legislative Assembly of the State and accepted the Jammu and Kashmir Reorganisation Bill, 2019 thereby fulfilling the necessary prerequisite for the Bill to be passed as an Act of Parliament<sup>14</sup>.

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<sup>10</sup> Proclamation No. G.S.R. 1223(E), dated 19th December, 2018, available at <http://egazette.nic.in/WriteReadData/2018/194042.pdf>, last seen on 17/12/2019.

<sup>11</sup> Ibid, at Cl. (c)(i).

<sup>12</sup> Declaration under Article 370(3) of the Constitution, G.S.R. 562(E), dated 6th August, 2019, available at <http://egazette.nic.in/WriteReadData/2019/210243.pdf>, last seen on 17/12/2019.

<sup>13</sup> Rajya Sabha, *Uncorrected Verbatim Debates*, dated 5th August, 2019, available at <http://164.100.47.7/newdebate/249/05082019/Fullday.pdf>, last seen on 17/12/2019; Lok Sabha, *Text of Debate*, dated 5th August, 2019, available at <http://loksabhadocs.nic.in/debatetextmk/17/1/05.08.2019f.pdf>, last seen on 17/12/2019.

<sup>14</sup> Art. 3, the Constitution of India.

The aforesaid changes give rise to four vital questions of law. *First*, whether the President can validly amend Article 367 to replace the Constituent Assembly of the State with the Legislative Assembly of the State in the proviso to clause (3) of Article 370? *Second*, whether the concurrence of the President in C.O. 272 and the recommendation of the Parliament in C.O. 273 is legally permissible given that the State of Jammu and Kashmir was under President's Rule at the time? *Third*, is the Parliament vested with the requisite constitutional power to bifurcate the State of Jammu and Kashmir into two separate Union territories during the operation of President's rule? *Fourth*, what is the extent to which the judiciary may intervene in such a case? The subsequent parts of this paper attempt to provide an answer to each of these questions in detail.

### **3. Legislative Assembly as a Valid Successor to the Constituent Assembly of the State**

At the center of the discourse on the constitutional validity of C.O. 272, is the proviso to clause (3) of Article 370 which requires the recommendation of the Constituent Assembly of the State of Jammu and Kashmir before the President can declare Article 370 inoperative or operative only with such "exceptions" and "modifications" as may be specified. Therefore, from a bare perusal of clause (3), it is clear that the recommendation of the Constituent Assembly is required not only to cease the operation of Article 370 but also to amend Article 370 through "modifications" and "exceptions".

However, due to the dissolution of the Constituent Assembly of the State post the adoption of the Jammu and Kashmir Constitution ("J&K Constitution"), compliance with the letter of the proviso had become an obvious impossibility. To address this legal conundrum, C.O. 272 uses the power of the President under Article 370(1)(d) to amend Article 367, the interpretative clause of the Constitution, in relation to the State of Jammu and Kashmir and substitutes the words "Constituent Assembly of the State" with "Legislative Assembly of the State" in the proviso to clause (3) of Article 370. The logical question that then arises is whether the said substitution amounts to a "modification" under clause (3) of Article 370 and is therefore unconstitutional in the absence of a recommendation of the Constituent Assembly of the State.

The case of *Mohd. Maqbool Damnoo v State of Jammu and Kashmir* ("*Maqbool Damnoo*")<sup>15</sup> is illustrative of the issue. In this case, the Supreme Court ("Court") addressed the question of whether "Sadar-i-Riyasat" was validly replaced by "Governor" in the Explanation to "Government of the State" in clause (1) of Article 370 through the exercise of a Presidential Order that amended Article 367. The main contention before the Court was that the change in definition amounted to an amendment of Article 370(1) through the back-door since it was introduced without the invocation of clause (3) of Article 370. However, the Court upheld the new Explanation primarily on the ground that it was in pursuance of an amendment to the J&K Constitution which had provided for the appointment of a Governor in place of the Sadar-i-Riyasat and thereby recognized the constitutional position in the State as it existed on that date. Thus, the Court reasoned that the new definition only gave legal meaning to the phrase "Government of the State" which had previously become redundant and was something which the Court would have done by way of interpretation in any case. Therefore, the concerned

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<sup>15</sup> Mohd. Maqbool Damnoo v. State of Jammu and Kashmir, AIR 1972 SC 963.

change in definition was not in the nature of a “modification” to clause (1) of Article 370, which would have necessarily required the recommendation of the Constituent Assembly.

Interestingly, the Court also rejected the contention that Section 147 of the J&K Constitution prevented the Legislative Assembly of the State from replacing “Sadar-i-Riyasat” with “Governor” in the J&K Constitution in so far as it amended Section 147 itself. This contention arose from the language of Section 147 in its unamended form, which required the assent of the Sadar-i-Riyasat to any Bill seeking to amend the J&K Constitution. At the same time, Section 147 barred the Legislative Assembly from making an amendment to Section 147 itself, leading the petitioners to argue that Section 147 demonstrated the perpetual existence of the Sadar-i-Riyasat.<sup>16</sup> However, the Court rejected this contention in light of Section 158 of the J&K Constitution which made the Jammu and Kashmir General Clauses Act, 1977 (“the J&K General Clauses Act”) applicable for the purpose of interpretation of the J&K Constitution. In this regard, Section 18 of the J&K General Clauses Act states that the application of any law to a functionary extends to the successors of that functionary as well thereby leaving the Court to decide whether the Governor was the successor to the Sadar-i-Riyasat. The Court held in the affirmative and noted that despite the Governor not being an elected position, unlike the Sadar-i-Riyasat, the same had no bearing on the issue since the executive power of the State vested in both functionaries as heads of the State and further, the overall democratic character of the Government in the State remained unchanged.

Thus, the legal position emerging from *Maqbool Damnoo* is that reference to a particular functionary in the Constitution can be construed to mean its successor in accordance with Section 18 of the General Clauses Act, 1897,<sup>17</sup> which uses language identical to Section 18 of the J&K General Clauses Act, and can be applied to interpret the provisions of the Constitution as per clause (1) of Article 367. Hence, the author opines that the Union Government has carefully traced its steps in accordance with the decision of the Court in *Maqbool Damnoo* and that the substitution of the phrase “Legislative Assembly” for “Constituent Assembly” is in keeping with the change that was upheld by the Court in *Maqbool Damnoo*.

In this context, the primary argument against construing “Legislative Assembly” to mean “Constituent Assembly” flows from Section 147 of the J&K Constitution. Section 147 prevents the Legislative Assembly from introducing or moving any “Bill or amendment” seeking to make any change in the provisions of the Constitution of India as applicable to the State. Given that Article 370 is a provision of the Constitution of India that applies in relation to the State, commentators have argued that the Legislative Assembly does not possess the requisite constituent power to make a recommendation under clause (3) of Article 370.<sup>18</sup> However, the author refutes this contention as the process to effect a recommendation only requires the passing of a statutory resolution by the Legislative Assembly. As per Assembly rules of procedure and conduct of business, a “resolution” is a mechanism by which the Assembly expresses its opinion on a matter of general public interest<sup>19</sup> and may take the form of a

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<sup>16</sup> Ibid, at para 26.

<sup>17</sup> S. 18, The General Clauses Act, 1897.

<sup>18</sup> K. Nivedhitha, *Guest Post: Article 370: The Constitutional Challenge*, Indian Constitutional Law and Philosophy, available at <https://indconlawphil.wordpress.com/2019/08/13/guest-post-article-370-the-constitutional-challenge/>, last seen on 17/12/2019.

<sup>19</sup> Lok Sabha Secretariat, *Motions and Resolutions in Parliament*, (14<sup>th</sup> ed., 2014), available at <http://164.100.47.194/loksabha/writereaddata/ParliamentProcedure/Motions%20and%20Resolutions.pdf>, last seen on 17/12/2019.

recommendation.<sup>20</sup> Thus, the terms “resolution” or “recommendation” ought to be distinguished from “Bill or amendment”. The omission of the words “resolution” or “recommendation” from Section 147 of the J&K Constitution would resultantly suggest that the legislative power to recommend the cessation of Article 370 is vested in the Legislative Assembly. The reliance on Section 147 therefore seems to be misplaced. The wording of Section 147 aside, the Legislative Assembly of the State may be validly regarded as the successor to the Constituent Assembly for the following *three* reasons –

### 3.1. *Mandate of the Legislative Assembly*

The Legislative Assembly, just like the Constituent Assembly, is an elected body chosen on the basis of adult franchise.<sup>21</sup> Thus, by their very nature, both the Constituent Assembly and the Legislative Assembly represent the wishes of the people of the State of Jammu and Kashmir. Resultantly, the similarity in the mode of formation and broader mandate would suggest that the two bodies share sufficient characteristics for the Legislative Assembly to be declared as the successor to the Constituent Assembly for the purpose of Section 18 of the General Clauses Act, 1897. Therefore, even if *Maqbool Damnoo* were to be criticized on the ground that the Court failed to provide adequate reasoning as to how the Governor could be construed to be the valid successor of the *Sadar-i-Riyasat* given the distinction in the mode of appointment of the two functionaries,<sup>22</sup> the said criticism would not be applicable to the instant case.

### 3.2. *Harmonious Reading of Clause (1)(d) and Clause (3) of Article 370*

Pursuant to sub-clause (d) of clause (1) of Article 370, the President has the power to extend all provisions of the Constitution [except for Article 1 and Article 370 itself which are already applicable to the State as per sub-clause (c)] subject to possible exceptions and modifications to the State of Jammu and Kashmir with the concurrence of the ‘Government of the State’. As per the amended Explanation in clause (1), any reference to the ‘Government of the State’ is to be construed as “including references to the Governor of Jammu and Kashmir acting on the advice of his Council of Ministers”.<sup>23</sup> The invocation of this power was first seen in 1950 when the President, with the concurrence of both the Government and the Constituent Assembly of the State, issued the Constitution (Application to Jammu and Kashmir) Order, 1950 which extended the application of several provisions of the Constitution to the State of Jammu and Kashmir. Subsequently, this Order was superseded by the Constitution (Application to Jammu and Kashmir) Order, 1954 (“Order of 1954”) which has been amended several times over the years to extend various provisions of the Constitution to the State. A bare reading of the amendments to the parent Order of 1954 shows that various provisions of the Constitution such as the Preamble, Article 14, Article 21, among others have been extended to Jammu and Kashmir verbatim.<sup>24</sup> In *Sampat Prakash v. The State of Jammu and Kashmir* (“*Sampat Prakash*”), the Court sanctioned the working of clause (1)(d) in this fashion by observing that the President was expected to make exceptions or modifications to a provision while applying it to the State only if the situation in the State demanded the same and that the said exceptions and modifications were capable of being rescinded on account of any change

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<sup>20</sup> Lok Sabha Secretariat, *Rules of Procedure and Conduct of Business in Lok Sabha – Rule 171*, (16<sup>th</sup> ed., 2019) available at <http://164.100.47.194/loksabha/rules.aspx>, last seen on 17/12/2019.

<sup>21</sup> Art. 170(1), the Constitution of India; S. 47(1), the Constitution of Jammu and Kashmir.

<sup>22</sup> *Abdul Qayoom Khan v. State of J&K and Ors.*, 2016 (1) JKJ 506, para 24.

<sup>23</sup> The Constitution (Application to Jammu and Kashmir) Second Amendment Order, 1965.

<sup>24</sup> The Constitution (Application to Jammu and Kashmir) Order, 1954, available at [http://jklaw.nic.in/constitution\\_jk.pdf](http://jklaw.nic.in/constitution_jk.pdf), last seen on 20/05/2020.

in the situation in the State.<sup>25</sup> Therefore, the previous usage of clause (1)(d) coupled with the observations of the Court clearly indicate that the application of provisions of the Constitution to Jammu and Kashmir with exceptions and modifications is contingent on the discretion of the President and the Government of the State. This ability to decide on how provisions of the Constitution are to be extended to the State is also confirmed by the use of the word ‘may’ in clause (1)(d) with regard to making such exceptions and modifications. In turn, this would effectively mean that all provisions of the Constitution of India, as applicable to other states in the country, can be made applicable to the State of Jammu and Kashmir with the only condition being the concurrence of the Government of the State, which is de-facto the Council of Ministers. Consequently, such an outcome would dismantle the scheme of Article 370 and render it inoperative in practice without the invocation of clause (3) of Article 370. Therefore, if the Council of Ministers has an implied power to virtually de-operationalize Article 370 under clause (1)(d), the same may logically also be extended to the Legislative Assembly, a body with widespread representation and law making power, under clause (3) to ensure a harmonious reading of the two clauses. Even if such an interpretation is deemed to clash with Section 147 of the J&K Constitution, precedence ought to be given to Article 370 since the Constitution of Jammu and Kashmir has been held to be subordinate to the Constitution of India<sup>26</sup>.

### 3.3. *The Constitution as a Living Document*

An acceptance of the change in terminology would also be in line with the tendency of the Court to interpret the Constitution as a living document that needs to evolve and keep pace with the needs of changing times.<sup>27</sup> The Court explained the importance of a living Constitution in *Justice K.S. Puttaswamy v Union of India* wherein it stated that while the Constitution is an embodiment of the eternal values of Indian society, it also possesses the ability to ensure its continued relevance. The Court further noted that the ability of the Constitution to stay relevant stems from permitting present and subsequent generations to find unique solutions to pressing issues of their times.<sup>28</sup> In practice, the adoption of this rule of interpretation has resulted in the relaxation of locus standi rules in public interest litigation cases<sup>29</sup> and an expansion of the scope of the right to life under Article 21.<sup>30</sup> Therefore, in the present case, even if the Court were to agree with the notion that the Constituent Assembly of India intended, by way of the proviso in clause (3), for the Constituent Assembly of the State to take a final decision on whether or not Article 370 was to be abrogated, the same would not proscribe it from holding that the words and expressions used in the Constitution have no fixed meaning<sup>31</sup> and can be interpreted to reflect current political realities. In such a scenario, and as a hallmark of representative democracy, the body which comes closest to representing the people presently residing in the State of Jammu and Kashmir is the Legislative Assembly. A textualist interpretation to the contrary may lead to an arguably absurd situation where the Union Government and the State Legislative Assembly would never be permitted to abrogate Article 370 despite reaching an agreement to do so in the near future. This position is further untenable given that the

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<sup>25</sup> *Sampat Prakash v. The State of Jammu and Kashmir*, AIR 1970 SC 1118, para 12.

<sup>26</sup> *State Bank of India v. Santosh Gupta and Ors.*, (2017) 2 SCC 538, para 43.

<sup>27</sup> *I.R. Coelho (Dead) By Lrs v. State of Tamil Nadu*, AIR 2007 SC 861, para 32; *Government of NCT of Delhi v. Union of India*, (2018) 8 SCC 501, para 140;

<sup>28</sup> *Justice K.S. Puttaswamy v. Union of India*, AIR 2017 SC 4161, para 151.

<sup>29</sup> *S.P. Gupta v. Union of India*, AIR 1982 SC 149.

<sup>30</sup> *Olga Tellis v. Bombay Municipal Corporation*, (1985) 3 SCC 545, para 37; *Justice K.S. Puttaswamy v. Union of India*, AIR 2017 SC 4161, para 392.

<sup>31</sup> *Aruna Roy v. Union of India*, (2002) 7 SCC 368, para 78.

abrogation of Article 370 and consequent repeal of the special status of Jammu and Kashmir is not in contravention of the basic structure of the Constitution, as argued in the next Part.

#### **4. Application of the Basic Structure Doctrine to Article 370**

Based on the above analysis, it becomes imperative to evaluate Article 370 on the yardstick of the basic structure. Introduced by the Court in *Kesavananda Bharti v State of Kerala* (“*Kesavananda Bharati*”),<sup>32</sup> the basic structure doctrine postulates that the Parliament may amend any provision of the Constitution provided the core features and principles of the Constitution remain unchanged. Now, one may hypothetically argue that Article 370 falls outside the ambit of the basic structure doctrine because the basic structure doctrine was propounded in relation to the constituent power of Parliament under Article 368 and Article 370 cannot be amended by the Parliament through Article 368. However, such an argument would be wholly misconceived as it fails to address whether Article 370 is such an inalienable feature of the Constitution that it cannot be amended or abrogated by the President even upon a recommendation of the Legislative Assembly of the State. Therefore, the restriction on the amending power of Parliament, in the form of the basic structure doctrine, would also extend to the President and the Legislative Assembly if Article 370 is deemed to have attained the status of a basic feature of the Constitution. In short, apart from the argument that the Legislative Assembly cannot replace the Constituent Assembly for satisfying the requirement in the proviso to clause (3), the only other way of contending that Article 370 cannot be amended or abrogated by the Legislative Assembly is by establishing that Article 370 is now a part of the basic structure of the Constitution. Having said that, I will now proceed to explain why I believe that Article 370 is not part of the basic structure of the Constitution.

##### *4.1. Article 370 in the Context of Federalism*

In *Kesavananda Bharati*, the Court noted that the federal character of the Constitution forms part of the basic structure<sup>33</sup> which has been reiterated in a plethora of subsequent cases.<sup>34</sup> In this context, scholars have argued that since Article 370 governs the relationship of the Union with the State of Jammu and Kashmir, it is an integral aspect of federalism thereby rendering it unamendable.<sup>35</sup> Moreover, one may place reliance on *Sampat Prakash*, wherein the Court held that Article 370 remained operative even after the adoption of the Constitution of Jammu and Kashmir since the Constituent Assembly had only recommended a modification to Article 370 during its existence thereby clearly indicating that it did not intend for the provision to cease to operate.<sup>36</sup> More recently, in *State Bank of India v Santosh Gupta*,<sup>37</sup> the Court noted that in spite of the word ‘temporary’ in the marginal note of Article 370, it could only be rendered inoperative after following the due procedure laid down in clause (3). However, I contend that these decisions cannot be regarded as determinative of the question

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<sup>32</sup> *Kesavananda Bharati Sripadagalvaru v. State of Kerala*, AIR 1973 SC 1461.

<sup>33</sup> *Ibid*, at para 302.

<sup>34</sup> *Kuldip Nayar v. Union of India and Ors.*, AIR 2006 SC 3127; *Ashoka Kumar Thakur v. Union of India and Ors.*, (2008) 6 SCC 1.

<sup>35</sup> F. Mustafa, *Article 370, Federalism and the Basic Structure of the Constitution*, The India Forum (05/07/2019), available at <https://www.theindiaforum.in/sites/default/files/pdf/2019/07/05/article-370-federalism-and-the-basic-structure-of-the-constitution.pdf> last seen on 17/12/2019.

<sup>36</sup> *Sampat Prakash v. The State of Jammu and Kashmir*, AIR 1970 SC 1118, para 7.

<sup>37</sup> *State Bank of India v. Santosh Gupta and Ors.*, AIR 2017 SC 25.

concerning the permanence of Article 370. This is because in neither decision does the Court explicitly hold that Article 370 is beyond amendment pursuant to the dissolution of the Constituent Assembly of the State and is thus a permanent or basic feature of the Constitution. In simpler terms, there exists a distinction between the Court holding that Article 370 continues to be operative post the dissolution of the Constituent Assembly of the State versus the Court holding that Article 370 continues to be operative but is also now permanent and unamendable since the Constituent Assembly of the State has been dissolved. Notably then, the observations of the Court in both decisions fall short of the latter. Therefore, the argument that an amendment to Article 370 would be violative of the basic structure necessitates deeper analysis.

The test for whether an amendment violates the basic structure of the Constitution has been laid down in *M. Nagaraj v UOI* (“M. Nagaraj”).<sup>38</sup> Known as the “essences of rights” test or the “over-arching principles” test,<sup>39</sup> the Court held that a constitutional amendment is violative of the basic structure only if it abrogates an over-arching principle of the Constitution so as to change the very identity of the Constitution. For instance, in *R.C. Poudyal v UOI*,<sup>40</sup> the Court observed that a digression from the one-person-one-vote rule was not violative of the basic features of democracy due to the various forms and manifestations of democracy. Therefore, the question that arises is simple – Will an amendment to Article 370 (which may include its repeal) abrogate the principle of federalism so as to render the Constitution almost unrecognizable? An analysis of the true nature of federalism as enshrined in the Constitution provides an answer.

In *S.R. Bommai v UOI* (“S.R. Bommai”), the Court held that the essence of federalism is the distribution of powers between the Union and the States.<sup>41</sup> This position was upheld in *Jindal Stainless Limited v State of Harayana*,<sup>42</sup> wherein the Court noted that the key characteristics of the federal system as laid down in the Constitution were supremacy of the Constitution, division of powers between the Union and the States and the existence of an independent judiciary. The said division of powers has been demarcated in the three Lists of the Seventh Schedule to the Constitution. Therefore, it is fairly clear from judicial pronouncements that asymmetric or pluralistic federalism, whereby States are vested with unequal powers and have different legislative and administrative relations with the Centre based on their needs and specificities,<sup>43</sup> has not been considered to be an essential feature of federalism. Thus, Article 370 apart, while certain other provisions of the Constitution such as Article 371A, Article 371B, among others, are admittedly also representative of asymmetric federalism, that in and of itself does not render asymmetric federalism a key facet of federalism as enshrined in the Constitution or alternatively, part of the basic structure of the Constitution. Consequently, to the extent that Article 370 deviated from the demarcation of powers enunciated in the three Lists by limiting Parliament’s law making powers and granting greater autonomy to Jammu and Kashmir, it digressed from the essence or the core nature of the larger federal structure embodied in the Constitution. The abrogation of Article 370 would, therefore, align Jammu and Kashmir with the core of the Indian federal structure and thus cannot be regarded as an annulment of the principle of federalism. Consequently, the abrogation of

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<sup>38</sup> *M. Nagaraj v. Union of India*, (2006) 8 SCC 212.

<sup>39</sup> *Indian Medical Association and Ors. v. Union of India and Ors.*, AIR 2011 SC 2365, para 85.

<sup>40</sup> *R.C. Poudyal and Ors. v. Union of India (UOI) and Ors.*, AIR 1993 SC 1804.

<sup>41</sup> *S.R. Bommai v. Union of India*, AIR 1994 SC 1918, para 14.

<sup>42</sup> *Jindal Stainless Limited v. State of Haryana*, (2017) 12 SCC 1, para 944.

<sup>43</sup> *M. Govinda Rao and N. Singh, Asymmetric Federalism in India*, UC Santa Cruz International Economics Working Paper, 3, Working Paper Number 04-08, University of California, Santa Cruz (2004).

Article 370 would certainly not meet the high judicial threshold for a basic structure contravention as laid down in *M. Nagaraj*.

#### 4.2. *Article 370 is Subject to the Will of the People of Jammu and Kashmir*

There is another reason why Article 370 cannot be considered as a part of the basic structure. Since independence, the bedrock of the relationship between the Union of India and the State of Jammu and Kashmir has been that the will of the people of Jammu and Kashmir would be supreme with respect to their State. This is evinced from the statements of Gopalaswami Ayyangar in the Constituent Assembly Debates, who at the time of moving to introduce Article 370 (then Article 306A) into the Constitution, noted that the “will of the people, through the instrument of a constituent assembly, will determine the Constitution of the State as well as the sphere of Union jurisdiction over the State”.<sup>44</sup> However, the Constituent Assembly of the State chose not to make a recommendation to abrogate Article 370 prior to its dissolution. This makes it fair to assume, primarily on account of the wording of clause (1)(d) of Article 370, that it did not intend for the legal relationship between the Union and the State to be set in stone. As a result, this legal relationship has continuously evolved over time with numerous provisions of the Constitution being made applicable to the State through the mechanism of clause (1)(d) (as explained in Part III). Notably, with each extension of constitutional provisions to the State, the sphere of autonomy of the State has correspondingly decreased.<sup>45</sup> In fact, 260 out of 395 Articles of the Constitution, 94 out of 97 entries in the Union List and 26 out of the 47 entries in the Concurrent List have been extended to the State.<sup>46</sup> This has led to the dilution of Article 370 to the extent that it has been described as an “empty shell”<sup>47</sup>. Therefore, the framework of Article 370, which allows for constant alteration in the constitutional relationship between the Union and the State, itself makes it clear that the power to decide on the degree of legal autonomy to be enjoyed by the State vests in the elected representatives of the people of Jammu and Kashmir. Consequently, the people of the State through their elected representatives may (in the future) choose to put an end to Article 370 and accept the Constitution in its entirety. As a result, the basic structure doctrine would not stand in the way of the Legislative Assembly and the President coming together to abrogate Article 370. However, the crucial question of whether the President and the Parliament can validly abrogate Article 370 during the operation of President’s rule is addressed in the next Part.

## 5. Delineating the Contours of the Powers under President’s Rule

C.O. 272 states that the “concurrence of the Government of the State of Jammu and Kashmir” has been obtained. As mentioned earlier, the phrase ‘Government of the State’ ordinarily refers to the Governor acting on the advice of the Council of Ministers. However, as explained in Part II, the concurrence obtained as per C.O. 272 was the concurrence of the

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<sup>44</sup> K.M. Munshi, *Indian Constitutional Documents: Pilgrimage to Freedom*, 185 (1967); Sampat Prakash v. The State of Jammu and Kashmir, AIR 1970 SC 1118, para 4.

<sup>45</sup> Abdul Qayoom Khan v. State of J&K, 2016 (1) JKJ 506, para 17.

<sup>46</sup> A.G. Noorani, *Deception on Article 370*, GREATER KASHMIR (04/07/2016), available at <https://www.greaterkashmir.com/news/opinion/deception-on-article-370/>, last seen on 20/05/2020.

<sup>47</sup> Greater Kashmir, *Article 370 reduced to empty shell: J&K High Court Bar Association*, (07/07/2017), available at <https://www.greaterkashmir.com/news/kashmir/article-370-reduced-to-empty-shell-hcba/>, last seen on 21/05/2020.

Governor, acting on behalf of the President, due to the imposition of President's rule in Jammu and Kashmir. Similarly, the recommendation under clause (3) of Article 370 which formed the basis of C.O. 273 was given by the Parliament on behalf of the Legislative Assembly of Jammu and Kashmir. Therefore, for C.O. 272 and, consequently, C.O. 273 to withstand judicial scrutiny, the concurrence of the President and recommendation of the Parliament must fall within the constitutional purview of the powers that may be exercised during President's rule. Hence, the issue pertains to the scope of the powers that may be exercised by the President and Parliament during the period of President's rule. Accordingly, in this Part, I will attempt to demystify the full range of powers and decisions that fall within the domain of President's rule. Additionally, I will examine whether such powers have been constitutionally exercised in the instant case.

### 5.1. *Assessing the Scope of President's Rule*

Article 356 of the Constitution governs the situation of President's rule. As per sub-clause (a) of clause (1) of Article 356, the President may by Proclamation "assume to himself all or any of the functions of the Government of the State and all or any of the powers vested in or exercisable by the Governor". Along similar lines, sub-clause (b) states the President may by Proclamation "declare that the powers of the Legislature of the State shall be exercisable by or under the authority of Parliament". Thus, *prima facie*, the actions of the President and the Parliament appear to be within the confines of the bare text of the Constitution.

The said actions however must also be considered in accordance with the spirit of the Constitution.<sup>48</sup> The arguments of the petitioner in the writ petition<sup>49</sup> and rejoinder<sup>50</sup> filed before the Court to declare the legal measures adopted in relation to Jammu and Kashmir as constitutionally invalid assume significance in this regard. The petitioners argue that the purpose of President's rule under Article 356 is only to ensure continued governance in the State until an elected government returns to power thereby placing implied limitations upon the powers that can be exercised by the President in such a situation. Resultantly, the petitioners submit that the President cannot implement decisions of a permanent nature that alter the very structure and status of the State under the framework of the Constitution in the absence of an elected state government. To buttress this argument, the petitioners rely on Article 357(2), which states that any law made on behalf of the Legislature of the State during the pendency of Proclamation shall, after the Proclamation has ceased to operate, continue in force until "altered or amended or repealed" by a competent State Legislature. The petitioners also contend that to confer on the President such wide powers would be in direct contravention of the constitutional principles of federalism and representative democracy.

While the aforementioned arguments are of considerable force, they do not present an accurate legal position on the issue at hand. In *S.R. Bommai*,<sup>51</sup> the Court observed that the object of Article 356 was to enable the Union to take remedial action in order to restore governance of the State in accordance with the provisions of the Constitution. However, the Court did not venture into an analysis of the scope of 'remedial action' or the ambit of powers

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<sup>48</sup> Supreme Court Advocates-on-Record Association and Another v. Union of India, AIR 1994 SC 268, para 19.

<sup>49</sup> *Mohd Akbar Lone & Anr. (Petitioners) v. Union of India & Ors. (Respondents)*, available at [https://www.livelaw.in/pdf\\_upload/pdf\\_upload-363037.pdf](https://www.livelaw.in/pdf_upload/pdf_upload-363037.pdf), last seen on 17/12/2019.

<sup>50</sup> *Dr. Shah Faesal & Ors v. Union of India & Anr.*, W.P. 1099 of 2019, available at <https://www.livelaw.in/top-stories/temporary-presidents-rule-cannot-be-used-permanently-repeal-jk-special-status-petitioners-article-370-cases--149738>, last seen on 17/12/2019.

<sup>51</sup> *S.R. Bommai and Ors. v. Union of India (UOI) and Ors.*, AIR 1994 SC 1918.

that may be exercised during President's rule. In the absence of sufficient judicial clarity, weightage must be given to the text of Article 356.

The position adopted by the petitioners is hit by Article 356(1)(c), which vests in the President the power 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, including provisions for suspending in whole or in part the operation of any provisions of this Constitution relating to any body or authority in the State"<sup>52</sup>. By implication, the President is empowered to suspend the proviso to Article 3 which requires a reference to the State Legislature of any Bill seeking to alter the boundaries or area of that particular State.<sup>53</sup> Alternatively, the President may decide to suspend the portion of clause (1) of Article 169 requiring the passing of a resolution by the State Legislature in relation to the abolition or creation of a Legislative Council in that State.<sup>54</sup> The power to suspend the aforementioned constitutional provisions would be meaningless unless the benefit of suspending such provisions can be availed in practice. In effect, this indicates that fundamentally permanent decisions, such as altering the boundaries or status of the State or creating a Legislative Council in the State, may be taken even during the imposition of President's rule to the extent that it is necessary for achieving the objects of the Proclamation. Therefore, considering the power to take these decisions, the abrogation of Article 370 for giving effect to the objects of the Proclamation would also presumably lie within the ambit of President's rule.

At this stage, another important point must be clarified. The ability of the President to take the aforesaid permanent decisions during President's rule may appear to be contradictory to the spirit of Article 370 which mandates the "concurrence of the Government of the State" before any constitutional decisions can be implemented in relation to Jammu and Kashmir. However, it must be recognized that the State ceded its autonomy, in the context of President's rule, the moment the provisions of Article 356 were made applicable to the State.<sup>55</sup> Thus, the extension of Article 356 to the State of Jammu and Kashmir meant that the "Government of the State" vested in the President the power to make decisions for the State during President's rule, provided that they are within the confines of the provisions of Article 356.

Additionally, the interpretation of the petitioners would hamper the functioning of the Parliament. This is because, according to the petitioner's line of argumentation, only the decisions which can be reversed by a subsequent elected government of the State may be taken during President's rule. This would lead to an outcome whereby Parliament would be forestalled from introducing any Bill seeking to amend provisions of the Constitution which require the ratification of one-half of the State Legislatures<sup>56</sup> during the prevalence of President's rule in any State. It is true that the requirement of half the number of States may be met even without the ratification of the State under President's rule. However, there exists the possibility, albeit rather slim, that the ratification of the State under President's rule may prove decisive to meet the said requirement. In such a situation, the Parliament would be precluded from ratifying the amendment in question on behalf of the State Legislature as the same would be incapable of being reversed by the new State government. Consequently, the said amendment to the Constitution would not be capable of being carried out until the

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<sup>52</sup> Art. 356(1)(c), the Constitution of India.

<sup>53</sup> Art. 3, the Constitution of India.

<sup>54</sup> Art. 169(1), the Constitution of India.

<sup>55</sup> The Constitution (Application to Jammu and Kashmir) Order, 1954, available at [http://jklaw.nic.in/constitution\\_jk.pdf](http://jklaw.nic.in/constitution_jk.pdf), last seen on 21/05/2020.

<sup>56</sup> Art. 368(2), the Constitution of India.

completion of President's rule in the State. Thus, given that President's rule could extend to a maximum period of three years<sup>57</sup>, the threshold of abstaining from taking permanent or irreversible decisions, as argued by the petitioners, is legally unsustainable.

Therefore, I believe that the correct legal position is that while wide powers may be exercised by the President and the Parliament during President's rule, the use of such powers must have a direct relation to the objects sought to be achieved by the Proclamation or in other words, the imposition of President's rule. I contend that there is an additional reason to support this position. The principle of federalism, as espoused in the Constitution, is not federalism in its strictest sense.<sup>58</sup> A string of judicial decisions has confirmed that the Constitution is 'quasi-federal' since it contains both federal and unitary elements with a bias towards the latter.<sup>59</sup> The Court has in the past cited Article 356 as one of the provisions of the Constitution which is representative of this tilt in favour of the Centre.<sup>60</sup> Therefore, an interpretation of Article 356, which upholds the exercise of wide powers by the Centre during President's rule, that furthers the objects of the Proclamation would also be consistent with the principle of supremacy of the Centre over the States as envisaged by the Constitution.<sup>61</sup> Having established the scope of President's rule, I will now proceed to argue that the exercise of such powers is unconstitutional in the context of the Proclamation in Jammu and Kashmir.

## 5.2. *Evaluating C.O. 272 and C.O. 273 in light of the Proclamation in Jammu and Kashmir*

In line with the above analysis, it becomes necessary to turn towards the events leading up to the declaration of President's rule in the State of Jammu and Kashmir in order to identify the objects of the Proclamation in the instant case. In June 2018, the Bharatiya Janata Party withdrew its support to the People's Democratic Party led coalition government in Jammu and Kashmir thereby reducing it to a minority in the Legislative Assembly.<sup>62</sup> As a result, Governor's rule was imposed on the State in accordance with Section 92 of the J&K Constitution.<sup>63</sup> On November 21, 2018, the Governor dissolved the Legislative Assembly citing political horse-trading and the impossibility of forming a stable government due to the prospect of political parties with opposing ideologies coming together as the reasons for his decision.<sup>64</sup> Thereafter, upon the completion of six months of Governor's rule in the State,<sup>65</sup> a Proclamation for President's rule was issued on 19th December, 2018.<sup>66</sup> Subsequently, in

<sup>57</sup> Art. 356(4), the Constitution of India "(...but no such Proclamation shall in any case remain in force for more than three years)".

<sup>58</sup> K. Lakshminarayanan v. Union of India, (2019) 4 SCJ 30, para 52.

<sup>59</sup> State of West Bengal v. Union of India, (1964) 1 SCR 371, para 91; State of Karnataka v. Union of India, (1978) 2 SCR 1, para 250; S.R. Bommai v. Union of India, AIR 1994 SC 1918, para 210.

<sup>60</sup> Kuldip Nayar v. Union of India, AIR 2006 SC 3127, para 23.5; Government of NCT of Delhi v. Union of India, (2018) 8 SCC 501, para 105.

<sup>61</sup> Jindal Stainless Limited v. State of Haryana, (2017) 12 SCC 1, para 32.

<sup>62</sup> The Hindu Business Line, *BJP pulls out of alliance with PDP in J&K*, (19/06/2018), available at <https://www.thehindubusinessline.com/news/national/bjp-pulls-out-of-pdp-govt-in-jk/article24200617.ece>, last seen on 21/05/2020.

<sup>63</sup> S. 92, the Constitution of Jammu and Kashmir.

<sup>64</sup> The Economic Times, *Jammu and Kashmir Governor dissolves Assembly after rivals stake claim to government formation*, (22/11/2018), available at <https://economictimes.indiatimes.com/news/politics-and-nation/jk-assembly-dissolved-amid-claims-for-power/articleshow/66739283.cms>, last seen on 21/05/2020.

<sup>65</sup> S. 92(3), the Constitution of Jammu and Kashmir.

<sup>66</sup> Proclamation No. G.S.R. 1223(E), dated 19th December 2018, available at <http://egazette.nic.in/WriteReadData/2018/194042.pdf>, last seen on 21/05/2020.

March 2019, the Election Commission declared that Assembly elections in the State would not be held along with the Lok Sabha elections due to recent violent incidents and lack of security forces in the State.<sup>67</sup> Consequently, the Proclamation in question was extended for a further period of six months<sup>68</sup> during which time the above constitutional changes were undertaken.

Based on the abovementioned circumstances, the need for the imposition of President's rule in the State was two-fold. *First*, a political vacuum was created in the State since no party or coalition was able to establish a majority on the floor of the Assembly and thereby form a stable government in the State. *Second*, the deferment of Assembly elections in the State meant that President's rule in the State had to continue until a fresh election was held. Flowing from these reasons, the Proclamation was the consequence of a political crisis in the State which required the Centre (President and Parliament) to step in until a government with a clear mandate was elected to power in the State. Arguably, the object of the Proclamation was only to ensure stable continuity in governance and administration of the State in accordance with the provisions of the Constitution for the limited duration of President's rule.

The question which then arises is whether C.O. 272 and C.O. 273 were in any way necessary to give effect to the abovementioned objective of the Proclamation. To that extent, C.O. 272 as discussed in Part II, extended Article 367 with certain modifications to the State of Jammu and Kashmir thereby paving the way for the abrogation of Article 370. Additionally, C.O. 272 extended all provisions of the Constitution, as amended from time to time, to Jammu and Kashmir thus rendering Article 370 nugatory even without C.O. 273. In summation, C.O. 272 along with C.O. 273 sought to abrogate Article 370 so as to repeal the special status of Jammu and Kashmir under the Constitution. In fact, the Centre's stated rationale for the same is that, *inter alia*, it would help curb terrorism, diminish feelings of separatism and allow for the full integration of Jammu and Kashmir with the rest of India in furtherance of national interest.<sup>69</sup> I argue that these stated outcomes would probably have been necessary to restore governance in the State in accordance with the provisions of the Constitution, as required by Article 356(1)<sup>70</sup>, if President's rule had been declared in the State on account of a break down in law and order or due to an internal rebellion or some other grave security predicament in the State. However, as explained above, the Proclamation in question was in light of a political crisis in the State due to the majority government losing its support in the Assembly and the incapability to form an alternate government commanding the confidence of the Assembly. Consequently, the Centre was to act as a caretaker government until this political crisis was resolved in the State by the electorate through a process of fresh elections. In such a situation, I do not believe that the abrogation of Article 370 was either "necessary" or "desirable" to give effect to the object of the Proclamation. The object of the Proclamation was to carry on the day-to-day government of the State in accordance with the Constitution, and this had already been achieved without the abrogation of Article 370 for the initial seven months of President's rule in the State. Therefore, in view of the material and information available in the public domain, I believe that the President and the Parliament have acted beyond the scope of their

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<sup>67</sup> A.G. Noorani, *The Case of the missing election in J&K*, THE HINDU (20/03/2019), available at <https://www.thehindu.com/opinion/op-ed/the-case-of-the-missing-election-in-jk/article26593728.ece>, last seen on 21/05/2020.

<sup>68</sup> The Economic Times, *President's rule extended for 6 more months beginning July 3*, (12/06/2019), available at <https://economictimes.indiatimes.com/news/politics-and-nation/president-rule-in-jk-to-be-extended-for-6-more-months/articleshow/69759938.cms>, last seen on 21/05/2020.

<sup>69</sup> Counter Affidavit on behalf of Union of India, Mohd. Akbar Lone v. Union of India, WP(C) 1037 of 2019 (S.C.) (Pending), para 20.

<sup>70</sup> S.R. Bommai v. Union of India, AIR 1994 SC 1918, para 57.

constitutionally-prescribed powers in relation to Article 356 and thus, C.O. 272 and C.O. 273 ought to be struck down as unconstitutional.

In summation, the legal criterion for the Centre to take fundamentally permanent decisions during the operation of President's rule is that they must be necessary to achieve the intended objectives behind the imposition of President's rule in the state. In the instant case, the issuance of C.O. 272 and C.O. 273, which resulted in the abrogation of Article 370, fails to meet this criterion and therefore, should not be upheld by the Court. I will now turn my attention to the second landmark constitutional change being effectuated – the reorganisation of the State of Jammu and Kashmir.

## 6. Constitutional Validity of the Jammu and Kashmir Reorganisation Act, 2019

The Jammu and Kashmir Reorganisation Act, 2019 (“the Reorganisation Act”) is unprecedented as there is no example of a State being bifurcated into two separate Union territories<sup>71</sup> since the creation of Union territories in place of Part C States in 1956<sup>72</sup>. In this Part, I will examine the legality of the Reorganisation Act in two prongs. *First*, I will address the question of whether the Parliament possesses the power to create two Union territories by extinguishing a State under Article 3 of the Constitution. *Second*, assuming that such a power exists, I will assess whether it could have been invoked in the instant case while the State of Jammu and Kashmir was under President's rule.

### 6.1. *Bifurcation of a State into two Union Territories*

The plain language of Article 3 provides a starting point for an analysis on whether the Parliament possesses the requisite power to bifurcate the State of Jammu and Kashmir into the Union territories of Jammu and Kashmir and Ladakh. The key clauses of Article 3 for the purpose of the present analysis are as follows:

*Parliament may by law –*

*(a) form a new State by separation of territory from any State or by uniting two or more States or parts of States or by uniting any territory to a part of any State;*

*[Explanation I. – In this article, in clauses (a) to (e), “State” includes a Union territory, but in the proviso, “State” does not include a Union territory.*

*Explanation II. – The power conferred on Parliament by clause (a) includes the power to form a new State or Union territory by uniting a*

<sup>71</sup> India Today, *Jammu and Kashmir bifurcated: India has one less state, gets two new Union Territories in J&K, Ladakh*, (31/10/2019), available at <https://www.indiatoday.in/india/story/jammu-and-kashmir-bifurcated-ladakh-union-territory-october-31-1614249-2019-10-31>, last seen on 17/12/2019.

<sup>72</sup> S. 2(2), The Constitution (Seventh Amendment) Act, 1956.

*part of any State or Union territory to any other State or Union territory.]*

It is contended that the implication of Explanation I would be to read clause (a) of Article 3 as follows: “form a new State or Union territory by separation of territory from any State or Union territory or by uniting two or more States or Union territories or parts of States or Union territories or by uniting any territory to a part of any State or Union territory” for three reasons.

*First*, the ordinary meaning of the word “includes” in Explanation I would imply that the words “Union territory” enlarge the meaning of the word “State” rather than substituting or replacing it.<sup>73</sup> *Second*, such a reading would be consistent with the wording of Explanation II which also uses the word “or” between the words “State” and “Union territory” thereby clarifying how clause (a) ought to be read. Third, the past practice of creating Union territories also lends supports to the above-mentioned reading of clause (a). For instance, the Punjab Reorganisation Act, 1966 reorganised the erstwhile State of Punjab by transferring some territory to the Union territory of Himachal Pradesh, creating a new Union territory known as Chandigarh and bifurcating the remaining territory between the two new States of Punjab and Haryana.<sup>74</sup> In effect, this demonstrates that the new Union territory of Chandigarh was formed by “separation of territory” from the (former) State of Punjab in line with the aforementioned reading of clause (a).

Thus, the above-mentioned reading of clause (a) provides for the formation of a single new Union territory by “uniting two or more States” thereby effectively destroying both the States in question. Logically, clause (a) would therefore also include the power to create two new Union territories by destroying a particular State as done in the instant case. Furthermore, the fact that such a power has not been expressly provided for cannot be reason enough to deny the same given the previous practice of converting various Union territories such as Himachal Pradesh,<sup>75</sup> Manipur,<sup>76</sup> Tripura<sup>77</sup> into individual States in spite of the absence of express wording in clause (a) to this effect.

The above contentions aside, the wording of Explanation II (in and of itself) gives credence to the idea that the Parliament can extinguish a State for the creation of two Union territories. This is because as per Explanation II, a new Union territory may be formed by “uniting a part of any State or Union territory to any other State or Union territory”. Therefore, the use of the words “any other State” as opposed to the words “part of any other State” in the latter half of the Explanation would mean that hypothetically, a new Union territory named ‘A’ may be created by uniting a part of State ‘B’ with the whole of State ‘C’. In turn, the creation of Union territory ‘A’ would destroy a part of State ‘B’ and the entirety of State ‘C’. Therefore, Explanation II expressly authorizes the destruction of a State for the creation of a Union territory. Given that the same Explanation states that the power conferred on Parliament by clause (a) “includes” the aforesaid power, it is only illustrative of the manner in which new Union territories can be created. Resultantly, along with a reading of clause (a), it would be logical to hold that variations of the method to create Union territories as envisaged in Explanation II would also be permitted so as to allow for two Union territories to be created by destroying a single State.

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<sup>73</sup> P. Kasilingam and Ors. v. P.S.G. College of Technology and Ors., AIR 1995 SC 1395, para 19.

<sup>74</sup> Ss. 3, 4, 5 & 6, The Punjab Reorganisation Act, 1966.

<sup>75</sup> S. 3, The State of Himachal Pradesh Act, 1970.

<sup>76</sup> S. 3, The North-Eastern Areas (Reorganisation) Act, 1971.

<sup>77</sup> Ibid, at S. 4.

The above interpretation is further strengthened by the object and purpose of Article 3. Unlike other federations such as the United States, the Indian Union was not the outcome of an agreement or compact between separate States and has aptly been characterised as an “indestructible Union of destructible units”<sup>78</sup>. This proposition is embodied in Article 3 which is reflective of the unique quasi-federal nature of the Constitution<sup>79</sup> which exists even qua the State of Jammu and Kashmir.<sup>80</sup> Resultantly, the Court has held that Article 3 has to be construed in light of the fact that the Constitution does not guarantee the territorial integrity of States and allows for changes in their territorial limits.<sup>81</sup> Thus, the power of Parliament to destroy States should necessarily include the power to decide the manner in which the States are to be destroyed or reorganised for the meaningful exercise of such a power. Hence, if the Parliament and the State Legislature, as required in the case of Jammu and Kashmir, in their collective wisdom believe that the conversion of the State into a Union territory would result in greater stability in administration and governance, they ought to be allowed to act in furtherance of that purpose.

Interestingly, the petitioners have argued against construing Article 3 in a manner that includes the power to convert a State to a Union territory on the ground that India could effectively become a “Union of Union territories” instead of a “Union of States” as envisaged under Article 1.<sup>82</sup> This argument is fallacious on two counts. First, the petitioner’s contention is, in truth, an argument that relates to a speculative misuse of power by the Parliament under Article 3. However, it is a settled proposition of law that the mere possibility of a power being abused is not a valid reason to deny its existence.<sup>83</sup> Second, the question of whether the Parliament has legally exercised its powers under Article 3 would need to be examined on a case to case basis. In turn, this would depend on whether the circumstances in question warrant the exercise of such a power and more importantly the scope of judicial review in such matters. However, in any case, the Parliament does not possess unlimited power under Article 3<sup>84</sup> since the restrictions on the exercise of such a power presently exist in the form of the basic features of the Constitution.<sup>85</sup> In *Mangal Singh v. UOI*, the Court held that the power of the Parliament to admit, establish and form new States has to be in accordance with the democratic pattern envisaged by the Constitution and cannot be used to override the constitutional scheme.<sup>86</sup> Therefore, in the hypothetical and extremely unlikely event that the Parliament attempts to convert all States into Union territories, it would be subverting the entire scheme of the Constitution which envisages a quasi-federal structure of governance with States existing as constituent units with an elected Legislature and Executive alongside the Union Government<sup>87</sup>. Consequently, such an action of Parliament would be visibly unconstitutional and hence liable to be struck down by the Court. In this scenario, it is virtually impossible to specify the number of States that would need to be converted to Union territories for it to be considered as *ultra vires* the power of the Parliament under Article 3 and is a matter best left for the Court to address if and when such a situation arises. Having contended that the power to bifurcate a

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<sup>78</sup> Raja Ram Pal v. The Hon’ble Speaker, Lok Sabha, (2007) 3 SCC 184.

<sup>79</sup> S.R. Bommai v. Union of India, AIR 1994 SC 1918, para 210; Government of NCT of Delhi v. Union of India, (2018) 8 SCC 501, para 127.

<sup>80</sup> State Bank of India v. Santosh Gupta, (2017) 2 SCC 538, para 10.

<sup>81</sup> In Re: The Berubari Union and Exchange of Enclaves Reference Under Article 143(1) of The Constitution of India, AIR 1960 SC 845, para 35.

<sup>82</sup> Mohd Akbar Lone v. Union of India, WP(C) 1037 of 2019 (S.C.) (Pending), para BB.

<sup>83</sup> State of West Bengal v. Union of India, AIR 1963 SC 1241, para 35.

<sup>84</sup> Kesavananda Bharati Sripadagalvaru v. State of Kerala, AIR 1973 SC 1461.

<sup>85</sup> R.C. Poudyal v. Union of India, AIR 1993 SC 1804, para 116.

<sup>86</sup> Mangal Singh v. Union of India, AIR 1967 SC 944, para 7.

<sup>87</sup> Government of NCT of Delhi v. Union of India, (2018) 8 SCC 501, para 106.

State into two Union territories is within the bounds of Article 3, it remains to be seen whether the same is legally permissible even during a situation of President's rule.

## 6.2. *Bifurcating a State under President's Rule*

In contrast to the requirement of ascertainment of views *vis-à-vis* all the other States, Article 3 as extended to the State of Jammu and Kashmir (prior to the issuance of C.O. 272) required the "consent" of the Legislature of the State for any change in the area, name or boundaries of the State.<sup>88</sup> This would imply that Article 3 would be violated if the State were to be bifurcated without the consent of the State Legislature. However, as I have contended in Part V, Article 356(1)(c) may be invoked to suspend the proviso to Article 3 if the same is necessary to give effect to the objects of the Proclamation, thereby dispensing with the need to obtain the consent of the State Legislature. Nonetheless, in harmony with the position adopted in Part V, the purpose of the Proclamation was for the Centre to only hold the fort in the State until an elected State government returned to power. This means that, given this standard objective, no drastic constitutional changes, including the territorial bifurcation of the State, were necessary for its success. Therefore, insofar as the Reorganisation Act was enacted by exceeding the powers of the President and the Parliament under Article 356, it should be declared unconstitutional.

## 7. Scope of Judicial Review

In response to the various writ petitions assailing the constitutionality of the aforementioned legal measures, the Union of India, in its Counter affidavit filed before the Court, has submitted that the desirability and wisdom of the decisions of the President and the Parliament are not amenable to judicial review.<sup>89</sup> In light of this submission, a deliberation on the scope of judicial review in the instant case becomes necessary.

As mentioned in Part V, the Centre's reasons for abrogating Article 370 and bifurcating the State of Jammu and Kashmir is that it would help curb terrorism and separatism along with ensuring the complete integration of Jammu and Kashmir with the Union. Furthermore, according to the Centre, ending the legal regime under Article 370 would result in greater socio-economic development of the State and the extension of various government schemes to the residents of Jammu and Kashmir.<sup>90</sup> The decisions to abrogate Article 370 and reorganise the State therefore fall within the realms of policy-making during a situation of President's rule. Accordingly, the broad practice of the Court in pronouncing on matters of policy generally, and in the context of President's rule particularly, provides an insight into the scope of judicial review in the present case.

In *State of Punjab v. Ram Lubhaya Bagga*, the Court observed that questioning the validity of governmental policy is not normally within the domain of the judiciary except where it is arbitrary or violative of any constitutional or statutory provision.<sup>91</sup> Similarly, in *Ugar*

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<sup>88</sup> The Constitution (Application to Jammu and Kashmir) Order, 1954, available at [http://jklaw.nic.in/constitution\\_jk.pdf](http://jklaw.nic.in/constitution_jk.pdf), last seen on 21/05/2020.

<sup>89</sup> Counter Affidavit on behalf of Union of India, Mohd. Akbar Lone v. Union of India, WP(C) 1037 of 2019 (S.C.) (Pending), para 10.

<sup>90</sup> *Ibid.*, at para 18.

<sup>91</sup> *State of Punjab v. Ram Lubhaya Bagga*, AIR 1998 SC 1703, para 22.

*Sugar Works v. Delhi Administration*, the Court noted that courts are not expected to express their opinion as to whether a particular policy should have been adopted at a particular given time or in a particular situation since the same is best left to the discretion of the State. The Court further noted however that this rule would not be applicable if the policy was mala fide, unreasonable or arbitrary.<sup>92</sup> Notably though, in *S.R. Bommai v. Union of India*, the Court observed, in the context of Article 356, that an excessive use of power also amounted to an illegal, irrational and *mala fide* exercise of power.<sup>93</sup> The Court elaborated by stating that the removal of the State Government or the dissolution of the Assembly would be a disproportionate and unreasonable exercise of power by the President under Article 356 if what the situation required was only the assumption of some functions or powers of the Government of the State under Article 356(1)(a).<sup>94</sup> Since the situations of the failure of the constitutional machinery in States may vary in nature and extent, the measures to remedy the situation under Article 356 would have to be proportionate and based on the given circumstances.<sup>95</sup>

Drawing from the above judgments, it would be open to the Court in the instant case to satisfy itself on the absence of arbitrariness and unreasonableness of the decisions to abrogate Article 370 and bifurcate Jammu and Kashmir. More importantly, however, the review of the Court ought to entail an assessment of whether the President and the Parliament have exceeded their powers under Article 356 while trying to rectify the failure of constitutional machinery in the State of Jammu and Kashmir pursuant to which President's rule had been imposed on the State. In turn, the Court will have to delve into whether it was necessary or desirable to abrogate Article 370 and bifurcate the State of Jammu and Kashmir to fulfil the objectives of President's rule in Jammu and Kashmir. To sum up, the review of the Court must be directed towards examining whether the actions of the President and the Parliament, in the form of issuing C.O. 272, C.O. 273 and enacting the Reorganisation Act, are within the ambit of the powers assigned to them under Article 356 of the Constitution.

## 8. Conclusion

The decision of the Court in the instant matter is undoubtedly one of the most eagerly anticipated decisions of recent times due to the complex legal issues and policy ramifications at play. The perennial debate on the permanence of Article 370 in the absence of the Constituent Assembly of Jammu and Kashmir may finally be put to rest. More specifically, the Court would need to address whether the mechanism laid down in clause (3) of Article 370 can still be utilised and if so, in what manner. Therefore, even in the event that C.O. 272 is struck down in its entirety, the Court's observations on clause (3) would in no way just be academic but rather serve to elucidate the legal method for a possible abrogation of Article 370 in the future. In this context, owing to the precedent laid down in *Maqbool Damnoo*, the arrangement for the application of constitutional provisions to Jammu and Kashmir under clause (1)(d) of Article 370 and the need for a living Constitution, I believe that the Legislative Assembly of the State can be construed by the Court to be the valid successor to the Constituent Assembly of the State.

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<sup>92</sup> Ugar Sugar Works Ltd. v. Delhi Administration, AIR 2001 SC 1447, para 17.

<sup>93</sup> S.R. Bommai v. Union of India, AIR 1994 SC 1918, para 71.

<sup>94</sup> Ibid.

<sup>95</sup> Ibid.

The Court would also need to answer questions pertaining to the scope and limitations of President's rule that have previously been unexplored and which would go a long way in dissecting the nature of Centre-State relations within the framework of the federal structure of the Constitution. On this aspect, I believe that the language of Article 356 and the quasi-federal nature of the Constitution confer on the Centre the power to take wide-ranging and even unalterable decisions as long as they are desirable for achieving the objects of the Proclamation at hand. Tested against this legal standard, the actions of the President and the Parliament exceed the constitutionally prescribed limits on the use of their powers during the operation of President's rule and therefore cannot be validated. Therefore, the special status of Jammu and Kashmir enshrined in Article 370 and the State of Jammu and Kashmir in its original form ought to be restored.

It is essential that the Court acts expeditiously to pronounce a judgment on the matter to prevent it from becoming a *fait accompli*. Irrespective of the final outcome, the verdict of the Court is almost certain to have a long lasting impact on the development of constitutional law jurisprudence in the country.