

**I. A. NO. \_\_\_\_\_ of 2019**

**IN**

**WRIT PETITION (CIVIL) NO. 1099 of 2019**

**IN THE MATTER OF:-**

**SHAH FAESAL AND ORS. ...PETITIONERS**

## VERSUS

**UNION OF INDIA & ORS. ...RESPONDENTS**

**AND IN THE MATTER OF:-**

**KASHMIRI SAMITI, DELHI**

**REPRESENTED BY ITS SECRETARY**

**KASHMIR BHAWAN, KASHMIR BHAWAN MARG**

**AMAR COLONY, LAJPAT NAGAR – IV**

NEW DELHI - 110 024 ...APPLICANT

## APPLICATION FOR IMPEADMENT

**PAPER BOOK**  
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**ADVOCATE FOR THE APPLICANT: K.V. MUTHU KUMAR**

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## SHAH FAESAL AND ORS. ...PETITIONERS

UNION OF INDIA &amp; ORS. ....RESPONDENTS

## NEW DELHI - 110 024 ...APPLICANT

HON'BLE SUPREME COURT OF INDIA.

APPLICANT ABOVENAMED

**MOST RESPECTFULLY SHOWETH:**

1. The present Application seeks impleadment of the Applicant, namely the Kashmiri Samiti Delhi, in the present Writ Petition and the batch of Petitions tagged along with it. The Applicant herein is one of the oldest and largest organizations of and for Kashmiri Pandits residing in Delhi. It is a truly representative organization whose executive members are elected by its life-members every two years. Since its founding in 1960, the Applicant has been working

towards preservation and promotion of Kashmiri culture and social heritage, more particularly the culture of Kashmiri Pandits.

2. The efforts of the Applicant assume relevance and importance in view of the fact that despite being the oldest residents of Kashmir, Kashmiri Pandits have faced repeated religious persecution for centuries at the hands of an iconoclastic mindset whose worldview is at loggerheads with the very foundations of Kashmiri Hinduism. The factum of such transgenerational religious persecution and systematic ethnic cleansing of Kashmiri Pandits has been recorded in several historical documents.
3. The exodus of Kashmiri Hindus, which includes other communities within the Indic religious fabric, attained exponential proportions at the time of the partition and shockingly even after the establishment of an independent democratic Indian Republic, thanks directly to the erstwhile Articles 370 and 35A. The said provisions facilitated the alienation of the erstwhile State of Jammu and Kashmir from the Union and the aggressive ostracization and persecution of pro-India groups within the erstwhile State. In fact, the said provisions contributed significantly to the growth of Islamist radicalism and the birth of Islamist terrorism. It is clarified that the references to Islamism are references to a politico-religious ideology as commonly accepted in contemporary global literature.

4. It is humbly submitted that the said provisions facilitated the nurturing and normalization of the very ideology which led to the partition of India in 1947 and allowed the ideology to take root in every aspect of Kashmiri life. In the process, the said provisions endangered the sovereignty of the Indian Union apart from exposing pro-India groups within the Kashmir Valley to virulent hatred directed at the religion of Kashmiri Pandits, and ultimately resulted in the genocide and forced exodus of the Kashmiri Pandit community. As a consequence, members of the community became refugees in their own land and continue to be in that wretched condition after close to three decades of their very public and televised exodus from the Kashmir Valley. The Applicant has been at the forefront of initiatives directed at easing the hardships of faced by the Kashmiri Pandit community. The Applicant sponsors housing, schooling and education, provides financial, legal and occupational support to Kashmiri Pandits in Delhi. About 5000 Kashmiri Pandits are members of the Applicant. A monthly newsletter named 'Koshur Samachar' is published by the Applicant to keep its members apprised of its initiatives. That said, no amount of effort on the part of the Applicant and other Kashmiri Hindu organizations can heal the transgenerational trauma inflicted on the community until the causes which led to its exodus are removed root and branch. In this regard, the amendments effected to Article 370 and the repealment of Article 35A, coupled with the reorganization of the erstwhile State into Union Territories

are steps in the right direction. Therefore, as victims of the erstwhile provisions, the Applicant has a right to be impleaded as a party to the instant Petition and be heard.

5. The Applicant has recently come to know of the instant Writ Petition and other tagged Petitions which challenge the Constitution Orders numbered C.O. 272 of 2019 and C.O. 273 of 2019 dated 05.08.2019 and 06.08.2019 respectively. The Applicant has also become aware of the challenge to the Jammu and Kashmir Reorganization Act of 2019, passed by the Parliament on 09.08.2019. Given that any orders that may be passed by this Hon'ble court in the instant Petition and connected Petitions will have a direct bearing on the rights of the members of the Applicant, the Applicant has the necessary *locus* to seek impleadment in the current Petition.

6. At the outset, the Applicant submits before this Hon'ble Court that its arguments are in support of the amendments made to the Constitution *vide* C.O. 272 and C.O. 273 as well as the promulgation of the Jammu and Kashmir Reorganization Act, 2019 (hereinafter referred to as "the Act"). The ensuing portions of this Application will place before this Hon'ble Court the arguments in support of the Impugned Constitution Orders and the Act.

### **Backdrop to and Effect of Articles 370 and 35A**

7. It is humbly submitted that the partition of undivided India into two dominions and demarcation of territories thereof came into effect as a consequence of the Indian

Independence Act of 1947, implemented in consonance with the Government of India Act, 1935. Section 6 of the Government of India Act, 1935 (hereinafter 'the 1935 Act') defines 'Accession of Indian States' and sets out the broad guidelines for drafting of an 'Instrument of Accession' (IoA). It is submitted that a clear reading of the provision makes it evident that an 'Instrument of Accession' is the only legal document that could effect an accession to either of the dominions, namely India or Pakistan. Since the 1935 Act was applicable to both India and Pakistan, the accession of princely states to either of them was pursuant to application of Section 6 of the 1935 Act.

8. The broad guidelines for drafting an IoA provided by the 1935 Act were the same for all princely and provincial states, irrespective of which dominion the princely states decided to accede to, and a format was prescribed for the same. The format for accession was drafted and prescribed by the States Department or the 'Ministry of States' formed under the Interim government of India. The States Department had the charge of replacing the supremacy of the princely states with the democratically elected governments and the function of maintaining smooth relations between the Indian princely states and between the Central and provincial governments. The drafted formats were designed to ensure that all accessions were absolute, and no anomaly was encountered at a later stage. These formats were published by the Ministry of States of Government of India in its 'White Paper on Indian States,



1950' at Appendices VII (format for princely states) and VIII (for provincial states) of the same. A copy of the formats is annexed herewith at **Annexure- A/1(Pages\_\_ to\_\_)**.

9. It is emphasized that all IoAs adhered to the prescribed format, and to support the claim, the Applicant submits copies of IoAs executed by Rulers of Manipur and Udaipur which are identical to the one executed by the erstwhile Ruler of J&K, Maharaja Hari Singh. True copies of Instrument of Accession of Manipur and the Instrument of Accession of Udaipur are annexed herewith as **Annexure- A/2(Pages\_\_ to\_\_)**.

10. It is therefore submitted, that the accession of the State of Jammu and Kashmir was and could have only been effected by means of an IoA executed in the prescribed format, and the said accession was always intended to be absolute. Further, the terms of accession of J&K were identical to that of the other princely states that acceded to either of the dominions. It is also submitted that the relationship of the State of J&K with the Indian dominion was and is only as a consequence of the IoA executed by the Ruler of that state on 26.10.1947 and accepted by the then Governor General of India on 27.10.1947. Therefore, the argument that insertion of Article 370 of the Constitution of India, 1949 was directly attributable to the so-called unique terms of the IoA, patently lacks factual and legal basis.

11. That being said, the invasion of the Princely State of Jammu and Kashmir by Pakistan despite having signed a Standstill Agreement with the Ruler of the State provides the backdrop in which the IoA was entered into with India since the invasion had altered the *status quo* prevailing until then and had brought to fore the true intentions of a third party who had and continues to have a *malafide* and illegal vested interest in the State. This coupled with the fact that the Constituent Assembly for the framing of the Constitution for India was already working towards the said object since December 1946 effectively meant that there were no representatives from the Princely State in the Constituent Assembly until the execution of the IoA in October 1947. Given the turbulent situation in the State, it was deemed fit to provide for a transitional and temporary provision, namely Article 370 (which was Article 306A in the original draft). Therefore, the erstwhile Article 370 owed its existence to the circumstances then prevailing in the State. In appreciating the subsequent developments and in evaluating the constitutionality of the Impugned Constitution Orders and the 2019 Act, it is therefore imperative to not lose sight of the ground realities since ultimately the Constitution is meant to protect the sovereignty and integrity of India, and not facilitate secessionism of any kind.

12. The fact that the State was ultimately meant to be treated at par with other States in India with respect to the application of the Indian Constitution is evident from the

Proclamation dated 25.11.1949 made by the then Ruler of the State, Maharaja Karan Singh (successor of Maharaja Hari Singh), two years after the execution of the IoA:

*“That the Constitution of India shortly to be adopted by the Constituent Assembly of India shall insofar as it is applicable to the State of Jammu and Kashmir, govern the constitutional relationship between this State and the contemplated Union of India and shall be enforced in this State by me, my heirs and successors in accordance with the tenor of its provisions. That the provisions of the said Constitution shall, as from the date of its commencement, supersede and abrogate all other constitutional provisions inconsistent therewith which are at the present in force in this State. “*

True copy of the Proclamation dated 25.11.1949 signed by the then Maharaja of Kashmir is annexed herewith as **Annexure- A/3(Pages\_\_\_ to\_\_\_)**.

13. The above Proclamation was similar in its language to the ‘Agreements of Merger’ signed by some of the other Princely States, thereby accepting the application of the Constitution of India, 1949 to their States. Another feature of the ‘Agreements of Merger’ was the obligation of Privy Purses determined by the Union Government. This feature was also applicable to the Princely State of J&K via a letter dated 24.12.1952 issued by the then Minister of Home Affairs of the provisional Government of India addressing the Ruler of Jammu and Kashmir. The said letter confirmed the amount to be paid to the Ruler under the Privy Purse. The said letter and the sequence of events according the status of ‘Ruler’

under Article 366 of the Constitution of India, 1949 to the Maharaja of J&K were discussed in detail in **State of Jammu & Kashmir vs. Dr. Karan Singh, AIR 1997 J K 132**. True copy of the Judgement of the Hon'ble High Court of Jammu and Kashmir in the case of **State of Jammu & Kashmir vs. Dr. Karan Singh, AIR (1997) J K 132** is annexed herewith as **Annexure- A/4(Pages\_\_\_ to\_\_\_)**.

14. The Constituent Assembly of the State of Jammu and Kashmir came into existence in October 1951 i.e. after the coming into force of the Indian Constitution. During the period, constant parleys were held with between representatives of the State led by Sheikh Abdullah and the Indian Union, which culminated in the Delhi Agreement of 1952. The Delhi Agreement effectively explains the intent behind the contents of Article 35A which was introduced through the Presidential Order of May 14, 1954. The said Article whose unconstitutionality was manifest both on procedural and substantive grounds, only facilitated the alienation of the State and its people from the Union at an exponential pace. True copy of the Delhi Agreement of 1952 is annexed herewith as **Annexure- A /5(Pages\_\_\_ to\_\_\_)** and the true Copy of the Presidential Order of May 14, 1954 is annexed herewith as **Annexure- A /6(Pages\_\_\_ to\_\_\_)**.

15. While Article 370 was merely a stop gap measure, the object truly sought by continuing the said arrangement beyond its original purpose came to the fore through Article 35A. The said Article allowed the State's Legislature to

completely arrogate to itself the sole and untrammelled power to design the demographics of the State, and ensure a skewed demographic representation in every aspect of the State's public life and administrative machinery. By providing express immunity to the said Article from scrutiny on grounds of violation of Part III of the Constitution, the power of the Judiciary to even review the laws of the State on the said anvils was completely taken away. In other words, the State would be run like a country within a country with some citizens being more equal than others owing to their religious affiliation, which violates the very founding principles of modern independent secular democratic India.

16. Notwithstanding the fact that the final Constitution of the erstwhile State of Jammu and Kashmir contained Section 3 which expressly stated that the State was and shall be an integral part of the Indian Union, the very essence of being a part of India was violated through Article 35A. The direct contribution of this Article in the exodus of religious minorities from the erstwhile, including the exodus of over half a million Kashmiri Pandits, cannot be overstated. In fact, it is undeniable that conditions in the Kashmir Valley are still not conducive for the safe return and rehabilitation of Kashmiri Pandits and other religious minorities owing to the mindset which introduced Article 35A and the mindset which has been perpetuated by the said Article, whose effects are still alive and kicking.

17. Importantly, in appreciating the ground realities of the State, it must never be forgotten that there is a third party, a State actor, namely Pakistan, which has used the State as a laboratory for the continued implementation of the Two Nation Theory (TNT) in the hope of balkanizing India. It would be banal to point out that provisions such as Articles 370 and 35A provided the said State actor with the tools needed to achieve its goals, which it would have, had it not been for the presence of the Indian Army in the State. In preserving the territorial integrity of the country, the Indian Armed Forces have paid a heavy price and continue to do so. All of this could have been reduced significantly, if not entirely avoided, had Articles 370 and 35A not stood in the way of normalizing the demographic composition of the State like any other State of India. It is humbly submitted that in appreciating the legal arguments in the ensuing portions of the instant Application, the above backdrop and realities must be borne in mind.

**Arguments in support of the Constitutional Orders of 2019 and the Act of 2019**

18. The Applicant humbly submits that the history of Article 370 itself demonstrates that the said provision was meant to be temporary and transient, and not special as is sought to be portrayed by the Petitioners. The Constituent Assembly debates with respect to the erstwhile Article 370 (Article 306A of the Draft Constitution of India, 1948) are clear in this regard. Before proceeding to deal with the debates, extracted below is the erstwhile Article 370:

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

*(1) Notwithstanding anything in this Constitution—*

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

*(b) the power of Parliament to make laws for the said State shall be limited to—*

*(i) those matters in the Union List and the Concurrent List which, in consultation with the Government of the State, are declared by the President to correspond to matters specified in the Instrument of Accession governing the accession of the State to the Dominion of India as the matters with respect to which the Dominion Legislature may make laws for that State; and*

*(ii) such other matters in the said Lists as, with the concurrence of the Government of the State, the President may by order specify.*

*Explanation.—For the purposes of this article, the Government of the State means the person for the time being recognized by the President as the Maharaja of Jammu and Kashmir acting on the advice of the Council of Ministers for the time being in office under the Maharaja’s Proclamation dated the fifth day of March, 1948;*

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

*(d) such of the other provisions of this Constitution shall apply in relation to that State subject to such exceptions and modifications as the President may by order specify:*

*Provided that no such order which relates to the matters specified in the Instrument of Accession of the State referred to in paragraph (i) of sub-clause (b) shall be issued except in consultation with the Government of the State:*

*Provided further that no such order which relates to matters other than those referred to in the last preceding proviso shall be issued except with the concurrence of that Government.*

*(2) If the concurrence of the Government of the State referred to in paragraph (ii) of sub-clause (b) of clause (1) or in the second proviso to sub-clause (d) of that clause be given before the Constituent Assembly for the purpose of framing the Constitution of the State is convened, it shall be placed before such Assembly for such decision as it may take thereon.*

*(3) Notwithstanding anything in the foregoing provisions of this article, the President may, by public notification, declare that this article shall cease to be operative or shall be operative only with such exceptions and modifications and from such date as he may specify:*

*Provided that the recommendation of the Constituent Assembly of the State referred to in clause (2) shall be necessary before the President issues such a notification.”*

19. The mandate of the erstwhile is clear from its very title and language. The provision was drafted by Shri N. Gopalaswami Ayyangar, one of the members of the Drafting Committee of the Constitution. He was the former Prime Minister of J&K (1937-1943) and had also served as a Diwan to the then Ruler, Maharaja Hari Singh. While proposing the



Draft for the then Article 306A (later Article 370), to the Constituent Assembly on 17.10.1949, Shri Ayyangar made the following opening statement:

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

*the Constitution for the whole of India. All those other States have agreed to integrate themselves in that way and accept the Constitution provided.”*

20. At this point he was interrupted by an Hon’ble member of the Assembly, Shri Maulana Hasrat Mohani, who questioned Shri Ayyangar for the reasoning behind such discrimination in the case of the State of J&K, to which Shri Ayyangar gave the following response stating the reason in an unambiguous manner:

*“The discrimination is due to the special conditions of Kashmir. That particular State is not yet ripe for this kind of integration. It is the hope of everybody here that in due course even Jammu and Kashmir will become ripe for the same sort of integration that has taken place in the case of other States. (Cheers) At present it is not possible to achieve that integration.”*

21. The above response of Shri Ayyangar explains why the provision was treated as a ‘Temporary provision’. He continued to then explain what were the ‘special conditions’ that the State was facing:

*“I shall briefly indicate what the special conditions are. In the first place, there has been a war going on within the limits of Jammu and Kashmir State. There was a cease-fire agreed to at the beginning of this year and that cease-fire is still on. But the conditions in the State are still unusual and abnormal.*

*They have not settled down. It is therefore necessary that the administration of the State should be geared to these unusual conditions until normal life is restored as in the case of the other States. Part of the State is still in the hands of rebels and enemies.”*

22. Further explaining as to what temporary situation was the draft Article 306A intended to address, Shri Ayyangar said:

*“At present, the legislature which was known as the Praja Sabha in the State is dead. Neither that legislature nor a constituent assembly can be convened or can function until complete peace prevails in that State. We have therefore to deal with the Government of the State which, as represented in its Council of Ministers, reflects the opinion of the largest political party in the State. Till a constituent assembly comes into being, only an interim arrangement is possible and not an arrangement which could at once be brought into line with the arrangement that exists in the case of the other States. Now, if you remember the viewpoints that I have mentioned, it is an inevitable conclusion that, at the present moment, we could establish only an interim system. Article 306A is an attempt to establish such a system.”*

23. The Applicant humbly submits that the above unaltered excerpts from the Constituent Assembly Debates are sufficient to explain the context in which the erstwhile Article 370 should have always been understood and

applied. The intention that clearly comes out is that the provision was merely intended to subsist for the period until the coming into being of the Constituent Assembly of J&K and the drafting of the Constitution of J&K that would have set the administrative scheme for the future of the said State. This provision was not in any way intended to define the relationship of the said State with the Indian Dominion for eternity, nor did it preclude the possibility of a future State government submitting to the full application of the Constitution of India in the manner and to the extent it applies to other States of India. Shri Ayyangar went on to explain the functioning of the said Article to the assembly, in the following manner:

*“So far as that provision is concerned, I have already indicated to you that the provisions regarding the Constitution of other States could not at present be applied to Jammu and Kashmir. Therefore, clause (1) (a) of this article says that the provisions of article 211A (current Article 238) of this Constitution shall not apply to the State of Jammu and Kashmir. The Second portion of this article relates to the legislative authority of Parliament over the Jammu and Kashmir State. This (is) governed primarily by the Instrument of Accession. Broadly speaking, that legislative power is confined to the three subjects of defence, foreign affairs and communications, but as a matter of fact these broad categories include a number of items which are listed in the*

*Instrument of Accession. I believe they number some twenty to twenty-five.*

*Now, these items have undergone a change in description, in numbering, in arrangement, as amongst themselves, in List I and List III of the new Constitution. It is therefore necessary that the items mentioned in the Instrument of Accession should be brought into line with the changed designations of entries in Lists I and III of the new Constitution.*

*So, clause (1) (b) of article 306A says that this listing of the items as per the terms of the new Constitution should be done by the President in consultation with the government of the State. Clause (b) (ii) refers to possible additions to the List in the Instrument of Accession, and these additions could be made according to the provisions of this article with the concurrence of the government of the State. The idea is that even before the Constituent Assembly meets, it may be necessary in the interests of both the Centre and the State that certain items which are not included in the Instrument of Accession would be appropriately added to the List in that Instrument so that administration, legislation and executive action might be furthered, and as this may happen before the Constituent Assembly meets, the only authority from whom we can get consent for the addition is the Government of the State. That is provided for. Then, there is the Explanation, which defines what the Government of the State means. The Government of the State is defined both in the Constitution (Jammu and Kashmir Constitution Act of 1956) which is now supposed to be in force in the Jammu and Kashmir State as well as in the Proclamation which the Maharaja issued on the*

*5th March, 1948. The terms of the Proclamation, to the extent that they are inconsistent with the provisions of the Constitution Act of the State, will prevail over that Constitution Act, and therefore it is that in this Explanation it is the Proclamation which is referred to. Under the terms of that Proclamation the Maharaja constituted an interim popular Government, and he said: -*

*"I hereby ordain as follows :-*

*(1) My Council of Ministers shall consist of the Prime Minister and such other Ministers as may be appointed on the advice of the Prime Minister. I have by Royal Warrant appointed, Sheikh Mohd. Abdullah as the Prime Minister with effect from the 1st day of March 1948.*

*He proceeds –*

*"The Prime Minister and other Ministers would function as a Cabinet and act on the principle of joint responsibility."*

*Then there was no Legislature functioning, and so he instituted a kind of responsible Government with a Prime Minister and colleagues who would own collective responsibility for their acts and regard themselves as jointly responsible for all the acts of the Government. Now, that is brought out in this Explanation...As regards the Council of Ministers, this Proclamation set up a system under which this Council was to be established, viz., that the Maharaja first finds the Prime minister and then on his advice appoints his colleagues, and the Explanation as now amended by me says that whatever Council of Ministers is in being at the time will, along with the Maharaja to whom they are responsible give*

*their concurrence or give their advice on such matters as are referred to them under this article. Clauses (c) and (d) refer to the provisions of the Constitution other than the matters listed in Lists I and III. These various provisions have been divided into certain categories. The first according to this draft is that article 1 of the Constitution will automatically apply. As you know, it describes the territory of India, and includes amongst these territories all the States mentioned in Part III, and Jammu and Kashmir is one of the States mentioned in Part III. With regard to the other provisions in the Constitution, these will apply to the Jammu and Kashmir State with such exceptions and modifications as may be decided on when the President issues an order to that effect. That Order can be issued in regard to subjects mentioned in the Instrument of Accession only after consultation with the Government of the State. In regard to other matters, the concurrence of that Government has to be taken. Now, it is not the case, nor is it the intention of the members of the Kashmir Government whom I took the opportunity of consulting before this draft was finalized - it is not their intention that the other provisions of the Constitution are not to apply. Their particular point of view is that these provisions should apply only in cases where they can suitably apply the only subject to such modifications or exceptions as the particular conditions of the Jammu and Kashmir State may require. I wish to say no more about that particular point at the present moment.*

*Then we come to clause (2). You will remember that several of these clauses provide for the concurrence of the Government of Jammu and Kashmir State. Now, these relate*

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

*The last clause refers to what may happen later on. We have said article 211A will not apply to the Jammu and Kashmir State. But that cannot be a permanent feature of the Constitution of the State, and hope it will not be. So the provision is made that when the Constituent Assembly of the state has met and taken its decision both on the Constitution for the State and on the range of federal jurisdiction over the State, the President may on the recommendation of that Constituent Assembly issue an order that this article 306A shall either cease to be operative, or shall be operative only*



*subject to such exceptions and modifications as may be specified by him. But before he issues any order of that kind the recommendation of the Constituent Assembly will be a condition precedent. That explains the whole of this article.*

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

24. It is submitted that the above excerpts from the Constituent Assembly debates on the concerned provision, clearly define what each part of the said provision was meant to accomplish. At no point did Shri Ayyangar make a submission that the said Article intends to prevent a possible full integration of the State of J&K or that in the absence of the J&K Constituent Assembly the Article prevents the future Government of the said State from

altering the relationship. The relevant debates of the Constituent Assembly of India dated 17<sup>th</sup> October, 1949, excerpts from which have been quoted above are annexed herewith as **Annexure- A /5(Pages\_\_ to\_\_)**.

25. Also, given that the Petitioners seem to place reliance on the Delhi Agreement of 1952 to support their challenge to the Impugned Constitutional Orders and Act, it would be equally imperative to consider the terms of the Indira-Sheikh Accord of 1974 whose Clause 3 reads as under:

*“3. Where any provision of the Constitution of India had been applied to the State of Jammu and Kashmir with adaptation and modification, such adaptations and modifications can be altered or repealed by an order of the President under Article 370, each individual proposal in this behalf being considered on its merits ; but provisions of the Constitution of India already applied to the State of Jammu and Kashmir without adaptation or modification are unalterable.”*

26. Surely, it cannot be the Petitioners’ position that the Agreement of 1952 needs to be abided by whereas the Accord of 1954 can be completely ignored. In view of the above and in view of the fact that multiple orders have been passed after the coming into force of the Jammu and Kashmir Constitution in 1957, it becomes important to consider the Constitutional implications of the 1954 Accord on the contention that consent of the Constituent Assembly

of the erstwhile State was a condition precedent for any changes to Article 370.

26. Coming to the Constitutional (Application to Jammu and Kashmir) Order, 2019 (“C.O. 272”), it is submitted that the impugned Constitutional Order dated 05.08.2019 starts with the following words:

*“In exercise of the powers conferred by clause (1) of article 370 of the Constitution, the President, with the concurrence of the Government of State of Jammu and Kashmir, is pleased to make the following Order:—*

The above extract from the C.O. 272 makes it clear that it has been passed in exercise of the President’s power under the erstwhile Article 370(1)(d) of the Constitution to extend “*such of the other provisions*” of the Constitution of India that did not apply to the State of Jammu and Kashmir as on 05.08.2019. The fact that such power exercised at a time when the State was under the President’s Rule does not affect its legality since nothing in Article 370 as it stood then, prevented the exercise of powers granted by it during the President’s Rule. True copy of the Constitutional Order dated 05.08.2019 *vide* C. O. No. 272/2019 is annexed herewith as **Annexure-A/7(Pages\_\_ to\_\_)**.

27. The Governor of Jammu & Kashmir issued a proclamation on 20.6.2018 under Section 92 of the Constitution of Jammu and Kashmir with the

concurrence of the President of India, thereby assuming to himself the functions of the Government and Legislature of the State. The proclamation issued by the Governor on 20.6.2018 ceased on 19.12.2018 after six months. True copy of the proclamation dated 20.6.2018 and the text of Section 92 of the Constitution of Jammu and Kashmir, 1956 is annexed herewith as **Annexure-A/8(Pages\_\_\_ to\_\_\_)**. Under Section 92 of the Constitution of Jammu and Kashmir, there was no provision for further continuation of such Proclamation after six months. Hence, on the recommendation of Governor and having regard to the prevailing situation in the State, the President issued a proclamation promulgating President's Rule in J&K under article 356 of the Constitution of India. Resolutions approving the subject Proclamation by President were passed in the Lok Sabha on 28.12.2018 and subsequently in the Rajya Sabha on 03.1.2019. True Copy of the President's Proclamation under Article 356 dated 19.12.2018 is Annexed herewith as **Annexure-A/9 (Pages \_\_\_ to \_\_\_)**.

28. The said term of President Rule over State of J&K under the proclamation dated 19.12.2018 was due to expire on 2<sup>nd</sup> July, 2019. Therefore, the Governor of J&K recommended once again that the President Rule in the State may be extended for a further period of six months with effect from 3<sup>rd</sup> July, 2019. As a consequence, resolutions were passed by Lok Sabha and Rajya Sabha

on 28.06.19 and 01.07.19 respectively extending President's Rule by another six months.

29. It is submitted that irrespective of the President Rule being imposed on the State, President's powers under Article 370(1) of the Constitution of Jammu and Kashmir, 1949 to extend the existing provisions of the Constitution of India to the State Jammu and Kashmir has been specifically endorsed by this Hon'ble Court in **Puranlal Lakhanpal v. The President of India, AIR 1961 SC 1519**, in the following terms:

*“Article 370 clearly recognizes the special position of the State of Jammu and Kashmir and that is why the President is given the power to apply the provisions of the Constitution to that State, subject to such exceptions and modifications as the President may by order specify.*

*The President thus has power to say by order that certain provisions of the Constitution will be excepted from application to the State of Jammu and Kashmir and on such order being made, those provisions would not apply to that State. Besides this power of making exceptions by which certain provisions of the Constitution were not to apply to that State the President is also given the power to apply the provisions of the Constitution with such modifications as he thinks fit to make...It seems to us that when the Constitution used the word "modification" in Article 370(1), the intention was that the President would have the power to amend the provisions of the Constitution if he so thought fit in their application to the State of*

*Jammu and Kashmir...the word 'modify' also means 'to make partial changes in' and 'modification' means 'partial alteration'.*

*If, therefore, the President changed the method of direct election to indirect election he was, in essence, making a partial change or partial alteration in Article 81, and therefore the modification made in the present case would be even within the dictionary meaning of that word. But, in law, the word 'modify' has even a wider meaning. In Words and Phrases by Roland Burrows, the primary meaning of the word 'modify' is given as 'to limit' or 'restrict' but it also means 'to vary' and may even mean to 'extend' or 'enlarge'. Thus, in law, the word 'modify' may just mean 'vary', i.e., amend."*

30. Reliance is further placed on a decision of a Constitution Bench of this Hon'ble Court in **Sampat Prakash v. State of Jammu & Kashmir, AIR 1970 SC 1118** ruled:

*"Further the legislative history of the Article shows that it was envisaged that the President would have to take into account the situation existing in the State when applying a provision of the Constitution and that such situations arise from time to time: There was the possibility that, when applying a particular provision, the situation might demand an exception or modification of the provision applied; but subsequent changes in the situation might justify the rescinding of those modifications or exceptions.*

*This could only be brought about by conferring on the President the power of making Orders from time to time under Art. 370.*

In view of the legislative intent and Constitutional practice highlighted above, the Applicant submits that the objections to the impugned C.O. 272 in the present petition on the grounds that it incorrectly uses the method of Presidential power under Article 370(1) or impermissibly modifies/amends certain words or phrases of the Constitution as they apply to Jammu and Kashmir further thereto, are not sustainable.

31. Coming to Constitutional (Application to Jammu and Kashmir) Order, 2019 (“C.O. 273”), the President on recommendation of the Parliament of India, amended Article 370 in order to make all provisions of Constitution of India applicable to the State of J&K, notwithstanding anything to the contrary contained in any other provision of the Indian Constitution or of the J&K Constitution, or any instrument, agreement or treaty as recognized under Article 363 of the Indian Constitution. This was done keeping in view that provisions of Article 356 (Emergency) of the Constitution of India, 1949 were operational in J&K, and there was no State Legislature in function. Under Article 356(1)(b), the President has the power to “*declare that the powers of the legislature of the State (under President Rule) be exercisable by or under*

*the authority of Parliament.”* With respect to Article 370(3), under which this C.O. 273 has been effected, the power of such recommendation to amend Article 370 lies with the Constituent Assembly of J&K which ceased to exist after the coming into force of the Constitution of J&K in September 1956. True copy of the Constitutional Order No. 273 is annexed herewith as **Annexure-A/11(Pages\_\_ to\_\_)**.

The Applicant submits that in the absence of the Constituent Assembly as required by Article 370(3), the Parliament of India remains the sole representative body, that has elected representatives from the erstwhile State with constituent powers at par with the expired said Constituent Assembly. Therefore, to say that the said Constitutional Order was passed behind the backs of the elected representatives from the erstwhile State is factually and legally incorrect.

32. The Jammu and Kashmir Reorganization Act, 2019 – The Act no. 34 of 2019 passed by the Parliament, and assented to by the President on 9<sup>th</sup> August, 2019, reorganized one state of J&K into two Union Territories (UT), i.e. UT of Jammu and Kashmir with a legislature and the UT of Ladakh without a legislature. The Parliament of India is fully authorized under Article 3 of the Constitution, to alter the boundaries of any State or forming new States or UTs by separation or unison of any two existing States or UTs. There is no exception to this provision of the Constitution. Further, the argument that



applies to the Impugned COs equally applies to the Act with respect to the absence of a State Legislature whose views are required. True copy of the Reorganization Act of State of Jammu and Kashmir is annexed herewith as **Annexure- A/12(Pages\_\_\_ to\_\_\_)**.

33. It is further submitted that while popular opinion is not proof of constitutionality, it needs to be acknowledged that Impugned COs and the Act have been welcomed by the people of Jammu and Ladakh. Historically speaking, even after the accession of the princely state of J&K, when the National Conference Party was not in favor of a full integration of the State with the dominion of India, Shri Cheewang Rigzin, the President of Buddhist Association of Ladakh, on behalf of the majority Buddhist population of Ladakh and nearby region, sent representations to the then Prime Minister of India, Shri Nehru, requesting him to consider their separation from the State of J&K and fully merge Ladakh with the Dominion of India. The following excerpt is from the 1949 representation:

*“That we have the right to determine our own future apart from other communities and people inhabiting the state and that we cannot be affected by the result of the forthcoming plebiscite in the event of its being favourable to Pakistan... We are a separate nation by all the tests- race, language, religion, culture determining nationality. The only link connecting us with the other people of the*

*State being the bond of common ruler. If the Indian National Congress could persuade itself to recognize: the Muslims of India as a separate nation although they had so much in common with the other elements of the Indian population, the Government of India should have no hesitation in recognition of what is patent and scout revertible fact in our case.*

*In case the result of the plebiscite is favourable to India, we simply go a step further than other people of the State in seeking a closer union with that great country and in case it is otherwise, our verdict stands clear and unchallengeable. When we have decided to cut ourselves from the State itself, the question of our forming part of Pakistan cannot arise at all.”*

True copy of the representation of 1949 is annexed herewith as **Annexure- A/ 13(Pages\_\_ to\_\_)**.

In view of the above facts and arguments, the Applicant submits that the Impugned COs and the Act were passed in accordance with the Constitution, and have paved the way for return of religious minorities such as Kashmiri Pandits to their ancestral homeland.

### **PRAYER**

IN LIGHT OF THE FACTS OF THE CASE, LEGAL ARGUMENTS ADVANCED, CASE LAWS CITED, IT IS PRAYED BEFORE THIS HON'BLE COURT THAT THIS HON'BLE COURT MAY BE PLEASED TO:

- (i) Allow the application seeking permission to implead in Writ Petition No. 1099/2019 and connected matters pending before this Hon'ble Court; and/or
- (ii) Pass such other and further order(s) and direction(s) as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case and in the interest of justice.

AND FOR THIS ACT OF KINDNESS THE APPLICANT AS IN DUTY BOUND SHALL EVER PRAY.

DRAWN AND FILED BY:

K.V. MUTHU KUMAR  
ADVOCATE FOR THE APPLICANT

Drawn on:  
Filed on: