THE PARADOX OF INDIAN CENTRALISED FEDERALISM: AN ANALYTICAL STUDY OF INDIAN FEDERAL DESIGN ALONG WITH ITS CHALLENGES

Dissertation submitted to National Law University and Judicial Academy, Assam in partial fulfilment for the award of the degree of

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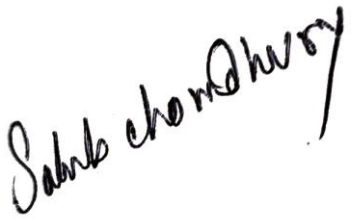
This is to certify that JITENDER has completed his dissertation titled "THE PARADOX OF INDIAN CENTRALISED FEDERALISM: AN ANALYTICAL STUDY OF INDIAN FEDERAL DESIGN ALONG WITH ITS CHALLENGES" under my supervision for the award of the degree of MASTER OF LAWS/ ONE YEAR LL.M DEGREE PROGRAMME of National Law University and Judicial Academy, Assam. His research work is found to be original and suitable for submission.

Date: July 22, 2021.



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STUDENT DECLARATION

I, JITENDER, do hereby declare that the dissertation titled "THE PARADOX OF INDIAN CENTRALISED FEDERALISM: AN ANALYTICAL STUDY OF INDIAN FEDERAL DESIGN ALONG WITH ITS CHALLENGES" submitted by me for the award of the degree of MASTER OF LAWS/ ONE YEAR LL.M. DEGREE PROGRAMME of National Law University and Judicial Academy, Assam is my original work and has not been submitted, either in part or full anywhere else for any purpose, academic or otherwise.

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My dissertation work entitled **"THE PARADOX OF INDIAN CENTRALISED FEDERALISM: AN ANALYTICAL STUDY OF INDIAN FEDERAL DESIGN ALONG WITH ITS CHALLENGES"** is never a work of an individual. It is more than a combination of ideas, suggestions, reviews, contributions and efforts of many. So I wish to express my appreciation to all those with whom I have worked, interacted and those thoughts and insights have helped me in furthering my knowledge and understanding of the subject.

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1993- Transaction of the Business of the Government of NCT of Delhi Rules

2019- Rules of Procedure and Conduct of Business in Lok Sabha, Lok Sabha Secretariat

2019- Constitutional Order (C.O.) 272

2019- Constitutional Order (C.O.) 273

2019- Jammu and Kashmir Reorganisation Act

2021- Government of National Capital Territory Delhi (Amendment) Act

TABLE OF ABBREVIATIONS

Serial No.	List of Abbreviations	Expansions
1.	AIR	All India Reporter
2.	Art.	Article
3.	CAD	Constituent Assembly Debates
5.	C.O.	Constitutional Order
7.	Ed.	Edition
8.	Eg.	For example
9.	Govt.	Government
10.	IPC	Indian Penal Code
11.	ILI	Indian Law Institute
12.	GNCTD	Government of National Capital Territory Delhi
13.	JILI	Journal of Indian Law Institute
14.	J&K	Jammu and Kashmir
15.	MHA	Ministry of Home Affairs
16.	Ors	Others
17.	SC	SUPREME COURT
18.	SCC	SUPREME COURT CASES
19.	Vol.	Volume
20.	Viz.	Videlicet (means it is permitted to see)

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CHAPTERISATION PLAN

Chapter 1: Introduction

"A constitution is what a constitution does, not what it professes.

-V.R. Krishna Iyer"

1.1 Research Background

Indian federalism is quasi-federal, a new term as coined by K.C. Wheare, the Australian Constitutional Expert and centralizing in its tendency due to the overriding powers of Central Government given by the Indian Constitution. After the partition of India in 1947, there was the necessity of a strong centre having a grip upon the States. It was proposed by the Union Constitution Committee and subsequent proceedings of the Constituent Assembly[1] but it posed several challenges before Indian Federal Design.[2] It happened due to the breakdown of dominance maintained by the Congress party in Indian politics by its fragmentation leading to the formation of regional parties. This lead to the formation of governments in the Centre and States of different parties due to which tussle started between them to dominate each other. Central Government abused its powers provided by Article 356[3] of the Indian Constitution several times by imposition of Presidential Rule in different States to dissolve State Government irrespective of party enjoying power in the centre. This is how the misuse of the power by the central government due to its centralising tendency via. Article 356 has posed the challenge before Indian federal design.[4] [5] [6]

Similarly, the Central Government had earlier favoured unilaterally its appointed Lieutenant Governor especially by Legal Notifications issued by Union Home Ministry regarding the unilateral appointment of acting Chief Secretary by the LG against the wish of Delhi government and unilaterally curtailment of the power of Anti-corruption Branch (ACB) of Delhi against Central government employees favouring the LG against the Delhi's elected government. Again, it acted in favour of

[1] Constituent Assembly Debates (CAD), Vol. VII, pp. 33,43.
[2] Michael Burgess, Comparative Federalism Theory and Practice, Routledge Tylor and Francis Group, ed.1st, 2006
[3] Article 356, The Constitution of India.
[4] Anil Ghanghas, State Emergency under Article356 vis-à-vis Indian Federalism, International Journal of Law, 2018, Vol. 4, No.1, pp.100-110.
[5] Krishna M.Tummala, The Indian Union and Emergency Powers, International Political Science Review ,1996 Vol. 4, No.17, pp. 378-382.
[6] Rajeev Dhavan, President's Rule in the States, N.M. Tripathi, Bombay Publishers, edn. 1st,1979.

the LG of Delhi by negating the decision of the Supreme Court of India by enacting the recently Govt. of NCT Delhi (Amendment) Act, 2021[7] that has posed a new challenge before the Delhi government. Because the Supreme Court already in the case of *Govt. of NCT Delhi* v. *Union of India*[8] over the same issue held that the Lieutenant-Governor of the Delhi had to act as per the aid and advice of the Council of Ministers of Delhi Government except in matters of land, police and public order. The court further held that the LG cannot interfere in each matter in the name of 'aid and advise' leading to denial for seeking the permission of the LG by the Delhi Government in all matters. But these decisions of the Delhi government have to be communicated to the LG as per the judgement of the above case. But this recent amendment[9] has provided overriding powers to the LG above the elected government of Delhi leading to unending supremacy over the Delhi government decision making power. This is how centralising nature of federal design has posed the new challenge in form of the continuing tussle over the decision making in the NCT Delhi between the Central Government and Delhi Government.

Similarly, the removal of Article 370 under the notification ("C.O. 272")[10] of the President of India of the Indian Constitution had posed a typical challenge because of its overriding centralizing power granted to the Central Government. This leads to the unilateral decision imposed by the Central Government upon Jammu and Kashmir to remove its special constitutional status as provided by the Indian Constitution. This is how it is a contentious issue due to the imposition of removal of Article 370 in J&K without the expression of its views by the elected government as required by the Proviso of Article 3[11] of the Indian Constitution.

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[7] The Government of National Capital Territory of Delhi (Amendment) Act, 2021, No. 15 of 2021, dated March 28,2021.

[8]Govt. of NCT Delhi v. Union of India, (2018) 8 SCC 501. The court observed: "constitutional statesmanship between the two levels of governance, the Centre and the Union Territory, ought to ensure that practical issues are resolved with a sense of political maturity and administrative experience."

[9] Supra note 7.

[10]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.

[11]Proviso to Article 3 states that no Bill for the purpose shall be introduced in either House of Parliament except on the recommendation of the President and unless, where the proposal contained in the Bill affects the area, boundaries or name of any of the States , the Bill has been referred by the President to the Legislature of that State for expressing its views thereon within such period as may be specified in the reference or within such further period as the President may allow and the period so specified or allowed has expired.

This research outlines the history of Indian federalism adopted by the Indian Constitution and its over-centralising tendency. This will also analyse the challenges which are faced by the Indian Federal system due to the over-centralisation tendency. These challenges are enumerated as following: (a) Misuse of Article 356 by the imposition of Presidential Rule in different States by the Central Government from time to time. (b) The tussle of power was created unnecessarily in NCT Delhi by the recent Amendment in Govt. of the National Capital Territory Delhi Act (Amendment 2021). It is done unilaterally by the Central Government for maintaining power key in own hand through appointed LG. It led to the hurdle in the working of the elected government of Delhi in taking independent decisions. (c) The scrapping of Article 370[12] by the Central Government without following the Proviso of Article 3 is a glaring example of an over-centralising tendency.

1.2 Statement of Problem

The problem focussed in this study is to discuss the challenges faced due to over-centralisation in the Indian federal system. It leads to the creation of the problems by the Centre like misuse of Art.356, unilateral abrogation of Art.370 and suppression of the autonomy (in terms of power) of the elected government of Delhi. This over-centralisation is also against the inherent nature of federalism which requires its de-centralisation and autonomy. Hence the study has been entitled as:

"The Paradox of Indian Centralised Federalism: An Analytical Study of Indian Federal Design along with its Challenges."

1.3 Detailed Literature Review

1.3.1 Regarding Fundamentals of the Federalism

1. Malik[13](2019) in his article published in ***ILI Law Review Journal*** provides an account of federalism ranging from the concept of federalism along with definitions given by Jurists or Academicians of high repute like Livingstone, A.V. Dicey and K.C. Wheare etc. It also critically analyses Indian federalism from the purview of

[12] 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.
[13] M. Asad Malik, Changing Dimensions of Federalism in India: An Appraisal, ILI Law Review, Winter Issue, 2019.

challenges faced by Indian Federalism and judicial trends followed by the Supreme Court of India and whether it is a basic feature of the Indian Constitution or not. It stressed the necessity of cooperative and collaborative federalism for achieving the goals of the Constitution as envisaged by the Constitution framers itself.

2. **Federalism[14] (2018)** published in Stanford Encyclopaedia of Philosophy gives an elaborate account of federalism across the world in terms of the history of federalism in Western Thoughts like J.S. Mill and Immanuel Kant etc. along with mentioning of Federalist and Anti-federalist Papers in their appropriate places and reasons for adoption of federalism in world. It provides a detailed analysis of the evolution of federalism in the world and hence knowledge of different stages of its development.

3. Bulmer[15](2015) gives an elaborate account of federalism ranging from its definitions, types of federalism, pros and cons along with possible alternatives to federalism. It is published by International Institute for Democracy and Electoral Assistance (International IDEA).

4. Bagchi[16] (2000) gives details ranging from Montesquieu's model namely 'The Confederate Form' to James Madison's model namely 'The Compound Republic'. It also describes issues before federalism including decentralisation and cooperative v/s competitive federalism. It gives the idea to the researcher regarding lessons from US federalism.

5. **Aliff [17](2015)** gives details about the concept of federalism and its history along with a description of different types of federalism because according to the author it is imperative for the policymakers to identify different forms of federalism.

5. Basu[18](2008), published a book on Comparative Federalism is a compact treatise on this subject giving details about the origin of federalism and the Legal Test of federalism along with its basic features for its easy recognition. This gives the detailed

[14] Federalism, Stanford Encyclopaedia of Philosophy, First published Sun Jan 5, 2003; substantive revision Jun 7, 2018.
[15] Elliot Bulmer, Federalism : Constitution Building Primer-12, International institute for Democracy and Electoral Assistance (International IDEA), 2nd edition,2017.
[16] Amaresh Bagchi, Rethinking Federalism: Overview of Current Debates with Some Reflections in Indian Context, *Economic and Political Weekly* , Aug. 19-25, 2000, Vol. 35, No.34, pp. 3025-3036.
[17] S.M.Aliff, New trends and Models in Federalism, ISOR Journal of Humanities and Social Sciences, 2015, Vol.20, No.11, pp.74,75.
[18] D.D. Basu, Comparative Federalism, LexisNexis Publication, ed. 2nd, 2008, pp. 13-14.

version of comparative federalism of different federal nations with meticulously designed information in a well-knitted manner to the researcher.

6. Boyd[19] (1997) characterises the different types of federalism during different phases of time in American Federalism. It gives the researcher an idea of different types of federalism followed in America viz. Pre-federalism (1775-89), Dual federalism (1789-1865, 1865-1901), cooperative (1901-1960), creative (1960-68), contemporary federalism (1970 to till date). It focussed specifically on Creative federalism which started from the reign of President Johnson of the USA.

7. Bataveljic[20](2012) provides an idea to the researcher about the concept of federalism along with its types, functions and goals of federalism.

1.3.2 Regarding Indian Federalism:

1. Jain[21] (1973) provides all minute details of Indian Federalism to encompass all the changes occurring in this area within 23 years of the inauguration of the Indian Constitution**.** It enlisted about experiences done by us from the problems faced and their attempted solutions by the federations of the USA, Canada and Australia. It also details the three pillars of the Indian federal system which have developed in varying degrees in the above federations i.e. a strong centre, flexible federation and cooperative federalism. It also specifies the reasons due to which these features were adopted in the Indian federation and the researcher get acquainted with this knowledge.

2. Ghosh[22] (2020) provides a detailed account of the history of Indian federalism and focussed on the regional interests and diverse political demands of state-level actors (political parties) that have constantly posed challenges in terms of decentralisation of powers and reorganisation of the states upon the linguistic basis. It demarcates about four phases of Indian federalism to the researcher since the birth of the Indian

[19] Eugene Boyd, American federalism, 1776 to 1997: Significant Events, retrieved from http://usa.usembassy.de/etexts/gov/federal.htm, updated on Jan.6, 1997.
[20] Prof. Dr. Dragan Bataveljić, Federalism: The Concept, Development and Future; International Journal of Humanities and Social Science Vol.2, No. 24 [Special Issue – December 2012].
[21] M.P.Jain, Indian Federalism: A Background Paper, Presented in Seminar held in ILI, New Delhi, 1973.
[22] Ambar Kumar Ghosh, The Paradox of "Centralised Federalism": An Analysis of the Challenges to India's Federal Design, ORF Occasional Paper No.272, Sept.2020, Observer Research Foundation.

Republic like one-party Congress system and Expressive federalism along with Multi-Party federalism and returning of Dominant Party from 2014 onwards.

4. Raju[23] (1991) describes the great contribution of Dr. B.R. Ambedkar as Drafting Committee Chairman in the formation of the Indian Constitution. It entails how Dr. Ambedkar supported the wider powers to the Centre in maintaining the unity of the nation as a whole and how he advocated the word "Union" in the place of" Federation". It also gives the researcher an idea of why provisions of the stronger centre with Emergency Powers were incorporated in the Indian constitution and even not neglecting the possibility of misuse of these powers. Even it describes Dr. Ambedkar consciousness about the "over-centralisation of the powers" because of the necessity of the time. It also specified about flexible nature of the Constitution as envisioned by Ambedkar. This all work is supported by Constituent Assembly Debates (CAD) and incorporated in this work by the researcher.

5. Singh[24] (2003) encompasses all details about the implications of centralised federalism along with reasons why this was necessary for incorporation in Indian centralised planning for progress with high pace. It clarifies to the researcher the provisions of decentralisation itself present in the Indian Constitution. It gives the detailed version of four pivotal events taking place during 1989-1992. It also detailed about after-effects of the proliferation of political parties in India. It gives the idea of the decline of secularism and containment of violence during different governmental regimes in India with the pace of time. This provides an idea to the researcher about challenges faced by Indian Centralised Parliamentary Federalism like that of decentralisation and religious and ethnic groups outbreaks of violence faced from time to time.

6. Jain[25](2018) published a book on Indian Constitutional Law depicting out why the unique Indian federal system cannot be called a Quasi-federal system as by prominent jurists or academicians from time to time. It detailed out the reasons for utilising this extremely vague term viz. (a) how much it is quasi-federal this or deviated from the

[23] K.H.Cheluva Raju , Dr. B.R.Ambedkar and Making of The Constitution: A Case Study on Indian Federalism, Indian Journal of Political Science, Vol. 52, No.2, April-June, 1991.
[24] M.P.Singh and Douglas V. Verney, Challenges to India's Centralised Parliamentary Federalism, Pubilus: The Journal of Federalism, Vol.33, No.4, pp.1-20, Published by Oxford University Press.
[25] M.P.Jain, Indian Constitutional Law, LexisNexis Publication, ed. 8th, 2018, 775-786.

pure federal model (b) it does not clear about how powerful the centre is (c) where it exists between a unitary state and a federal proper? It gives elaborated Case Laws on the federal nature of the Indian system as illustrated by the Supreme Court of India from time to time whether it comes within the purview of the basic feature of the Constitution of India. It also points out to the researcher why Indian federalism deviated from USA classical federalism as envisioned by James Madison. It indicates the deviation of the USA itself from its initial proposition of weak Centre and accent on State's rights towards strong Centre without any explicit amendment of the USA Constitution but with the help of ingenious legislative devices, judicial tolerance and also through judicial activism. This book gives extensive knowledge to the researcher regarding the Indian Constitutional Law because of its easy and lucid explanations covering all major aspects of the Indian Constitution.

7. Basu[26](2008) provides an extensive study of the Indian federal design to the researcher in different aspects along with the comparative version of the different federal designs of several nations to provide all-around knowledge of the researcher and others. It specifically stresses upon Indian federal design via. Chapter No. 4 ranges from its history to present strong central bias along with the judicial assessment of the Indian federalism to the future of federalism in India.

1.3.3 Regarding Article 356 and its Effects

1. Dubey[27](2018) provides an elaborated version of the controversial use of Article 356 by the Union government. It also provides safeguards against abuse of the power by the Central government in name of the President of India by the nominal Presidential satisfaction. It also elucidates the judicial decisions regarding this abuse and guidelines framed by the Supreme Court of India.

2. Rajashekara[28](1987) depicts clearly about non- remaining of Art.356 as a "dead letter or dormant provision" only to be used as a last resort as "rescue-operation". It clears that under Art.356 rule of the Union government, the governor will function as

[26] Supra note 18 at pp. 116-145.
[27] Dr. Anil Kumar Dubey, Presidential Takeover of State Government, ILI Law Review, Summer Issue, 2018.
[28] H.M. Rajashekara, President's Rule in the Indian States, Indian Journal of Political Science, Oct.-Dec.1987, Vol.48, No.4, pp. 632-642.

a *de facto* Chief Minister. It was originally considered as a "stop-gap arrangement or temporary rule."

3. Tummala[29] (1996) analyse the two court decisions on the dismissal of duly elected State governments of Karnataka (19890 and Madhya Pradesh (1992) where it was successfully challenged before the court and court even asserted its power of judicial review. It gives the researcher an idea of the implications of Art.356 by misuse of the Governor as a puppet of the Union government.

4. **Ghanghas[30] (2018)** explains clearly the misuse of the powers in the name of Art.356 nearly above 126 times since independence by doing biased decisions by the Union government for its political advantages over the opposite political parties. It clarified about the Supreme Court became a strong defender of Constitutional rights and propriety during the minority government of Narasimha Rao. Similarly, stated about the evolution of President K.R. Narayanan as a strong defender of the Constitution by returning the recommendations to impose Art.356 rule in U.P. and Bihar. It also critically analyses the Supreme Court Judgement in the *S.R. Bommai* case and Sarkaria Commission Report. Even the Supreme Court by its decisions reverted the Congress government in two States viz. Uttarakhand and Arunachal Pradesh by reversal of the Centre government imposition of Presidential rule in these States within a minimum time of 3 months difference in 2016 probably the fastest succession in Indian judicial history till date. It raises the finger against the BJP's Centre government misuse of power for its political gains.

6. Krishnaswamy and Khosla[31] (2009) focussed upon the response to critique done by Subhankkar Dam regarding the issue that when a legislative assembly is considered as validly constituted regarding Supreme Court judgement in *Rameshwar Prasad v. Union of India*[32].

1.3.4 Regarding Article 370 Implications and its Abrogation

[29] Supra note 5 at pp. 373-384.
[30] Supra note 4 at pp. 100-110
[31] Sudhir Krishnaswamy and Madhav Khosla, Regional Emergencies underArticle 356: The Extent of Judicial Review, Indian Journal of Constitutional Law, 2009, Vol.3, p. 168.
[32] Rameshwar Prasad v. Union of India, AIR 2006, SC 980.

1. Mahajan[33] (2020) proceeds for the examination of impugned legal measures about their constitutional validity. It studies whether Legislative Assembly is the valid successor to the Constituent Assembly of the State by considering the decision of "Maqbool Damnoo Case", regarding the declaration by the President of Art.370 as inoperative. It emphatically evaluates C.O.272 and C.O.273 against the Governor's Rule in the State in terms of Section 92 of the J&K Constitution by the Proclamation in June 2018 and then against the President's Rule imposed under Art.356 via. Proclamation issued on Dec19, 2018 after the passage of 6 months of completion of Governor's Rule in the J&K. It further goes on to analyse the validity of the J&K Reorganisation Act, 2019 in terms of whether Parliament possesses the power to create two UT's during the President's Rule in the State.

2. Special Report: 204[34] (2019) under the aegis of ICPS (Institute of Peace and Conflict Studies) put forward the opinion about the implications on the legal, political, security and foreign relations dimensions due to the abrogation of Special Status by Art.370 and regarding the formation of the two new Union Territories (UTs) by bifurcation of Jammu and Kashmir with the help of Reorganisation Act, 2019 viz. Jammu and Kashmir with a Legislature and Ladakh comprising of Kargil and Leh districts without a provision of the Legislature.

3. The Hindu[35] (2019) provides an elucidated details of why Art. 370 of the Indian Constitution providing Special Status and Art.35A of Jammu and Kashmir Constitution regarding the determination of Permanent Residential Citizenship (PRC) be scrapped because of the discrimination between the permanently residing people from their 2-3 generations there in J&K like the case of Valmikis from Punjab, West Pakistani refugees, Gorkhas who are unable to gain PRC of J&K due to Art.35A of the Constitution of Jammu and Kashmir.

4. Tillin[36] (2019) exposes the contingent nature of Indian asymmetric constitutional provisions i.e. clarifies the fragile (breakable) set of compromises on which

[33] Kashish Mahajan, The abrogation of Art.370 and Bifurcation of J&K- A Bridge Too Far, Indian Journal of Constitutional Law, 2020, Vol. 9, pp. 106-125.
[34]Special Report: 204, IPCS (Institute of Peace and Conflict Studies), Article 370 and the Reorganization of Jammu and Kashmir, 2019
[35] The Hindu, Full text of document on Govt's Rationale Behind Removal of Special Status to J&K, Retrieved from, www.thehindu.com, on May 13, 2021.pp. 1-38.
[36] Louis Tillin, The Fragility of India's Federalism, The Hindu, Aug. 8, 2019.

asymmetric federalism rest. It can create ambiguity in minds of other specially treated territories like the North East States. This 'transitional clause' of Art.370 had changed to its semi-permanent status. It directly raised the fingers upon the reliability of Indian government sayings or words.

5. Ramakrishnan[37] (2019) stressed the fact that Indians look backwards in terms of Owen Dixon (an Australian jurist appointed by the United Nations to mediate between India and Pakistan on this J&K issue) Plan of bifurcation of J&K. At that time India denied the bifurcation plan.

6. Mustafa[38] (2019) in his article stresses the point that Art.370 is part of the basic structure of the Constitution and hence not able to be scrapped out from the Indian Constitution based on specified Supreme Court decisions. It is a transitional provision not in terms of removable by the Indian government single-handed decision but in terms of the right to modify or retain or delete it by the Constituent Assembly of J&K Constitution which decided to retain it as a permanent provision. Several grounds for the challenge before the Supreme Court had been illustrated by the author. This prompted the researcher to work upon this controversial issue to find out the actual scenario.

7. Mustafa[39] (2019) highlights the history of Art.370 and critically analyse that it is not an issue of integration but pertains to granting autonomy or federal powers through the Doctrine of the Basic Structure of the Constitution by various judgements of the Supreme Court i.e. continuation of diversity and granting autonomy leads to long-lasting integration of J&K State with the Union of India.

8. Pandey[40] (2019) enlightens upon the fact whether the legality of C.O. 272 is justified or not by presenting the views of Constitutional experts like Subash Kashyap who says that order was 'constitutionally sound' and there is 'no legal and constitutional fault' found in this C.O. But A. G. Noorani, another expert of the

[37] T.Ramakrishnan, Idea of Dividing Kashmir has a Chequered History, The Hindu, Retrieved from www.thehindu.com, Aug 7, 2019.
[38] Prof. Faizan Mustafa, Explained; What Changed in J&K?, The Indian Express, Aug 7, 2019, retrieved from, www.theindianexpress.com.
[39] Prof. Faizan Mustafa, art. 370, Federalism and the Basic Structure of the Constitution, The India Forum Magazine, sep 27, 2019, retrieved from www.theindiaforum.in/article-370-federalism-and-basic-structure--constitution
[40]Geeta Pandey, BBC, Article 370:What Happened with Kashmir and Why it Matters, Aug.6, 2109, retrieved from, www.bbc.com

Constitution termed it as an illegal decision similar to committing fraud which is challengeable before the Supreme Court of India. This article stresses the fact that the Muslim majority region (Kashmir) is clubbed with the Hindu majority region (Jammu) to negate out effects of Muslim voters ultimately favouring BJP party politics (Hindutva politics).

9. Mishra[41] (2020) clarified the stand of different countries of the world upon the abrogation of Art.370 and removal of the special status of J&K. It cleared the minds of Pakistan and China who are trying to float it as an international issue but the international community is nodding with the stand of India that it is an internal issue of India.

10. Medha[42] (2019) in this article focuses upon the wider ideology of Hindu nationalism and Hindutava politics, the main stand of the present regime of BJP in the Centre leading to far-reaching implications for the democratic set up of India. It also considers the implications of the abrogation of Art. 370 leading to ambiguity in the minds of other specially treated states like the North-East States containing tribal areas.

11. Narain[43] (2016) stresses upon the facts that India has to move beyond the "Pakistani and ISI blame game" to attack the root cause of disaffection of Kashmiri Youth from India by strengthening administration along with the creation of new jobs or employment for them and countering the Wahhabi influence through the promotion of Sufi values and moderation There should be reviewing of the draconian AFSPA and alleged human rights violation be done by the Indian government to de-radicalise the Kashmiri youths and follow up the counter-terrorist initiatives taken by the government.

[41] Vivek Kumar Mishra, The abrogation of article 370: International Reactions, Indian Journal of Asian Affairs, Jun-Dec.2020, Vol.33, No.1/2, pp.120-129.
[42] Medha, The Revocation of Kashmir's Autonomy: High-Risk Hindutva Politics at Play, German Institute of Global and Area Studies (GIGA), GIGA Focus, Asia, No.5, Aug, 2019, downloaded from www.jstor.org.
[43] Akanksha Narain, Revival of Violence in Kashmir: The Threat to India's Security, Counter terrorist Trends and Analyses, Vol.8, No.7, July 2016, pp.15-20.

12. Prakash[44] (2020) depicts out the history of the State of J&K to the accession of J&K in India via. Instrument of Accession (IOA) and then incorporation of Art.370 to satisfy the Special Status of the State via. deliberations taking place in the Indian Constituent Assembly at that time by inclusion of four representatives including Sheikh Abdullah. The agreed result of these discussions leads to the formation and incorporation of Art.370 in the Constitution. Then it critically considers the abrogation of Art.370 and its implications.

13. Peer and Rahman[45] (2012) critically analyse the Special Status of J&K under Art.370. It analyses how autonomy of J&K was decreased by 'Hollowing of Art.370' by Presidential Orders from time to time and it was cleared from the statement of Jawahar Lal Nehru on the floor of the Lok Sabha on Nov. 27, 1963, that "gradual erosion of Art.370 is going on…we should allow it to go on." Even the Constituent Assembly of J&K was dissolved and concurrence required to be given by State Legislative Assembly was to be confirmed by that dissolved Constituent Assembly of J&K regarding continuance of Presidential Orders for the matters not mentioned in the Instrument of Accession (IOA). That should have ideally resulted in the ending of the Presidential Order passing on matters other than mentioned in IOA. But they are continuing in terms of restricting the powers of State Legislature and in return extending the powers of Union's Legislative powers. Even Art.249 application to the J&K was extended only relying upon a Rajya Sabha resolution and concurrence of Governor, without even concurrence of a democratically elected legislature in the State. It also stresses the fact that Parliamentary Amendments (59th, 64th, 67th, and 68th) were done out to impose Presidential Rule in Punjab but in the case of J&K even after having a Special Constitutional Status, no such amendments were followed out but only Executive Orders were sufficient for imposition and extension of this rule from 1990 to 1996.

1.3.5 Regarding Power Tussle in Delhi

[44] Aniruddha Prakash, The Past and Present of Article 370, International Journal of Creative Research Thoughts (IJCRT), Nov 2020, Vol.8, No.11, pp.139-146.
[45] Gazala Peer and Javedur Rahman, An Unpleasant Autonomy: Revisiting the Special status for J&K, Economic & Political Weekly, Vol. 47, No. 23, pp.72-75.

1. Samuel[46] (2017) presents this issue of the fight for Statehood from its historical past to present continuing tussle between Lieutenant Governor Najeeb Jung (representative of the Union government) and Chief Minister Kejriwal of Aam Aadmi Party (AAP) over the appointment of acting Chief Secretary.

2. Sahoo[47] (2018) depicts clearly that irrespective of the party in the Union government even after the declaration of Statehood for Delhi in their Election Manifesto completely abandoned this issue leaving it in the lurch people of Delhi. It stresses the history of Delhi from 1803 to 1911 as the Capital of British India Then after continuous upheavals, Delhi in 1991 gets its Legislature. It concludes that the mid-way path is followed by Delhi i.e. *abandonment of Complete Statehood Status for Delhi* along with *demands for more powers in the hands of the Delhi government.* This is the pattern followed by the majority of Capital Territories in the world. This is how it gives an idea to the researcher about the solution to this critical issue.

3. Chaudhary[48](2020) encompasses in itself a snapshot of Delhi's struggle for Statehood to present a tussle between AAP and Lt. Governor By comparing the governance of Capital Cities of the World, it concludes that Delhi may follow somehow Ottawa model of governance but modifying this model according to our needs and complete Statehood be dropped out and more powers can be demanded by the State Legislature and harmoniously follow the spirit of the Constitution of India. It provides the researcher unique solution to this ongoing tussle.

4. Saikumar[49] (2015) in this essay points out that inherent diarchy in capital cities have to be positively considered and demands for full statehood or greater Central control are both incapable of the fulfilment i.e. more decentralisation be there similar (not same) to that of Ottawa model is a great solution to this tussle.

[46] Divya Ann Samuel, Fight of Delhi for a Full Statehood, 2017, Vol. 11, p.235.
[47] Niranjan Sahoo, Statehood for Delhi: Chasing a Chimera, Observer Research Foundation Occasional Paper, New Delhi, June 2018.
[48] Vikram Chaudhary, Statehood of Delhi and Centre-State Relations, Project Work in RGNUL Patiala, pp.1-25.
[49] Rajgopal Saikumar, An Essay, NCT of Delhi: Towards a Unique Diarchy (…and Away from a Monarchy), The Hindu centre for Politics and Public Policy, June 30, 2015.

5. Kaur[50] (2003) relies upon describing the how working of Delhi will change in terms of better governance and lesser bureaucracy. The powers of legislators and hence elected representatives should increase for better governance of Delhi but each party is playing political gimmick upon this hot issue to achieve political gains when every time Statehood is put before the floor of the Houses and no result.

6. Sharma[51](2020) published a book "Statehood For Delhi ?" under the aegis of Prabhat Prakashan where he provides a complete chronology of Delhi from the time of Transfer of Capital of India from Calcutta to Delhi during the British Raj to post-independence experiments to till date for administration of Delhi.

This leads to the conclusion that the Delhi government should be provided more powers for better and efficient administration.

1.4 Need and Justification of the Study

The study can be justified on the ground that legal research on the challenges before Indian federal design is in the embryonic stage due to avoidance of putting these challenges altogether in any research work and achieving any result. The extensive review of literature also indicates that research in this area has been made while very little research work has been done in the field of challenges faced due to over-centralisation especially. Specific literature work in this field is not sufficient and to fill this gap this study has been carried out.

1.5 Aim

This research study aims to find out possible safeguards and precautions necessary for consideration to address the different challenges faced due to the over-centralisation of powers leading to misuse of Art.356 in different States, abrogation of Art.370 in J&K and recent amendment in GNCTD Act, 2021in Delhi.

1.6 Research Objectives

The researcher has undertaken this research with the following research objectives:

1. To analyse Indian centralised federalism and its Constitutional Provisions.

[50] Naunidhi Kaur, Capital Games, Frontline, Sept-Oct 2003, http://www.frontline.in/static/html/fl2020/stories/20031010002404800.htm.
[51] S.K.Sharma, Statehood of Delhi?, Prabhat Prakashan, ed.1st, 2020.

2. To study and analyse the challenges faced due to over-centralization of Indian Federal design leading to misuse of Art.356 in different States, abrogation of Art.370 in J&K and recent amendment in GNCTD Act, 2021in Delhi

3. To examine the role of the Judiciary in addressing these challenges posed from time to time.

4. To suggest measures as the possible solutions for these challenges studied in this research work.

1.7 Scope and Limitations

The present research is limited to the study of the challenges faced due to the over-centralisation of Indian federal design. The study is further confined to especially three challenges viz.

a) Art. 356 and its misuse by the Union Government.

b) Whether abrogation of Art. 370 is an abuse of power by the Union Government and constitutional validity of abrogation is to find out.

c) The continuing tussle of power in Delhi between Centre and Delhi Government.

The research is limited to the books by various authors, e-journals, e-articles and e-books due to the present COVID-19 pandemic situation because of the lack of availability of sources and research is confined to digital availability.

1.8 Research Questions

To achieve the objectives set by the researcher, the following research questions have been framed accordingly:

1. What are the challenges faced due to the over-centralisation in Indian Federal design?

2. How is the misuse of Article 356 done by the Central Government in the imposition of presidential rule in different States?

3. How the removal of Article 370 is against the spirit of federalism in India?

4. How Govt. of Delhi NCT (Amendment) Act, 2021[52] is posing the challenge for the Indian federal structure?

5. What role has been played by the Indian Judiciary in the interpretation of such challenges concerning Indian Federalism?

1.9 Research Methodology

The present research work has been based on Doctrinal Legal Research Methodology. The study has been done by utilising both primary and secondary sources of data. The researcher has taken the help of primary sources such as the Constitution of India, different legislations, case laws, official documents and reports. In pursuit of the research study, the researcher has utilised secondary sources such as Articles from Journals, Law books, Magazines and Online sources of high repute.

1.10 Chapterisation/ Research Design

Chapter 1- Introduction: The first chapter is introductory and it includes a brief introduction of the broad area of the study. A clear statement of the problem, need and justification of the study, objectives of the study and research questions along with the extensive review of literature has been presented. The research methodology has been presented with the chapterisation plan of the study.

Chapter 2- Fundamentals of Federalism: This second chapter deals with the fundamentals of Federalism with its sub-headings viz. the concept of federalism, history of federalism, Legal Test of federalism, and different types of Federalism devolved with the progress of time.

Chapter 3- Indian Federalism and its Legal Framework: This chapter provides a background or history of Indian Federalism, reasons for adoption of Indian Centralised Federalism, Constitutional Provisions regarding federalism in India, Judicial Interpretation of Indian Federalism and observations.

Chapter 4- Article 356 and its Improper Invocation by the Central Government: The fourth chapter highlights the misuse of Art.356 by the Central Government, the

[52] Supra note at 7.

approach of the Supreme Court in the context of Art.356 and the safeguards against the misuse of the power by the Central Government.

Chapter 5- Abrogation of Article 370 and Bifurcation of the State of Jammu and Kashmir: This chapter provides a detailed evaluation of C.O. 272 and C.O. 273 in the light of the Proclamation of Presidential Rule issued by the President in the State, Constitutional Validity of Jammu and Kashmir Reorganisation Act, 2019 leading to the bifurcation of the State into two Union Territories under Presidential Rule in the State.

Chapter 6- Power Tussle between Central Government and Government of National Capital Territory Delhi: It details out the study in different aspects of the recent row over the Govt. of NCT Delhi Amendment Act, 2021 by detailing out the Constitutionality of Amendment Act, 2021, and present status of NCT Delhi Government upon this Amendment.

Chapter 7- Findings of the Study: This chapter deals with the findings achieved as per the objectives initially set for this research work.

Chapter 8- Conclusions and Suggestions: The last chapter provides conclusions arrived at as a result of this research work. The researcher has suggested measures for challenges studied in this research work. The suggestions for further research work are also placed in this chapter.

Chapter 2: Fundamentals of Federalism

Federalism implies the sharing of power between the Central (Federal) government and different sub-units or states government as per the scheme specified by the written Constitution of the nation.

2.1 Concept of Federalism

It is derived from the Latin word “foedus” which means Covenant or Agreement. It means federal states are created by a treaty or an agreement. Due to this, James Madison in *Federalist 39* had called the new USA Constitution *"neither a national nor a federal Constitution, but a composition of both*". It is because of constituting neither a single large unitary state nor a league/confederation among several small states, but a hybrid of the two.[53] It is a system where sovereignty is divided between the core centre and peripheral states or sub-units. There is no explicit definition of the term “federalism”. A few of these as given by scholars and academicians are as follows:

According to Prof. Wheare:[54]

“…the systems of Government embody predominantly on the division of powers between Centre and regional authority each of which in its sphere is coordinating with the other independent as of them, and if so is that Government federal?”

This distinctive feature is a relationship of *parity* between the two levels of the established governments and initially, it was embodied in the Constitution of the United States of 1789.[55] It means a form of government in which powers are divided between two levels of government of equal status.[56]

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[53] Madison, James Hamilton, Alexander and Jay, John (1987) *The Federalist Papers*, Penguin, Harmondsworth, p.259.
[54] K.C. Wheare, *Federal Government*. Oxford University Press, London, 1963, p.33.
[55] In 1946, scholar Kenneth Wheare observed that the two levels of government in the US were "coequally supreme". In this he echoed the perspective of the founding fathers, James Madison in *Federalist 39* having seen the several states as forming "distinct and independent portions of the supremacy" in relation to the general government. Wheare Kenneth (1946), *Federal Government*, Oxford University Press, London, pp.10–15. Madison, James Hamilton, Alexander and Jay, John (1987), *The Federalist Papers*, Penguin, Harmondsworth, p.258.
[56] Law, John (2013) "How Can We Define Federalism?", in *Perspectives on Federalism*, Vol. 5, No. 3, pp. E105-6. http://www.on-federalism.eu/attachments/169_download.pdf.

According to Dicey:[57]

"Federalism means the distribution of the force of the state among several co-ordinate bodies each originating in and controlled by the constitution."

So federalism is a device to ensure the participative role of the State in the decision-making process.[58] Therefore federalism is the concept and constitutional mechanism for dividing power between national and state governments so that federating units (states) can enjoy substantial, constitutionally specified autonomy over certain policy areas while sharing power in other areas under agreed rules i.e. it combines partial self-government with partial shared government (Elazar,1987).[59] Federalism is usually followed by culturally diverse or territorially large nations. It is a medium of ensuring peace, stability, and mutual accommodation in the nations having territorially concentrated differences of identity, ethnicity, religion, or language i.e. it becomes a tool of accommodating diversity within unity.[60] "Federalism, especially in large or diverse countries, can also improve service delivery and democratic resilience, ensure decisions are made at the most appropriate level, protect against the over-concentration of power and resources, and create more opportunities for democratic participation[61]. Federalism also reconciles a desire for unity and communality on certain issues with a desire for diversity and autonomy on others.[62]" **Constitutional supremacy** over ordinary laws of the nation and **constitutional entrenchment** (complex mechanism for the amendment of a constitution as compared to ordinary laws) provide guarantees to sub-units regarding their respect of autonomy and existence as a separate entity.[63]

Therefore, the researcher has found that federalism comes in the present structure by passing through the various stages from the rudimentary one belonging to K.C. Wheare to ultimately of present flexible one as envisaged by James Madison and Hamilton with Alexander Ray in Federalist Papers. Still, it is progressing by favouring more towards decentralisation of powers.

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[57] Supra note 18 at 8.
[58] Kaleeswaram Raj, Federalism in Judicial Appointments, *The Hindu*, Sept. 17, 2014.
[59] Supra note 15 at 1.
[60] Ibid.
[61] Ibid.
[62] Ibid.
[63] Ibid, p.33

2.2 History of Federalism

Several of the early contributors to federalist thought explored the rationale and weaknesses of centralised states as they emerged and developed in the 17th and 18th centuries. Johannes Althusius (1557–1630) is considered as the father of modern federalist thought due to his argument in *Politica Methodice Digesta* (Althusius 1603) for the autonomy of his city Emden, both against its Lutheran provincial Lord and against the Catholic Emperor and he was strongly influenced by French Huguenots and Calvinism. Rejecting subjugation of theocracy, Althusius developed a non-sectarian, non-religious contractualist political theory of federations leading to prohibited state interventions even for purposes of promoting the right faith.[64]

The discussions of the U.S. Constitutional Convention, 1787 makes a clear development in federalism. A central feature is that federations were seen as uniting not only member units as in confederations but also the citizenry directly. The Articles of Confederation of 1781 among the 13 American states fighting against the British rule had created a too weak centre for the enforcement of the laws, defence and for securing interstate commerce. The U.S. Constitutional Convention met on May 25, 1787 to September 17, 1787 was explicitly restricted to revise the Articles, but ended up recommending more fundamental changes leading eventually to the Constitution that took effect in 1789.[65]

In *The Federalist Papers*[66], James Madison (1751–1836), Alexander Hamilton (1755–1804) and John Jay (1745– 1829) vigorously supported the suggested model of interlocking federal arrangements (Federalist 10, 45, 51, 62) by their arguments... Madison and Hamilton agreed with Hume that the risk of tyranny by passionate majorities was reduced in larger republics where member units of shared interest could and would check each other. Due to great concerns regarding the correct allocation of powers, Madison supported appointing some authority with member units because they would be the best fit to address "local circumstances and lesser interests" which are otherwise neglected by the centre (Federalist 37).

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[64] Supra note 14 at 3.

[65] Id at 4.

[66] Hamilton, Alexander, James Madison, and John Jay, 1787–88, *The Federalist Papers*, Jacob E. Cooke (ed.), Middletown, CT: Wesleyan University Press, 1961.

2.3 Types of Federalism[67]

Several types of federal structures developed in history because of the demand of time and prevailing circumstances in the states. "What form of federal institutions should take place and to what extent federal principle should be followed chiefly depends upon the balance between common interests or identities and divergent interests or identities."[68] These are described as follows:

1. **Identity federalism[69]:** It is present where two or more culturally, religiously or otherwise distinct national communities have enough commonality of interest or identity to make them want to live together in one polity, but enough distinctiveness of interest or identity to make them demand substantial autonomy within that polity (e.g. Canada, Switzerland).

2. **Efficiency federalism[70]**: It is present when a culturally homogeneous but geographically large nation wishes to govern by decentralizing power to local people while maintaining national unity and the ability to act coherently in matters of national policy (e.g. Germany, Argentina).

3. **Coming Together federalism[71]:** It occurs where already independent states combine to form a federal nation eg. USA Switzerland, Australia.[72]

4. **Holding together federalism[73]:** It shows its presence where already unitary state enters into federalism for the solution of the problems of scale (size of the political units) and diversity eg. India, Spain, Belgium.[74]

5. **Competitive federalism[75]:** Here national and subnational institutions are fundamentally distinct ones, overlapping in territorially jurisdiction but

[67] Supra note 15.
[68] Id at 5.
[69] Id at 4.
[70] Ibid.
[71] Id at 8.
[72] Federalism, NCERT Book, 13rd edition, 2020, p.15.
[73] Id at 8.
[74] Federalism, NCERT Book, Ch. 2, p.15.
[75] Id at 20.

occupying separate legal spheres i.e. each one working in their area independent of the other while ignoring the presence of the other.[76]

6. **Cooperative federalism[77]:** Here both institutions regard themselves as partners in the government along with sharing of the powers for the common good. Extensive inclusion of the sub-unit states in the framing and implementation of the policies is done by the Central government[78]eg. Germany, South Africa and Belgium.[79]

7. **Dual federalism[80]:** It is also called **layer-cake federalism** or divided sovereignty. It is a political arrangement in which power is divided between the federal and state governments exclusively i.e. no interference of the other in between two levels of the government in the exclusive area of legislation and administration eg. Australia, USA, India, Pakistan.[81]

8. **Symmetrical federalism[82]:** It indicates that various constituent sub-units are at the same level in terms of powers, autonomy and preferences given to them by the federal (Central) government i.e. equal presentation is given to different states.

9. **Asymmetrical federalism[83]:** Here different subunits of the nation have differential autonomy, powers and preferences as compared to the others eg. in India, Art. 370 and Art.371 giving differential autonomy to Jammu Kashmir and other states respectively. It can occurs also in a different manner where territories belong to the federation but are not territories (not as a part of the federation) and having differential treatment by the Constitution itself.

10. **Creative federalism[84]:** It specified that President Johnson's Creative federalism was a major departure from the past ones because of the shifting of

[76] Supra note 16.
[77] Supra note 15 at 20.
[78] Ibid..
[79] S.M.Aliff, New trends and Models in Federalism, ISOR Journal of Humanities and Social Sciences, 2015, vol.20,issue 11, p. 74,75.
[80] Supra note 15 at 21.
[81] Federalism, NCERT Book, Ch.2, p.15.
[82] Supra note 15 at 21.
[83] Id at 21.
[84] Eugene Boyd, American federalism,1776 to 1997: Significant Events, retrieved from http://usa.usembassy.de/etexts/gov/federal.htm, updated on Jan.6,1997.

power relationship towards the national government itself via. expansion of the Grant-in-aid system and the increasing use of regulations upon the constituent states in the USA. It flourished from 1960 to 1968 under the reign of President Lyndon Johnson to achieve the social outcomes in the form of reduction of poverty and elimination of hunger by utilising state governments as agents or intermediaries for the implementation of Great Society programmes.

11. **Confederation[85]:** Before 1787, the term 'federal' was used to indicate "confederation" which specifies a system in which constituent states had independent sovereignty as opposed to central government i.e. these had the right to opt-out of the confederation and central authority had to take the approval of states for new policy formation.

2.4 The Legal Test of Federalism[86]

For the nation to be qualified as a federal state, it has to encompass these features within itself as specified by Durga Dass Basu. These are as follows:

1. **A written constitution:** A federal state should have a written constitution.
2. **A dual government:** There should be set up of Dual Government within the written constitution itself i.e. sovereignty of the two levels of the governments be in the hands of the constitution itself, not in the hands of the central government as occurs in case of the unitary governance system.
3. **Distribution of powers:** It should come itself from the constitution of the nation i.e. powers be divided between federal and state governments as per the scheme of the constitution and it is not dependent upon the whim of the central government.
4. **No unilateral change:** The above distribution of power cannot be amended by the unilateral Will of the parties of the federation.

[85] Federalism, History Of; www.encyclopaedia.com, p.1.
[86] Supra note 57 at 13-14.

5. **Judicial Interpretation/Review:** This power distribution must be guarded by the Judiciary. It means there will be an imposition of limitations in terms of invalidation or voidness or unconstitutionality of the laws or Acts.

6. **Independence of Judiciary:** Judiciary will be Sentinel or Guardian of the Constitution of the nation. For this independence of the judiciary to be maintained otherwise allegations of partial or biased judgements will be put against the judiciary itself.

While Political Scientists emphasise the maximum degree of autonomy enjoyed by the sub-units of the federal nation as a test of federalism. But Legal Fraternity stresses the power of Judicial Review so that division of powers is justiciable.

- **Advantages of federalism:**

Federalism provides division of powers between the Centre and States by the written Constitution of any nation. It provides the necessity of a written Constitution in a federal nation. It leads to the decentralisation of the powers towards the States. It ultimately makes the States more powerful in terms of their autonomy. Hence, the States are not subordinating to the Central government but co-ordinate with it. The power of judicial review puts limitations upon the Centre leading to prevention of misuse of the power by the Centre.

2.5 Observations

This is deducted from the study of the history of federalism that it develops with the progress of time and come to its present stage. It is still in progress and changes following the facing of challenges coming before it. That is why several types of federal structures developed as per the necessity of the time.

Any country has to pass the legal test of federalism[87] for considering itself as a federal nation and its constitution as a federal one otherwise cannot be presumed as a federal one despite the inclusion of the term 'federal' in the title.

[87] Supra note 18 at 13-14.

CHAPTER 3: INDIAN FEDERALISM AND ITS LEGAL FRAMEWORK

3.1 Background /History of Indian Federalism

Till 1935, India was having a unitary system but the Government of India Act, 1935 had introduced the federal concept and the term 'federation' in India.[88] The decentralisation in India started from the Government of India Act, 1919 with the introduction of diarchy or dual government.[89] In India, the unitary system was camouflaged to the federal system by giving certain powers and duties to the states by the Constitution of India i.e. skeleton of the unitary system was preserved and the flesh of the federal system was imposed upon it. Out of several models, the Indian Constituent Assembly wisely favoured moving on the path of the Government of India Act, 1935 by the adoption of this as the main skeletal framework of the Indian Constitution.[90] Regarding the concept of federalism in the Indian Constitution, its history can be divided into two phases viz. (a) Before June 3, 1947. (b) After June 3, 1947. It was the landmark date of the announcement of the partition of India into two Dominions on a communal basis.

> At the outset of the first meeting of the Constituent Assembly, two major problems were encountering the federalism in India namely viz. communal sentiments of Muslims and the semi-independent Princely Indian States.[91] The solution for accommodating these problems was the introduction of federalism with minimal powers to the Centre and residual powers be left for the constituent units providing maximum autonomy to them. Hence, in consonance with the above decision the 'Objectives Resolution' was approved by the Constituent Assembly on December 13, 1946, as per terms of the Cabinet Mission Plan[92] and adopted on January 22, 1947, and providing three powers of Defence, Foreign Affairs and Communications to the Union and

[88] Available at: www.lawyersclubindia.com (last visited on July 10, 2019).
[89] M.P. Singh, Outlines of Indian Legal and Constitutional History, Lexis Nexis Publication, ed.7th , 2003, p. 169.
[90] H.M. Seervai, Constitutional Law of India, (Vol. I), Universal Law Publishing, ed. 2008, p. 286.
[91] Supra note 18 at p.116-117.
[92] K.R. Bombawall, The Foundations of Indian Federalism, Chapter 6, Publishing House Bombay, 1967.

States shall be autonomous units having all residuary powers[93] together with those powers which followed by implication from powers assigned to the Union.

After the announcement of partition of India by the formation of Pakistan, it was announced by the Union Constitution Committee after meeting on June 5, 1947, that the above Objective Resolution based on Cabinet Mission Plan will not be binding and a strong Centre was an imperative necessity[94] along with three legislative Lists and residuary powers would belong to the Union, not the States.[95] This decision was given node by the Constituent Assembly[96] and implemented by the Union Powers Committee. That is why framers of the Indian Constitution who initially adopted the American Model suddenly shifted towards the Canadian Model of stronger Union compared to the States and exceeding the Canadian Model also in strengthening the hands of the Centre. Even Dr. Ambedkar supported this view by saying "*I would like to have a strong centre, stronger than the Centre as we had earlier created by Objectives Resolution".*[97] Therefore it was declared India shall be a Union of States. The term 'federation' as used by the Union Constitution Committee was replaced by the term 'Union'[98] [99] as proposed by the Drafting Committee due to following reasons: (i) Indian Union is not the result of any agreement between the sovereign States because the British Provinces and the Princely States were not sovereign even during the British Raj. Hence, they have no right to secede out from the Union because it is permanent and indestructible. *The 'Union of India' has been formed by the People of India through their Constituent Assembly Representatives while the States have been brought into the Union by the Constitution of India by a process of 'merger' and 'integration' and placing*

[93] CAD, Vol. I, pp.57-58 and Vol. II , p.300.
[94] CAD, Vol. IV, p. 729.
[95] CAD, Vol. XI, pp. 657-58 (Gadgil).
[96] CAD, Vol. I, p. 57.
[97] CAD, Vol. IV, p. 741.
[98] CAD, Vol. VII, p. 33.
[99] Chief Justice RS French, Federalism in The Supreme Court of India and the High Court of Australia, available at: http://www.hcourt.gov.au/assets/publications/speeches/currentjustices/frenchcj/frenchcj03june09.pdf (last visited on Oct. 31, 2019).

them on the same footing as much as possible as the other units of the Union as per credit lies towards Framers of the Constitution. The Americans had to fight a Civil War to establish that the States had no right to secede out and their federation is indestructible and the Indian Drafting Committee cleared about this fact at the outset rather leave on the speculation itself.

3.2 Reasons for Adoption of Indian Centralised Federalism

Indian Constitution is a federal one due to division of powers between Union and States by the Constitution itself and both Union and States derive their existence from the Constitution and Union cannot subjugate or demolish the States of its own. It provides the power of judicial review to the independent judiciary by its provisions.

The framers of the Indian Constitution were firmly standing upon the necessity of 'a stronger centre' within the Indian federalism from the beginning due to the following reasons:[100]

(i) To strengthen the security of the newly formed nation.

(ii) To control the fissiparous and divisive forces.

(iii) To ensure the uniformity and stability of the administration.

(iv) To promote and achieve uniform progress throughout the nation by forcing the pace of economic development by mobilizing national resources and utilizing them properly under the vigil of the Centre irrespective of it is a small or big State in terms of population and area.

(v) To promote the Democratic Socialism, Agrarian Reforms and Planned Economy as visioned by Jawahar Lal Nehru.

(vi) To enable a greater assertive role in the international arena.

(vii) Due to the best option after the non-possibility of the following Unitary system in India, a strong Centre with the federal design was adopted.

This was done to establish and maintain the supremacy of the Union while maintaining the autonomy of the States limited to the certain subjects mentioned in

[100] Supra note 24.

the State List of the Art.246 of the Indian Constitution. Even Dr. Ambedkar said in the Constituent Assembly that *"a strong Centre should not make India less federal: It may be that the Constitution assigns to the Centre a larger field for the operation of its legislative and executive authority than it is to be found in any other federal Constitution. It may be that the residuary powers are given to the Centre and not to the States. But these do not form the essence of federalism."*[101]

However, Dr. Ambedkar in the Constituent Assembly had warned against the 'over-centralisation of powers' and its misuse by the Centre by stating the following words:

"However, much you may deny powers to the Centre, it is difficult to prevent the Centre from becoming strong. Conditions in the modern world are such that centralisation of powers is inevitable. The same conditions are sure to operate on the government of India and nothing that one can do will help to prevent it from becoming.

On the other hand, we must resist the tendency to make it stronger. It cannot chew more than it can digest. Its strength must be commensurate with its weight. It would be a folly to make it strong that it so may fall by its weight."[102]

3.3 Constitutional Provisions regarding Federalism in India

Indian Constitution is federal in form and passes the Legal Test for Federalism as clearly described in Chapter 2 of this study which is indicated also by the presence of the following provisions embodied in it namely,

(i) Supremacy of the written constitution as the Grundnorm of the country and the 'Supreme Law of the Land.[103]

(ii) More elaborated scheme of division of powers between the Union and the State governments as compared to that any other federal country of the

[101] CAD, Vol. VII, p. 33.
[102] Id at 42.
[103] In Special Reference No.1 of 1964 UP Assembly Case, AIR 1965 SC 745. The court observed: "The supremacy of the constitution is fundamental to the existence of a federal State in order to prevent either the legislature of the federal unit or those of the member States from destroying or impairing that delicate balance of power which satisfies the particular requirements of States which are desirous of union, but not prepared to merge their individuality in a unity."

world like USA, Canada and Australia etc.[104] It provides 3 Legislative Lists viz. Union List (97 entries), State List (66 entries) and Concurrent List (47 entries) and provision of the Residuary Powers to the Centre leading to the biasing towards the Centre which is keenly felt in the USA, Canada and Australia. Even in the field of State List, the Centre can enter this arena by various Constitutional provisions.[105] While Articles 245 to 255 deal with the distribution of legislative powers and Articles 256 to 261 deal with the distribution of administrative powers of the Constitution.[106]

(iii) The existence of an independent judiciary[107] [108] is provided by different provisions of the Constitution along with the powers of Judicial Review[109] and Judicial Activism[110].

(iv) A rigid procedure for amendment of the constitution.[111]

(v) Flexible and cooperative federalism is introduced here in consideration of experiences drawn from the war and crisis of other federal countries like the presence of the Inter-state Council.[112] [113]

Defending the flexible nature of the Constitution Dr. Ambedkar said in the Constituent Assembly viz. *"One can therefore safely say that the Indian federation will not suffer from the faults of rigidity and legalism. Its distinguishing feature is that it is a flexible federation."*[114] The flexibility lies even in the procedure of the Amendment w.r.t. to the federal portion of the Constitution as compared to that of the USA and Australia.[115]

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[104] Part XI deals with the Relations between the Union and the States; Ch. I of Part XI deals with Legislative Relations and distribution of Legislative Powers while Ch. II deals with Administrative Relations 'between the Union and the States. The distribution of powers between the Union and the States can be discerned from the various provisions of the constitution. A machinery is also provided for, for settling their disputes in the constitution.
[105] Art. 249 to 254, The Constitution of India.
[106] Supra note 105.
[107] Art.124, The Constitution of India.
[108] Justice V. Dhanapaln, "Basic Structure of the Indian constitution - An Analysis" 8 SCC (J) 2 (2014).
[109] Art. 13, 32,131, 141, and 226, The Constitution of India.
[110] Art.32 and 226, The Constitution of India.
[111] Art. 368, The Constitution of India.
[112] Art. 263, The Constitution of India.
[113] Supra note 23 at pp.162-163.
[114] CAD, Vol. VIII, p. 256.
[115] Supra note 20 at 210.

(vi) The states exercise a range of autonomous powers and enjoy some measure of representation in central government through the Council of States.[116]

(vii) Decentralisation in governance is promoted by the 73rd [117] and 74th [118] Constitutional Amendments leading to the creation of a third tier of government *viz.,* Panchayats and Municipalities. Therefore, we can say that Indian federalism is unique and offered a possible solution to many problems. It has been tailored according to the specific needs of the country.

The Use of the word 'Union of Sates' and not the 'Federal of Federation' indicates a uniquely distinctive character and nature of the Indian constitution. The expression 'federal' was avoided due to historic, cultural, social and political experiences.[119] Dr. B.R. Ambedkar had no ambiguities about the federal nature of the constitution and clarified it by saying in the Constituent Assembly: [120]

"*The basic principle of Federation is that the Legislative and Executive authority is partitioned between the Centre and the States not by any law to be made by the Centre but by the constitution itself ... The chief mark of federalism as said lies in the partition of the legislative and executive authority between the Centre and the Units of the constitution. This is the principle embodied in our constitution. There can be no mistake about it."*

3.4 Judicial Interpretation of Indian Federalism

The attitude of the judiciary has always been the characterisation of the Indian system as a federal one with few exceptions in the nascent stage. It has rather followed a two-fold attitude viz.

[116] Art.80, The Constitution of India.
[117] Art. 243 and 243 A-O, The Constitution of India.
[118] Art. 243 P – Z and ZA- ZG, The Constitution of India.
[119] Satish Chandra Srivastava, Nature of Federalism in India 45 (July 2010).
[120] Brij Kishor Sharma, Introduction to constitution of India 40 (PHI, Delhi, 2011).

(i) In contests between government (Central or State one) and individual, it always takes the side of Government's legislative power by the expansive interpretation and upheld the impugned laws.[121]

(ii) In a contest between the Centre and States, the court sided towards the strong Centre leading to undermining of federalism in India. The court followed this strategy to check the exaggerated claims put forward by the States regarding their position, status and powers vis-à-vis the Centre eg. *West Bengal v. Union of India*[122], *the* court has specified it as *"not being true to any traditional pattern of federalism"* to counter the claims of sovereignty. It means that The States would not have legal rights against the over-riding powers of the Union because of the theory of paramountcy or superiority of the Union.

Similarly, in the *State of Rajasthan v. UOI*[123], it was characterized as "more unitary than federal" along with "the appearances" of the federal structure due to largely watered down by the needs of progress and development of the country as per Beg, CJI. A similar pattern was followed in the case of *Karnataka v.UOI*[124] by saying that the Indian Constitution only set up the "pragmatic federalism" which is overlaid by strongly unitary features as per sayings of Beg, CJI.

But before the State of West Bengal case decision in 1963, the court had favoured by labelling the Indian Constitution as federal one eg. in the case of *Automobile Transport v. State of Rajasthan*[125], it was characterized by seven judges Bench saying that it has essential features of a "federal or quasi-federal structure" as per the words of S.K. Das, J.

In the Reference Case of 1965[126], GajendraGadkar, CJI on the behalf of majority judges had characterized the Indian Constitution as a 'Federal Constitution' because all necessary characteristics required are present.

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[121] M.P.Jain, Indian Constitutional Law, LexisNexis Publication, ed. 8th, 2018, 775-786.
[122] State of West Bengal v. Union of India, AIR 1963 SC 1241.
[123] State of Rajasthan v. Union of India, AIR 1977 SC 1361.
[124] State of Karnataka v. Union of India, AIR 1978 SC 68.
[125] Automobile Transport v. State Of Rajasthan, AIR 1962 SC 1406 (1415-16).
[126] Ref. under Art.143, AIR 1965 SC 745 (para. 39).

In 1973, some of the judges in the Full Bench case of Keshvananda[127] "accepted federalism" as one of the "basic features" of the Constitution of India. But it was watered down by Krishna Iyer, J. by saying that it is "an Indo-Anglian version of the Westminster model with quasi-federal adaptations."[128]

But it was rectified by describing our Constitution as "a federal or quasi-federal" by Bhagwati, J. in the case of *Union of India v. Sankalchand*[129].

The above decisions show that the aberrations in the *West Bengal*[130] and *Karnataka*[131] cases are founded on the wrong grounds because pragmatism in federalism is not right as per the views of Bench and Bar. After all, it is the necessity of justifiability[132] of the division of powers is completed by the Constitution.

In a landmark case of *S.R. Bommai v. Union of India*[133] , most of the Judges on the Bench expressed a more balanced view like "Sawant, J. has expressed the federalism as the basic feature of the Indian Constitution." Similarly, Jeevan Reddy, J. has considered it as "one of the principles of governance."[134] This leads to the position that "States are not mere appendages of the Centre and supreme within their allotted spheres which cannot be tampered by the Centre itself". It does not mean that the state has no autonomy.

Similarly, in *UCO Bank v. Dipak Debbarma*[135], the court has stressed the preservation of federal balance by not allowing the transgression of any limitations imposed upon the Centre or the State by the Constitution of India.

Similarly, in *State Bank of India v. Santosh Gupta*[136], the Supreme Court of India has accepted the Special Status of State of J&K on the ground of federal features of the Indian Constitution viz. J&K is a part of this federal structure.

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[127] Keshavananda v. Union of India, AIR 1973 SC 1461.
[128] Shamser Singh v. State of Punjab, AIR 1974 SC 2192 (para. 103), Krishna Iyer, J.
[129] Union of India v. Sankalchand, AIR 1977 SC 1361.
[130] State of West Bengal v. Union of India, AIR 1963 SC 1241.
[131] Supra note 124.
[132] Legal Test of Federalism.
[133] S. R. Bommai v. Union of India, AIR 1994 SC 1918: (1994) SCC 1.
[134] Ibid.
[135] UCO Bank v. Dipak Debbarma , (2017) 2 SCC 585.
[136] State Bank of India v. Santosh Gupta, Civil Appeal Nos. 12240-12246_of 2016.

Similarly, in *Government (NCT of Delhi) v. Union of India*[137], the Constitution Bench of 5 Judges of the Supreme Court held that "LG of the Delhi cannot interfere in every decision of the Delhi government and there is no such need to seek the permission of the LG in all matters and LG had to act as per aid and advise of the Council of Ministers of the Delhi government except on the matters of land, police and public order. Therefore, the Union and the State governments must accommodate a collaborative federal structure by the harmonious coexistence and inter-dependence."

This is how the Indian Judiciary has accepted federalism as a basic feature of the Constitution and as a federal constitution.

3.5 Observations

Based upon the above study it can be easily justified that the Indian Constitution is a federal Constitution encompassing all features which can pass the Legal Test for Federalism. The concept of federalism keeps on changing from the commencement of the Constitution eg. GST is an example where States has equal power to impose a tax. Recently, Supreme Court has stressed the concept of collaborative federalism by harmonious co-existence irrespective of their differences.

In summary, framers of the Constitution have designed it on the three pillars namely, (i) a strong centre, (ii) flexible federation, and (iii) co-operative federalism. These features have been incorporated due to experiences from the problems faced and the solutions undertaken by the federations of the USA, Canada and Australia.

Indian federal constitution is unique by not following the traditional features as proposed by K.C. Wheare because of its unique history and societal problems faced by people of India due to their diversity in culture, language and even religions also.

The Supreme Court of India had justified on several occasions that Indian federalism is a basic structure of the Constitution i.e. it cannot be removed by any amendment of the Parliament of India under Art. 368. Therefore, federalism is an inherent part of the Constitution even though it is not mentioned in any of the provisions of the Indian Constitution. It was also cleared by the statements given by great illuminaries of India like Dr. Ambedkar and Dr. Rajendra Prasad who were in the Constituent Assembly as

[137] Government of NCT Delhi v. Union of India, (2018) 8 SCC501

a Chairman of the Drafting Committee and President of Constituent Assembly respectively (both occupied very honourable positions there).

Therefore, it can be inferred from this study that it is inherently present in the Indian Constitution without any doubt which cannot be deleted out by any person by following any tactics. This is beyond the amendment powers provided under Article 368 of the Indian Constitution and comes under the purview of the doctrine of basic structure. Hence beyond the amending powers of the Indian Parliament also.

Chapter 4: Article 356 and its Improper Invocation by the Central Government

4.1 History of the framing of Article 356

The instinct regarding the framing of Article 356 or the proximate origin of the President's rule in the Indian Constitution originates from Sections 45 and 93 (for the use by Governor-General and Governor respectively) of the Government of India Act, 1935 who especially dealt with the breakdown of the Constitutional system at both levels of the governance. This was done by the Constituent Assembly in the framing of the Constitution by the formation of Articles 188 (concerning Governor's report) and 278[138] (concerning the Proclamation of President's Rule and corresponding to Art. 356).

The framers of the Constitution framed the Articles 355,356 and 365 to meet a contingency or to accommodate the exceptional situation of the breakdown of the constitutional machinery in the State at any time. These come under the head of 'Emergency Provisions' under Part XVII of the Constitution ranging from Articles 352 to 360. Dr. B.R. Ambedkar defended these emergency powers from the experience of other federal systems especially the USA by stating:

"All federal systems including the American are placed in a tight mould of the federation. No matter what the circum- stances, it cannot change its form and shape. It can never become unitary. On the other hand, the Draft Constitution can be both unitary as well as federal according to the requirements of time and circumstances. In normal times it is framed to work as the federal system. But in times of war, it is so designed as to make it work as though it was a unitary system. Such power of converting itself into a unitary state, no federation possesses."[139]

Raising the point regarding the possibility of misuse of these powers, Dr. Ambedkar stated:

"I do not altogether deny that there is the possibility of the Articles being abused or employed for political purposes. But that objection applies to every part of the

[138] Art. 188 and 278, The Constitution of India, 1949.
[139] CAD, Vol. VII, p. 34.

Constitution which gives power to the Centre to override the Provinces. The proper thing we ought to expect is that such Articles will never be called into operation and that they would remain a dead letter."[140]

This Article 356 is not applicable in all cases. Therefore to accommodate this situation similar provisions have been made under different Statutes viz.

(i) Section 92 of the Constitution of Jammu & Kashmir, for the State of Jammu & Kashmir,

(ii) Section 51 of the Government of Union Territories Act, 1963 for the Union Territories and

(iii) Article 239-AB for Delhi under the Constitution of India.

Any State under the rule of Art. 356 is also known by the terms like "Governor's Rule" or "Central Rule" or "New Delhi Rule" or "Presidential Administration" or "Governor's administration" or "President's Rule".[141]

4.2 Rationale of Art. 356 in Indian Constitution

Art. 356 empowered the Union government to take over governance (powers) of the State in its own hands by issuing a Proclamation in the name of the President of India. The rationale regarding the framing of this Article in the Constitution can be followed under these four heads viz.:

(i) Objectives of the Union of India: To avoid communalism, regionalism and maintaining the grip hold on the states in case of exceptional circumstances of war and crisis, it was necessary to maintain the spirit of the Union of India.[142]

(ii) Nature of State Autonomy: In absence of any agreement or compact between the Union of India and its Constituent States, these states have not moral or legal rights to secede out from the Union of India.[143] Even after this these States have been given autonomy in the terms of political independence

[140] CAD, Vol. IX, p. 177.
[141] H.M.Rajashekara, President's Rule in the Indian States, Indian Journal of Political Science, December 1987, Vol. 48, No. 4, p. 633.
[142] Art. 1, The Constitution of India.
[143] CAD, Vol. VII, p. 43.

and self-government[144] that is supported by the decision of the Supreme Court in *S.R. Bommai v. Union of India*[145]. Dr. Ambedkar supported the Constituent Assembly by stating words viz.

"The Drafting Committee wanted to make it clear that though India was to be a federation, ... not the result of an agreement by the States to join in a Federation and that the Federation not being the result of an agreement, no States has right to secede from it."[146]

(iii) Duty of Union towards the States: In pursuance of the objectives of the Indian Union, a duty to protect the States against external aggression and internal disturbance is given in the terms of Art.356 i.e. to ensure the governance of the States in these exceptional circumstances following the provisions of the Constitution.

(iv) Justification of the Art. 356: In consideration of the above-mentioned duty and exceptional circumstances the interference by the Union government in the arena of the State government powers is justified or not even encroachment in the area of State. It takes instinct from Section 93 of the Government of India Act, 1935. It is supported by the wordings of Dr. Ambedkar as follows:

"*...to make it quite clear that Article 278 and 278 A [corresponding to Article 356 and 357] are not to be deemed as a wanton invasion by the Centre upon the authority of provinces, we propose to introduce Article 277-A [corresponding to Article 355]."****[147]***

4.3 Constitutional Contours of Art. 356

Article 356 is contained in Part XVIII of the Constitution under the head "Emergency Provisions" with a marginal note "Provisions in case of failure of constitutional machinery in States." It is cleared that it is to be invoked in an emergent situation i.e. the failure of constitutional machinery. This article is divided into 5 clauses. Clause 1

[144] 4A Words and Phrases 662 (Permanent ed. 1658 to Date 1969); 2 New Survey of Universal Knowledge Encyclopaedia Britannica 789 (1959) and 2 The Encyclopaedia American (The International Reference Work First published in 1829) 667 (1960).
[145] Supra note 133 at para. 365 (9).
[146] CAD, Vol. XI, p. 976.
[147] CAD, Vol. IX., p. 133.

deals with the condition for invocation of this article and its consequences. Other clauses of the article deal with the procedure for approval and extension of the duration of the invocation.

It is clear from the wordings of Article 356 (1) that Presidential Proclamation can be issued only when the President is satisfied that in the State a situation has arisen where the government of the State cannot be carried on following the provisions of the Constitution and this satisfaction is formed either on the report from the Governor of the State or otherwise. The Proclamation issued under this article is popularly known as President's rule. The provision of this Clause 1 of Article 356 may be detailed under the following main heads: (1) Presidential Satisfaction and (2) The Failure of Constitutional Machinery.

4.3.1 Presidential Satisfaction

After 42nd Amendment, 1976 of the Constitution, there is the complete exclusion of independent decisions by the President except to send back for the reconsideration of the advice given by the Council of Ministers as per the Proviso under Art.74 (1) of the Constitution.

4.3.1.1 Scope for Judicial Review of Presidential Satisfaction

There had always been a tussle between the executive and the judiciary regarding the issue of 'Judicial Review' upon advice given to the President by the Council of Ministers and the court was barred to interfere in it on the ground of Article 74 (2).

Before the judgement in the *State of Rajasthan v. Union of India*[148], there was no scope of the power of judicial review as stated by Supreme Court and High Courts from time to time in different case laws eg. *Rao Virender Singh v. Association of India*[149]and *Shamsher Singh v. State of Punjab*[150] etc.

But, in the *State of Rajasthan* v. *Union of India*, the scope for judicial review of the Presidential satisfaction was opened up based on the grounds viz.:

"(i) Where the order was malafide, or

[148] State of Rajasthan v. Union of India , AIR 977 SC 1361
[149] Rao Virender Singh v. Association of India, available at: https://indiankanoon.org/doc/138995/, last seen on 12/5/2021.
[150] Shamsher Singh v. State of Punjab, AIR 1975 1 SCR 814.

(ii) Where the authority passing the order took into account extraneous or irrelevant consideration, or

(iii)Where authority passing the order failed to take into account other relevant considerations."

All the seven judges were in consonance on the above three grounds. This decision in the Rajasthan case had created a landmark by establishing a new starting of judicial review of Presidential satisfaction. It was done despite the bar expressed by Art.365 (5) on the judicial review. After this decision, Clause 5 had to be repealed by the Constitution 44th Amendment Act, 1978 and thus removal of the cap put upon judicial power by the Legislature. But this tussle continued between the government and judiciary based on the plea of "Subjectivity" by the government and hence avoiding judicial review by the court, but of no use.

Even the above decision was reinforced strongly by the Supreme Court in *S.R. Bommai v. Union of India*[151], where it was considered thoroughly and concluded that Presidential satisfaction is under the sweep of judicial review. It will be done by reviewing the material on which basis Presidential satisfaction is finalised, not upon the advice tendered to the President by the executive. It is done by removing the ambiguity that material upon which advice was prepared is out of the purview of Art. 74 (2) and privilege provided under Sections 123 and 124 of the Indian Evidence Act, 1872. In response to the plea that advice comprises material and therefore is beyond the scope of judicial review, B.P. Jeevan Reddy J. clarified by saying:[152] *"The material placed before the President by the Council of Ministers does not thereby become part of advice. Advice is what is based on the said material. Material is not advisable if the advice is tendered in writing, in such a case that writing is the advice and is covered by the protection provided by Article 74 (2).*

4.3.1.2 Grounds for Presidential Satisfaction

There are two grounds mentioned in Art. 356 (1) regarding this satisfaction viz**. (a) Governor's Report and (b) or Otherwise**

[151] Supra note 133.
[152] Ibid, pp.2072-73 para 257.

(a) **Governor's Report:** It is the main source of Presidential satisfaction because Governor is the main channel between the Union and States. The position of the Governor was described as a key factor in the *Bommai*[153] *case.* About the Governor's obligation, while sending the report, it was observed in the Bommai case that: *"Governor is a very high constitutional functionary. He is supposed to act fairly and honestly consistent with his oath."*[154]

(b) Or Otherwise: It is considered only when the Governor's Report is not reliable because of legal malafides i.e. the President himself is also competent to assess the situation in the State when the Governor is unable or unwilling to report. But it should not defy the report of Governor otherwise it will constitute prima facie evidence of improper invocation of Art. 356. The Framers' of the Constitution did not specify any source which could come under the term "otherwise". The Supreme Court of India in *State of Karnataka* v. *Union of India* upheld the information received from the Commission of Inquiry under the sweep of "otherwise".[155]

4.3.2 The Failure of Constitutional Machinery

(1) The Failure of Constitutional Machinery:

The failure of constitutional machinery is the primary condition for the Proclamation of the Presidential Rule in any State. But every such breach of constitutional provision does not constitute the basis of this ground. This term was not expressly described in the Constitution as per Dr. Ambedkar viz. *"The expression "failure of machinery" I find has been used in the Government of India Act, 1935. Everybody must be quite familiar therefore with its de facto and de jure meaning."*[156]

It is not possible to provide an exclusive definition of this term. As per the Sarkaria Commission report viz. *"A failure of constitutional machinery may occur in many ways. Factors which contribute to such a situation are diverse and imponderable. It*

[153] Ibid.
[154] Ibid.
[155] State of Karnataka v. Union of India , AIR 1978 S C 68 at 95, para 40.
[156] CAD, Vol. IX, p. 177.

is, therefore, difficult to give an exhaustive catalogue of all situations which would fall within the sweep of the phrase.... "[157].

A similar difficulty was also observed in case of *Bommai* case.[158]

But the Sarkaria Commission categorised these in the following types: **(a)** Political Crisis, **(b)** Internal Subversion, **(c)** Physical Breakdown, **(d)** Non-compliance with the Union's Direction and **(e)** Reorganisation of States.

4.3.2.1 Political Crisis

It is a situation created when no political party or coalition of parties is not able to form the Ministry either after an election or at any stage during the tenure of the Assembly or if the Ministry fails to carry out its responsibility to the Assembly, it will lead to the failure of constitutional machinery. Because these situations arise due to political failure or dead-lock or crisis and these may be termed as "political crisis".

The Sarkaria Commission has opinioned that the failure of constitutional machinery due to a political crisis may occur in the following different modes:

(i) When after a general election, no party or coalition of parties can secure an absolute majority and is unable to form the government by acquiring the confidence of the assembly.[159]

(ii) Where a ministry resigns or is dismissed due to loss of its majority on the floor of the house and no alternative government can be formed.[160]

(iii) Where the party in a majority refuses to form or continue the ministry and all possible alternatives to form a government have been failed.[161]

The situation enumerated as (ii) and (iii) were also considered under the head of political crisis by the Administrative Reforms Commission.[162]

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[157] The Commission was set up under the chairmanship of Shri R.S. Sarkaria, a retired judge of the Supreme Court, by the Government of India vide notification dated 9th June 1983 to examine and review the working of the existing arrangement between the Union and State and recommend such changes or other measures as may be appropriate. The Report was published in 1988 entitled as "Report of Commission on Centre-State Relations" (Part I), p. 171, para 6.4.01.
[158] Supra note 157.
[159] Id at 171, para 6.4.02 (i).
[160] Id, para 6.4.02 (ii).
[161] Id, para 6.4.02 (iii).

4.3.2.2 Internal Subversion

It occurs only when the government of the State is carried against the provisions of the Constitution. The following situations are contributing to this situation:

(i) Where the government of a State having majority support in the Assembly, has been continuing against the provisions of the Constitution and the law.[163]

(ii)Where the government of a State intentionally creates a deadlock or continues a policy and bring the system of responsible government to a halt.[164]

(iii) Where the State government, although superficially acting within the constitutional forms, intentionally acting against the principles and conventions of responsible government.[165]

(iv)Where a ministry, even though properly constituted, violates the provision of the Constitution[166] and this was also recognized by the Administrative Reforms Commission.[167]

(v) Where the State government is creating or supporting a violent revolution or revolt with or without the support of a foreign power.[168]

4.3.2.3 Physical Breakdown

The following are types of physical break-down constituting a failure of constitutional machinery:

(i) Where a properly constituted government either refuses or is unable to deal with the situation of internal disturbance leading to paralysis of the administration and endangers the security of the State.[169]

(ii) Where the State Government is unwilling or unable to exercise its governmental power to deal with the situation of a natural calamity such as an earthquake, cyclone, epidemic and flood *etc.*[170]

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[162] Ist Report of Administrative Reform Commission, Sept. 1967, p. 276.
[163] Supra note 157, p.172, para 6.4.10 (i).
[164] Id, para 6.4.10 (ii).
[165] Id, para 6.4.10 (iii).
[166] Id, para 6.4.10 (iv).
[167] Supra note 162.
[168] Supra note 157, p.172, para 6.4.10 (v).
[169] Id, para 6.4.11 (i).

In the case of *re A. Seeramulu*[171], these situations were also held as the failure of constitutional machinery.

The internal disturbance may also be considered a physical breakdown. Article 355 comprises the duty of protection of states against internal disturbance. But after June 20, 1979, it comes under Article 356 due to the substitution of the term "Armed rebellion" with the term "internal disturbance" under Article 352 by the 44th Constitution Amendment Act, 1978. There is a difference between a situation of public disorder and internal disturbance in both terms of degree and kind. The former involves minor breaches of the peace of purely local importance while, the latter is an aggravated form of public disorder which endangers the security of the State[172] and if leads to paralyses of the State administration and the Government refuses to deal with the situation, it will be considered as the abdication of governmental power which can be assessed as a physical breakdown.

4.3.2.4 Non-compliance with the Union's Direction

Article 365 of the Constitution specifies this situation of non-compliance with the Union's directions as contemplated in Art.356. Each non-compliance with the directions of the Union will not amount to failure of constitutional machinery because all directions cannot be weighed equally eg. directions concerning the means of communication of military importance under article 257 (2) and directions for the implementation of the recommendations of Language Commission under Article 344 (6) cannot be placed at the equal pedestal. The extent of the non-compliance affecting the Union-State relations will finally determine whether it is the failure of constitutional machinery or not. The phrase "it shall be lawful for the President to hold" shows that it depends on the application of the mind by the President to weigh any non-compliance in the particular case whether it amounts to a failure of constitutional machinery.

But after the warning or notice by the Union government, the State government either applies the correctives to comply with the direction or satisfies the Union that the

[170] Id at 172, para 6.4.11 (ii).
[171] re A. Seeramulu ,AIR 1974 AP 106 at 110, para 9.
[172] Supra note 157, p.170, para 6.3.13.

warning or direction was based on incorrect facts, it shall not be proper for the President to apply the article 356 in such a situation.[173]

4.3.2.5 Reorganisation of States

When a Union Territory was made a full-fledged State, or a new State was created then due to lack of an appropriate legislature the Presidential rule was imposed and applied in these 4 cases eg. in Kerala – November 1, 1956, when the new State of Kerala was created and Manipur and Tripura – January 21, 1972, when these Union Territories were made a full-fledged State and the recent case of J&K reorganisation of August 5, 2019.

But it may not always be a conclusive ground for action under article 356. In all the above four mentioned instances, a Presidential rule was already in an application there.

4.4 Misuse of Art. 356 by the Central Government

The exercise of power under article 356 can be said to be fully justified barely only in less than half of the cases. The situations of misuse of the application may be divided into the following groups mainly based on the Sarkaria Commission Report[174] : 1. Non-issuance of Warning to Errant State, 2. Dismissal of Ministry Commanding Majority, 3. Denial of Opportunity to Claimant, 4. Non-formation of Caretaker Government and 5.Wholesale Dissolution of the Assemblies.

4.4.1 Non-issuance of Warning of Errant State

The Framers of the Constitution intended that the Union should issue a prior warning or opportunity before taking any action against errant State under article 356.[175] Such a warning can be dispensed only in case of extreme urgency where failure on the part of the Union to take immediate action will lead to disastrous consequences.[176]

But after the warning or notice by the Union government, the State government either applies the correctives to comply with the direction or satisfies the Union that the

[173] Id at 173, para 6.5.01.
[174] Id at 174-177.
[175] CAD, Vol. IX, p. 134.
[176] Supra note 157, p.173, para 6.5.01.

warning or direction was based on incorrect facts, it shall not be proper for the President to apply the article 356 in such a situation.[177]

The issuance of a prior warning should be considered as a precautionary measure only. The power conferred under article 356 is a drastic one. It is, therefore desirable that a prior warning or opportunity be given to the errant State. The Framers of the Constitution intended that the Union should adopt some precautions before taking any action against errant State under article 356.[122]

Therefore, the use of power conferred under Article 356 will be improper if no prior warning or opportunity is given to the errant State to correct itself. Such a warning can be dispensed only in case of extreme urgency where failure on the part of the Union to take immediate action will lead to disastrous consequences.[123]

Where in response to the prior warning or notice to an informal or formal direction under articles 256, 257, *etc*., the State government either applies the correctives and thus, complies with the direction of or satisfies the Union government that the warning or direction was based on incorrect facts, it shall not be proper for the President to hold that a situation contemplated in article 356 has arisen.[124]

It may be submitted that not issuance of prior may not be considered as a conclusive ground to hold a Presidential proclamation improper. The issuance of a prior warning should be considered as a precautionary measure only.

4.4.2 Dismissal of Ministry Commanding Majority

Here article 356 is invoked to deal with intra-party problems or for totally different situations not allowed under the scheme of this article.[125]These following situations may be included in this category viz.:

(1) It is used to sort out internal differences or intra-party problems of the ruling party.[178]

(2) It is used merely on the ground of allegations of corruption or mal-administration against the elected government.[179] The Framers of the Constitution were against the application of this article upon the lacking of good government in a State.[180]

[177] Id, para 6.5.01.
[178] Id, para 6.5.01(viii).

(3) Where the Governor declines to dissolve the Assembly despite the advice of a duly constituted ministry which has not been defeated on the floor of the House and without allowing the ministry to demonstrate its majority support through the floor test and recommends the Presidential rule upon the basis of his subjective assessment only that the ministry no longer commands the confidence of the House.[181]

(4) Where Art. 356 is utilised to resolve a breakdown in law and order because the maintenance of public order (except the use of the armed forces of the Union in aid of the civil power) is subject matter allotted to States under Entry I, List II.[182]

(5) Where in a situation of internal disturbance not amounting to an abdication of its governmental powers by the State government, all possible means to avert the situation have not been exhausted by the Union in the discharge of its duty imposed under article 355.[183]

(6) Where it is invoked based on caste, creed and religion of the Chief Minister, as was clarified in the *Bommai case.*[184]

(7) Where it is invoked for over-taking the duly constituted ministry and dissolving the Assembly on the only ground that in the general elections to Lok Sabha, the ruling party in the State(s) has suffered clear defeat[185] as occurred in 1977[186] and 1980.[187]

(8) Where it is used on the sole ground of stringent financial exigencies of the States.[188]

(9) Where it is invoked for a purpose extraneous or irrelevant to the one for which it has been conferred by the Constitution, would be vitiated by legal malafides.[189]

4.4.3 Denial of Opportunity to Claimant

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[179] Id, para 6.5.01(i) & (x).
[180] CAD, Vol. IX, p. 134.
[181] Supra note 157 at 173 para 6.5.01(iii).
[182] Id at , para 6.3.11 – 6.3.13.
[183] Id at 173 para 6.5.01(v).
[184] Supra note 133 at 2035 para 157.
[185] Supra note 157 at 173 para 6.5.01(iv).
[186] XXIII Asian Recorder (1977) 13766.
[187] XXVI Asian Recorder (1980) 15367.
[188] Supra note 157 at 174 para 6.5.01(ix).
[189] Id, para 6.5.01(ix).

It contains the following types of situations:

When the outgoing Chief Minister is denied the opportunity to prove his majority in the House after the support to a ministry is claimed to have been withdrawn.

(i) When there is a denial of the opportunity to the claimant form a government after the general elections.

(ii) Where the claimant is denied the opportunity to form an alternative government after a ministry resigns or is dismissed on losing its majority support in the Assembly.[190]

4.4.4 Non-formation of Caretaker Government

It is found when the formation of a stable government is not possible and fresh election becomes a necessity of the time but no caretaker government is formed.[191]

4.4.5 Wholesale Dissolution of Assemblies

When Legislative Assemblies of 9 States were dissolved simultaneously twice in 1977 and 1980 and Art.356 was imposed on the sole ground that in the election to Lok Sabha, the ruling party in the State has suffered a massive defeat. Article 356 was first applied on April 30, 1977,[192] for the dissolution of the Legislative Assemblies of Punjab, Haryana, H.P., U.P., Bihar, W.B., Orrisa, M.P. and Rajasthan and secondly on the 17th February 1980[193] for the dissolution of the Legislative Assemblies of U.P., M.P., Bihar, Orissa, Gujarat, Maharashtra, T.N., Punjab and Rajasthan for dissolving Assemblies of nine States simultaneously are such kind of instances.

In the *Bommai Case*, Ahmadi J. has justified this stand by the following observation:[194]

"It is a matter of common knowledge that people vote for different political parties at the centre and in the States and, therefore, if a political party with an ideology different from the ideology of the political party in power in any State comes to power in the Centre, the Central Government would not be justified in exercising power

[190] Id, para 6.5.01(ii).
[191] Id at 177, para 6.6.32(ii).
[192] XXIII Asian Recorder (1977) 13766.
[193] XXVI Asian Recorder (1980) 15367.
[194] Supra note 133 at 1953 para13.

under Article 356(1) unless it is shown that the ideology of the political party in power in the State is inconsistent with the constitutional philosophy..."

4.5 Safeguards Against Abuse of the Power

The various safeguards have been suggested to check the abuse of the power conferred by the misuse of Article 356. These may be dealt with under the following heads: 1. Framers' Approach, 2. Constitutional Mandate, 3. Recommendations of the Sarkaria Commission, 4. Recommendations of the Venkatachaliah Commission, 5. Recommendations of Punchhi Commission, 6. The approach of the Apex Court and 7. The approach of the Inter-State Council.

4.5.1 Framers' Approach

The Framers of the Constitution had clarified that two precautions should be adopted before the invocation of Article 356. As per the statement of Dr. Ambedkar regarding this: [195]

"... the President ... will take proper precautions before actually suspending the administration of the provinces. I hope the first thing he will do would be to issue a mere warning to a province that has erred, that things were not happening in the way in which they were intended to happen in the Constitution. If that warning fails, the second thing for him to do will be to order an election allowing the people of the province to settle matters by themselves. It is only when these two remedies fail that he would resort to this Article."

The application of the first precaution is possible within a short time and it may provide one more chance to errant State to work upon the error. But, it cannot be a primary condition to invoke the article. The second precaution is not always appropriate because the failure of constitutional machinery is an emergency requiring emergent action.

4.5.2 Constitutional Mandate

This can be studied in the two-part viz. (a) Parliamentary approval and (b) Presidential requirement to reconsider the advice of the Cabinet.

[195] CAD, Vol. IX, p. 177.

(a) Parliamentary Approval

The Parliamentary approval works as a safeguard against the abuse of power provided by this article because as per Art.356(3), every proclamation issued has to be laid before each House of Parliament and ceases to operate at the expiry of two months unless it has been approved by both Houses and this proceeding is also published.

(b) Presidential Requirement to Reconsider the Advice

According to the proviso to this article, the President may send back such advice as tendered by the Council of Ministers under Article 74 (1) for reconsideration once and after that, he is constitutionally bound to act following the advice tendered after reconsideration. This may hesitate the Council of Ministers while tendering advice to invoke article 356 for extraneous purposes.

The President sent back the advice on two occasions viz. – 1. U.P. Case - October 22, 1997, and 2. Bihar Case - September 25, 1998. Here on both occasions, the Council of Ministers did not press its advice again before the President.

4.5.3 Recommendations of the Sarkaria Commission

The Sarkaria Commission recommended the following 8 safeguards to prevent abuse of the power conferred by Article 356. As per the wordings of the report viz.

(1) "*Article 356 should be invoked very sparingly as a measure of last resort when all available alternatives fail to prevent or rectify a breakdown of constitutional machinery in the State.*[196]

(2) A warning should be issued to the errant State that it is not carrying on the government of the State following the provisions of the Constitution. However, this may not be possible in a situation when denial of immediate action would lead to disastrous consequences.[197]

(3)When external aggression or internal disturbance paralyses the State administration creating a situation drifting towards a potential breakdown of the constitutional machinery of the State, all alternative courses for discharging

[196] Supra note 157, p. 179, para 6.8.01.
[197] Id, para 6.8.02.

paramount responsibility under article 355 should be exhausted to contain the situation.[194198]

(4) (a) In a situation of political breakdown, the Governor should explore all possibilities of having a government enjoying majority support. If an installation of such a government is not possible and fresh elections can be held without avoidable delay, he should ask the outgoing ministry, if there is one, to continue as a caretaker government. But, this guideline is applicable only when the ministry was defeated solely on a major policy issue, unconnected with any allegations of mal-administration or corruption and is agreeable to continue. He should then dissolve the Assembly.[199]

(4) (b) If the ingredients described above are absent, it would not be proper for the Governor to dissolve the assembly and install a caretaker government. He should recommend Presidential rule without dissolving the Assembly.[200]

(5) Every proclamation should be placed before each house of Parliament at the earliest, in any case before the expiry of two month period contemplated in cl. (3) of Article 356.[201]

(6) The Governor's report should be a speaking document containing a precise and clear statement of all material facts and grounds based on which the President may satisfy himself as to the existence or otherwise of the situation contemplated in article 356.[202]

(7) The Governor's report, based on which a Proclamation is issued under Art.356 (1), should be given wide publicity in all the media and in full.[203]

(8) Normally, the Presidential rule should be issued based on the Governor's report under article 356 (1).[204]

Besides these safeguards, the Commission also recommended the following 4 amendments to be made in Article 356:

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[198] Id, para 6.8.03.
[199] Id, para 6.8.04 (a).
[200] I*d*, para 6.8.04 (b).
[201] Id, para 6.8.05.
[202] Id, para 6.8.09.
[203] Id, para 6.8.10.
[204] Id, para 6.8.11.

(1) The State Legislative Assembly should not be dissolved either by the Governor or the President before the proclamation issued under Article 356 (1) has been laid before Parliament and it has had an opportunity to consider it. Article 356 should be suitably amended to ensure this.[205]

(2) Safeguards corresponding to cells. (7) and (8) of Article 352 dealing with the provision that the President shall revoke a proclamation of emergency issued under cl. (1) or any proclamation varying it if the Lok Sabha passes a resolution disapproving the proclamation or continuance of such proclamation and procedure thereof should be incorporated in article 356 to enable Parliament to review the continuance of a proclamation.[206]

(3) To make the remedy of judicial review on the ground of legal malafides a little more meaningful, it should be provided through an appropriate amendment that the material facts and grounds on which article 356 (1) is invoked should be made an integral part of the proclamation notwithstanding anything in cl. (2) of Article 74.[207]

(4) *The word 'and' occurring between sub-clauses (a) and (b) in cl. (5) of Article 356 should be substituted by 'or.'*[208]*"*

4.5.4 Recommendations of the Venkatachaliah Commission

Similarly, the Venkatachaliah Commission has recommended 6 safeguards to contain the abuse of this power conferred by Article 356. As per the wordings of Commission's Report, the safeguards are as follows:

(1) "Article 356 must be used sparingly only as a remedy of the last resort.[209]

(2) In case of political breakdown, the concerned State should be allowed to explain its position and redress the situation before invoking article 356 unless the situation is such that following the above course would not be in the

[205] Id, para 6.8.06.
[206] Id, para 6.8.07.
[207] Id, para 6.8.08.
[208] Id, para 6.8.12.
[209] The Commission was constituted under chairmanship of Shri M.N. Venkatachalia, the former Chief Justice of India, by a resolution of the Government of India dated 22nd February 2000 (Vol. I at 1 para 1.1.1) to examine as to how the Constitution can respond to the changing needs of efficient, smooth and effective system of governance and recommend changes (at 2-3 para 1.3.1). The Report was submitted to the Government on the 31st March 2002 (at vii) entitled as "Report of the National Commission to Review the Working of the Constitution" (Vol. I), p.169, para 8.19.2.

interest of the security of State, or defence of the country, or for other reasons necessitating urgent action.[210]

(3) The question of whether the ministry in a State has lost the confidence of the Assembly or not, should be decided only on the floor of the Assembly and nowhere else.[211]

(4) The Governor should not be allowed to dismiss the ministry so long as it enjoys the confidence of the House. The Governor can dismiss it only when a Chief Minister refuses to resign after it is defeated on a motion of no-confidence.[212]

(5) In a situation of political breakdown, the Governor should explore all possibilities of having a government enjoying majority support in the Assembly. If the installation of such a government is not possible and fresh elections can be held without avoidable delay, the Governor should ask the outgoing ministry to continue as a caretaker government, provided the ministry was defeated solely on an issue unconnected with any allegations of mal-administration or corruption and is agreeable to continue. He should then dissolve, the Assembly.[213]

(6) The Governor's report should be a speaking document containing a precise and clear statement of all material facts and grounds based on which the President may satisfy himself as to the existence or otherwise of the situation contemplated in article 356."[214]

Here these four safeguards out of six- (1), (2), (5) and (6) have also been recommended by the Sarkaria Commission.[215]

The Commission also recommended regarding these 3 amendments to be made in article 356 viz.:

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[210] Ibid, para 8.19.5.
[211] Supra note 209, p. 170, para 8.20.3.
[212] Ibid.
[213] Ibid.
[214] Ibid at 171, para 8.20.5.
[215] Supra note 157, p. 179, para 6.8.01, .02, .04 and at 180, para 6.8.09.

(1) *"The word 'and' between sub-clause (a) and (b) of clause (5) of Article 356 should be substituted by 'or' so that Presidential rule may be continued if elections cannot be held even without the State is under a Proclamation of Emergency.*[216]

(2) *Clauses (6) and (7) under article 356 may be added on the line of clauses (7) and (8) of Article 352 to review the continuance of the proclamation and to restore the democratic process earlier than the expiry of the stipulated period.*[217]

(3) *Article 356 should be amended to ensure that the Assembly should not be dissolved either by the Governor or the President before the proclamation issued under the article has been laid before Parliament and it has had an opportunity to consider it."*[218]

All the above amendments have also been recommended by the Sarkaria Commission.[219]

4.5.4 Recommendations of Punchhi Commission

The Punchhi Commission[220] referred recommendations are based upon the guidelines laid down in the *Bommai Case* in its report and said that "*the provisions of articles 352 and 356 should be applied only as a measure of last resort.*[221] *The Commission further recommended a constitutional or legal framework to deal with the situations which require intervention by the Centre without invoking the extreme steps under articles 352 and 356 and the Commission called this kind of situation a "Localised Emergency" which would ensure that the Legislative assembly would not be dissolved and the State government can continue to function with a mechanism to let the Central government respond to the issue specifically and locally.*[222]

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[216] Id at 171, para 8.21.3.
[217] Id at 172, para 8.21.4.
[218] Id at 173, para 8.22.3.
[219] Id at 180, para 6.8.06, .07 and .12.
[220] The commission was constituted in 2007 under the Chairmanship of Justice Madan Mohan Punchhi (Rtd.), former Chief Justice of India to examine Centre-State relations along with the possibility of giving sweeping powers to the Centre for suo moto deployment of Central forces in States and investigations of crimes affecting national security. The report of the commission was published in 2010 as report of commission on Centre-State relations.
[221] The report of the commission was published in 2010 as report of commission on Centre-State relations, vol. II Chapter 11at 226 para 11.11.01.
[222] Ibid.

The Commission also recommended suitable amendments in the Constitution to incorporate the guidelines based upon the basis of the judgement of the Supreme Court in the Bommai case."[223]

4.5.6 The Approach of the Apex Court

Presidential satisfaction as provided in Article 356 is the satisfaction of the Union Cabinet in the name of the President and courts are excluded to review it on the ground of Article 74(2). Clause 5 was inserted to Article 356 by the Constitution (Thirty-eight Amendment) Act, 1975 for eliminating the chance of its judicial review. But the Supreme Court developed it for the first time in the *State of Rajasthan* v. *Union of India*[224] the scope for its judicial review Presidential satisfaction and hence after the decision of this case, cl. (5) was repealed by the Constitution (Forty-fourth Amendment) Act, 1978.

In *S.R. Bommai* v. *Union of India,* the Court specified the following guidelines as safeguards against abuse of the power conferred under Article 356 viz.:

(1) The proclamation under Article 356 (1) comes under the aegis of judicial review and it can be stroked down by the Supreme Court or the High Court if it is found to be malafide or based on wholly irrelevant or extraneous grounds.[225]

(2) After the striking down of the proclamation by the court, it has the power to restore the dismissed government and revive or reactivate the Assembly whether it was dissolved or kept under suspended animation.[226]

(3) The Assembly shall be dissolved only after the proclamation is approved by both the Houses of Parliament under Art. 356(3) and not before that. It can only be suspended until such approval.[227]This recommendation was also made for appropriate amendment in Article 356 to that effect.[228]

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[223] Ibid, p. 225-26, para 11.10.01.
[224] State of Rajasthan v. Union of India, AIR 1977, p. 1389 para 59, 1400 para 127, 1414-15 para 144, 1420 para 170, 1423-24 para 180, 1439-40 para 206&207 and 1376 para 28.
[225] Supra note 133 at 2003 para 91 (I) and 2112 para 365 (7).
[226] Id, p. 2004 para 91 (V) and 2113 para 365 (8).
[227] Id at 2004 para 91 (IV) and 2112 para 365 (3).
[228] Supra note 157, p. 179, para 6.8.06.

(4) In case the proclamation is not approved by the both Houses of Parliament, the dismissed government will get restored and the suspended Assembly gets reactivated.[229]

(5) The holding of the test on the floor of the House is the proper course for testing the strength is in all those cases where the majority to the government is claimed to have been withdrawn.[230]

Similarly in *Rameshwar Prasad* v. *Union of India*, the Court decided that it can revive the Legislative Assembly kept in suspended animation or dissolved and restore the dismissed government upon the striking down of the proclamation issued under Article 356[231] eg. on January 26, 2016 government in the State of Arunachal Pradesh, an elected government (Nabam Tuki government) was toppled down for political consideration. But that was restored by the Supreme Court.[232] This is a landmark judgement because the government was restored by the removal of a successor government (Khalikho government) present in that place.

Similarly, the presidential rule was imposed in Uttarakhand on March 27, 2016, to topple the State government headed by Harish Rawat without allowing proving the majority while the outgoing Chief Minister was ready to prove his strength.[233] This Presidential proclamation was challenged by the Harish Rawat in the Uttarakhand High Court which quashed the proclamation on April 21, 2016, and restored the dismissed government because of the support by the *Bommai Case* judgement. The Court also directed him to seek the vote of confidence on April 29, 2016, on the floor of the house.[234]

But the Union government challenged the above ruling of the high court.[235] The Supreme Court stayed the order of the high court till 27th April because of the reason that judgement was not in the public domain and directed the high court to release the

[229] Id at 2112, para 365 (5)(a).
[230] Id at 1988, para 77.
[231] Rameshwar Prasad v. Union of India, AIR 2006 SC 980 at 995-96 para 21.
[232] Nabam Rabia and Others v. Deputy Speaker and Others, Supreme Court July 13, 2016 para 196 (III) and (IV).
[233] Harish Chandra Singh Rawat v. Union of India, Uttarakhand high court April 21, 2016 para 3.
[234] XXXIX Asian Recorder (1993), p. 22818.
[235] The Hindu, April 23, 2016.

signed judgement to the parties by April 26.[236] As per the order of the court, May 6 was fixed for a floor test to be held on May 10 for the outgoing Chief Minister (Harish Rawat) to prove his majority under the supervision of the Court.[237] The majority was obtained in this test and hence Presidential Rule had to be revoked out with reinstating of Rawat's Government.

4.5.7 The Approach of the Inter-State Council

"If at any time it appears to the President that the public interests would be served by the establishment of such a council charged with the duty of –

(a) inquiring into and advising upon disputes which may have arisen between States;

(b) investigating and discussing subjects in which some or all of the States, or the Union and the States have a common interest; or

(c) Making recommendations upon any such subject for the better coordination of policy and action concerning the subject, it shall be lawful for the President to establish such a council along with its duties and procedure."[238]

The Administration Reforms Commission also recommended the constitution of an Inter-State Council for the discussion and resolution of the problems of Centre-State relations as and when they arise.[239]

There was the consensus in the 8th meeting of the Inter-State Council that the safeguards recommended by the Sarkaria Commission and guidelines laid down by the Supreme Court in the *Bommai* case against misuse of the provision should be incorporated in the Constitution.[240]

4.6 Observations

Art. 356 was included by the framers of the Constitution for facing the typical unwarranted situations only, not for such non-judicious use of power indicating the irrational and arbitrary use of the power by the Centre for its political gain while putting at the stake progress of the nation. This is the abuse of powers by the Centre

[236] Ibid, front page.
[237] Petition for special leave to Appeal No. 11567/2016 called on for hearing on 9-5-2016 para 1.
[238] Art. 263, The Consitution of India.
[239] Administraitve Reforms Commission Report on Centre-State Relations (1969) at ii.
[240] The Hindustan Times (New Delhi) August 30, 2003 at 9.

given under the Constitution of India i.e. misuse due to over-centralisation of power is there.

Several recommendations and safeguards have been placed there from various Commissions reports and judgement of the Supreme Court also instructed the Centre to follow the guidelines as provided in the *Bommai* case. Similarly, amendments have been proposed in different clauses of Art. 356 for its improved application by the Centre.

Similarly, power of judicial review is also present with the Supreme Court from the decision of *State of Rajasthan*[241] case of and *Bommai*[242] case reinforced this decision by further in the form of consideration of the material on basis of which advice is given to President as to be put before the Court while under judicial review.

Therefore, it can be concluded that the application of mind by the President should be done for its rational use and not able to put himself behind the veil of "subjectivity" for ignoring the wrong application of Art. 356 by him.

This is how over-centralisation is a basic cause root of the problem and it can be minimized or solved out as per following of the various recommendations and safeguards of the above-mentioned sources.

[241] Supra note 123.
[242] Supra note 133.

CHAPTER 5: Abrogation of Article 370 and Bifurcation of the State of Jammu and Kashmir

5.1 History of Art. 370 and its Importance concerning the State of Jammu and Kashmir

Article 370 is present in the second position under Part XXI of India's Constitution namely, "Temporary, Transitional and Special Provisions". Art. 370 was temporary in a manner that the Constituent Assembly of J&K was given the right to retain or modify or delete it and it finally decided to maintain its provisions. After this decision, the Constituent Assembly of J&K was dissolved and hence doors of deleting or modifying Art. 370 and its provisions were completely closed.[243] Another interpretation regarding its temporary nature may be due to pending plebiscite by the people of J&K and this method also not followed and hence should be retained till plebiscite as per the assurance given by the GOI White Paper regarding J&K in 1948.[244] On October 17, 1949, Art. 370 was included in the Indian Constitution before the completion of the drafting of the Indian Constitution ended on November 26, 1949, i.e. Art. 370 had been present there before the adoption of the Indian Constitution (or Constitution).[245] Even on the occasion of the inclusion of Art. 370 finally by the Constituent Assembly of India on October 17, 1949, Ayyangar again committed the stand of GOI of the plebiscite by the people of J&K and the drafting of their separate Constitution by their Constituent Assembly of J&K.[246] Even a five-judges Bench of the Supreme Court of India in *Sampat Prakash* (1969)[247] refused clearly to accept Art. 370 as a temporary one and even said to that extent it is permanent one despite the use of headnote having the words "temporary provision". Similarly, Delhi High Court in 2017 had rejected a petition by Kumari Vijayalakshmi

[243] Prof. Faizan Mustafa, Explained: What 's Changed in Jammu and Kashmir?, The Indian Express, May 13, 2021, retrieved from https://indianexpress.com/article/explained/explained-article-370-has-not-been-scrapped-but-kashmirs- special-status-has-gone-5880390/
[244] Prof. Faizan Mustafa, Expained : What are Articles 370 and 35A?, The Indian Express, August 6, 2019,p. 13,retrieved from https://indianexpress.com/article/explained/understanding-articles-370-35a-jammu-kashmir-indian-constitution-5610996/
[245] Supra note 243, p. 5.
[246] Supra note 244, p. 4.
[247] Sampat Prakash v. The State of Jammu and Kashmir, AIR 1970 SC 1118, para 7.

contending upon the basis of the temporary nature of Art.370 and its continuation is itself the fraud upon the Constitution.

The Indian Independence Act, 1947 had made the provision for the joining of the 580-odd Princely States to either Dominion of India or Pakistan only by the Instrument of Accession (IOA) as per Section 6(a) of this Independence Act because their sovereignty was restored to these states by the Britishers.[248] Hence, IOA was like an international treaty between two sovereign countries, and the maxim "Pacta Servanda" has to be respected by them. The Schedule attached to IOA mentioned the powers allotted to the Indian Parliament for legislating regarding the defence, external affairs, and communications w.r.t. the State of J&K.

"**Clause 5 of IOA:** Under this Raja Hari Singh said that the terms of "my Instrument of Accession cannot be varied by any amendment of the Act or of the Indian Independence Act unless such amendment is accepted by me by an Instrument supplementary to this Instrument."

"**Clause 7 of IOA:** Under this Raja Hari Singh said: Nothing in this Instrument shall be deemed to commit me in any way to acceptance of any future Constitution of India or to fetter my discretion to enter into arrangements with the Government of India under any such future Constitution."[249]

It was settled policy of GOI as cleared by the letter written dated May 17, 1949, by Prime Minister J.L.Nehru with the concurrence of Sardar Vallabhbhai Patel and N.Gopalaswami Ayyangar to J&K Prime Minister Sheikh Abdullah regarding J&K is that the Constitution of J&K is to be determined by the people of the J&K representing them in the form of Constituent Assembly convened for the formation of the Constitution of J&K. This is because of the disputed accession anywhere with India with any State like that of J&K, it will be settled with focussing upon the wishes of the people of that State (or plebiscite), not upon the unilateral decision of the Ruler of that State like Raja Hari Singh in this case. On the acceptance of IOA by India and then by the Governor-General of India Lord Mountbatten on October 27, 1947, he stated that India regarded this "IOA as purely temporary and provisional" as per GOI's White Paper in 1948 regarding J&K. Accordingly, upon the restoration of Law

[248] Supra note 243, p. 5-6.
[249] Supra note 243, p. 6.

and Order in the State and the clearance of invaders from the Pakistani side, the question of the State's accession will be decided and finally settled by a reference to the wish of the people of J&K.

5.1.1 Article 370 and its Impact

Article 370[250] is mentioned in the appendices section.

Hence, this Article 370[251] clarified the special status of J&K from its sui generis aspects and leads to the following conclusions viz.:

(i) The power of Parliament to make laws for the State of J&K is limited to the matters in the Union List and Concurrent List corresponding 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;[252]

(ii)The power of Parliament to make laws on other matters in the Union and Concurrent Lists is contingent *on the concurrence of* the Government of the State;[253]

(iii) Besides Article 1 and Article 370[254], 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;[255]Specific recognition is given to the existence of a separate Constitution for the State of Jammu and Kashmir;[256]

[250] In exercise of the powers conferred by this article the President, on the recommendation of the Constituent Assembly of the State of Jammu and Kashmir, declared that, as from the 17th day of November, 1952, the said art. 370 shall be operative with the modification that for the *Explanation* in cl. (1) thereof, the following *Explanation* is substituted, namely:-
"Explanation.– For the purposes of this article, the Government of the State means the person for the time being recognised by the President on the recommendation of the Legislative Assembly of the State as the *Sadar-I-Riyasat of Jammu and Kashmir, acting on the advice of the Council of Ministers of the State for the time being in office.". (Ministry of Law Order No. C.O. 44, dated the 15th November, 1952). *Now "Governor".
[251] Art. 370, The Constitution of India.
[252] Art. 370(1)(b)(i), The Constitution of India.
[253] Art. 370(1)(b)(ii), The Constitution of India.
[254] Art. 370(1)(c),The Constitution of India.
[255] Art. 370(1)(d) along with its two Proviso, The Constitution of India.
[256] Art. 370(2), The Constitution of India.

(iv) Provides for its abrogation or amendment procedure which requires a mere declaration by the President according to a recommendation of the Constituent Assembly of the State.[257]"

Therefore, Article 370 was a constitutional recognition of the conditions mentioned in IOA and reflected the contractual rights and obligations of the two parties i.e. India and Raja Hari Singh.[258]The scrapping of J&K special status is the wrong way to an end because it should not have been scrapped without the involvement of wider consultations.[259] It is also an "Executive Excess" and a fatal legal error followed by the Government of India (GOI) as per the sayings of P.Chidambaram, the former Finance Minister of GOI.[260] Art. 370 is not an issue of integration but autonomy as clarified by Article 3 of the J&K Constitution i.e. it clearly defines powers of J&K in terms of its more autonomous character and Art. 35A of the J&K Constitution also defines "permanent residents", *not "permanent citizens"*.

5.1.2 Article 35A of J&K Constitution and its automatic Scrapping:

This Article 35A is regarding the testimony of special status of J&K and furthering this by status accorded to "Permanent Residents" of the J&K State by the Government of India. Art. 35A was added to J&K Constitution in 1954 by an order of President Rajendra Prasad on the advice of the Cabinet under J.L. Nehru. This was done without the consensus (or bypassing) of the Indian Parliament while passing this Order under the guise of Presidential Order i.e. Art. 368 regarding the amendment procedure was not properly followed by the Indian Government itself. But this Article 35A is against the "very spirit of oneness of India" because of the creation of 'class within a class of Indian citizens. It also leads to violation of Art. 14, 19, and 21 of the Indian Constitution because of arbitrary and irrational behaviour in defining the permanent residents of J&K and only upon arbitrary conditions leading to deprivation of rights to the people living there from their generations eg. Dalits and Valmikis who was brought there between 950-60 were provided Permanent Resident Certificates

[257] Art. 370(3), The Constitution of India.
[258] Ibid, p.7.
[259] The Hindu Editorial, Scrapping J&K's special status is the wrong way to an end, Printable version , May 8, 2021 6:31:34 PM , https://www.thehindu.com/opinion/editorial/scrapping-jks-special-status-is-the-wrong-way-to-an-end/article28827024.ece
[260] Ibid.

(PRC) only upon the strange condition that their future generations will even continue to be scavengers and their denial to freedom of work of their choice. While others like descendants of Gorkha soldiers of Maharaja's Army, West Pakistan refugees, and Women living in J&K for the past decades (if they married non-permanent residents), etc. were even denied the PRC status to them.

- **Article 35A of J&K Constitution[261]:**

It is mentioned in the appendices section as per the actual wordings of this Article. Before the issue of "Constitution Order 1954", the term "Permanent Resident" had not figured anywhere in any of the "Constitution Order" nor in any Constitutional provision in J & K. In pursuance of powers given by Article 35A(a), the State Constituent Assembly had enacted Section 6 defining "Permanent Resident" as the class of persons who had settled in the State as "State Subjects" in the period before May 1944 and their heirs only shall continue to be treated permanent resident irrespective of the fact that they reside in the State of J & K or not i.e. it relates to the hierarchical pattern only. It retained the law introduced by the Dogra autocratic ruler Hari Singh disqualifying women of PRC of J&K if they married non-residents and prohibiting refugees from then-West Pakistan living in J&K since Partition from acquiring state subject rights.

The issue has arisen as to whether the citizens who are not termed as "permanent residents" can claim to be factually "permanent residents" of J & K.[262]

At present Art. 35A stands abrogated automatically due to abrogation of Art.370 of the Indian Constitution.

5.2 The Impugned Legislative Measures regarding Abrogation of Art. 370

The abrogation of Art.370 is done upon the basis of the Constitution (Application to J&K) Order, 2019 ("C.O. 272") and Declaration under Art. 370 (3) of the Constitution of India ("C.O. 273") issued by the President under Art.370 (1) (d) with

[261] Full text of document on govt.'s rationale behind removal of special status to J&K - The Hindu https://www.thehindu.com/news/national/full-text-of-document-on-govts-rationale-behind-removal-of-special-status-to-jk/article28821368.ece 74/109

[262] https://www.thehindu.com/news/national/full-text-of-document-on-govts-rationale-behind-removal-of-special-status-to-jk/article28821368.ece

the "concurrence of the Government of the State of Jammu and Kashmir." 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[263] because during the issuance of this order the State of Jammu and Kashmir was under President's rule under Article 356 of the Constitution.[264]

5.2.1 Constitutional Order (C.O.) 272:

The notification[265] of C.O. 272 is mentioned in the appendices section. C.O. 272 indicates via. its clauses that (i) It supersedes Constitution Application Order, 1954 as amended from time to time; (ii) It extends all provisions of the Constitution, as amended from time to time by superseding J&K Constitution to the State of Jammu and Kashmir; (iii) It modifies Article 367 of the Constitution concerning the State of Jammu and Kashmir by replacing the expressions

(a) "Constituent Assembly of the State" with "Legislative Assembly of the State" in the proviso to clause (3) of Article 370.

(b) Governor of J&K, for the time being, shall be construed as Sadar-i-Riyasat of J&K.

(c) Governor of J&K acting on the advice of his Council Of Ministers shall be construed as Government of J&K.

Consequently, on the recommendation of Parliament, acting on behalf of the Legislative Assembly of the State under Article 356, the President issued a new notification by Declaration under Article 370 (3) of the Indian Constitution viz."C.O. 273.

5.2.2 Constitutional Order (C.O.) 273:

[263] Proclamation No. G.S.R. 1223(E), dated December 19, 2018, available at http://egazette.nic.in/WriteReadData/2018/194042.pdf, last seen on 17/12/2019.
[264] Ibid.
[265] Text of Notification of C.O. 272, Uploaded by Dte. of Printing at Government of India Press, Ring Road, Mayapuri, New Delhi-110064 and Published by the Controller of Publications, Delhi-110054, dated August 5, 2019.

The notification[266] of C.O. 273 is mentioned in the appendices section. Consequently upon the recommendation of the Parliament, the President of India declared by C.O. 273 that Article 370 had ceased to be an operative exception being an amended clause which provided that all provisions of the Constitution of India amended from time to time and without any modifications or exceptions would apply to the State of Jammu and Kashmir.[267]

In continuance, Parliament passed the Jammu and Kashmir Reorganisation Act, 2019 by expressing its "views" on behalf of the Legislative Assembly of the State.[268]

5.2.3 Questions of Law in Contention:

In consonance of changes by C.O. 272 and 273, there arise four questions of law which are in contention viz.

(i) Whether President can validly replace by addition of a new clause in Art. 367 the "Constituent Assembly" of the State with the "Legislative Assembly" of the State in the proviso to clause (3) of Article 370?

(ii) Whether the concurrence of the President in C.O. 272 and the recommendation of the Parliament in C.O. 273 is legally valid even when the State of Jammu and Kashmir was under President's Rule at the time?

(iii) Whether bifurcation of the State of Jammu and Kashmir into two separate Union territories by the Parliament during the reign of the President's rule in the J&K is valid?

(iv) To what extent the judiciary may intervene in such a case?

The subsequent portions will deal with these issues in detail.

5.3 Legislative Assembly as a Valid Successor to the Constituent Assembly of the State

[266] Text of Notification of C.O. 273, Uploaded by Dte. of Printing at Government of India Press, Ring Road, Mayapuri, New Delhi-110064 and Published by the Controller of Publications, Delhi-110054, dated August 6, 2019.
[267] C.O. 273, August 6, 2019.
[268] J&K Reorganistion Act, 2019.

This situation arises due to the closure of the doors for abrogation or repealing of Art. 370 by the dissolution of the Constituent Assembly of the State after the adoption of the Jammu and Kashmir Constitution ("J&K Constitution") and hence C.O. 272 uses the power of the President under Article 370(1)(d) to amend Article 367 by the addition of a new Clause as Art. 367(4). Then the question arises regarding the validity in the absence of a recommendation of the Constituent Assembly of the State.

In *Mohd. Maqbool Damnoo v State of Jammu and Kashmir ("Maqbool Damnoo")"*[269] case, the Supreme Court ("Court") focused upon 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 raised was that there was a back-door change in definition that amounted to an amendment (modification) of Article 370(1) introduced without the invocation of clause (3) of Article 370. But the Court upheld the new Explanation on the basis that it was in consonance with an amendment of the J&K Constitution which had recognised the appointment of a Governor in place of the Sadar-i- Riyasat and thereby understanding the constitutional position in the State as it existed on that date. Therefore, the above change in definition was not like a "modification" to clause (1) of Article 370 for which the recommendation of the Constituent Assembly was necessarily required

Similarly, the Court also declined another 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 is due to the language of Section 147 in its un-amended form requiring the assent of the Sadar-i-Riyasat to any Bill required for the amendment of the J&K Constitution. On the above basis, the petitioners contended that Section 147 shows the perpetual existence of the Sadar-i-Riyasat.[270] However, the Court also rejected this contention by the application of Section 158 of the J&K Constitution which paved the way for the application of the Jammu and Kashmir General Clauses Act, 1977 ("the J&K General Clauses Act") for the interpretation of the J&K Constitution. By application of Section 18 of the J&K General Clauses Act which allows the Court to

[269] Mohd. Maqbool Damnoo v. State of Jammu and Kashmir, AIR 1972 SC 963.
[270] Ibid, para 26.

decide upon whether the Governor was the successor to the Sadar-i- Riyasat on the ground that application of any law to a functionary extends to the successors of that functionary as well. Similarly, Section 18 of the General Clauses Act, 1897 also uses identical language to that of the J&K General Clauses Act, 1977 and will be of deciding nature for interpreting the provisions of the Constitution as per Article 367(1). The Court decided in favour of the change in definition although Governor not being an elected position, unlike the Sadar-i-Riyasat and ultimately will not have any effect on the issue and no change in the overall character of the government because the executive power of the State vested in both functionaries as heads of the State.

Therefore, the researcher opines that the Union Government has carefully followed the footprints of the decision of the Court in *Maqbool Damnoo* and this substitution of the phrase "Legislative Assembly" for "Constituent Assembly" is in consonance as that was upheld by the Court in *Maqbool Damnoo.*

The above decision of the Court is also supported by the fact there is an omission of the words "resolution" or "recommendation" in Section 147 of the J&K Constitution ultimately leaving the scope of recommendation by utilizing the Legislative Power by the Legislative Assembly of the State because for the recommendation[271] to take place the statutory resolution by the Legislative Assembly is required.[272]

The Legislative assembly can be validly considered as a successor to the Constituent Assembly due to this cogent reason viz.

- **Harmonious Reading of Clause (1) (d) and Clause (3) of Article 370**

In pursuance to Article 370 (1)(d), the President can 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.' This is supported by the favourable decision by the Supreme Court in the case

[271] Lok Sabha Secretariat, *Rules of Procedure and Conduct of Business in Lok Sabha Rule 171,* (16th ed., 2019) available at http://164.100.47.194/loksabha/rules.aspx, last seen on 17/12/2019.
[272] Lok Sabha Secretariat, *Motions and Resolutions in Parliament*, (14th ed., 2014), available at http://164.100.47.194/loksabha/writereaddata/ParliamentProcedure/Motions%20and%20Resolutions.pdf, last seen on 17/12/2019.

of *Sampat Prakash* v. *The State of Jammu and Kashmir* ("Sampat Prakash") that the President is capable of such expectations and modifications if the situation in the State demanded the same and that these were capable of being reverted on account of any change in the situation in that State.[273] It means that all provisions of the Constitution of India 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. And it may logically also be extended to the Legislative Assembly, a body with widespread representation and law-making power, under clause (3) for ensuring a harmonious reading of the two clauses.

5.4 Application of Basic Structure Doctrine to the Article 370

It becomes very important to evaluate Article 370 based on the Doctrine of basic structure as introduced by the Court in the case of *Kesavananda Bharti v State of Kerala (Kesavananda Bharati*)[274] which propounds that the Parliament may amend any provision of the Constitution except the core features and basic principles of the Constitution. There are two opposing views on Art. 370 viz. one is favourable and the other is against this version.

5.4.1 Article 370 in the Context of Federalism

In *Kesavananda Bharati,* the Court specified the federal character of the Constitution is essentially part of the basic structure which has been reinforced by various decisions in the subsequent cases.[275] Various scholars have favoured that because Article 370 deals with the relationship of the Union with the State of Jammu and Kashmir (federal aspect) and hence unamenable[276]. Even a five- judges Bench of the Supreme Court of India in *Sampat Prakash* (1969)[277] refused clearly to accept Art. 370 as a temporary one and even said to that extent it is permanent one despite the use of headnote having the words "temporary provision". Similarly, Delhi High Court in

[273] Sampat Prakash v. The State of Jammu and Kashmir, AIR 1970 SC 1118, para 12.
[274] Kesavananda Bharati Sripadagalvaru v. State of Kerala, AIR 1973 SC 1461.
[275] 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.
[276] 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.
[277] Sampat Prakash v. The State of Jammu and Kashmir, AIR 1970 SC 1118, para 7.

2017 had rejected a petition by Kumari Vijayalakshmi contending upon the basis of the temporary nature of Art.370 and its continuation is itself the fraud upon the Constitution. Recently in *State Bank of India v. Santosh Gupta,*[278] the Court stressed that despite the word 'temporary' in the marginal note of Article 370, it could be ceased to be operative only after following the due procedure laid down in clause (3). However, these decisions cannot be regarded as final ones because the court does not explicitly mention that Art. 370 is a permanent provision and beyond the amendment after the dissolution of the Constituent Assembly. Hence above decisions fall short of this version that Art. 370 continues to be operative and permanent or unamendable even after the dissolution of the Constituent Assembly. Hence above decisions need careful and deeper analysis.

The Supreme Court in *M. Nagaraj v UOI* ("M. Nagaraj")[279] laid down testing criteria known as the "essences of rights" test or the "over-arching principles" test,[280] for determining whether any constitutional amendment is violative of the basic structure only if it abrogates an over-arching principle of the Constitution to change the very identity of the Constitution eg. in R.*C. Poudyal v UOI,*[281] the Court observed that a deviation from the one-person-one-vote rule was no violation of the basic features of democracy due to the various forms and manifestations of democracy. Now the question arises: Whether an amendment to Article 370 (which may include its repeal) lead to change the very identity of the Constitution? For this, we have to delve into "Legal Tests of federalism".

In *S.R. Bommai v UOI* ("S.R. Bommai") case the court held that the essence of federalism lies in the distribution of powers between the Union and the States.[282] This was reinforced in *Jindal Stainless Limited v State of Haryana,*[283] wherein the Court stressed upon the key characteristics of the federal system as laid down in the Constitution (same as that of Legal Test of Federalism) were supremacy of the Constitution, division of powers between the Union and the States and the existence of an independent judiciary. Therefore, apart from Article 370, other provisions of the

[278] State Bank of India v. Santosh Gupta and Ors., AIR 2017 SC 25.
[279] M. Nagaraj v. Union of India, (2006) 8 SCC 212.
[280] Indian Medical Association and Ors. v. Union of India and Ors., AIR 2011 SC 2365, para 85.
[281] R.C. Poudyal and Ors. v. Union of India (UOI) and Ors., AIR 1993 SC 1804.
[282] Supra note 133 at para 14.
[283] Jindal Stainless Limited v. State of Haryana, (2017) 12 SCC 1, para 944.

Constitution such as Article 371A, Article 371B, among others, are admittedly also representative of asymmetric federalism does not represent a key facet of federalism as enshrined in the Constitution or part of the basic structure of the Constitution. Hence, the abrogation of Art.370 does not pass the criteria of the test as laid down in the *M. Nagaraj* case.

Therefore, the overall result of the above case laws suggests that abrogation of Article 370 would ultimately diminish the special status of Jammu and Kashmir which should not be abrogated unilaterally by the Centre without following democratic principles.

5.4.2 Article 370 is subject to the Will of the People of Jammu and Kashmir

Article 370 cannot be considered as a part of the basic structure of the Constitution can be deduced from the following incidents:

It was settled policy of GOI as cleared by the letter written dated May 17, 1949, by Prime Minister J.L.Nehru with the concurrence of Sardar Vallabhbhai Patel and N.Gopalaswami Ayyangar to J&K Prime Minister Sheikh Abdullah regarding J&K is that the Constitution of J&K is to be determined by the people of the J&K representing them in the form of Constituent Assembly convened for the formation of the Constitution of J&K. This is because of the disputed accession anywhere with India with any State like that of J&K, it will be settled with focussing upon the wishes of the people of that State (or plebiscite), not upon the unilateral decision of the Ruler of that State like Raja Hari Singh in this case. Hence the bedrock of the relationship is the will of the people of Jammu and Kashmir would be supreme concerning their State. This is cleared from the statements of Gopalaswami Ayyangar in the Constituent Assembly Debates at the time of introduction of 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.[284] With each extension of constitutional provisions by the amendments in form of Presidential orders to the State, the sphere

[284] K.M. Munshi, *Indian Constitutional Documents: Pilgrimage to Freedom,* 185 (1967); Supra note 282, para 4.

of autonomy of the State has correspondingly decreased.[285] 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.[286] Ultimately it has led to the dilution of Article 370 and described as an "empty shell".[287] Therefore, the framework of Article 370, which allows for constant alteration in the relationship of the State vests in the elected representatives of the people of Jammu and Kashmir. Consequently, the people of the State through their elected representatives have an option in the future to put an end to Article 370 and accept the whole Constitution. Hence the basic structure doctrine would not come in the way of the Legislative Assembly and the President coming together to abrogate Article 370 i.e. basic structure doctrine is not a hurdle of any type regarding the abrogation of Art. 370. But whether during the operation of the President's rule the President and the Parliament can validly abrogate Article 370 is considered in the next section.

5.5 Delineating the Contours of the Powers under President's Rule

Here the concurrence of the President and recommendation of the Parliament exercised during President's rule will be tested for the constitutionality of C.O. 272 and C.O. 273 i.e. the validity of the powers exercised by the President and Parliament during the period of President's rule will be determined.

5.5.1 Assessing the Scope of President Rule

As per Art. 356 (1) sub-clauses (a) and (b), *prima facie*, the actions of the President and the Parliament appear to be within the limits of the bare text of the Constitution.

As per the arguments of the petitioner in the writ petition[288] and rejoinder [289] filed before the Court the petitioners submit that the President cannot implement decisions of a permanent nature that alter the very structure and status of the State

[285] Abdul Qayoom Khan v. State of I&K, 2016 (1) JKJ 506, para 17.
[286]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.
[287]Greater Kashmir, *Article 370 reduced to empty shell: I&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.
[288] *Mohd Akbar Lone & Anr. (Petitioners) v. Union of India & Ors. (Respondents),* available at https://www.1ivelaw.in/pdf upload/pdf upload-363037.pdf, last seen on 17/12/2019.
[289] *Dr. Shah Faesal & Ors v. Union of India & Anr.*, W.P. 1099 of 2019, available at https://www.1ivelaw.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.

under the framework of the Constitution in the absence of an elected state government by relying on Article 357(2), which states that any law made on behalf of the Legislature of the State during President Rule will continue in force until "altered or amended or repealed" by a competent State Legislature. The petitioners also stressed that such wide powers of the President would be against the spirit of the constitutional principles of federalism and representative democracy. But above contentions by the petitioner do not present an accurate legal position on the issue at hand. In the *S.R. Bommai*[290] case, the Court clarified that the object of Article 356 is to take remedial action for restoration of the governance of the State under the provisions of the Constitution. However, the Court did not deeply analyse the scope of 'remedial action' or the ambit of powers during such rule. In the absence of clarity, it can be clarified by the text of Art. 356.

The contentions raised by the petitioners are put down by the bare language of 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 anybody or authority in the State."[291] Therefore the President is empowered by the Art. 356(1)(c) to suspend the proviso to Article 3[292] which requires a reference to the State Legislature of any Bill seeking to alter the boundaries or area of that particular State. Also, the President can decide to suspend the portion of clause (1) of Article 169 having the requirement of the passing of a resolution by the State Legislature concerning the abolition or creation of a Legislative Council in that State during President Rule.[293] These above-mentioned powers would be meaningless unless such can be availed in practice even during the imposition of the President's rule leading to ultimately fundamentally permanent decisions for achieving the objects of the Proclamation. Therefore, under these powers, the abrogation of Article 370 would also presumably lie within the ambit of the President's rule.

[290] Supra note 133.
[291] Art. 356(1)(c), The Constitution of India.
[292] Art. 3, The Constitution of India.
[293] Art. 169(1), The Constitution of India.

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 and hence "concurrence of the Government of the State" also lies within President for the time being due to its autonomy ceded by the State to the President and Parliament, provided that they are within the confines of the provisions of Article 356.

The petitioner argues that only the decisions which can be reversed by a subsequently elected government of the State may be taken during President Rule would hamper the functioning of the Parliament leading to forestalled Parliament from introducing any Bill requiring the ratification of one-half of the State Legislatures[294] during the President's rule in any State. It is hard fact that this requirement of half the number of States may be possible even without the ratification of the State under the President's rule. There exists a minor chance of deciding the nature of the ratification by the State under President's rule leading to the preclusion of the Parliament from ratifying the amendment in question on behalf of the State Legislature because of the inability of the new State government to reverse the above-ratified amendment. Therefore any amendment to the Constitution would be incapable of being carried out until the formation of the new government in that State or maximum limit three years period[295] of President Rule which is legally unsustainable for making permanent or irreversible decisions.

This position will put the Parliament work on standby mode for a continuous undefined period when one after the other States are put under President Rule due to any unavoidable situations.

Therefore, the contention by the Petitioner is legally unsustainable which is due to the wide use of powers by the President and Parliament should have a direct relation to the objects to be achieved during President Rule. This is additionally supported by the series of decisions of the Supreme Court stressing upon the fact the Constitution is quasi-federal having a tilt towards the unitary nature[296] due to biasing

[294] Art. 368(2), The Constitution of India.
[295] Art. 356(4), The Constitution of India "(...but no such Proclamation shall in any case remain in force for more than three years)."
[296] 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; Supra note 133 at 1918, para 210.

towards a strong Centre.[297] Also, federalism, as envisaged by the Constitution, is not present in its stricter sense[298] supports the wide use of powers by the Centre during President Rule and would be consistent with the principle of supremacy of the Centre over the States as per the Constitution.[299]

5.5.2 Evaluation of C.O. 272 and C.O. 273 in the light of the Proclamation of Presidential Rule issued by the President in the State

To identify the objects of the Proclamation there is the requirement of inspecting the events leading to such a situation. The Governor's rule was imposed under Section 92 of the J&K Constitution[300] in June 2018 due to the withdrawal of the support by the Bharatiya Janata Party to the People's Democratic Party-led coalition government reducing it to a minority in the Legislative Assembly.[301] On November 21, 2018, the Governor dissolved the Legislative Assembly stating 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.[302] After the completion of six months of the Governor's rule in the State[303], a new Proclamation for President's rule was issued on 19th December 2018.[304] The declaration by the Election Commission in March 2019 regarding the non-possibility of Assembly elections in the State along with the Lok Sabha elections due to recent violent incidents and lack of security forces in the State[305] leads to the issuance of the

[297] Supra note 280, para 23.5; Government of NCT of Delhi v. Union of India, (2018) 8 SCC 501, para 105.
[298] K. Lakshminarayanan v. Union of India, (2019) 4 SCJ 30, para 52.
[299] Supra note 288.
[300] S. 92, the Constitution of Jammu and Kashmir.
[301] The Hindu Business Line, *BJP pulls out of alliance with PDP in I&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.
[302] The Economic Times, *Jammu and Kashmir Governor dissolves Assembl y 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.
[303] S. 92(3), the Constitution of Jammu and Kashmir.
[304]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.
[305] A.G. Noorani, *The Case of the missing election in I&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.

Proclamation for extension of six months period further[306] and within this time these constitutional changes take place. Based on the above circumstances, the Proclamation was the consequence of a political crisis in the State.

The legitimate question that comes up is whether C.O. 272 and C.O. 273 applied to abrogate Article 370 to repeal the special status of Jammu and Kashmir under the Constitution were in any way necessary to give effect to the abovementioned objective of the Proclamation. The rationale was given by the Union that 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.[307] But this is justified if Proclamation had been declared in the State on account of a breakdown in law and order or due to an internal rebellion or some other grave security predicament in the State. While the Proclamation was issued due to a political crisis in the State and the smooth running for the initial seven months of President's rule in the State without the abrogation of Article 370 indicates towards this factual situation. Hence the abrogation of Article 370 was neither "necessary" nor "desirable" to give effect to the object of the Proclamation. Therefore, the President and the Parliament have acted beyond the scope of their prescribed powers under the Constitution and hence C.O. 272 and 273 ought to be invalid in terms of their constitutionality and should not be upheld by the court.

5.6 Constitutional Validity of the Jammu and Kashmir Reorganisation Act, 2019

The Jammu and Kashmir Reorganisation Act, 2019 ("the Reorganisation Act") is a unique example of a State being bifurcated into two separate Union territories.[308] There will be two prongs test for examining the legality of the Reorganisation Act viz. *(i)* about the validity of the Parliamentary power to create two Union territories by

[306] 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.
[307] 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.
[308] India Today, *Jammu and Kashmir bifurcated: India has one less state, gets two new Union Territories in I&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.

extinguishing a State under Article 3 of the Constitution. *(ii)* about the validity of the application of this power under the President's rule.

5.6.1 Bifurcation of a State into two Union Territories

The Parliamentary power to bifurcate the State of Jammu and Kashmir into the Union territories of Jammu and Kashmir and Ladakh revolves around Article 3 of the Indian Constitution.

The implication of Explanation I with the reading of clause (a) of Article 3 will be 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" and it is justified for three* reasons viz.

(i) The words "Union territory" enlarge the meaning of the word "State" rather than substituting or replacing it.[309] (ii) this agrees with the wording of Explanation II which also uses the word "or" between the words "State" and "Union territory" (iii) the past practice of creating Union territories also this version eg. the Punjab Reorganisation Act, 1966 shows that the new Union Territory of Chandigarh was formed by "separation of territory" from the (former) State of Punjab.

Thus, the reading of clause (a) in consonance with Explanation I gives an option 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 also include the power to create two new Union territories by destroying a particular State as followed in the current case.

The wording of Explanation II itself reinforces this idea of the creation of two Union territories by extinguishing a State by the Parliament due to the option of 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 phrase "any other State" as opposed to the phrase "part of any other State" in the latter half of the Explanation leads to a new possibility that 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

[309] P. Kasilingam and Ors. v. P.S.G. College of Technology and Ors., AIR 1995 SC 1395, para 19.

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.

Therefore as per Article 3, the power of Parliament also includes how the States can be meaningfully exercised and India as a Union is also characterised as an “indestructible Union of destructible units”[310] which reflects the quasi-federal nature of the Constitution[311] which also for the State of J&K.[312] The court held that Constitution does not guarantee the territorial integrity of the States and allows for reorganisation of their boundaries.[313]

The argument by the petitioners against construing Article 3 in a manner that will lead to the formation of a “Union of Union territories” instead of a “Union of States” as envisaged under Article 1 is wrongly based on two facts viz. (i) The petitioner’s contention of the mere possibility of a power being abused is not a valid reason to deny its existence.[314] (ii) The question of the legal validity for the use of power by the Parliament under Article 3 would need to be examined on a case-to-case basis by using the scope of judicial review.

But the Parliament does not have unlimited power in any case under Article 3[315] since the restrictions on the exercise of such a power presently exist in the form of the basic features of the Constitution.[316] In *Mangal Singh* v. *UOI*, the Court stated that the power of the Parliament under Article 3 to admit, establish and form new States has to agree with the democratic pattern set up by the Constitution and cannot be used to overtake the constitutional scheme.[317] If in assuming that the Parliament even tries to convert all the States into Union territories, it would be like the damaging of the entire scheme of the Constitution which is based on a quasi-federal structure of governance with States having an elected Legislature and Executive alongside the Union

[310] Raja Ram Pal v. The Hon’ble Speaker, Lok Sabha, (2007) 3 SCC 184.
[311] Supra note 133at para 210; Supra note 138 at 501, para 127.
[312] Supra note 137 at 538, para 10.
[313] 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.
[314] State of West Bengal v. Union of India, AIR 1963 SC 1241, para 35.
[315] Kesavananda Bharati Sripadagalvaru v. State of Kerala, AIR 1973 SC 1461.
[316] R.C. Poudyal v. Union of India, AIR 1993 SC 1804, para 116.
[317] Mangal Singh v. Union of India, AIR 1967 SC 944, para 7.

Government.[318] Hence such an assumed action of Parliament will be unconstitutional and hence liable to be struck down by the Court.

Therefore, the overall decision is in favour of valid legal action by the Parliament for bifurcation of J&K into two Union Territories viz. J&K and Ladakh respectively.

5.6.2 Bifurcating a State under President Rule

There would be a violation of Article 3 of the State that was bifurcated without the consent of the State Legislature. But as per Article 356(1)(c), the proviso to Article 3 can be suspended if the same is in consonance to the objects of the Proclamation leading to dispensing with the requirement to obtain the consent of the State Legislature. But in the present situation there is no nexus with the achievement of an objective of the Proclamation viz. removal of political crisis i.e. both lies in the opposite ends and different step was taken of the territorial bifurcation of the State.

Hence this Reorganisation Act should be declared unconstitutional due to exceeding the powers by the President and the Parliament under Article 356 and an invalid step in the context of nexus or rationale of the objectives of the President's Rule.

5.7 Scope of Judicial Review

The necessity of scope of judicial review exists due to its submission of Counter affidavit by the Union of India before the Court in response to the writ petitions that the desirability and wisdom of the decisions of the President and the Parliament are not amenable to judicial review[319] because of existence within the arena of policy-making of Union government based on President Rule in the State.[320] The Union government justifies its policy by stressing the curbing the terrorism and separatism along with ensuring the complete integration of Jammu and Kashmir with the Union and it will result in the greater socio-economic development of the State and the extension of various government schemes to the residents of Jammu and Kashmir.

[318] Government of NCT of Delhi v. Union of India, (2018) 8 SCC 501, para 106.
[319] 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.
[320] Ibid, para 18.

In the case of *State of Punjab* v. *Ram Lubhaya Bagga*, the Court observed that questioning the validity of governmental policy will be within the domain of the judiciary when there is arbitrary or violative of any constitutional or statutory provision.[321] Similarly, in *Ugar Sugar Works* v. *Delhi Administration*, the Court stressed upon that it is the best way to be open for the discretion of the State to express their opinion as to whether a particular policy should have been adopted at a particular given time or in a particular situation. But this rule would not be applicable if the policy was mala fide, unreasonable or arbitrary.[322]

Similarly, in *S.R. Bommai* v. *Union of India*, the Court clarified in the context of Article 356 that excessive use of power will also be considered an illegal, irrational, and malafide exercise of power.[323] 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.[324]

Based on judgements of the above cases, it will be valid to the Court in the instant case to satisfy itself regarding arbitrariness and unreasonableness of the actions taken by the President and the Parliament under the veil of Article 356 to abrogate Article 370 and bifurcate Jammu and Kashmir. The review of the Court will deeply analyse the issuing C.O. 272, C.O. 273 and enacting the Reorganisation Act on the touchstone of powers provided in Article 356 of the Constitution.

5.8 Observations

The pending decision of the Supreme Court in the instant matter will be landmark judgement due to the solution expecting upon these complex legal issues and policy-making by the Union and the perennial question of the permanence of Article 370 in the absence of the Constituent Assembly of Jammu and Kashmir will be finally decided. Hence even if C.O. 272 is struck down in its entirety, the Court's observations on clause (3) would explain the possibility of the valid legal method required for the abrogation of Article 370 in the future. Due to the precedent laid

[321] State of Punjab v. Ram Lubhaya Bagga, AIR 1998 SC 1703, para 22.
[322] Ugar Sugar Works Ltd. v. Delhi Administration, AIR 2001 SC 1447, para 17.
[323] Supra note 133.
[324] Ibid.

down in *Maqbool Damnoo*, the harmonious reading of Clause (1)(d) and Clause (3) of Article 370 and the need for a living Constitution, the Legislative Assembly of the State can be considered by the Court to be the valid successor to the Constituent Assembly of the State.

But testing upon the touchstone of use of the powers by the Union government fails because of excessive use of the powers without having any nexus to achieve the objective of President Rule under the guise of Art. 356. Therefore actions taken by the President and Parliament regarding the bifurcation of the state of J&K along with the issuance of C.O. 272 and 273 seems to be invalid.

Irrespective of the final decision of the Supreme Court, it will be a landmark judgement providing new wings to the concept of federalism in India and will work as a Precedent for a long time under Art.141 of the Constitution of India.[325] It will remove the various aspersions raised and doubts created against the Indian federalism by different media-houses and think-tanks for creation of a suspicious environment in and around India because of negating down of these aspersions by the international community except few ones like Pakistan, Turkey, China and Malaysia (due to its political compulsions of the PM in securing the Muslim majority votes support on the domestic front).[326] Therefore, the hidden agenda of Pakistan and China are several times spoiled even in United Nations Security Council meeting by the cordial relation diplomacy of India and show clearly that abrogation of Art.370 is an internal matter of India, not an international one leading to no bowing before anyone on this issue.

But it should be done democratically by the Union government by the involvement of the Will of the people of J&K through their elected representatives. Otherwise, it will be a black spot on the image of the Union government (India) and hence against the spirit of "Constitutionalism" that is an essence of the democratically run Republic nation India. Hence, at the present abrogation of Article 370 and hence reorganisation of J&K seems to be constitutionally invalid on the face of it and it is a clear act of over-centralisation of power being misused by the Centre and should be declined out by the Supreme Court of India.

[325] Art. 141 and under the Doctrine of Stare Decisis illustrates this concept.
[326] Supra note at 41.

CHAPTER 6: Power Tussle between Central Government and Government of National Capital Territory Delhi

6.1 History of Struggle for the Statehood of Delhi

Within a decade, the statehood demand gained considerable momentum in 1987 because of the demand made for a legislative assembly nearly every day by the opposition members.[327] It was most vocally raised by Madan Lal Khurana of the Bharatiya Janata Party (renamed after Jana Sangh in 1980) in Delhi after massive defeat in 1984 Lok Sabha elections due to attached electoral compulsions beyond the personal political ambitions for the Statehood of Delhi. It led to the formation of the BJP headed government in1993 in Delhi.[328] This led to the formation of Justice R.S. Sarkaria Committee (later renamed Balakrishnan Committee when Justice Sarkaria resigned) to look at 'Reorganisation of Delhi Set-up' by the Centre in 1987.[329]

Based on a strong plea made by The BJP and the Janata Dal before the committee along with the recommendations of the Sarkaria (Balakrishnan) Committee[330], the Congress government at the Centre tabled a bill in Parliament in May 1990 and the Constitution 69th Amendment Act, 1991 was passed by Parliament leading to insertion of Articles 239AA and 239BB in the Constitution having a provision of Legislative Assembly in Delhi. In its continuance, the Parliament also passed The Government of National Capital Territory of Delhi (GNCT) Act, 1991 regarding the framework of Legislature in Delhi[331] i.e. the 69th Constitution Amendment Act roughly restored the governance system of 1952 viz. a Union Territory with a legislative assembly, the council of ministers and an elected chief minister with a limited mandate.[332]

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[327] P.Goyel, Delhi's March Towards Statehood, UBS Publisher Delhi, 1994.
[328] Sanjay Kumar, *Changing Electoral Politics in Delhi: from Caste to Class* (Delhi: Sage Publisher, 2014).
[329] Niranjan Sahoo, *Statehood for Delhi: Chasing a Chimera*, Observer Research Foundation (ORF) Occasional Paper, June 2018, p.10.

[330] Ajay Mehra, Sharing Sovereignty, *Seminar*, July 2015, http://www.india-seminar.com/2016/677/677_index.htm.
[331] The Delhi Legislative Assembly was empowered to make laws on all the matters in the State List or in the Concurrent List of the Constitution- except Entries 1 (Public Order), 2 (Police), and 18 (Land), and entries 64, 65 and 66 relatable to the entries of the State List.
[332] For instance, the 69th Amendment to the Constitution, which conferred such a distinction upon Delhi in 1991, makes it amply clear that while the elected government in Delhi enjoys the powers and

6.2 Statehood and Political Doublespeak

After the gaining of partial statehood in 1991, BJP gained the victory in Delhi's first assembly elections in 1993 and focused upon the complete statehood demand for political gains for his party as that of the present row between AAP and BJP.[333] It reached its peak in 2003 when the then Deputy Prime Minister L.K. Advani tabled the Constitutional Amendment (102) Bill intended to repeal two constraining articles: 239AA and 239BB.[334] But this 102nd Constitution Amendment Bill statehood bill died prematurely due to the BJP losing the Delhi assembly elections in December 2003 and the general elections later.[335]

But the BJP maintained this position on statehood until 2014. Surprisingly, the party dropped the statehood demand from its Vision Document in the 2015 assembly elections. This led to the complete opposite stand before the Supreme Court hearing on statehood by the BJP-led government at the Centre.[336] [337]

Similarly, the Congress Party changed its status dramatically during the reign of the Congress Party, its Chief Minister Sheila Dikshit did not say publicly any single word regarding the question of statehood during her 15-year tenure. She broke her silence during the reign of the AAP government and said that "The city would have witnessed better development had my government not been shackled by the present governance structure of Delhi characterized by a multiplicity of agencies and authorities. I

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privileges offered to all other states in India, these are of qualifying in nature. For instance, while Article 239AA empowers Delhi's elected government to legislate on all subjects included in the State List of Schedule VII, reserve subjects such as public order, police and land are out of its purview. Further, given its national capital status, the Indian Parliament under article 239AA (3)(b) enjoys free hand to legislate on any subjects impacting Delhi's governance. The most serious limitation however is that being listed as a union territory, the elected government has to share powers with LG, a central government appointee who is designated as "Administrator." Unlike the governor, *the* LG is the real power centre. For instance, the Article 239AA (4) clearly tilts the balance of power in favour of *the* LG rather than supporting the elected CM.

[333] Niranjan Sahoo, *Statehood for Delhi: Chasing a Chimera*, Observer Research Foundation (ORF) Occasional Paper, June 2018, p.10.

[334] These two articles had conferred upon Delhi the status of National Capital Territory, having its administrator named as lieutenant governor who, in every sense, was the real centre of power, not the elected chief minister.

[335] Supra note 50.

[336] The Times of India Report, November 17, 2017, https://timesofindia.indiatimes.com/india/delhi-being-a-union- territory-its-govt-cant-claim-power-privileges-of-state-govt-centre-tells-supreme court/articleshow/61742390.cms.

[337] Jayanta Sriram, *The Hindu*, 23 May 2015, http://www.thehindu.com/ news/cities/Delhi/bjps-volteface-on-full-statehood-for-delhi/article 7236354.ece.

reiterate my demand to grant full statehood to Delhi."[338] But the inclusion of the statehood for the first time in its election manifesto of 2015 due to humiliating defeat suffered in the 2013 assembly elections.[339] But its enthusiasm faded down due to the continuous tussle between LG and CM for a long time.[340] Hence it can be concluded that it stand revolved according to political compulsions and political gains as per changing time.

6.3 Aam Aadmi Party and Statehood of Delhi

The Aam Aadmi Party or AAP after gaining a landslide victory[341] in the Delhi legislative elections in 2015 has been at continuous tussle going till present date with the BJP government at the Centre, especially with the office of the LG, on issues of administrative jurisdictions and statehood for the national capital because of the various administrative and procedural barriers faced by the elected government of Delhi. Arvind Kejriwal, the key architect of AAP and the present chief minister, in May 2016 called for a referendum on the statehood of Delhi by making a passionate plea to all political parties.[342] For furthering it AAP put forward The State of Delhi Bill, 2016[343] before the public to achieve maximum support by political parties and people of Delhi.

But with Delhi High Court decision of 2016[41] against the AAP version of complete statehood led to a fall in its enthusiasm and deviated from its path towards "maximum autonomy" instead of statehood demand.[344]

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[338] Supra note 334.

[339]The Guardian, 8 December 2013, https://www.theguardian.com/world/ 2013/dec/08/india-revolution-claims-congress-election-collapse- gandhi.

[340] Delhi Congress chief Ajay Maken recently said that its support for statehood is linked to Delhi remaining India's national capital, http://www.business-standard.com/article/news-ians/congress- against-full-statehood-if-delhi-loses-national-capital-status-ajay- maken-interview-116122901044_1.html.

[341] An excellent account of AAP's spectacular rise can be found from Gaurav Vivek Bhatnagar's reporting, *The Wire*, 26 November 2017, https://thewire.in/politics/tracing-aaps-successes-failures-five-years- since-launch

[342] *The Hindustan Times*, 26 May 2016, https://www.hindustantimes.com/ delhi-news/after-brexit-kejriwal-calls-for-referendum-on-delhi- statehood/story-MsBWc9AK4U5hw5cntCZWnL.html.

[343] The *Mint* story, https://www.livemint.com/Politics/pRGzOwzohsL8KqlIoaAnN/Delhi-govt-places-draft-statehood-bill-in-public- domain.html.

[344]Apula Singh, *The Wire*, 12 August 2016, https://thewire.in/58286/ decoding-delhi-demand-for-full-statehood/.

This is how every party had changed its stand as per political necessity with the change of time.

6.4 An Analysis of the Supreme Court Judgement in *Govt. of NCT Delhi v. Union of India*[345] [346]

6.4.1 Constitutional Position of Delhi

The tussle of power stemmed from the unilateral appointment of acting Chief Secretary only for 10 days by the LG without aid and advice from the Delhi government. It more escalated when several steps taken by the Delhi government for curbing corruption were interfered with by the Centre upon the ground of non-approval by the LG. It ultimately arises from the unique position of Delhi due to Article 239 AA. The co-existence of Articles 239 and 239 AA of the Constitution lead to a jurisdictional conflict. The opposing stands taken by the Delhi government and the Centre on these issues led to chaos in governance in Delhi. Therefore, the term *"aid and advice"* is in contention between both parties.

6.4.2 Background of the Case

The confrontation between Chief Minister Arvind Kejriwal belonging to AAP and Lieutenant Governor (LG) Najeeb Jung representing the Central BJP government, started over the appointment of a temporary (acting) Chief Secretary Shakuntala Gamlin[347] had turned into a power tussle between Aam Aadmi Party (AAP) and the Bhartiya Janta Party (BJP). This was due to the objection put by the Delhi Government against the LG's unilateral decision to appoint the acting Chief Secretary on grounds that the LG did not possess the power to appoint without 'aid and advice of the Chief Minister and his Council of Ministers (CoM). This issue was politicised largely by accusing the LG of strategically working in the hands of the Central government for protecting the company Reliance Industries Limited (RIL).[348] It was based on the complaint filed in ACB by EAS Sharma, the former Revenue Secretary

[345] Supra note 350.
[346] Govt. of NCT Delhi v. Union of India, SCC Online, SC 661.

[347] Supra note at 49.
[348] Atul Dev, Why has Arvind Kejriwal Abandoned the Investigation He Launched against Mukesh Ambani Last Year? The Caravan (2015), http://www.caravanmagazine.in/vantage/why-has-arvind-kejriwal-abandoned-investigation-he-launched-against-mukesh-ambani-last-year.

along with TSR Subramaniam, the former Cabinet Secretary; Kamini Jaiswal, a Senior Advocate of the Supreme Court and Admiral RH Tahiliani, the former Chief of Naval Staff on the grounds of conspiration of the Central government with RIL leading to the creation of "artificial scarcity" of Natural gas in Krishna Godavari Basin and ultimately the steep rise in prices of the Natural Gas.[349] An FIR was filed by ACB owing to its existence upon the basis of the notification issued by the Centre in 1993.[350] The Union Home Ministry Notification, dated May 21 turns this tussle more bitter by directing the Delhi Government from restraining its Anti-Corruption Branch for acting against Central Government officials in the capital city.[351] This was taken as a frontal attack on the core agenda of the AAP Party regarding curbing corruption and crony capitalism. The tussle was carried further by the Chief Minister (CM) Arvind Kejriwal by issuing a notification to all bureaucrats in Delhi, not to take any orders from the LG without consultation of his ministers, and even impeachment proceedings against LG was attempted at the Assembly. The Delhi High Court judgement in *Anil Kumar v. GNCT of Delhi*[352], dated May 25 added more chaos by holding that the notification was no more than suspect. Even on appeal before the Supreme Court, it did not stay the High Court order but made the ruling regarding the Union government notification was not binding and hence increased the confusion instead of clarity on this issue. The relations between the Centre and the Delhi Government get more worsted with the arrest of Delhi Law Minister Jitender Singh Tomar upon the charges of obtaining a fake law degree from a university in Bihar. This arrest was termed as unjustified and unreasonable in law.[353]

6.4.3 Issues of the Case[354]:

- Notification by the Union Home Ministry regarding ousting of Delhi government relating to 'services".

[349] Yash Dahiya, *Govt. of NCT of Delhi and Ors. V. Union of India, Tussle Between the AAP and the Centre*, International Journal of Law Management &Humanities, Vol. 1, No.5, 2018.
[350] V. Venkatesan, Trajectory of the tussle, Frontline, https://www.frontline.in/cover-story/article24440227.e (last viewed on Aug 6, 2018).
[351] Manu Sebastian, Live Law (2018), http://www.livelaw.in/aftermath-of-supreme-court-judgment-on-delhi-govt-v-lg-tussle/ http://www.livelaw.in/aftermath-of-supreme-court-judgment-on-delhi-govt-v-lg-tussle/ (last viewed on August 6, 2018).
[352] Anil Kumar v. Govt. of Delhi, OA-1269/2013, CAT Principal Bench New Delhi, May 26, 2015.
[353] BJP trying to settle scores: Somnath Bharti on Tomar's arrest. Accessed on June 22, 2015.
[354] Yash Dahiya, *Govt. of NCT of Delhi and Ors. V. Union of India, Tussle Between the AAP and the Centre*, International Journal of Law Management &Humanities, Vol. 1, No.5, 2018.

- Another notification restricting the jurisdiction of ACB of Delhi in the Central government employees.
- Non-approval of investigation of allegations of corruption in Delhi.

But Supreme Court refused to look into these issues on the ground that the petitioner (RIL) itself had approached the Delhi High Court and when the High Court has already heard the matter on all issues. The Delhi High Court should deal with this case and give its judgement. [355]

RIL itself filed a plea before the Delhi High Court On May 2, 2014, for asking to quash the FIR.[356] The company referred to this FIR as "motivated and malicious" and a part of the "political gimmicking" played by the Aam Aadmi Party (AAP). The court responded by issuing a notice that asked the central government and RIL to cooperate with the investigation.

During this entire gimmick, the Delhi High Court on August 4, 2016, decided in favour of the LG (regarding the notifications issued by the Centre and Delhi government) in *another case* filed by the Delhi government viz. *Govt. of NCT Delhi v. Union of India*.[357]

But this continuous power tussle and *appeal by the Delhi government before the Supreme Court* against the decision of the Delhi High Court led to landmark judgement by the Supreme Court *reversing*[358] the decision of the Delhi High Court.

6.4.4 Analysis of *Delhi High Court* Judgement[359] in *Govt. of NCT Delhi v. Union of India*

The Delhi High Court delivered its verdict on August 4, 2016,[360] and decided in favour of the LG as opposed to the stand of the Delhi government upon various

[355] Vikash Kumar Bairagi, Who is the Boss of Govt. of NCT of Delhi?[A constitutional battle between Lt. Governor and Delhi Govt. in an asymmetric Federal Govt.: A hope for full statehood of Delhi], The SCC Online Blog (2017), https://blog.scconline.com/post/2017/01/07/who-is-the-boss-of-govt-of-nct-of-delhi-a-constitutional-battle-between-lt-governor-delhi-govt-in-an-asymmetric-federal-govt-a-hope-for-full-statehood-of-delhi/ (Last viewed on Aug 6, 2018).
[356] Atul Dev, Why has Arvind Kejriwal Abandoned the Investigation He Launched against Mukesh Ambani Last Year? The Caravan (2015), http://www.caravanmagazine.in/vantage/why-has-arvind-kejriwal-abandoned-investigation-he-launched-against-mukesh-ambani-last-year.
[357] Govt. of NCT Delhi v. Union of India, W.P.(C) No.5888/2015 & CM Nos.10642/2015, Delhi High Court Judgement dated August 4, 2016.
[358] Supra note 350.
[359] Ibid.

notifications issued by it. The Delhi High Court held that the LG was not bound by the aid and advice of the Council of Ministers and that he was the administrative head of the National Capital Territory of Delhi (NTCD). The LG's approval was compulsory now to implement the decision taken by the Council of Ministers.

6.4.4.1 Legality of the Notification Issued by the Delhi Government

The Delhi High Court[361] strikes down the legality of the notification issued by the Delhi government regarding the set up of the Commission of Inquiry and other initiatives for curbing corruption. It is based on two reasons as follows:

(i) As per the General Clauses Act, the term 'appropriate government" concerning UT will be the Union government.

(ii) It concluded that if the LG could differ with the Council of Ministers and LG being the executive head of Delhi, then his consent is necessary on all proposals before putting them into action, otherwise deemed to be invalid.

The second argument accepted by the Delhi High Court is that "aid and advice" of Council of Ministers" is not binding on the LG.

6.4.4.2 Legality of the Notification issued by the Home Ministry of the Central Government

The two notifications issued by the Union Home Ministry regarding the unilateral appointments by the LG under Entry 41 of List II and ousting the jurisdiction of ACB of Delhi against employees of the Union government. These notifications are being approved by the Delhi High Court[362] because of the non-presence of the Public Service Commission in the State of Delhi as put forward by the High Court. Along with this exclusion of Central Government employees from the scanner of ACB was based on Entry 1 (Police) upon which only the Union government can legislate under Article 239AA (3).

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[360] Ibid.
[361] Ibid.
[362] Ibid.

6.4.5 Over-ruling of High Court Judgement by the Supreme Court in *Govt. of NCT Delhi v. Union of India*[363]

But due to continuous tussle in form of unilateral appointment of MK Meena as Joint Commissioner of Delhi Police by the LG of Delhi and retaliation replacement of Home Secretary by Delhi and then use of Veto power by the LG upon such replacement lead to appeal by the Delhi government before the Supreme Court and the matter escalated so much that a Division Bench of Supreme Court had to recommend the matter to a Constitutional Bench comprising of 5 judges on February 15, 2017.[364] The Supreme Court decided to hear the matter in November 2017 and reserved its judgement on December 6, 2017 and declared its landmark judgement on July 4, 2018.

- **Interpretation of word "Aid and Advice" under Art.239AA (4) of Indian Constitution**

As per the majority decision, the Supreme Court held that LG is bound to follow the "aid and advice" of Council of Ministers unless he exercised it under the proviso to clause (4) of Art. 239AA i.e. no independent decision-making power is allotted to him.[365] This is dispensed with in case of the Entries of land, police, and public order.[366]

It further clarified that the term "any matter" referred in the proviso to clause (4) of Art. 239AA cannot be considered as "every matter".[367] It means power under the proviso is only for exceptional use, not for general use. The LG should not act as an obstructionist by acting mechanically without due application of mind by referring every decision of COM to the President.[368] It also specified the Transaction of Business Rules, 1993 regarding the settlement of any difference between them by way

[363] Supra note 350.
[364] Vikash Kumar Bairagi, Who is the Boss of Govt. of NCT of Delhi?[A constitutional battle between Lt. Governor and Delhi Govt. in an asymmetric Federal Govt.: A hope for full statehood of Delhi], The SCC Online Blog (2017), https://blog.scconline.com/post/2017/01/07/who-is-the-boss-of-govt-of-nct-of-delhi-a-constitutional-battle-between-lt-governor-delhi-govt-in-an-asymmetric-federal-govt-a-hope-for-full-statehood-of-delhi/ (Last viewed on Aug 6, 2018).
[365] Govt. of NCT Delhi v. Union of India, Supreme Court, Civil Appeal No. 2357 of 2017, para 277 (xvii), p. 231 of the Conclusions in Seriatim.
[366] Ibid, para 277 (xvi), p. 230.
[367] Ibid, para 277 (xviii), p. 232.
[368] Ibid, para 277 (xviii), p. 232.

of harmonious resolution by discussion and dialogue.[369] It also held that copy of the decisions of COM must be communicated to LG regarding the updating of its decisions by the government, not to be construed as "concurrence" of LG is required by the government.[370] The status of LG is not the same as that of Governor of a State and he is the only administrator.[371] There is no room for "absolutism" or "anarchy" in the Constitution and in no way Delhi can be accorded the status of the State.[372] The court also held that the President be involved only in constitutionally important issues only, not in general administrative matters.[373] The court also stressed the need of following cooperative federalism by functioning in harmony with both constitutional offices.[374]

6.5 Recent Row over the Govt. of NCT Delhi Amendment Act, 2021[375]

Recently, the Govt. of NCT Delhi (Amendment) Bill, 2021 was tabled before the Lok Sabha on March 15, 2021, and enacted on March 28, 2021by notification in the Gazette of India. It revived the dispute on the distribution of powers between LG and the Delhi government. It was enacted to negate down the judgement of the Constitutional Bench of the Supreme Court which created the adverse situation created against LG (nominee of the Centre). But as per Act, it aims to "further define the responsibilities of the elected government and LG in Delhi."

According to this Amendment Act, 2021, it will force the Delhi elected government to take LG advice before such implementation of the decisions of the Council of Ministers.

- The LG was bound by the aid and advice of the Council of Ministers.
- The status of LG is not the same as that of Governor of a State and he is the only administrator or limited Governor. There is no room for "absolutism" or

[369] Ibid, para 277 (xx), p. 233.
[370] Ibid, para 277 (xxi), p. 234.
[371] Ibid, para 277 (xii), p. 228.
[372] Ibid, para 277 (xxiii), p. 236.
[373] Ibid, para 277 (xvii), p. 231.
[374] Govt. of NCT Delhi v. Union of India, Supreme Court, Civil Appeal No. 2357 of 2017, para 277 (xviii), p. 232 of the Conclusions in Seriatim.
[375] Govt of NCT Delhi (Amendment) Act, 2021, No. 15 of 2021, Ministry of Law and Justice (Legislative Department), Published in Gazette of India, March 28, 2021.

"anarchy" in the Constitution and in no way Delhi can be accorded the status of the State. The elected government must keep in mind that Delhi is not a state.

- The court also held that the President be involved only in constitutionally important issues only, not in general administrative matters.

6.5.1 Justification by the Union Government of the Amendment Act, 2021

It is required for structural clarity in the governance system. It is cleared from the statement on "objects and reasons" of the bill[376] enacted that Section 44 of GNCTD Act, 1991 deals with the conduct of business and there is no structural mechanism for effective time-bound implementation of the said Section.

There is no such clarity upon the matters what matters are to be sent to the LG before issuing an order upon these. All executive actions are taken in name of LG whether taken on aid and advice of Council of Ministers or by LG himself in entries of land, police, and public order.

6.5.2 Provisions of the GNCTD Amendment Act, 2021[377]

- It amended Sections 21, 24, 33, and 44 of the GNCT Delhi Act, 1991.[378]
- This Act defined responsibilities in line with the constitutional scheme of governance of national capital, as interpreted by the Supreme Court of India.[379]
- 'The term "Government" referred to in any law made by the Legislative Assembly shall mean the LG.'[380]
- The widening of the discretionary powers of LG is done even in matters where the Legislative Assembly is empowered only to frame new laws.[381]

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[376] Statement of Objects and Reasons, Govt. of NCT Delhi (Amendment) Bill, 2021, As introduced in Lok Sabha, March 5, 2021.
[377] Govt of NCT Delhi (Amendment) Act, 2021, No. 15 of 2021, Ministry of Law and Justice (Legislative Department), Published in Gazette of India, March 28, 2021.
[378] Ibid.
[379] Statement of Objects and Reasons, Govt. of NCT Delhi (Amendment) Bill, 2021, As introduced in Lok Sabha, March 5, 2021.
[380] Section 2, Govt of NCT Delhi (Amendment) Act, 2021, No. 15 of 2021, Ministry of Law and Justice (Legislative Department), Published in Gazette of India, March 28, 2021.

- It also provides a "necessary grant of an opportunity" to LG for providing his opinion before the implementation of decisions taken by the Council of Ministers. It has to be done by general or special order.[382]
- LG shall have the power to reserve for its consideration any bill or matters outside the purview of powers of the Legislative Assembly.[383]
- It also ends up the power of the Legislative Assembly upon the rule-making for itself or its Committees to consider of the day-to-day administration of Delhi.[384]
- Rules or Committees made before this new Amendment Act comes into force "shall be void."[385]
- It also bars the Legislative assembly to conduct inquiries w.r.t. administrative decisions.[386]

6.6 Constitutionality of GNCT Delhi (Amendment) Act, 2021[387]

(i) **Reversing the verdict of Supreme Court[388]:**

It is widely criticized for its anti-democratic nature and utilisation of legislative ways to secure political gains.[389]

The Centre has reversed the Supreme Court verdict for strengthening the hands of LG (own appointee or agent) and making both the elected government of Delhi and Legislative Assembly impotent. But there seem to be paradoxes due to the statement of objects and reasons stated to give effect to Supreme Court verdict and on the other hand nullifying that verdict of the Supreme Court. The basic foundations of the verdict were based upon the principles of democracy and federalism along with the

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[381] Ibid, Section 5.
[382] Ibid, Section 5.
[383] Ibid, Section 5.
[384] Ibid, Section 4.
[385] Ibid, Section 4.
[386] Ibid, Section 4.
[387] Vineet Bhalla, What is the Constitutionality of GNCT Delhi (Amendment) Act, 2021?, The Leaflet, dated April 28, 2021, pp. 1-18, https://www.leaflet.in/what-is-the-Constitutionality- of- GNCT- Delhi-amendment-act-2021
[388] Ibid.
[389] Ibid.

supremacy of the elected government of Delhi over its LG and these principles are toppled down by this Amendment Act.

(a) **Violation of Article 239 AA of the Constitution[390]:** It amends the GNCT Delhi Act, 1991 leading to the violation of multiple provisions of Art. 239AA viz. abrogation of executive accountability provided in Art. 239AA(6).Fouling of spirit of Art. 239 AA(4) by putting the LG in the driver seat of the government instead of the elected government.

(b) It also violates Art.239 AA(7)(a) by allowing the Parliament in place of the elected government to make provisions for incidental or consequential matters.

(c) It also violates art. 239 AB by downgrading the powers of the elected government and in turn increasing the powers of the LG.

(ii) **Violation of the Basic features of the Constitution[391]:** It violates the basic features of the Constitution like federal structure; separation of powers between the legislature, executive and judiciary and republican along with the democratic form of government.

Therefore, the Amendment Act violates the spirit of the 2018 verdict of the Supreme Court, violates the letter and spirit of Art. 239 AA and the basic structure of the Constitution and hence it *deems to be unconstitutional* clearly.

6.7 Present Status of NCT Delhi Government upon this Amendment

The Delhi High Court issues notice on a Public Interest Litigation filed by Neeraj Sharma, AAP member[392] challenging GNCTD Bill, 2021 based upon the unconstitutionality and violating of principles of democracy and federalism and Article 14 and 21. It stated that the amendment nullifies the decision of the Supreme Court regarding the supremacy of the elected government of Delhi. It also mentioned that the amendment Act transgresses and pervades even the Constitutional Bench judgement of the Supreme Court. It also submitted that it is violating of principles of democracy and federalism which is enshrined in the Preamble and edifice of the

[390] Ibid.
[391] Ibid.
[392]The Business Standard, *Delhi HC issues notice on AAP member's plea challenging GNCTD Bill, 2021*, dated May 25, 2021, pp. 1-6, https://www.business-standard.com/article/current-affairs/delhi-hc-issues-notice-on-aap-member-s-plea-challenging-gnctd-bill-2021-12105240033...

Indian Constitution. This PIL comes up for hearing before the two-judge Bench of High Court namely Justice DN Patel and Justice Jyoti Singh and issued the notice to Union of India and Delhi government for further hearing on July 23, 2021, and directed the respondents to file a detailed reply in this matter.

The Delhi High court also issued a notice on a plea of challenging the constitutionality of the GNCTD Act, 2021. It was pleaded before the Court that it is not only against the verdict of Supreme Court in ***Govt. of NCT Delhi v. Union of India (C.A. No. 2357 of 2017)*** but also against the basic principles of the republican and democratic character of the Indian Constitution.

6.8 Observations

Delhi had passed through various phases of governance from the time of Britishers to date. Its governance system evolved with time and presently has special status under Art.239AA of the Constitution. The tussle between the Centre and the Delhi government is creating a trench between the relations of the two. The Delhi High Court decision also increased the tension by misinterpretation of the powers of the LG and Centre. But with a decision by the Supreme Court upon appeal by the Delhi government turns down the hands of the LG and the Centre who were illegally interfering in the field of Delhi government and ordered the LG not to interfere in every matter because the phrase "aid and advice" does not allow the LG to poke its nose into the routine job of the Delhi government.

But the Centre again interfered in Delhi governance by passing a recent Amendment Act, 2021 by negating down the above decision of the Supreme Court which seems to be unconstitutional and its validity is in question before the Delhi High Court by filing the PIL by AAP member along with other petitions filed by the others based on violation of the basic spirit of the Constitution viz. federalism, democratic principles and violation of Art.239AA also.

This is how Amendment Act, 2021 in contention is a power presentation by the Centre by following the theme of over-centralisation against the spirit of the Constitution as specified by the 69th Constitution Amendment Act, 1991 and in its continuation the GNCTD Amendment Act, 2021.

Chapter 7: Findings of the Study

Here the researcher has endeavoured to present the findings and conclusion arrived at as the result of the study undertaken. Some suggestions have also been forwarded by the researcher.

Findings of the Study

Findings of the study arrived at as a result of the analysis and discussion undertaken in the preceding Chapters related to different objectives are as follows:

7.1 To analyse Indian centralised federalism and its Constitutional Provisions:

After analysis, it is cleared without any doubt that the Indian Constitution is federal in form and passes the Legal Test for Federalism as described in Chapter No. 2 of this study which is indicated also by the presence of the following provisions embodied in it namely,

(i) Supremacy of the written constitution as the "Grundnorm" of the country and the 'Supreme Law of the Land.[393]

(ii) More elaborated scheme of division of powers between the Union and the State governments as compared to that any other federal country of the world like USA, Canada and Australia etc.[394] It provides 3 Legislative Lists viz. Union List (97 entries), State List (66 entries) and Concurrent List (47 entries) and provision of the Residuary Powers to the Centre leading to the biasing towards the Centre which is keenly felt in the USA, Canada and Australia. Even in the field of State List, the Centre can enter this arena by various Constitutional provisions.[395] While Articles 245 to 255 deal with the distribution of legislative powers and Articles

[393] In Special Reference No.1 of 1964 UP Assembly Case, AIR 1965 SC 745. The court observed: "The supremacy of the constitution is fundamental to the existence of a federal State in order to prevent either the legislature of the federal unit or those of the member States from destroying or impairing that delicate balance of power which satisfies the particular requirements of States which are desirous of union, but not prepared to merge their individuality in a unity."

[394] Part XI deals with the Relations between the Union and the States; Ch. I of Part XI deals with Legislative Relations and distribution of Legislative Powers while Ch. II deals with Administrative Relations 'between the Union and the States. The distribution of powers between the Union and the States can be discerned from the various provisions of the Constitution and the machinery is also provided for, for settling their disputes in the constitution.

[395] Art. 249 to 254, The Constitution of India.

256 to 261 deal with the distribution of administrative powers of the Constitution.[396]

(iii) Existence of an independent judiciary[397,398] as provided by different provisions of the Constitution along with the powers of Judicial Review[399] and Judicial Activism[400].

(iv) A rigid procedure for amendment of the constitution.[401]

(v) Flexible and cooperative federalism is introduced here in consideration of experiences drawn from the war and crisis of other federal countries like the presence of the Inter-state Council.[402, 403]

Defending the flexible nature of the Constitution Dr. Ambedkar said in the Constituent Assembly viz. "One can therefore safely say that the Indian federation will not suffer from the faults of rigidity and legalism. Its distinguishing feature is that it is a flexible federation."[404] The flexibility lies even in the procedure of the Amendment w.r.t. to the federal portion of the Constitution as compared to that of the USA and Australia.[405]

(v) The states exercise a range of autonomous powers and enjoy some measure of representation in central government through the Council of States.[406]

(vi) Decentralisation in governance is promoted by the 73rd [407] and 74th [408] Constitutional Amendments leading to the creation of a third tier of government *viz.,* Panchayats and Municipalities. Therefore, we can say that Indian federalism is unique and offered a possible solution to many

[396] Supra note 433.
[397] Art.124, The Constitution of India.
[398] Justice V. Dhanapaln, "Basic Structure of the Indian constitution - An Analysis" 8 SCC (J) 2 (2014).
[399] Art. 13, 32,131, 141, and 226, The Constitution of India.
[400] Art.32 and 226, The Constitution of India.
[401] Art. 368, The Constitution of India.
[402] Art. 263, The Constitution of India.
[403] K.H. Cheluva Raju , Dr. B.R.Ambedkar and Making of The Constitution: A Case Study on Indian Federalism, Indian Journal of Political Science, Vol. 52, No. 2, April-June, 1991, pp.162-163.
[404] CAD, Vol. VIII, p. 256.
[405] Supra note 20 at 210.
[406] Art.80, The Constitution of India.
[407] Art. 243 and 243 A-O, The Constitution of India.
[408] Art. 243 P – Z and ZA- ZG, The Constitution of India.

problems. It has been tailored according to the specific needs of the country.

The Use of the word 'Union of Sates' and not the 'Federal of Federation' indicates a uniquely distinctive character and nature of the Indian constitution. The expression 'federal' was avoided due to historic, cultural, social and political experiences.[409] Dr. B.R. Ambedkar had no ambiguities about the federal nature of the constitution and clarified it by saying in the Constituent Assembly: [410]

"*The basic principle of Federation is that the Legislative and Executive authority is partitioned between the Centre and the States not by any law to be made by the Centre but by the constitution itself ... The chief mark of federalism as said lies in the partition of the legislative and executive authority between the Centre and the Units of the constitution. This is the principle embodied in our constitution. There can be no mistake about it*."

In summary, framers of the Constitution have designed it on the three pillars namely, (i) a strong centre, (ii) flexible federation, and (iii) co-operative federalism. These features have been incorporated due to experiences from the problems faced and the solutions undertaken by the federations of the USA, Canada and Australia.

Indian federal constitution is unique by non-following of traditional features as proposed by K.C. Wheare because of its unique history and societal problems faced by people of India due to their diversity in culture, language and even religions also.

7.2 To study and analyse the challenges faced due to over-centralization of Indian Federal design leading to misuse of Art.356 in different States, abrogation of Art.370 in J&K and recent amendment in GNCTD Act, 2021in Delhi:

(a) Regarding Article 356:

The finding of this study is that Art. 356 is a logical necessity in consonance with extra-ordinary Centre-State relations and special responsibility provided by Art. 355. Hence, it is concluded that Article 356 is not be deleted out of the Indian Constitution but its conscious and judicious use should be there for maintaining the spirit of the

[409] Satish Chandra Srivastava, Nature of Federalism in India, July 2010, p.45.
[410] Brij Kishor Sharma, Introduction to Constitution of India, PHI Delhi, 2011, p.40.

Indian Constitution. This is reinforced by the fact that there existed a similar provision in the form of Section 93 of the Government of India Act, 1935 (an Act which is considered as the base for framing of Centre-State relations under the Indian Constitution). This is also supported by the assertion of the importance of these "Emergency powers" in Constituent Assembly Debates of Indian Constitution viz.

However, these 'Emergency Provisions' were criticized in the Constituent Assembly Debates as anti-democratic, anti-federal and autocratic and opened to misuse by political parties.[411] Taking the experience of other federal systems particularly that of the United States, Dr. Ambedkar defended the emergency powers by stating that "*All federal systems including the American are placed in a tight mould of the federation. No matter what the circum- stances, it cannot change its form and shape. It can never become unitary.*

On the other hand, the Draft Constitution can be both unitary as well as federal according to the requirements of time and circumstances. In normal times it is framed to work as the federal system. But in times of war, it is so designed as to make it work as though it was a unitary system. Such power of converting itself into a unitary state, no federation possesses."[412]

It is decided by *S. R. Bommai*[413] case that the Governor's report cannot be conclusive but its relevance is undeniable[414] and the Presidential satisfaction is not beyond the sweep of power of Judicial Review for declaring it unconstitutional also after scrutinizing the material on basis of which satisfaction is formed by the President.[415] Several precautions have been recommended by the Sarkaria Commission[416] and Venkatachaliah Commission[417] reports to be adopted by the Governor while sending reports to the President for application of Art. 356 in any State

[411] H. V. Kamath, Constituent Assembly Debates, Vol. VIII, p.196.
[412] Constituent Assembly Debates, Vol. VII, p. 34.
[413] Supra note 133.
[414] Ibid..
[415] Ibid, pp. 2072-73, para 257.
[416] Supra note 157.
[417]Supra note 209.

The Sarkaria Commission[418] categorised certain circumstances as a failure of Constitutional Machinery as per the basic requirement for the application of Article 356 which was even not cleared from the judgement of the *S.R.Bommai* case. These are as follows: Political crisis, Internal subversion, Physical breakdown, Reorganisation of States and Non-compliance of Union government directions.

Similarly, Sarkaria Commission categorised the following situations[419] for improper invocations of Art. 356 viz. Non-issuance of warning to errant State, Dismissal of Ministry commanding majority, denial of opportunity to claimant, Non-formation of the caretaker government and Wholesale dissolution of Assemblies.

The safeguards (attempts) against the abuse of this power by the Centre are proposed from following different sources that attack the root cause of this problem for curbing this abuse of power by the Centre: Framers' approach, Constitutional Mandate, Recommendations of the Sarkaria Commission, Recommendations of the Venkatachaliah Commission, Recommendations of Punchhi Commission, Approach of the Apex Court and Approach of Inter-State Council. By following these various precautionary measures there will be minimal chances of misuse of this power under the garb of Art.356 by the Centre.

(b) Regarding Abrogation of Art. 370 and J&K Reorganisation Act, 2019:

The finding of this study is that the pending decision in the case[420] before the Supreme Court in the instant matter will be a landmark judgement and will depend upon the following factors:

(i) It is found that the Union Government has carefully followed the footprints of the decision of the Supreme Court in *Maqbool Damnoo*[421] and this substitution of the phrase "Legislative Assembly" for "Constituent Assembly" is in consonance as that was upheld by the Court in *Maqbool Damnoo* case. This step of the Union government is also reinforced by reasons specified under the three heads viz. mandate of the Legislative

[418] Supra note at 22.
[419] Supra note at 22, pp.174-177.
[420] Supra note 293.
[421] Supra note 269.

Assembly, Harmonious reading of Clause (1) (d) and Clause (3) of Article 370 and the Constitution as a Living document.

(ii) It is also deduced from the study that Article 370 does not pass the judicial threshold ("over-arching principles test") as put forward in the decision of *M. Nagraj v. Union of India*[422] case and hence Article 370 does not belong to the basic structure of the Constitution. It is also reinforced by the fact that Article 370 is now a "hollow shell"[423] due to its dilution several times by several Presidential Orders placed from time to time. It is cleared from the statement of Jawahar Lal Nehru on the floor of the Lok Sabha on Nov. 27, 1963, that "gradual erosion of Art.370 is going on…we should allow it to go on."[424]

(iii) While the Proclamation regarding Presidential Rule[425] was issued due to a political crisis in the State and the smooth running for the initial seven months of President's rule in the State without the abrogation of Article 370 indicates towards this factual situation of non-necessity of this abrogation. Hence the abrogation of Article 370 was neither "necessary" nor "desirable" to give effect to the object of the Proclamation. Therefore, the President and the Parliament have acted beyond the scope of their prescribed powers under the Constitution and hence C.O. 272 and 273 ought to be invalid in terms of their constitutionality and should not be upheld by the court.

(iv) It is also found that even though the bifurcation of J&K under Reorganisation Act, 2019 seems to be valid superficially on the touchstone of non-territorial integrity of the States as per Art.3 of Indian Constitution but it should be done by the democratic regime of J&K, not under the Presidential Rule as done in the present case.

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[422] M. Nagraj v. Union of India, SCC 2006, Issue no.8, p. 212.
[423] Greater Kashmir, *Article 370 reduced to empty shell: I&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.
[424] Gazala Peer and Javedur Rahman, An Unpleasant Autonomy: Revisiting the Special status for J&K, Ecconomic & Political Weekly, Vol. 47, No. 23, pp.72-75.
[425] 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.

(v) It is also found that there is the scope of judicial review before the court upon the touchstone of arbitrariness and unreasonableness on these decisions of abrogation of Art. 370 and bifurcation of J&K.

Therefore, testing upon the touchstone of use of the powers fails because of excessive use of the power by the President (indirectly Centre) without having any nexus to achieve the objective of President Rule under the guise of Art. 356. Therefore, actions taken by the President and Parliament regarding the bifurcation of the state of J&K along with the issuance of C.O. 272 and 273 ***seems to be invalid***.

Irrespective of the final decision of the Supreme Court, it will be a landmark judgement providing new wings to the concept of federalism in India and will work as a Precedent for a long time under Article 141 of the Constitution of India.[426]

(c) Regarding GNCT Delhi Amendment Act, 2021:

It is found that the constitutional validity of Amendment Act, 2021 is in doubt and not seems to be valid as per the touchstone of the spirit of the Constitution due to the following reasons:

(i) It is deduced from this study that reversal of the verdict of the Supreme Court[427] is done by the Union government for maintaining its superiority. It is widely criticized for its anti-democratic nature and utilisation of legislative ways to secure political gains.[428]

(ii) It results out from this study that there is a clear violation of Article 239 AA of the Constitution[429] by the amendment of the GNCT Delhi Act, 1991 because of the following reasons:

(a) The abrogation of executive accountability is provided in Art. 239 AA (6).

(b) Fouling of spirit of Art. 239 AA (4) by putting the LG in the driver seat of the government instead of the elected government.

[426] Art. 141 and under the Doctrine of Stare Decisis illustrates this concept.
[427] Govt. of NCT Delhi v. Union of India, (2018) 8 SCC501.
[428] Id at 2.
[429] Id at 3.

(c) It also violates Art.239 AA (7)(a) by allowing the Parliament in place of the elected government to make provisions for incidental or consequential matters.

(d) It also violates art. 239 AB by downgrading the powers of the elected government and in turn increasing the powers of the LG.

(iii) It is also a clear violation of the Basic features of the Constitution[430] like federal structure; separation of powers between the legislature, executive and judiciary and republican along with the democratic form of government.

Therefore, the Amendment Act violates the spirit of the 2018 verdict[431] of the Supreme Court, violates the letter and spirit of Art. 239 AA and the basic structure of the Constitution and hence it *deems to be unconstitutional* clearly.

(iv) Now the matter is before the Delhi High Court as a Public Interest Litigation (PIL) and notices are already issued on this PIL filed by Neeraj Sharma, AAP member[432] challenging GNCTD Bill, 2021 based upon the unconstitutionality and violating of principles of democracy and federalism and Article 14 and 21. It stated that the amendment nullifies the decision of the Supreme Court regarding the supremacy of the elected government of Delhi. It also mentioned that the amendment Act transgresses and pervades even the Constitutional Bench judgement of the Supreme Court. It also submitted that it is violating of principles of democracy and federalism which is enshrined in the Preamble and edifice of the Indian Constitution. This PIL comes up for hearing before the two-judge Bench of High Court namely Justice DN Patel and Justice Jyoti Singh and issued the notice to Union of India and Delhi government for further hearing on July 23, 2021, and directed the respondents to file a detailed reply in this matter.

The same Bench had recently issued a notice in two similar other petitions and sought their response on the petitions.

It leads to the finding that the matter is under prejudice before the court for its final decision regarding the question of the validity of this Amendment Act, 2021.

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[430] Id at 7.
[431] Govt. of NCT Delhi v. Union of India, Supreme Court, Civil Appeal No. 2357 of 2017.
[432] The Business Standard, *Delhi HC issues notice on AAP member's plea challenging GNCTD Bill, 2021*, dated May 25, 2021, pp. 1-6, https://www.business-standard.com/article/current-affairs/delhi-hc-issues-notice-on-aap-member-s-plea-challenging-gnctd-bill-2021-12105240033...

7.3 To examine the role of the Judiciary in addressing these challenges posed from time to time:

(a) Judicial Interpretation of Indian Federalism:

(i) The attitude of the judiciary has always been the characterisation of the Indian system as a federal one with few exceptions in the nascent stage. It has rather followed a two-fold attitude[433] viz.

(a) In contests between government (Central or State one) and individual, it always takes the side of Government's legislative power by the expansive interpretation and upheld the impugned laws.

(b) In a contest between the Centre and States, the court sided towards the strong Centre leading to undermining of federalism in India. The court followed this strategy to check the exaggerated claims put forward by the States regarding their position, status and powers vis-à-vis the Centre eg. in *West Bengal v. Union of India*[434], *the* court has specified it as *"not being true to any traditional pattern of federalism"* to counter the claims of sovereignty. It means that The States would not have legal rights against the over-riding powers of the Union because of the theory of paramountcy or superiority of the Union.

(ii) Similarly, in the *State of Rajasthan v. UOI*[435], it was characterized as "more unitary than federal" along with "the appearances" of the federal structure due to largely watered down by the needs of progress and development of the country as per Beg, CJI.

(iii) A similar pattern was followed in the case of *Karnataka v.UOI*[436] by saying that the Indian Constitution only set up the "pragmatic federalism" which is overlaid by strongly unitary features as per sayings of Beg, CJI.

(iii) But before the State of *West Bengal*[437] case decision in 1963, the court had favoured by labelling the Indian Constitution as federal one eg. in the case

[433] M.P.Jain, Indian Constitutional Law, LexisNexis Publication, ed. 8th, 2018, pp.775-786.
[434] Supra note 130.
[435] Supra note 123.
[436] Supra note 124.

of *Automobile Transport v. State of Rajasthan*[438], it was characterized by seven judges Bench saying that it has essential features of a "federal or quasi-federal structure" as per the words of S.K. Das, J.

(iv) In the *Reference Case* of 1965[439], GajendraGadkar, CJI on the behalf of majority judges had characterized the Indian Constitution as a 'Federal Constitution' because all necessary characteristics required are present.

(v) In 1973, some of the judges in the Full Bench case of Keshvananda[440] "accepted federalism" as one of the "basic features" of the Constitution of India. But it was watered down by Krishna Iyer, J. by saying that it is "an Indo-Anglian version of the Westminster model with quasi-federal adaptations."[441]

(vi) But it was rectified by describing our Constitution as "a federal or quasi-federal" by Bhagwati, J. in the case of *Union of India v. Sankalchand*[442].

The above decisions show that the aberrations in the West Bengal[443] and Karnataka[444] cases are founded on the wrong grounds because pragmatism in federalism is not right as per the views of Bench and Bar. After all, it is the necessity of justifiability[445] of the division of powers is completed by the Constitution.

(vii) In a landmark case of *S.R.Bommai v. Union of India*[446] , most of the Judges on the Bench expressed a more balanced view like "Sawant, J. has expressed the federalism as the basic feature of the Indian Constitution." Similarly, Jeevan Reddy, J. has considered it as "one of the principles of governance." This leads to the position that "States are not mere appendages of the Centre and supreme within their allotted spheres which cannot be tampered by the Centre itself". It does not mean that the state has no autonomy.

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[437] Supra note 130.
[438] Supra note 125.
[439] *Supra note 126*
[440] Supra note 127.
[441] Supra note 128 at 2192 , para. 103, Krishna Iyer, J.
[442] Supr note 129.
[443] Supra note 130.
[444] Supra note 124..
[445] Legal Test of Federalism.
[446] Supra note 133.

(viii) Similarly, in *UCO Bank v. Dipak Debbarma*[447], the court has stressed the preservation of federal balance by not allowing the transgression of any limitations imposed upon the Centre or the State by the Constitution of India.

(ix) Similarly, in *State Bank of India v. Santosh Gupta*[448], the Supreme Court of India has accepted the Special Status of State of J&K on the ground of federal features of the Indian Constitution viz. J&K is a part of this federal structure.

(x) Similarly, in *Government (NCT of Delhi) v. Union of India*[449], the Constitution Bench of five Judges of the Supreme Court held that *"LG of the Delhi cannot interfere in every decision of the Delhi government and there is no such need to seek the permission of the LG in all matters and LG had to act as per aid and advise of the Council of Ministers of the Delhi government except on the matters of land, police and public order. Therefore the Union and the State governments must accommodate a collaborative federal structure by the harmonious coexistence and inter-dependence."*

This is how the Indian Judiciary has accepted federalism as a basic feature of the Constitution and as a federal constitution.

(b) Scope of Judicial Review (Interpretation) on the Misuse of Article 356:

Scope for Judicial Review of Presidential Satisfaction

There had always been a tussle between the executive and the judiciary regarding the issue of 'Judicial Review' upon advice given to the President by the Council of Ministers and the court was barred to interfere in it on the ground of Article 74 (2) which is as follows: "The question whether any and if so, what advice was tendered by Ministers to the President shall not be inquired into in any court."[450] But for the exclusion of the Presidential Satisfaction from the ambit of judicial review, the Art.365 (5) was inserted by the 38th Constitution Amendment Act, 1975 which was as

[447] UCO Bank v. Dipak Debbarma ,(2017) 2 SCC 585.
[448] *Supra note at 136.*.
[449] Govt. of NCT Delhi v. Union of India, (2018) 8 SCC501.
[450] *Art. 74 (2), The Constitution of India.*

follows: "Notwithstanding anything in this Constitution, the satisfaction of the President mentioned in cl. (1) shall be final and conclusive and shall not be questioned in any court on any ground."[451]

Before the judgement in the *State of Rajasthan v. Union of India*[452], there was no scope of the power of judicial review as stated by Supreme Court and High Courts from time to time in different case laws eg. *Rao Virender Singh v. Association of India*[453]and *Shamsher Singh v. State of Punjab*[454] *etc.*

But, in the *State of Rajasthan* v. *Union of India*[9], the scope for judicial review of the Presidential satisfaction was opened up based on the grounds viz.:

"(i) Where the order was malafide, or

(ii) Where the authority passing the order took into account extraneous or irrelevant consideration, or

(iii) Where the authority passing this order failed to take into account relevant considerations."

All the seven judges were in consonance on the above three grounds. This decision in the Rajasthan case had created a landmark by establishing a new starting of judicial review of Presidential satisfaction. It was done despite the bar expressed by Art. 365(5) upon this judicial review. After this decision, Clause 5 had to be repealed by the Constitution 44th Amendment Act, 1978 and thus removal of the cap put upon judicial power by the Legislature. But this tussle continued between the government and judiciary based on the plea of "Subjectivity" by the government and hence avoiding judicial review by the court, but of no use.

Even the above decision was reinforced strongly by the Supreme Court in *S.R. Bommai v. Union of India*[455]*, where it was considered thoroughly and concluded that Presidential satisfaction is under the sweep of judicial review. It will be done by reviewing the material on which basis Presidential satisfaction is finalised, not upon*

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[451] Art. 365 (2), The Constitution of India.
[452] Supra note 123.
[453] Rao Virender Singh v. Association of India, available at : https://indiankanoon.org/doc/138995/, last seen on 12/5/2021.
[454] Shamsher Singh v. State of Punjab , AIR 1975 1 SCR 814.
[455] Supra note 133.

*the advice tendered to the President by the executive. It is done by removing the ambiguity that material upon which advice was prepared is out of the purview of Art. 74 (2) and privilege provided under Sections 123 and 1*24 of the Indian Evidence Act, 1872.

In response to the plea that advice comprises material and therefore is beyond the scope of judicial review, B.P. Jeevan Reddy J. clarified by saying that:[456] *"The material placed before the President by the Council of Ministers does not thereby become part of advice. Advice is what is based on the said material. Material is not advisable if the advice is tendered in written form, in such a case that writing is the advice and is covered by the protection provided by Article 74 (2)."*

It leads to the finding that the material of the report can be scrutinized by the court for finding out its reasonableness and rationale use.

(c) Scope of Judicial Review (Interpretation) of Art. 370 Abrogation and J&K Reorganisation Act, 2019:

The necessity of scope of judicial review exists due to its submission of Counter affidavit by the Union of India before the Court in response to the writ petitions that the desirability and wisdom of the decisions of the President and the Parliament are not amenable to judicial review[457] because of existence within the arena of policy-making of Union government based on President Rule in the State.[458] The Union government justifies its policy by stressing the curbing the terrorism and separatism along with ensuring the complete integration of Jammu and Kashmir with the Union and it will result in the greater socio-economic development of the State and the extension of various government schemes to the residents of Jammu and Kashmir.

In the case of *State of Punjab* v. *Ram Lubhaya Bagga*[459], the Court observed that questioning the validity of governmental policy will be within the domain of the

[456] Supra note 133.
[457] 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.
[458] Ibid, para 18.
[459] State of Punjab v. Ram Lubhaya Bagga, AIR 1998 SC 1703.

judiciary when there is arbitrary or violative of any constitutional or statutory provision.[460]

Similarly, in *Ugar Sugar Works* v. *Delhi Administration,* the Court stressed upon that it is the best way to be open for the discretion of the State to express their opinion as to whether a particular policy should have been adopted at a particular given time or in a particular situation. But this rule would not be applicable if the policy was mala fide, unreasonable or arbitrary.[461]

Similarly, in *S.R. Bommai* v. *Union of India*, the Court clarified in the context of Article 356 that excessive use of power will also be considered an illegal, irrational, and malafide exercise of power.[462] 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.[463]

On basis of the above cases judgements, it will be valid to the Court in the instant case to satisfy itself regarding arbitrariness and unreasonableness of the actions taken by the President and the Parliament under the veil of Article 356 to abrogate Article 370 and bifurcate Jammu and Kashmir. The review of the Court will deeply analyse the issuing C.O. 272, C.O. 273 and enacting the Reorganisation Act on the touchstone of powers provided in Article 356 of the Constitution.

(d) Judicial Interpretation of Status of Delhi and Recent GNCT Delhi Amendment Act, 2021:

(i) During the entire political gimmick of allegations between the Centre and Delhi government over the issues of corruption against Reliance Industries Ltd. and jurisdiction of ACB and the unilateral appointment of acting Chief Secretary by LG (or Centre), the Delhi High Court on August 4, 2016, decided in favour of the LG (regarding the notifications issued by the Centre and Delhi government) in *another case* filed by the Delhi government viz. *Govt. of NCT Delhi v. Union of India*.[464] Here

[460] Ibid, para 22.
[461] Ugar Sugar Works Ltd. v. Delhi Administration, AIR 2001 SC 1447, para 17.
[462] Ibid, para 71.
[463] Ibid.
[464] Govt. of NCT Delhi v. Union of India, W.P.(C) No.5888/2015 & CM Nos.10642/2015, Delhi High Court Judgement dated August 4, 2016.

all notifications issued by the Union Home Ministry were justified and hence curtailed the power of Delhi's elected government.

(ii) But this continuous power tussle and *appeal by the Delhi government before the Supreme Court* against the decision of the Delhi High Court led to landmark judgement by the Supreme Court *reversing*[465] the decision of the Delhi High Court. The Supreme Court give the judgement opposite to that of Delhi High Court by favouring Delhi's elected government by curtailing the wings of the LG upon the contentious term "aid and advice". Hence, from onwards except entries of land, police and public order there will be complete freedom to Delhi government to frame laws and take executive actions without the consent of LG i.e. ending of the interference by the LG (or Centre).

Present Status of Judiciary upon the GNCT Delhi Amendment Act, 2021

This Amendment Act, 2021 again revived the dispute on the distribution of powers between LG and the Delhi government by negating down the judgement of the Constitutional Bench of the Supreme Court.[466]

Now the matter is before the Delhi High Court as a Public Interest Litigation (PIL) and notices are already issued on this PIL filed by Neeraj Sharma, AAP member[467] challenging GNCTD Bill, 2021 based upon the unconstitutionality and violating of principles of democracy and federalism and Article 14 and 21. It stated that the amendment nullifies the decision of the Supreme Court in ***Govt. of NCT Delhi v. Union of India (C.A. No. 2357 of 2017)*** regarding the supremacy of the elected government of Delhi. It also mentioned that the amendment Act transgresses and pervades even the Constitutional Bench judgement of the Supreme Court. It also submitted that it is violating of principles of democracy and federalism which is enshrined in the Preamble and edifice of the Indian Constitution.

This PIL comes up for hearing before the two-judge Bench of High Court namely Justice DN Patel and Justice Jyoti Singh and the Bench issued the notice to

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[465] Ibid.
[466] Govt. of NCT Delhi v. Union of India, Supreme Court, Civil Appeal No. 2357 of 2017.
[467] The Business Standard, *Delhi HC issues notice on AAP member's plea challenging GNCTD Bill, 2021*, dated May 25, 2021, pp. 1-6, https://www.business-standard.com/article/current-affairs/delhi-hc-issues-notice-on-aap-member-s-plea-challenging-gnctd-bill-2021-12105240033...

Union of India and Delhi government for further hearing on July 23, 2021, and directed the respondents to file a detailed reply in this matter.

It concludes that the above matter is before the court for its final decision regarding the validity of this Amendment Act, 2021 on the touchstone of the spirit of the Constitution viz. separation of the powers and federal democratic nature of the governance.

7.4 To suggest measures as the possible solutions for these challenges studied in this research work:

This part will be dealt with under the head of “Suggestions” present in the next chapter.

Chapter 8 Conclusions and Suggestions

8.1 Conclusions

Based upon the findings on the different issues considered after the detailed study, there arises a common problem of over-centralisation of the power by the Centre against the spirit of the Constitution. Even after tilting towards the Centre while allotting the powers by the framers of the Constitution, there has been an irrational and arbitrary use of power leading to over-centralisation for political gains. The following conclusions are drawn by the researcher regarding the different issues studied in this research work:

8.1.1 Regarding Indian Federalism

The Indian Constitution is a federal one due to the passing of the legal test of federalism in terms of division of powers between the Centre and States along with the power of judicial review provided by the Constitution itself. It is also considered as a part of the Basic Structure of the Constitution as cleared by the judgements of the Supreme Court in several cases from time to time.[468] [469] [470] As per the decision of the G*ovt. of NCT Delhi*[471] case, there should be coordination amongst the Union and the State Governments. The Union and the States need to embrace collaborative or cooperative federal architecture for achieving this coordination.

8.1.2 Regarding Article 356 and its Abuse

It is concluded that Article 356 is a two-way sword and is necessary to maintain it in the Constitution even though doubts have been raised against this Article by various experts and the people for its misuse by the Centre. It is not necessary to repeal it because of specific urgent situations to maintain the integrity of Article 355 and the Constitutional machinery in any State of India. But its misuse by the Centre because of over-centralisation as against the spirit of the Constitution as envisaged by the Framers of the Constitution should be controlled following various safeguards and recommendations provided by the judgement of the Supreme Court in *S. R.*

[468] Automobile Transport v. State Of Rajasthan, AIR 1962 SC 1406, pp.1415-16.
[469] Ref. under Art.143, AIR 1965 SC 745, para.39.
[470] Keshavananda Bharti v. Union of India, AIR 1973 SC 1461.
[471] Government of NCT Delhi v. Union of India, AIR 2018 SC 501, p. 95 (para 109).

Bommai[472] case. The several safeguards suggested by different Commissions appointed from time to time by the Union government like Sarkaria[473], Venkatachaliah[474] and Punchhi [475]Commissions had provided a way forward towards the solution of the abuse of power by the Centre itself.

8.1.3 Regarding Abrogation of Article 370 and J&K Reorganisation Act, 2019

It is concluded after the research work that abrogation of Art. 370 and its special status seems to be constitutionally invalid due to non-consideration of the Will of the People of J&K via. their elected representatives while under Presidential Rule. The matter is pending[476] before the Supreme Court of India for its decision and the landmark judgement is still awaited eagerly by all. It can be done by following the democratic principles by the Centre by the concurrence of a majority of elected representatives of J&K leading to the inclusion of people of J&K in this typical change. It is a clear show of over-centralisation of the power by the Centre even though this Art. 370 is slowly hollowing out[477] with several Presidential Orders from to time due to the increased engulfing of the powers of the J&K government by the Indian Constitution.

8.1.4 Regarding GNCT Delhi Amendment Act, 2021

It is concluded that due to over-centralisation power used by the Centre in the recent Amendment Act of 2021 by overturning the decision of the Supreme Court seems to be constitutionally invalid because of violation of GNCT Delhi Act, 1991 as originally framed according to recommendations of the Balakrishnan Committee.[478] The demand for full-statehood should be dropped out while demanding for maximum autonomy as cleared from the study of the model of governance followed by different federal capitals of the world.[479] [480] [481]

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[472] Supra note 133.
[473] Supra note 157.
[474] Supra note 209.
[475] Supra note 220.
[476] Supra note 293.
[477] Supra note 45.
[478] Supra note 47.
[479] Supra note 47.
[480] Supra note 49.
[481] Supra note 50.

8.2 Suggestions

8.2.1 Regarding Indian Federal Design

- The politically biased persons should be avoided for the appointment to the post of President in India. It will lead to the more transparent and efficient functioning of the government without the allegations of biased or favoured decisions by the President of India.

- The Governor should not hold office during the pleasure of the President and hence Article 156(1) should be amended or deleted out. This will not lead to the mid-term resigning of the Governor. It also leads to the complete removal of the whims of the Union government upon which he works at present.

- The selection for the Constitutional Post of the Governor should be done by a Committee comprising of the leader of opposition in the Centre and the concerned State along with the consultation of Chief Minister of that State with Union Home Minister and Prime Minister for avoiding the allegations of biased selection of Governor.[482] The leader of the opposition should be included in the selection committee to avoid any allegations of partisan politics against the Union government and respective State governments.

- There should be an inclusion of the provisions of Impeachment of the Governor similar to that of the President as provided in Article 61 of the Indian Constitution. It will lead to the non-functioning of the Governor as a puppet of the Centre because from onwards power of removal will belong to the Indian Parliament, not the Union government.

8.2.2 Regarding Article 356 and its Abuse by the Centre

- Article 356 should not be deleted from the Constitution because of the urgency of the situation if created accidentally to carry out the functioning of the Constitutional machinery of the State.

[482] Supra note 209.

- Non-political Governor will not form biased report irrespective of the government present in that State as generally occurs in the present politics due to following of the signals by the Governor given by the Central government.
- The President should not act as a rubber stamp of the government but should behave like an impartial one like Sh. K.R.Narayana declined the request of the government to impose Art. 356 irrationally during his regime.
- Justified and rational use of it by the Centre should be done only when there is a complete breakdown of law and order that occurs in any State and the State govt. is unable or unwilling to maintain the spirit of the Constitution.
- As per the judgement of the Court in the *Bommai*[483] case, the Proclamation should be made more meaningful by providing grounds and material facts along with the Proclamation notwithstanding given in Art.74 (2) of the Constitution will indicate the transparency followed by the Centre.
- The judicial review will become more meaningful by evaluation of these matters by the special courts for speedy justice.
- The first-hand opportunity must be given to the State for the chance of improvement by the issuance of a warning to the concerned State government upon its irrational and illegal working leading to the transgression of its constitutional limits. It should be followed as a precautionary measure by the Union government against the errant State.
- There should be the restoration of the dismissed govt. if Proclamation is not approved by the both Houses of Parliament. It will lead to hesitation in the Centre for such invocation for its political gains.
- The provisions corresponding to Clause 8 of Art. 352 should be incorporated here also for calling of the Special Session of the Parliament upon the notice in writings signed by not less than one-tenth of the total number of the House of

[483] Supra note 133.

the People sent to the Speaker or President (as per the condition of the House in session or not respectively).[484]

- There should be a de-linking of two different conditions as provided in Art. 356 (5) i.e. it may not be possible to conduct elections even without the conditions of Proclamation of Emergency anywhere in India. Hence the possibility of two conditions differently at separate times may be possible and hence required.

8.2.3 Regarding the Abrogation of Art.370 and J&K Reorganisation Act, 2019

- The federal spirit of the Constitution should be followed by the Centre otherwise it will lead to the creation of suspicion in the minds of North-East States also because of special powers of governance provided to them as compared to other States similar (not same) to that of J&K.
- The Will of the people of J&K should be considered by the concurrence of the elected representatives of the people of J&K.
- There should be partial change done in Art. 35A of the J&K Constitution leading to providing permanent citizenship to all sections of the society present in J&K for a long time.
- Unemployment should be brought down by providing job opportunities to the youths of J&K leading to the development of better understandings between the youths of J&K and the Government of India.
- The continuance of AFSPA should be reviewed from time to time by the inclusion of J&K people representatives in the decision-making mechanism. The relaxations in terms of AFSPA can be advanced towards the people of J&K on their better cooperation with GOI.

8.2.4 Regarding the Statehood of Delhi and GNCT Delhi Amendment Act, 2021

[484] Supra note at 209.

- There should be the adoption of cooperative federalism by the Centre and Delhi government for dissolving the ice of tense relations between Centre and State.
- The more decentralisation of powers favouring Delhi should be followed by the Centre to avoid confrontation with the elected government of Delhi and considering the necessity of time for the progress of Delhi as a role model capital. Simultaneously, the complete Statehood demand by the State should also be dropped for the progress of Delhi and only more powers are demanded as against the demand of complete Statehood.
- The non-political persons should be an appointment at the post of LG. It will lead to the ending of political favour by LG to the Union government and vice-versa.

8.3 Suggestions for Further Research

Considering the importance of the present study the following suggestions for further continuation of the research work can be undertaken:

- The area of research already undertaken can be enlarged by doing the comparative study of the different provisions present there in the Constitutions of different federal countries.
- The area of study can be enlarged by focussing upon several other challenges faced by Indian federal design.
- A study on the trend of changing challenges faced by the different countries from time to time.
- A study can be done out by comparison of different types of federal designs followed by different federal countries.
- Evaluation of an efficient and transparent model of federal design by doing interdisciplinary studies by the cooperation of experts of the different fields.

This is how further research work can be extended in pursuing a Doctorate of Philosophy or other research projects prepared by different proposers like government, NGO's, research institutes and Policy think-tanks etc.

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