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## ELECTORAL AUTONOMY AND NOMINATED MLAS IN JAMMU & KASHMIR: A CONSTITUTIONAL QUANDARY IN ASYMMETRICAL FEDERALISM

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### ABSTRACT

Jammu and Kashmir (J&K) is a special region in the Union of India where the practice of democracy attracted challenges unlike other parts of India. To retain administrative control and counter foreign influence in the region, the Central Government had to curtail the political autonomy of J&K. This created a paradox: while aiming to strengthen governance, it also contributed to the extraconstitutional captivity of democracy in the region by limiting self-rule. The *grundnorm* of Kashmiri autonomy i.e., the substance of Article 370 was replaced with the Jammu and Kashmir (Reorganisation Act) 2019 which downgraded the constituent unit from an autonomous state to a mere union territory with a statutory legislature. Moreover, the centre empowered the Lieutenant Governor (LG) to nominate up to five members to the legislative assembly of J&K. This capacity to nominate members by an external agency posits a challenge to realising regional aspirations. Article 239A, which puts the legislature of J&K within the exclusive domain of the Parliament, harbours the calibre to disrupt the federal structure of India. This article briefly traces the evolution of governance model in J&K since its accession into India; and aims to examine the constitutionality and scope of the Parliaments power to control the configuration of the legislature of J&K and its implications on electoral democracy in the region. The research undertaken is doctrinal. The assessment drawn from this region is significant due to the recent elections in J&K, which demonstrated the expanded Parliamentary powers under the constitution after the abrogation of Article 370.

## 1. INTRODUCTION

The constitutional arrangement established by the merger of the erstwhile Kingdom of Jammu and Kashmir (J&K) with the Indian Union was relatively distinct from the arrangement preferred for other princely state. The king of J&K was rather hesitant to surrender his sovereignty to the Indian Union<sup>1</sup>; and when he did do so eventually, he conditioned the retention of legislative autonomy with the state legislature except on the matters of defence, external affairs and communication and matters incidental thereto.<sup>2</sup> These terms of accession remained preserved under Article 370 of the Indian constitution as a transitory provision<sup>3</sup> until it was abrogated by Presidential proclamation on 5<sup>th</sup> August, 2019.<sup>4</sup>

### *The Special Character of J&K as a Federal Unit<sup>5</sup>*

On being questioned by a fellow member in the Constituent Assembly on why J&K was being treated unlike other states, Shri. N. Gopalaswami Ayyangar elaborated that J&K “*is not yet ripe for this kind of integration*”.<sup>6</sup> He further cited the causes compelling such ‘discrimination’ to be abnormity and partial occupation of the territory by hostile groups.<sup>7</sup> The transition from a Kingdom to a subconstitutional<sup>8</sup> federal unit within the Indian Republic gave birth to unparalleled institutional setup in the polity of Indian federalism. Article 370 of the Indian constitution was a method to accommodate an interim institutional setup designed to serve deliberate causes.<sup>9</sup> The Hon’ble Supreme Court of India observes that Article 370 served two interim purposes:

a) to establish a constitutional link between the Union and J&K until a Constituent Assembly is formed in the state to ratify the Indian constitution; and

b) to function as an interim arrangement until the war conditions, remain active in the state.<sup>10</sup>

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<sup>1</sup> Sajid Ali, ‘How on this day 72 years ago, Jammu & Kashmir agreed to become a part of India’ *ThePrint* (New Delhi, 26 October 2019) <<https://theprint.in/past-forward/how-on-this-day-72-years-ago-jammu-kashmir-agreed-to-become-a-part-of-india/311724/>> accessed 08 March 2025

<sup>2</sup> Instrument of Accession 1947 F.NO.- P-I/20/47 clause 3

<sup>3</sup> *In Re: Article 370* 2023 INSC 1058 para 320

<sup>4</sup> Declaration under Article 370(3) of the Constitution “C.O.273”, G.S.R. 562(E) (New Delhi, 6 August 2019)

<sup>5</sup> Lok Sabha Secretariat (ed), ‘*Constituent Assembly Debates*’, vol 10 (6<sup>th</sup> reprint, Jainco Art India 2014) (423)

<sup>6</sup> CAD (n 5) (424)

<sup>7</sup> CAD (n 5) 425

<sup>8</sup> Tom Ginsburg & Eric A. Posner, ‘*Subconstitutionalism*’ (2010) 62 *Stan L Rev* 1583, 1584

<sup>9</sup> CAD (n 5) 425

<sup>10</sup> *In Re: Art. 370* (n 3) para 278

Hence, it would be just to posit that, considering the purpose b) above, the territory of J&K, as it situates presently, is unfit for governance as an ordinary state in the Indian union. It necessitates special institutional arrangements until normalcy is sustained in the state.

### ***Redefinition as an UT in the Indian Union***

Soon after the abrogation of Article 370 of the constitution, the Union Government, by exercising Article 3 of the Constitution, enacted the Jammu and Kashmir (Reorganisation) Act, 2019 (J&K Act 2019). The legislation bifurcated the state into two Union Territories of Jammu and Kashmir, and Ladakh, with the former alone retaining a legislature.<sup>11</sup> The Commission on State Reorganisation, 1955 observes that the rationale to restructure constituent political units is generally necessitated by factors such as “*national unity and administrative, economic and other considerations*”.<sup>12</sup> Further, the commission justified formulation the concept of ‘Union Territory’ as an exception to the primary constituent unit (States) wherever the strategic, security or other reasons compelled.<sup>13</sup> However, the concerns of the Union Government must be inclusive of the broader pillars that stabilises the diverse assembly of the Indian Union such as Federalism and Democracy.<sup>14</sup> The Indian constitution enables a flexible form of federalism or asymmetrical federalism, which could – as and when compelled by circumstances – translate into loss for select states for the greater good of the Indian Union.<sup>15</sup> While the states are coequal with the centre in the arena of legislative and executive authority,<sup>16</sup> the union territories are agencies of the union government.<sup>17</sup> Moreover, even amongst the Union Territories, the degree of autonomy is not uniform.<sup>18</sup> Nonetheless, the Hon’ble Supreme Court observes that Union Territories are interim constitutional arrangements owing to compelling circumstances and hence, once administratively viable, all Union Territories are destined to qualify for statehood.<sup>19</sup>

The States source their authority to govern from the Constitution and not a federal enactment. When Himachal Pradesh (HP) was in dispute with Punjab on retaining some power produced by a hydro-electric plant situated between the two States for free on the ground that it had

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<sup>11</sup> Jammu and Kashmir (Reorganisation) Act 2019, s 4

<sup>12</sup> Ministry of Home Affairs, *State Reorganisation Commission* (1955) para 45

<sup>13</sup> *Ibid* (n 12) para 237

<sup>14</sup> *In Re: Art. 370* (n 3) para 481

<sup>15</sup> CAD (n 5) (K.T. Shah) (437)

<sup>16</sup> *In Re: Art. 370* (n 3) para 482

<sup>17</sup> *In Re: Art. 370* (n 3) para 485

<sup>18</sup> *In Re: Art. 370* (n 3) para 485

<sup>19</sup> *In Re: Art. 370* (n 3) paras 491; 495

inherent right over the land and water that passed through the State, Punjab protested that the Parliament could unilaterally alter its boundary such that the quoted 'inherent right' is lost to other State(s). The Hon'ble Himachal Pradesh High Court held that despite the power of the Parliament conferred under Article 3, the executive power of the state legislature in respect of State list of Seventh Schedule of the Constitution would survive with the State.<sup>20</sup> The Union Territories are deprived of such constitutional powers as enjoyed by States as they are administered by the central Government. This possibility reflects a radical shift in power of a State being downgraded to the status of an Union Territory, especially since the views of the State legislature on such Parliamentary proposal are only recommendatory and not binding.<sup>21</sup>

## 2. GOVERNANCE STRUCTURE OF THE UNION TERRITORY OF JAMMU AND KASHMIR

The political restructuring of Jammu and Kashmir transformed the erstwhile state into a Union Territory with a Legislature.<sup>22</sup> As the J&K Act 2019 came into force, the then Governor of the undivided J&K assumed the position as a common Lieutenant Governor (LG) for both the Union Territories of Ladakh as well as that of Jammu & Kashmir.<sup>23</sup> Eventually, on 6<sup>th</sup> August, 2020, the President of India formally appointed Shri Manoj Sinha as the LG of J&K, who continues to serve the office till date.<sup>24</sup>

### *Applicability of Article 239A of the Constitution on Jammu and Kashmir*

Article 239A, as it situates today<sup>25</sup> where its operation onto the then Union Territories of Himachal Pradesh, Tripura, Manipur, Goa and Daman and Diu except Puducherry remains omitted,<sup>26</sup> it is purposed to empower the Parliament to legislate on matters concerning, *inter alia*, the UT's (J&K and Puducherry) legislature and Council of Ministers.<sup>27</sup> It is noteworthy that Article 239A, wherefrom the legislative authority of the UT of J&K is sourced, bestows the Parliament with the unfettered discretion to make laws concerning the UT, unlike Article

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<sup>20</sup> *State of Himachal Pradesh v. Union of India* 2011 (13) SCC 344 (SC) para 93

<sup>21</sup> *Babulal Parate v. State of Bombay* AIR 1960 SC 51 (SC) para 5

<sup>22</sup> JK Act 2019 (n 11)

<sup>23</sup> JK Act 2019 (n11) s 5

<sup>24</sup> Rashtrapati Bhavan, 'President of India Appoints Shri Manoj Sinha to be the Lieutenant Governor of Jammu and Kashmir' (New Delhi, 06 August 2020) <<https://ramnathkovind.nic.in/pr060820.html>> accessed on 08 March 2025

<sup>25</sup> The Constitution (Fourteenth Amendment Act 1962

<sup>26</sup> *Government of NCT of Delhi v. Union of India* C.A. 2357/2017 (SC) para 178

<sup>27</sup> The Constitution of India Act 1950, Art. 239A (1)

239AA(2) (in relation of Delhi) where such Parliamentary discretion remain absent.<sup>28</sup> Hence, the legislative and the executive setup established in the UT invoking Article 239A is subject to the discretion of the Parliament. Therefore, such UT legislatures do not retain a federal feature of being coequal with the Union legislature, as is the case with States in the Indian Union.

Moreover, the legislature of J&K established by operation of Article 239A (1) may either be ‘wholly elected’ or ‘partly elected and partly nominated’. No such nominative legislature is permitted in the National Capital Territory of Delhi under Article 239AA; which reflects that despite both Delhi and J&K being Union Territories, constitutionally they are not uniform. Article 239A (1) does not guarantee a representative form of government as available under Article 239AA (2). In other words, the Constitution does not guarantee a representative form of government to the Union Territories of J&K and Puducherry, as is guaranteed to Delhi. Further, the presence of distinct provisions for distinct Union Territories reflects that no two Union Territories are uniform in terms of their relationship with the Central Government and exercisable Presidential control over their administration.<sup>29</sup>

Article 239A operates in conjuncture with Article 240(1) which enables the President to make regulations for “*peace, progress and good government*” of the Union Territories. However, the proviso to Article 240(1) forbids the President from making regulation after the legislature under Article 239A commenced to function unless it is dissolved or is rendered dysfunctional by an Act of the Parliament. This mechanism helps in preventing duality of governance.<sup>30</sup> It is pertinent to note here that the Parliament is constitutionally and unconditionally empowered to disable the functioning of the J&K’s legislature.<sup>31</sup>

### ***The Lieutenant Governor***

The concept of State Government is alien to the administration of Union Territory as Article 239 prescribes that every Union Territory is to be administered by the President, either by herself or through an appointed delegate (Administrator).<sup>32</sup> Further, the General Clauses Act accommodates the Lieutenant Governor (LG) within the inclusive definition of “*Central*

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<sup>28</sup> *NCT v. UOI* (n 26) para 207

<sup>29</sup> *NCT v. UOI* (n 26) (part H) para 71

<sup>30</sup> *NCT v. UOI* (n 26) (part H) para 72

<sup>31</sup> *NCT v. UOI* (n 26) (part H) para 72

<sup>32</sup> *State of Madhya Pradesh v. Shri Moula Bux* (1962) 2 SCR 794 (SC) para 17

*Government*”<sup>33</sup>. Even when a legislation refers to appropriate government, the central government is the ‘state government’ in respect of the UT of J&K.<sup>34</sup> The executive power of the UT too vests exclusively with the President and not with anybody elected locally.<sup>35</sup> In other words, constitutionally there is no ‘State government’ in the UT of J&K.

### ***The Nominated Legislators***

Given the enabling character of Article 239A of the constitution, the Parliament, in addition to the discretion to dismantle the J&K’s legislature, is empowered to choose the composition of the legislature of J&K insofar as the proportion of the elected and nominated legislators is concerned.<sup>36</sup> The original J&K Act 2019 empowered the LG to nominate up to two members to the Legislative Assembly of the UT.<sup>37</sup> Come 2023, additional such enabling provisions were inserted to the J&K Act 2019; thereby enabling the LG to nominate three more members to the Legislative Assembly of the UT; two from the community of Kashmiri Migrants<sup>38</sup> and one from displaced persons from Pakistan occupied J&K.<sup>39</sup>

The power of the LG to nominate up to five members to Assembly has attracted discontent voices from some political parties of J&K. They claim that absolute discretion enjoyed by the LG merits judicial scrutiny.<sup>40</sup> They further allege that the LG may favour one party over the other and thereby affect the strength of the elected government of the UT.<sup>41</sup> The implications indicated here are further discussed below.

### ***Electoral Democracy in J&K***

The power of the LG to unilaterally nominate five members to the legislative assembly of J&K was challenged before the Hon’ble Supreme Court<sup>42</sup>, *inter alia*, on the following grounds, that:

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<sup>33</sup> The General Clauses Act 1897, s 3(8)(b)(iii)

<sup>34</sup> *NCT v. UOI* (n 26) (part K) para 117

<sup>35</sup> *NCT v. UOI* (n 26) para 39

<sup>36</sup> *NCT v. UOI* (n 26) (part D) para 26

<sup>37</sup> JK Act 2019 (n 11) s 15

<sup>38</sup> JK Act 2019 (n 11) s 15A

<sup>39</sup> JK Act 2019 (n 11) s 15B

<sup>40</sup> Bijay Kumar, ‘Explaining row over Lt Governor’s power to nominate 5 members to J&K Assembly’ *IndiaToday* (New Delhi, 07 October 2024) <<https://www.indiatoday.in/elections/assembly/story/jammu-and-kashmir-election-results-2024-lt-governor-manoj-sinha-5-mlas-nomination-row-2612614-2024-10-07>> accessed on 08 March 2025

<sup>41</sup> *Ibid* (n 40)

<sup>42</sup> *Ravinder Kumar Sharma v. Lieutenant Governor of Jammu and Kashmir & Ors.* WP(C) Diary No. 46862/2024 (SC)

- a) The LG must consult with the Council of Ministers before nominating members to the Legislative Assembly of the UT; and
- b) If a government is formed with a thin majority (as was in the 2024 Election where the ruling Party won by mere three seats),<sup>43</sup> those five members unilaterally nominated by the LG could undemocratically decide which party may form the government in J&K.<sup>44</sup>

However, the Apex court declined to admit the matter and directed the Petitioner to move to the High Court and exhaust the alternate remedies available. Hence, presently the matter remains admitted and *subjudice* before the Hon'ble Jammu and Kashmir High Court.<sup>45</sup>

Recently, the sister Union Territory of Puducherry encountered a controversy where some issues were identical. While the constitutional position is settled that all Union Territories are not uniform, since Article 239A is the parent provision empowering the Union Government to administer both the UTs, an argument may be sustained that both the UTs insofar as the powers of the LG is concerned, could be classified into one class for the purpose of interpreting applicable laws (as would be uncovered under headings below, even the statutory laws concerning both the UTs employ the same language).

In view of the post 2024 election controversy in J&K, two core concerns are visible for legal assessment:

- A. The legality of the power of the LG to nominate members to the UT's Assembly absent the consultation with the Council of Ministers; and
- B. Voting Rights of Nominated Legislators.

The next heading shall examine the judicially settled jurisprudence in respect of the UT of Puducherry and endeavour to study the developed interpretation thereunder to aid us in assessing the legal position of the foregoing concerns of J&K.

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<sup>43</sup> Election Commission of India, 'General Election to Assembly Constituencies: Trends & Results October – 2024' (Jammu & Kashmir) <<https://results.eci.gov.in/AcResultGenOct2024/partywiseresult-U08.htm>> accessed on 08 March 2025

<sup>44</sup> Debby Jain, 'Supreme Court Refuses to Entertain Plea to Restrain J&K LG from Nominating Members to Assembly, Asks Petitioner to Approach HC' LiveLaw (14<sup>th</sup> October 2024) <<https://www.livelaw.in/top-stories/supreme-court-refuses-to-entertain-plea-assailing-jk-lg-proposed-move-to-nominate-5-members-to-assembly-272354?fromIpLogin=16047.303998566309>> accessed on 08 March 2025

<sup>45</sup> *Ravinder Kumar Sharma v. Union Territory of J&K and Ors.* WP(C) PIL 14/2024 (JK HC)

### 3. JAMMU AND KASHMIR AND PUDUCHERRY: CONSTITUTIONAL SIBLINGS

On 23<sup>rd</sup> of June, 2017, the Union Government nominated three MLAs from BJP (which then served as the opposition to the ruling party) to the legislative assembly of Puducherry absent consultation with the Council of Ministers.<sup>46</sup> It attracted severe criticism from the ruling party. The decision was so unpopular that the speaker of the Puducherry Legislature declined to recognise the nominated members as Members of Legislative Assembly.<sup>47</sup> Cutting the chase of the subsequent events, put to judicial scrutiny, the following jurisprudential development was uncovered as discussed below.

#### *The Power of the LG to nominate members to the UT's Assembly absent the consultation with the Council of Ministers*

The law applicable to the UT of Puducherry is the Government of Union Territories Act, 1963 (UT Act, 1963) (as does the J&K Act 2019 to the UT of J&K). The UT Act, 1963 enables the Central Government to nominate up to three members to the legislature of Puducherry.<sup>48</sup> To effectively govern the UT of Puducherry, the President has made the Rules of Business of the Government of Puducherry, 1963 (1963 Rules) by exercising power given under Section 46 of the UT Act, 1963.

The Rule 48 of the 1963 Rules states that the LG, “*if he deems fit, either consult his council or the chief minister, before exercising his powers...*”. However, it is qualified by

- a) Rule 4(1) which refers to “*the business of the Government*” in relation to which the Council of Ministers are required to aid and advise the LG as per Section 44(1) of the UT Act, 1963; and
- b) Rule 4(2) thereof which mandates the application of Rule 48 only on “*remaining business of the Government*”.

Moreover, section 44(1) of the UT Act, 1963 concerns only such functions in relation to which the legislative assembly has the power to make laws. The Hon’ble Supreme Court observes that

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<sup>46</sup> Government of India, Ministry of Home Affairs, Notification F.No. 11012/1/2014-UTL (New Delhi, 23 June 2017)

<sup>47</sup> Editorial, ‘Speaker rejects Nomination of 3 BJP members to Puducherry’ IndiaToday (13 November 2017) <<https://www.indiatoday.in/pti-feed/story/speaker-rejects-nomination-of-3-bjp-members-to-puducherry-1085569-2017-11-13>> accessed on 08 March 2025

<sup>48</sup> Government of Union Territory Act 1963, s 3(3)



the words “*remaining business of the Government*” under Rule 4(2) refers only to the business of the Government of Puducherry and not Union Government. Section 3(3) of the UT Act, 1963 empowers the Union Government to nominate members to the legislative assembly, and thus, the said business of the Union Government does not concern the Government of the Puducherry.<sup>49</sup>

Likewise, the J&K Act, 2019<sup>50</sup> employs the same language as Section 44(1) of the UT Act, 1963 in respect of the role of the Council of Ministers; However, it explicitly states that in matters where the LG is required to act at his discretion, the aid and advice of the Council is not mandatory.

Then the question may surface: If the LG is not concerned with the aid and advice of the Council of Ministers of J&K, then is the discretion of the LG unfettered?

The Court observes that as per the Government of India (Allocation of Business) Rules, 1961, made by the President in exercise of his power under Article 77 of the Constitution, all matters of the Central Government concerning Part VIII of the Constitution in so far as it relates to Article 239A, are assigned to Ministry of Home Affairs of the Union Government.<sup>51</sup>

Thus, in light of the foregoing, the *de jure* power of the LG to nominate remains undisturbed by any executive or legislative member of the UT of J&K.

### ***Voting Rights of Nominated Legislators***

While entertaining a submission by Adv. Kapil Sibal on the Right of the nominated members to vote be restricted during budget and no confidence motion against the Government, the Hon’ble Apex Court observed that Article 239A enables the Union Government to provide for a legislature of a composition that may include nominated members. Further, the Court admitted that even statutorily, once part of the legislative assembly, there existed no distinction between a nominated or elected member.<sup>52</sup> Alike the UT Act, 1963,<sup>53</sup> the JK Act 2019<sup>54</sup> employs the

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<sup>49</sup> *K. Lakshminarayanan v. Union of India & Anr.* 2018 INSC 1161 paras 23-28

<sup>50</sup> JK Act 2019 (n 11) s 53

<sup>51</sup> *K. Lakshminarayanan* (n 49) paras 31-32

<sup>52</sup> *K. Lakshminarayanan* (n 49) para 92-94

<sup>53</sup> UT Act, 1963 (n 48) s 12(1)

<sup>54</sup> JK Act 2019 (n 11) s 25

same language in respect of Voting power in the Assembly by the members, without distinguishing them in any kind.

It is unfeasible to add words to a statute that is clear and explicit. The fact is, therefore, sustained that the nominated members have their right to vote in the assembly preserved as much as that of those elected.

#### 4. ASSESSMENT AND CONCLUSION

The constitutional restructuring of J&K subsequent to the abrogation of Article 370 has challenged the normative jurisprudence of electoral democracy and federalism in India. Justice Beg, in a seven-Judge Bench, observed that Indian federalism could be diluted in the interest of *“needs of progress and development of a country which has to be nationally integrated, politically and economically coordinated, and socially, intellectually and spiritually uplifted. In such a system, the States cannot stand in the way of legitimate and comprehensively planned development of the country in the manner directed by the Central Government”*.<sup>55</sup> Dr. Ambedkar clarifies in the Constituent Assembly, that although the Indian constitution envisages a dual polity of federalism as observed in USA, the Indian variant of Federalism would, however, not be *“placed in a tight mould of federalism”*.<sup>56</sup> He further adds, should need be, India will also function unitarily as dictated by time and circumstances.<sup>57</sup> Union Territories belong to the Union, and as entrusted by the Constitution, the administrative control exclusively rests with the President of India.<sup>58</sup> It is a constitutional arrangement that is designed to serve extraordinary circumstances. The special and sensitive region where UT of J&K is situated, merits the exercise of constitutionally sanctioned methods to safeguard the larger interest of the Union of India. A controlled constraint may be reversible but an uncontrolled disorder may perpetually paralyse order. Having said that, the present model of governance could undermine the democratic legitimacy of J&K and dilute regional aspirations to make way for national security needs. To bridge the gap between central authority and democratic representation,

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<sup>55</sup> *State of Rajasthan v. Union of India* (1977) 3 SCC 592 (SC) para 57

<sup>56</sup> Sansad, *Constitutional Assembly of India Debates (Proceedings)*, vol 7 (34) <[https://sansad.in/uploads/const\\_Assmbly\\_Debates\\_Volume7\\_4\\_November1948\\_64efedfedd.pdf?updated\\_at=2022-09-15T06:41:42.626Z](https://sansad.in/uploads/const_Assmbly_Debates_Volume7_4_November1948_64efedfedd.pdf?updated_at=2022-09-15T06:41:42.626Z)> accessed on 08 March 2025

<sup>57</sup> Ibid (n 56)

<sup>58</sup> *K. Lakshminarayanan* (n 49) para 53

judicial oversight and active civil societal engagement could serve as institutional checks on unfettered Parliamentary governance.

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