

CHIEF JUSTICE'S COURT
HON'BLE THE CHIEF JUSTICE DY CHANDRACHUD
HON'BLE MR. JUSTICE SANJAY KISHAN KAUL
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE B.R. GAVAI
HON'BLE MR. JUSTICE SURYA KANT

**SERIAL No. 501, COURT NO.1 SECTION PIL-W
SUPREME COURT OF INDIA
RECORD OF PROCEEDINGS**

Writ Petition (Civil) No.1099/2019

In re: Article 370 of the Constitution

TRANSCRIPT OF HEARING

02-August-2023

Document Control

Document Name & Date	Transcript of WP (Civil) 1099 of 2019 Hearing dated 02.08.2023
Status	Released
Version	1.0
Last Update	02.08.2023
Nature of Update	Original version
Release Date	02.08.2023
Document Owner	Supreme Court of India

10:45 AM IST

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36

CHIEF JUSTICE DY CHANDRACHUD: Mr. Sibal, before we begin, perhaps we can have some assessment from your side on the time schedule. So that time schedule and order of submissions so that we have some broad idea. So we take it that...

KAPIL SIBAL: There is a bit disorder at this side, My Lords, on that point. But we shall tell Your Lordships...

CHIEF JUSTICE DY CHANDRACHUD: Alright. So roughly Mr Sibal, how long... would you be arguing first? After you who would be arguing Mr. Sibal?

KAPIL SIBAL: Gopal, My Lords.

CHIEF JUSTICE DY CHANDRACHUD: Alright. Mr. Subramaniam [Sankaranarayanan] is going to be arguing after that. Then Dr...

KAPIL SIBAL: Then I think Dr. Dhavan [Dave] My Lords.

CHIEF JUSTICE DY CHANDRACHUD: Now the time estimate. I would suggest that we'll give a fairly comprehensive hearing to the first counsel. After that I think the others can pick up whatever threads remain to be argued because if we start giving the same amount to second, third, then we'll never... there will be no end to it. So once the ground has been covered by the counsel who has argued first then after that of the second counsel, then for the others, I think...

KAPIL SIBAL: Fair enough.

CHIEF JUSTICE DY CHANDRACHUD: So....

KAPIL SIBAL: We always adhere to that...

CHIEF JUSTICE DY CHANDRACHUD: Mr. Sibal can we suggest, can we suggest that you can continue until lunch tomorrow because we are starting right up in the morning?

KAPIL SIBAL: We will take My Lords, a little more than that because we have to go through the history because this has to be dealt within a historical context.

1 **CHIEF JUSTICE DY CHANDRACHUD:** Alright.

2

3 **KAPIL SIBAL:** My Lords, let me put it this way, I will try and do it, My Lords. And if Your
4 Lordships feel that I need a little more time Your Lordships <UNCLEAR>

5

6 **CHIEF JUSTICE DY CHANDRACHUD:** Absolutely, we are not going to... if you feel that,
7 you know.... Because our conscience also has to be satisfied that we have heard that side of the
8 matter fully from you.

9

10 **GOPAL SANKARANARAYANAN:** Mr. Sibal, in that request, because we have spent hours,
11 I mean thousands pages of [UNCLEAR]

12

13 **CHIEF JUSTICE DY CHANDRACHUD:** That's alright. But we don't have to read all the
14 documents. I mean that's why, written submissions are filed. So Mr...

15

16 **JUSTICE SANJAY KISHAN KAUL:** Lot of it is historical documents.

17

18 **KAPIL SIBAL:** That's right.

19

20 **GOPAL SANKARANARAYANAN:** That's right. But that history is important, which is
21 very...

22

23 **JUSTICE SANJAY KISHAN KAUL:** I agree some part of the history is important. But I
24 don't think we get mired in history only.

25

26 **GOPAL SANKARANARAYANAN:** Not at all.

27

28 **JUSTICE SANJAY KISHAN KAUL:** Of course. <UNCLEAR> legal proposition to be
29 decided.

30

31 **GOPAL SANKARANARAYANAN:** The three of Your Lordships have heard this matter
32 once before. When we started it took...

33

34 **CHIEF JUSTICE DY CHANDRACHUD:** So Mr. Subramaniam and Mr. Shekhar Naphade
35 have, you know, I shouldn't say billed for 8 hours but at least said that they are going to take
36 8 hours. So I think the 8 hours and 10 hours from Mr. Subramaniam, I think that's a little bit

1 of an overstatement. I think we'll have to cut down that. And Mr. Naphade we will also have
2 to request you to cut down your submissions. So last time...

3

4 **DINESH DWIVEDI:** Your Lordships, can you give one and half hours to two hours?
5 [UNCLEAR]

6

7 **CHIEF JUSTICE DY CHANDRACHUD:** So let's...we will start by...

8

9 **JUSTICE SANJAY KAUL:** Last time... let me say this...

10

11 **DINESH DWIVEDI:** Or else Mr. Ramachandran [UNCLEAR] because he has argued in the
12 past.

13

14 **JUSTICE SANJAY KISHAN KAUL:** He argued. He's not now. He's not addressing because
15 the party for whom he's appearing has withdrawn. But the point is on the last hearing almost
16 90% was, at least three of us are party to the hearing. And I think in about four days or so four
17 to five days we had almost finished the hearing of the petition.

18

19 **GOPAL SANKARANARAYANAN:** The question of the reference on those two judgements,
20 that's all.

21

22 **CLAIMANT'S COUNSEL:** The difficulty was when the preliminary issue was framed
23 whether 1960 or...

24

25 **JUSTICE SANJAY KISHAN KAUL:** Most parties, I am sorry, most parties argued the
26 merits of the matter.

27

28 **GOPAL SANKARANARAYANAN:** Your Lordship, you are right, Mr. Ramachandran and
29 Mr. Zafar Shah [UNCLEAR]

30

31 **JUSTICE SANJAY KISHAN KAUL:** They had argued the full length I remember. I had
32 made notes of that time...

33

34 **SANJAY PARIKH:** [UNCLEAR] Your Lordships may recall initially. We had argued actually
35 the law point whether there is an overlapping in the sense that the judgment which has been
36 given [UNCLEAR].

37

1 **CHIEF JUSTICE DY CHANDRACHUD:** You are right. Let's do this. Let's get down now....

2

3 **KAPIL SIBAL:** Four distinguished judges have not heard that.

4

5 **JUSTICE SANJAY KISHAN KAUL:** Two people [UNCLEAR]. Two people have fully
6 argued it, I remember it distinctly.

7

8 **CHIEF JUSTICE DY CHANDRACHUD:** Let Mr. Sibal open. And I am sure by the end of
9 the day we will have a good picture.

10

11 **DINESH DWIVEDI:** My Lords, myself, I will not take more than 2 hours. Whenever Your
12 Lordships give, whatever the order.

13

14 **CLAIMANT'S COUNSEL:** My Lords, I'll take a little more than that. My friend may take 2
15 hours but I'll take more than that.

16

17 **CHIEF JUSTICE DY CHANDRACHUD:** That Mr. Zafar should...

18

19 **ML SHARMA:** Your Lordship.

20

21 **JUSTICE SANJAY KISHAN KAUL:** Mr. Dhavan praising Mr. Zafar Shah in the last
22 proceeding that he had set [UNCLEAR].

23

24 **CLAIMANT'S COUNSEL:** [UNCLEAR]

25

26 **JUSTICE SANJAY KISHAN KAUL:** You are right. Absolutely right. Two of them. Zafar...

27

28 **CLAIMANT'S COUNSEL:** I addressed Your Lordships only on the reference.

29

30 **JUSTICE SANJAY KISHAN KAUL:** You are right. Only Raju Ramachandran and Zafar
31 Shah fully argued the matter.

32

33 **CLAIMANT'S COUNSEL:** That's right.

34

35 **ML SHARMA:** Your Lordship, may I submit? Permit me to submit my submission please. I
36 want to say something to the Honourable Court please Your Lordship.

37

1 **CHANDER UDAY SINGH:** This is an application to Your Lordships not in the matter My
2 Lords. I am really sorry to do this but clarification is needed whether My Lords Court 3, My
3 Lord Honourable Justice Bose's Bench can hear mentioning. There is something very urgent
4 that...

5

6 **CHIEF JUSTICE DY CHANDRACHUD:** There is a provision in the latest SOP.

7

8 **CHANDER UDAY SINGH:** Your Lordships are... I am just....

9

10 **CHIEF JUSTICE DY CHANDRACHUD:** There is a provision in the SOP, circulate an
11 email. I've said that however I urgent something is, once the mentioning is not available or the
12 mentioning is over, just an email will be put up to me by the registrar listing. I'll pass orders
13 immediately. So just read the SOP. It has everything in that.

14

15 **CHANDER UDAY SINGH:** Because Your Lordships have Constitution Bench...

16

17 **CHIEF JUSTICE DY CHANDRACHUD:** I think yesterday, every mentioning request
18 which was made until late night yesterday was attended to. I was in fact a little more liberal
19 because I knew that this was going to happen, that we are the first five are going to be in a
20 Constitution Bench. All requests have been granted. If there's something over and above that,
21 the SOP has a provision even for that. Follow the SOP, I'll give you a date immediately.

22

23 **CHANDER UDAY SINGH:** We will send that email immediately. There is something very
24 dire My Lords.

25

26 **CHIEF JUSTICE DY CHANDRACHUD:** Yes. So Mr. Sibal we'll start.

27

28 **ML SHARMA:** Your Lordship....

29

30 **CHIEF JUSTICE DY CHANDRACHUD:** Yes, Mr. Sharma?

31

32 **ML SHARMA:** Your Lordship, am I clear? May I request Your Lordships?

33

34 **JUSTICE SANJAY KISHAN KAUL:** You are very clear Mr. Sharma. What do you want to
35 say?

36

37 **ML SHARMA:** Your Lordships....

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36

CHIEF JUSTICE DY CHANDRACHUD: Mr. Sharma, I can anticipate what you are saying.

ML SHARMA: Yeah. I want to say....

CHIEF JUSTICE DY CHANDRACHUD: We are not calling this matter by the name of any individual litigant. We are saying In Re: Article 370, I think that should resolve your problem.

ML SHARMA: I agree. My request is only that of course, I filed the first petition. I have a very serious issue with me. Permit me to argue in the last. I'm not saying allow me first. Permit me to argue in the last...

CHIEF JUSTICE DY CHANDRACHUD: Of course Mr. Sharma. Yes. Mr. Attorney, likewise I think we don't have to... we will also request your side also to not overlap and then...

ML SHARMA: We will not overlap anything. I will not touch the point, whatever are going to be submitted by anyone over here. I have total different thing...

CHIEF JUSTICE DY CHANDRACHUD: Yes, yes Mr. Sharma, we got your point now.

JUSTICE SANJAY KISHAN KAUL: You will be the last batsman. Yes.

ML SHARMA: Yeah, but give me....

TUSHAR MEHTA: Necessarily be based upon what is argued, what points are formulated, how etc. And before they end, we would not indicate our time. We have understood My Lord, the concern that there should not be any repetition, unwarranted repetition etc.

KAPIL SIBAL: May I please My Lord...

PRASANNA S: A point of clarification Your Lordship. I was appointed the nodal counsel, unfortunately not able to present as I am down with conjunctivitis. But Writ Petition (Civil) no. 1099 of 2019, in which Mr. Ramachandran was appearing, although two parties have withdrawn, there are other petitioners who are still prosecuting this case and there will be representation for that as well.

1 **CHIEF JUSTICE DY CHANDRACHUD:** Alright. Who will be appearing in that, for the
2 remaining petitioners Mr. Prasanna?

3

4 **PRASANNA S:** We are still hoping that Mr Ramachandran can come [UNCLEAR].

5

6 **CHIEF JUSTICE DY CHANDRACHUD:** Let us know as....

7

8 **PRASANNA S:** Difficulty that...

9

10 **RESPONDENT'S COUNSEL:** With regard to main petitioners it's clear, with regards to
11 interveners Your Lordship nodal officer has given us time.

12

13 **CHIEF JUSTICE DY CHANDRACHUD:** We'll see about the interveners. Let's first hear
14 the counsel, and then we'll see what remains.

15

16 **RESPONDENT'S COUNSEL:** [UNCLEAR] described by Mr. Prasanna, the Nodal Officer.

17

18 **KAPIL SIBAL:** But the Court is to decide.

19

20 **CHIEF JUSTICE DY CHANDRACHUD:** He has suggested the time frame. We will then...
21 we will see. Of course, we will not.... we'll certainly decide at the end of the... once we have a
22 few of the leading counsel who make their submissions, we will know what areas still remain.
23 We will assign some time. Yes Mr. Sibal.

24

25 **TUSHAR MEHTA:** Mr. Sibal would be arguing which petition? So that we can have that.

26

27 **KAPIL SIBAL:** That is In Re: 370 now.

28

29 **TUSHAR MEHTA:** No. Whom do you represent? That's all. So that we can say that the
30 pleadings from...

31

32 **KAPIL SIBAL:** Mr. Lone.

33

34 **TUSHAR MEHTA:** Lone?

35

36 **KAPIL SIBAL:** Yeah. Akbar Lone My Lord.

37

1 **CHIEF JUSTICE DY CHANDRACHUD:** Yes.

2

3 **KAPIL SIBAL:** This is indeed , according to me, a historic moment in many ways. First, My
4 Lord that Your Lordships would be analysing why history was tossed out on the 6th of August
5 2019. Whether the procedure adopted by Parliament was consistent with what democracy
6 stands for. Whether the will of the people of Jammu and Kashmir could be silenced in this
7 fashion. Whether they will be denied a representative form of government through a dictate of
8 the Union inconsistent with our Constitution. It is also historic because it has taken five years
9 for Your Lordships to start hearing this case and for five years, My Lords, there has been no
10 representative government in the state of Jammu and Kashmir. It is also historic because you
11 will have to interpret Article 356 of the Constitution of India, an Article which seeks to restore
12 democracy. And how did that process, through an article which sought to restore democracy
13 you have decimated democracy. Can that be done under Article 356? That the State of Jammu
14 and Kashmir, historically represented a very unique relationship unlike princely states and the
15 states of India, which were integrated into the Union. Whether that historic relationship
16 between sovereign authorities could have been jettisoned in this fashion by seeking to amend
17 the Constitution and seeking to efface Article 370. Whether My Lords, a Governor of a state
18 would have on the 20th June 2018 decided that I will keep the Assembly under suspended
19 animation, which is the power of the Governor alone on the J&K Constitution, without even
20 trying to find out whether they can form a Government or not. Because on the 19th June, a
21 particular party withdrew support and on the 20th of June, the Governor passed this order.
22 Whether on the 21st November 2018 a dissolution of the Assembly could have taken place
23 before the imposition of Article 356. The Governor on the 21st of June dissolved the Assembly
24 without reference to 356. And thereafter, Article 356 was used and the manner that it was used
25 will be My Lords...I will address Your Lordships on those issues. These are issues that will
26 arise for Your Lordships consideration, never raised, never decided by this court. So in that
27 sense too, it is historic. So My Lords I will proceed because there is a historical context to the
28 state of Jammu and Kashmir. So I'll have to take Your Lordships through that history. And if
29 Your Lordships will permit me My Lords, I'll start with a list of dates.

30

31 **CHIEF JUSTICE DY CHANDRACHUD:** Mr. Sibal, as all counsel know that all the
32 arguments we have the benefit now of live transcription. So the arguments are being
33 simultaneously, we have transcripts in the court on the basis of speech to text software. Like
34 in the Maharashtra case, by the end of the day the transcripts will be given to the arguing
35 counsels. Your juniors can just verify that there are no mistakes. If there are any corrections,
36 they can be given to the registry so that we will upload them immediately on our website, so
37 they are available for everybody then to... that will also help counsel who are following.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37

KAPIL SIBAL: Absolutely.

CHIEF JUSTICE DY CHANDRACHUD: Of course it helps us as well, as well as everybody else.

KAPIL SIBAL: So My Lords, I'll start off with the list of dates which is Volume 2, Written Submissions, Volume 2, PDF page 33. My Lords, Written Submissions, Volume 2, PDF Page 33. We were reluctant students but Your Lordships ensured that we become disciplined students. Yes, the list of dates because it's somewhat elaborated, because it'll give you a flavour what the issues are My Lords. May I My Lords? 33 My Lords, PDF page 33. It's called Appendix 1, list of dates and events.

JUSTICE B.R. GAVAI: 5th of March, 1846.

KAPIL SIBAL: That's correct. That's correct. Hope it is 33 My Lords.

JUSTICE B.R. GAVAI: It is 33.

JUSTICE SANJIV KHANNA: Okay, fine.

KAPIL SIBAL: May I, My Lords? Before this, may I just state one... I want to make one statement clear, that we stand here on the premise that the integration of Jammu and Kashmir into India is unquestionable, was unquestionable and always remained unquestionable. That was a given. And despite that My Lords, the whole structure was overnight, My Lords changed through a process which I will demonstrate was unconstitutional. When Your Lordships will be dealing with this matter, there will be four legislations, in a sense that you'll be dealing with. One is the Constitution of India, the second is the Constitution of India as applicable in the State of Jammu and Kashmir, third is the Constitution of Jammu and Kashmir and fourth is Article 370. And the interaction between these three Constitutions in the context of Article 370 is something that Your Lordships will have to look at as we move forward. But please keep that in mind. The reason why I say Constitution of India is applicable to the State of Jammu and Kashmir, that over time My Lords, there were several orders issued, constitutional orders from time to time, which were incorporated in the Constitution of India as applicable to Jammu and Kashmir. The result was that most of the powers that... most of the responsibilities and powers were actually in tandem with the Constitution of India. There was, in fact, really no difference other than Article 370 itself. All the laws were applicable except that those laws were replicated

1 in the Constitutional orders of the Government of India. So, therefore there was no reason to
2 take away this right. It's in that context My Lords that I'm mentioning this. Now My Lords I'll
3 go to the list of dates.

4

5 On the 9 March 1846, the Treaty of Lahore was executed between Maharaja of Lahore, and the
6 British Government, resulting in the transfer of certain territories to the East India Company.
7 In particular, under Article 4 of the Treaty, the Maharaja cedes to the honourable Company,
8 all its forts, territories, rights and interests in the hill countries, which are situated between
9 the River Beas and Indus, including provinces of Cashmere and Hazara. Earlier, Jammu's
10 Maharaja Gulab Singh's General, Zorawar Singh had invaded Ladakh in 1834. Ladakh came
11 under Dogra rule and was incorporated into the state of Jammu and Kashmir in 1846. During
12 the Sino Sikh War the Qing Empire invaded Ladakh for the Sino Tibetan Army was defeated.
13 Ladakh was claimed as a part of Tibet by Phuntsok Wangyal, a Tibetan Communist leader. In
14 1947 partition left Ladakh a part of the Indian state of Jammu and Kashmir to be administered
15 from Srinagar. On the 16th of March 1846, following the Treaty of Lahore, the British
16 Government executed the Treaty of Amritsar on March 16, 1846. Under the Treaty, the hilly,
17 mountainous country with its dependencies situated in the east of River Indus and west of
18 River Ravi , including Chamba and excluding Lahore, Lahore was transferred by the British
19 Government to Maharaja Gulab Singh of Jammu. The reason was simple My Lords. There was
20 a violation of the Treaty of Lahore, and therefore compensation had to be paid My Lords to
21 the British government. He was not able to pay that compensation. In lieu of that
22 compensation, these territories were ceded. That's what happened. On the 30th of June 1857,
23 Gulab Singh died and was succeeded by his son, Ranbir Singh. Following the passage of the
24 Government of India Act 1858, territories formerly in possession under control of the East
25 India Company were vested in the British monarch in whose name India was to be governed.
26 1885, Maharaja Ranbir Singh died and was succeeded by Maharaja Pratap Singh. In 1889,
27 30th of August, the Interpretation Act of 1889 was passed by the UK Parliament, Section 18(4)
28 of the act defined the expression British India. All territories and places within Her Majesty's
29 dominion, which after the time being governed by Her Majesty through the Governor General
30 of India. In addition, the term India was defined under Section 18(5), as British India, together
31 with any territories of any native Prince or Chief under the suzerainty of Her Majesty exercised
32 to the Governor General of India. You will note here My Lords, Jammu and Kashmir is not
33 part of this. In 1925, Maharaja Patap Singh was succeeded by Maharaja Hari Singh, the last
34 ruler of the princely state of Jammu and Kashmir. And on the 20th of April, 1927 the
35 expression State Subject was defined in the State Subject Definition Notification dated April
36 20 1927, which was issued by Maharaja Hari Singh. This notification classified State Subjects
37 into four classes and subsequently became the basis for the definition of permanent residents

1 of Jammu and Kashmir under the Constitution of Jammu and Kashmir in Article 35(a) of the
2 Constitution of India.' Your Lordship need not go into it because we are not really dealing with
3 that issue. But I am just mentioning it. 'On the 22nd of April 1934, Maharaja Hari Singh
4 enacted Regulation 1 of Samvat 1991 on April 22, 1934.' Wherever there is Samvat My Lord, if
5 you take away 57 years that gives you the year. 'The regulation established a Legislative
6 Assembly for the State of Jammu and Kashmir called the Praja Sabha. While certain legislative
7 functions were delegated to the Praja Sabha, the ruler, Maharaja Hari Singh retained
8 supremacy over all legislative, executive, and judicial matters. On the 2nd of August 1935, the
9 Government of India Act 1935 was passed by the UK Parliament. The Act established India as
10 a Federation comprising Governors' Provinces, Chief Commissioners' Provinces, the Indian
11 States, which had or would accede to the Federation of India.

12

13 Under Section 6 of the said Act, the ruler of Indian Princely States was empowered to execute
14 an Instrument of accession, declaring that he accedes to the Federation of India, subject to the
15 terms of such instrument. Under Section 2, an Instrument of accession was to specify matters
16 with respect to which the Federal Legislature would have competence to legislate for a
17 particular state and the limitations, if any, on the Federal Legislature's power to make laws or
18 exercise executive authority over such state. Notably as the state of Jammu and Kashmir was
19 not a part of British India, provisions of the Government of India Act 1935 did not apply to it
20 unless an Instrument of accession was executed by its ruler in accordance with Section 6. On
21 the 7th of September 1939, the Jammu and Kashmir Constitution Act 1939 was promulgated.
22 While Maharaja Hari Singh retained sovereignty and supremacy over all legislative, executive,
23 and judicial functions, the act provided the Praja Sabha to make laws for the entire state of
24 Jammu and Kashmir or any part thereof, subject to certain conditions. Further, the said act,
25 vested executive functions with counsel consisting of a Prime Minister and other ministers
26 appointed by the ruler. The Act also provided for the High Court, which had been established
27 by the ruler in 1928 to be a court of record with jurisdiction to adjudicate upon *inter alia* civil
28 suits, civil criminal and revenue suits. On the 16th May 1946, the Cabinet Mission issued a
29 statement regarding its report. Under paragraph 15(1) and (4) of that statement, the Cabinet
30 Mission Plan envisaged a Union of India, where the Union would have responsibility over
31 Defence, Foreign Affairs and Communications, and the states would retain jurisdiction over
32 all other subjects not ceded to the Union. On the 12th, 22nd May 1946, the Cabinet Mission
33 issued a memorandum titled 'States, Treaties and Paramountcy', which affirmed that
34 following the establishment of an independent Government in India, the paramountcy of the
35 British monarch over Indian States would lapse and paramountcy power over their respective
36 territories would return to the states. On the 19th of December 1946, the Constituent Assembly
37 of India, in terms of the Cabinet Mission Plan, met for the first session. On the 22nd of January

1 1947, the Constituent Assembly of India unanimously adopted the Objectives Resolution,
2 which declared the Assembly's firm and solemn resolve to proclaim India as an independent
3 sovereign Republic. Importantly, paragraph 3 of the Objective Resolution declared that
4 princely states that had joined the Union of India, and I quote, whether with their present
5 boundaries or with such others as maybe determined by the Constituent Assembly and
6 thereafter, according to the law of the Constitution, shall possess and retain the status of
7 Autonomous Units, together with residuary powers and exercise all powers and functions of
8 Government and administration, save and accept such powers and functions as are vested in
9 or assigned in the Union.

10
11 On the 25 January 1947, the Constituent Assembly adopted a resolution- the establishment of
12 the Union Powers Committee to *inter alia* draw up lists of matters included in the and
13 interconnected with the suffix assigned to the Union, before the framing of the Constitution.
14 On the 5 July 1947, the Union Powers Committee submitted its second report of the
15 Constituent Assembly. Significantly, the report noted in paragraph 3 and I quote, "It is
16 necessary to indicate the position of Indian States as a scheme proposed by us. The States
17 which have joined the Constituent Assembly have done so on the basis of the 16th May
18 statement. Some of them have expressed themselves as willing to cede wider powers to the
19 Centres than contemplated in that statement. But we consider it necessary to point out that
20 the application to states in general of the federal list of subjects, insofar as it goes beyond the
21 16th May statement, should be with their consent. It follows from this, that in their case,
22 residuary powers would vest with them unless their consent to their vesting in the centre. And
23 Your Lordship knows that consent was given.

24
25 The UK Parliament on 18th of July 1947, passed the Indian Independence Act of 1947 under
26 (1)(1) Sec(1)(1) of the Act. From August 15, 1947, two independent dominions, India and
27 Pakistan, were to be established. Significantly, Section 7(1)(b) of the Act stated that following
28 independence, the suzerainty of the British monarch over Indian states would lapse and
29 returned to the rulers of such states. Resultantly as sovereign states, as many as 562 princely
30 states had the choice to remain independent or accede to either of the two dominions
31 established by the Act. Lastly, as a transitional measure, Section 8 prescribed that provisions
32 of the Government of India Act 1935, would continue to apply to the dominion of India and
33 Pakistan, subject to certain conditions. Under Section 9 of the Indian Independence Act, the
34 Governor General issued the India Provisional Constitutional Order 1947, which made certain
35 sections of the Government of India Act 1935 applicable to India until other provisions were
36 made by the Constituent Assembly. Among the applicable provisions was Section 6, which
37 dealt with accession of princely states to India through the execution of the Instrument of

1 Accession. On the 15th August, India attained independence and it was partitioned into the
2 dominions of India and Pakistan. Further, as British paramountcy had lapsed, princely states
3 that had not executed instruments of accession with either dominion became independent
4 states. These included the states of Junagadh, Hyderabad, and Jammu and Kashmir.

5

6 On 26th of October 1947, the ruler of Jammu and Kashmir made an offer of accession to India
7 asking for help from the Indian dominion to meet a grave emergency caused by mass
8 infiltration of tribesmen wronged from distant area of Northwest Frontier coming regularly in
9 motor trucks, Mansehra-Muzaffarabad Road, and fully armed with up to date weapons, which
10 cannot possibly be done without the knowing of the provincial Government of the Northwest
11 Frontier Province and the Government of Pakistan. In the Instrument of Accession signed by
12 him on the same date he declared his accession to India subject to the terms of such
13 instrument. Under Section 3 of the instrument, the dominion legislature had authority to
14 make laws for the State of Jammu and Kashmir on the subjects of Defence, External Affairs,
15 and Communication. Article 7, provided that the Instrument of Accession did not commit the
16 ruler to the acceptance of any future Constitution of India, while Section 8, vested sovereignty
17 over subjects not acceded to India in the ruler."

18

19 My Lords, just two issues, I want to flag here. Your Lordships, in the course of this hearing will
20 have to determine what does the Constituent Assembly stand for. A Constituent Assembly
21 stands for enacting a Constitution for the future of the territories with respect to which the
22 Constitution is to apply. It's essentially a political exercise. It's not a legal exercise. It's a
23 political exercise to take into account the aspirations of people, what kind of state the people
24 want and in the context of that draft the Constitution. Right?

25

26 The constitution itself is a political document, but it takes into account the aspirations of
27 several segments of society living within a united territory. Takes into account their separate
28 aspirations and in the context of that drafts a constitution to meet the aspirations in future
29 years for decades to come. So the exercise of a Constituent Assembly is a political exercise. The
30 drafting of the constitution, which is a political document, is a political exercise. Once the
31 constitution is drafted, once it is come into place, then all institutions under the constitution
32 are governed by the constitution. And those institutions are limited, are limited in the exercise
33 of their powers because they have to exercise their powers consistent with the provisions of
34 the constitution. Parliament cannot convert itself into a Constituent Assembly. That's done.
35 Today the Indian Parliament can't say by a resolution that we are the Constituent Assembly.
36 As a matter of law, they can't say it. Because they are now cabined, cribbed and confined by
37 the provisions of the constitution. They can't pass a law which is outside the list. They can pass

1 a law under 254. If the state passes a law, it's repugnant. They must adhere the basic features
 2 of the constitution. They can't suspend, except in emergencies with external aggression, the
 3 fundamental rights of people. That also is limited under the provisions of the Constitution.
 4 The executive can't do things which are contrary to the law and the judiciary then declares the
 5 law. But no Parliament can convert itself into a Constituent Assembly. And if you accept that
 6 proposition of law, it has enormous consequences for the future of my country. And that is one
 7 of the most salient and according to me, the core issues to be decided in this case. Because
 8 Parliament converted said that we declare the legislature of the State of Jammu and Kashmir
 9 as a Constituent Assembly. Where does Parliament get that power? How does Parliament get
 10 that power? Under which provision of law? Not under 356.

11

12 So that's My Lords, according to me, the core of the issue that Your Lordship will have to
 13 decide. May I now, My Lords, with Your Lordships permission, read the Instrument of
 14 Accession? Because what happened on the 26th of October actually the invasion so to say was
 15 started on the 20th of October and within six days, these decisions were taken. Because the
 16 invaders came, they were armed, they had guns. They would have run over the state. The ruler
 17 realizes that he cannot secure the security of his own people. He had entered into a standstill
 18 agreement with Pakistan. India refused to enter into a standstill agreement with him and then
 19 My Lords thereafter what happened? Thereafter what happened was that he said, "Look, I
 20 need help." And he told Mountbatten I cannot possibly secure my people. So thereafter, the
 21 proceedings started. He sought. And he said, "Look, if you help me, I will unconditionally
 22 access to India subject to my own conditions", which is separate My Lords, from the
 23 Instrument of Accession of the other states. And India accepted it, and that's how India
 24 secured the pace and was able to, My Lords.... And of course, the precursor to that is the
 25 Radcliffe Award, in terms of which the part of Gurdaspur would connected Jammu & Kashmir,
 26 My Lords, to India, was ceded to India under the Radcliffe Award, which allowed for that
 27 contiguity, which was the basic principle on the basis of which the partition was to take place.
 28 So that's how all this happened. Now let me read to Your Lordships, the Instrument of
 29 Accession. Volume 1 My Lords. Documents, Volume 1.

30

31 My Lords, kindly come to PDF page... yes. PDF page 7, Offer of Accession by Maharaja Hari
 32 Singh on 26th of October 1947. Documents, Volume 1, PDF page 7. Yes, My Lords. Volume 1
 33 My Lords page 7. PDF page is also 7. Page 7 yes.

34

35 **JUSTICE B.R. GAVAI:** Page 7 is an offer by....

36

37 **KAPIL SIBAL:** Yes. Offer of Accession by Maharaja Hari Singh.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37

JUSTICE SANJAY KISHAN KAUL: We begin with page 7?

KAPIL SIBAL: Yes. Page 7 My Lords. 26th October 1947.

JUSTICE SURYA KANT: Mr. Sibal, you are referring Documents, Volume 1.

KAPIL SIBAL: Yes, Volume 1.

JUSTICE B.R. GAVAI: Treaty of...

KAPIL SIBAL: Yes. My Lord. Lord Mountbatten wrote that letter.

'I have to inform' - may I My Lords? 'I have to inform Your Excellency that a grave emergency has risen in my state and request immediate assistance of your Government. As Your Excellency is aware the State of Jammu and Kashmir has not acceded to the Dominion of India or to Pakistan. Geographically, my state is contiguous to both the Dominions. It has vital ... It has vital economic and cultural links with both of them. Besides my state has a common boundary with the Soviet Republic of China. This should be 'and China', it should be sorry 'and China'. In their external relations and Dominion of India and Pakistan cannot ignore this fact. I wanted to take time to decide to which Dominion I should accede,' - Basically My Lords, he wanted to be independent, quite frankly. But given this situation, he had no choice. - 'or whether it is not in the best interest of both the Dominions and my State to stand independent, of course, with friendly and cordial relations with both. I accordingly approach the Dominions of India and Pakistan and entered into a standstill agreement with my State. Pakistan Government accepted this agreement. The Dominion of India desired further discussions with representatives of my Government. I could not arrange this in view of the developments indicated below. In fact, the Pakistan Government are operating Post and Telegraph system inside the state. Though we have got a standstill agreement with the Pakistan Government permitted steady and increasing strangulation of supplies like food, salt and petrol in my state... to my state. Afridis, soldiers in plain clothes and desperadoes with modern weapons have been allowed to infiltrate into the state at first in Poonch and then in Sialkot.' - There was a Poonch revolt, My Lords, - 'and finally in mass area adjoining Hazara District, on the Ramkot side. The result has been that the limited number of troops at the disposal of the state had to be dispersed and thus had to face the enemy at several points simultaneously. That it has become difficult to stop the wanton discussion of life and property and looting. The Mahora Power House, which supplies electric current to the whole of Srinagar, has been burnt. The number of women who have been kidnapped and raped makes my heart bleed. The wild forces

1 thus let loose on the state are marching on with the aim of capturing Srinagar, the summer
 2 capital of my Government as a first step to overrunning the whole state. The mass infiltration
 3 tribesmen drawn from the distant areas of Northwest Frontier, coming regularly in motor
 4 trucks using Mansehra-Muzaffarabad Road and fully armed with up to date weapons, cannot
 5 possibly be done without the knowing of the provincial Government of the NWSP and the
 6 Government of Pakistan. In spite of repeated requests made by my Government, no attempt
 7 has been made to check these raiders or stop them from coming to my state. The Pakistan
 8 radio even put out a story that a provincial government has been set up in Kashmir. The people
 9 of my state, both Muslims generally, both the Muslims generally have taken no part at all. With
 10 the conditions obtaining at present in my state and to the great emergency of the situation as
 11 it exists, I say no option, I have it should be, I have no option but to ask for help from the
 12 Indian dominion. Naturally, they cannot send the help asked for by me, without my state
 13 acceding to the dominion of India. I have accordingly decided to do so and I attach the
 14 instrument of accession for acceptance by your Government. The other alternative is to leave
 15 my state and my people to freebooters. On this basis, no civilized Government can exist or be
 16 maintained. The alternative I will never allow to happen as long as I am ruler of the State and
 17 I have life to defend my country. I may also inform Your Excellency's Government that it is my
 18 intention to once to set up an interim government and ask Sheikh Abdullah to carry the
 19 responsibilities in this emergency with my Prime Minister. If my state has to be saved,
 20 immediate assistance must be available at Srinagar. Mr. Menon is fully aware of the situation
 21 and he will explain to you if further explanation is needed. In haste and with kindest regards.'
 22 My Lords, Your Lordship may, just a historical fact, at that point in time, Sheikh Abdullah was
 23 in prison and he had been always against the ruler because he wanted the will of the people of
 24 Jammu and Kashmir, My Lords and not a despotic ruler. So he was against the Sadr-e-Riyasat,
 25 so to say. But My Lords, when he realized that look, unless I get him on my side. I'm not going
 26 to be able to defend. So he My Lords, released him, and said, you form the interim
 27 Government. Just a historical fact. That's how it happened. Yeah, I know that. But I want to
 28 bring politics into it. The moment I take somebody's name, they'll be the other side, no, no,
 29 no. Nehru had nothing to do with this. So I don't want to enter into politics here. No politics
 30 My Lord. I don't want fireworks in a very solemn occasion like this.

31

32 So, My Lords, now the Instrument of Accession, page 9. Actually Your Lordships knows more
 33 than we do. Your Lordship knows more about it than we do.

34

35 **JUSTICE SANJAY KISHAN KAUL:** No, no, we always keep learning.

36

1 **KAPIL SIBAL:** My learned colleague points out there are very interesting snippets in the
2 transfer of our documents as to how this happened, and VP Menon actually sets it up.

3

4 **JUSTICE SANJAY KISHAN KAUL:** I just told them there was 7 miles from the Srinagar,
5 the raiders. So then the Army was asked to...

6

7 **KAPIL SIBAL:** Absolutely, absolutely. Electricity My Lords was... and they could not be
8 controlled as they were raiders. There was no choice. I mean he never wanted to accede but
9 there was no choice. So may I My Lords? Page 9. Whereas the Indian Independence Act, 1947
10 provides that as... it's obvious My Lords, 15th August was independence. He did not
11 immediately accede. All the other Maharajas acceded apart from those two, Junagadh and
12 Hyderabad. He never wanted to. It's only in October that this happened. Whereas the Indian
13 Independence Act 1947 provides that as from the 15th day of August 1947, there shall be set
14 up an independent dominion known as India, and that the Government of India Act 1935 shall,
15 with such omissions, additions, adaptations and modifications of the Governor General may
16 by order specify, be applicable to the dominion of India. And whereas, the Government of
17 India Act 1935 as so adopted by the Governor General provides, that an Indian state may
18 accede to the Dominion of India by an instrument of accession executed by the ruler
19 [UNCLEAR].

20

21 Now, therefore, "I Shriman Inder Mahendra Rajrajeshwar Maharajadhiraj Shri Hari Singh ji,
22 Jammu and Kashmir Naresh Tatha Tibbetadi Deshadhipati ruler of Jammu and Kashmir state
23 in the exercise of my sovereignty in and over my said state do hereby execute this instrument.
24 I hereby declare that I accede to the Dominion of India with the intent the Governor General
25 of India, the dominion Legislature, the Federal Court, and any other dominion authority
26 established for the purposes of the dominion, shall by virtue of this my Instrument of
27 Accession, but subject always to the terms thereof... kindly mark that... subject always to the
28 terms thereof, and for the purposes only of the dominion, exercise in relation to the State of
29 Jammu and Kashmir such functions as may be vested in them by or under the Government of
30 India Act 1935, as in force in the dominion of India on the 15th day of August, 1947. Such
31 functions there may be vested. I hereby assume the obligation of ensuring that due effect is
32 given to the provisions of the Act within the state so far as they are applicable therein, by virtue
33 of my Instrument of Accession. I accept the matter specified in the Schedule hereto, as the
34 matter with respect to which the dominion legislature may make law for the state. I hereby
35 declare that I accede to the Dominion of India on the assurance that if an agreement is made
36 between the Governor General and the ruler of the state, whereby any functions in relation to
37 the administration of the state of any law of the dominion legislature shall be exercised by the

1 ruler of the state, that any such agreement shall be construed and have effect accordingly. In
2 terms of this Instrument of Accession, my Instrument of Accession shall not be varied by any
3 amendment of the Act or the Indian Independence Act, 1947 unless such amendment is
4 accepted by the... by instrument supplementary to this Instrument. Nothing in this instrument
5 shall empower the dominion legislature, to make any law for this
6 sub... This state authorizing the compulsory acquisition of land for any purpose. But I hereby
7 undertake that should the dominion for the purpose of a dominion law which applies in the
8 state deem it necessary to acquire any land, I will at their request, acquire the land at their
9 expense. Or if the land belongs to me, transfer it to them on such terms as maybe agreed or in
10 default of agreement determined by an arbitrator to be appointed by The Chief Justice of India.
11 Nothing in this instrument shall be deemed to commit in any way to my acceptance, of any
12 future Constitution of India, or to fetter my discretion to enter into an agreement with the
13 Government of India under any such future constitution. Nothing as an instrument affects the
14 continuance of my sovereignty, in and over this state, or save as provided by or under this
15 instrument, the exercise of any powers, authority, and rights now enjoyed by me as a ruler of
16 this state, or the validity of any law at present in force in this State. I hereby declare, and I
17 execute this Instrument on behalf of the state, and that any reference to this Instrument to me
18 or to the ruler of the state is to be construed as including reference to my heirs and successors."
19 And the acceptance Your Lordship will find at 11.

20 "I hereby accept this Instrument of Accession dated this 20th day of October.... 27th day of
21 October, 1947." Now My Lords.... sorry.

22

23 My Lords. Now there is a schedule to this accession, which is not in this document. But would
24 My Lords be kind enough to turn to Document Volume 4, PDF page 176? That has the
25 schedule.

26

27 **JUSTICE BR GAVAI:** Volume 4 page?

28

29 **KAPIL SIBAL:** Page 176. Running page 738, PDF page 176. Volume 4.

30

31 **JUSTICE BR GAVAI:** Running page 738?

32

33 **KAPIL SIBAL:** 738. Yes 738. Yes. That's correct, that's correct. Your Lordships might just
34 remember the residuary power unlike states in India, which vested under 97 with the Union
35 vested in the state. Residuary power did not vest in the Union, in the relationship of J&K with
36 the Union. So it was quintessentially, a truly federal marriage, so to say.

37

1 **CHIEF JUSTICE DY CHANDRACHUD:** Actually the resolution when it was passed by the
 2 Constituent Assembly, initially contemplated that the residuary power would be with the
 3 states. And it was between the time that the resolution and the eventual adoption of the
 4 Constitution that the residuary power, eventually 97 came to the centre.

5

6 **KAPIL SIBAL:** But they all accepted it. But here this issue was somewhat different. Now in
 7 the schedule will...

8 Now My Lords kindly see... Now My Lords kindly see the Schedule. 'Defence - Naval, Military
 9 and Air Forces of the Dominion and any other armed force raised or maintained by the
 10 Dominion; any armed forces, including forces raised or maintained by an acceding state,
 11 which are attached to, or operating with, any of the armed forces of the Dominion. Naval,
 12 Military and Air Force works, administration of cantonment areas, arms, fire-arms,
 13 ammunition, explosives.'

14 Then, 'External Affairs - like the implementing of treaties, agreements with other countries;
 15 extradition, including the surrender of criminals and accused persons to parts of His Majesty's
 16 Dominions outside India. Admission into, and emigration and expulsion from, India,
 17 including in relation thereto the regulation of the movements in India of persons who are
 18 British subjects, domiciled in India or subjects of any acceding state; pilgrimages to places
 19 beyond India. Naturalisation.'

20 Then, 'Communications - Post and telegraphs, including telephones, wireless, broadcasting
 21 and other forms and railways, etc.' We need not go into this. Maritime shipping, navigation,
 22 port quarantine, major ports and then My Lords, aircraft, lighthouses, carriage of passengers.
 23 And then My Lords, 'Ancillary - Election to the Dominion Legislature subject to the provisions
 24 of the Act, and of any order made thereunder. Offences against laws with respect to any of the
 25 aforesaid matters. Inquiries and statistics for the purposes of any of the aforesaid matters. The
 26 jurisdiction and powers of all courts with respect to any of the aforesaid matters but, except
 27 with the consent of the Ruler of the acceding state, not so as to confer any jurisdiction or
 28 powers upon any courts other than courts ordinarily exercising in or in relation to the state.'
 29 Right? So that's what

30

31 **CHIEF JUSTICE DY CHANDRACHUD:** These subjects, do they correspond specifically
 32 to certain entries on the Government of India Act?

33

34 **KAPIL SIBAL:** No, My Lord, the subjects of the State were with reference to those residing
 35 in the state, those who had come to the state, those who were in Pakistan, and came back. So
 36 that's a 1927 order which I'll point to Your Lordship later.

37

1 **CHIEF JUSTICE DY CHANDRACHUD:** Possibly these subjects which the instrument of
2 accession...

3

4 **KAPIL SIBAL:** Yes.

5

6 **CHIEF JUSTICE DY CHANDRACHUD:** ...recognizes, in terms of the legislative powers
7 of the dominion...

8

9 **KAPIL SIBAL:** Yes.

10

11 **CHIEF JUSTICE DY CHANDRACHUD:** ...must cover certain specific entries in the
12 Government of India Act. So these subjects are, for instance, defence- 1 2 3 4

13

14 **KAPIL SIBAL:** Yes, we will cover the entries.

15

16 **CHIEF JUSTICE DY CHANDRACHUD:** There would be certain specific entries in the
17 Government of India Act with reference to which there was an acceptance.

18

19 **KAPIL SIBAL:** Correct, My Lords, I will find that out and tell Your Lordships about which
20 part of the Government of India Act covers these. I appreciate that.

21 Then My Lords, kindly come back, come back to Volume 1. Yes then come to My Lords, 'Reply
22 from Lord Mountbatten to Maharaja Hari Singh'. That's at page 12.

23

24 **JUSTICE SURYAKANT:** Page?

25

26 **KAPIL SIBAL:** Page 12 My Lords. "My dear Maharaja Sahib, Your Highness' letter dated 26
27 October has been delivered to me by VP Menon. In the special circumstances mentioned by
28 Your Highness, my government had decided to accept the accession of Kashmir State to the
29 Dominion of India. Consistently with their policy that in the case of any state where the issue
30 of accession has been the subject of dispute, the question of accession should be decided in
31 accordance with the wishes of the people of the state. It is my Government's wish that as soon
32 as law and order has been restored in Kashmir, in a soil declared cleared of the invader, the
33 question of the state's accession should be settled by reference to the people. Meanwhile, in
34 response to Your Highness' appeal for military aid, action has been taken today to send troops
35 of the Indian Army to Kashmir to help your own forces, to defend your territory and to protect
36 the lives, property and honour of your people. My Government and I note with satisfaction
37 that Your Highness has decided to invite Sheikh Abdullah to form an interim Government to

1 work with you, with your Prime Minister. Then we go back to the list of...[UNCLEAR] page
2 38.

3

4 **CHIEF JUSTICE DY CHANDRACHUD:** 38.

5

6 **KAPIL SIBAL:** And My Lord, I've already read to Your Lordships, My Lord, the acceptance
7 letter of Mountbatten. So we go to 23, 5th of March 1948.

8

9 **JUSTICE SANJIV KHANNA:** You want to go back to the list of dates?

10

11 **KAPIL SIBAL:** Yes, My Lords, go back to the list of dates. PDF38, Volume 1.

12

13 **JUSTICE SANJAY KISHAN KAUL:** What page are you reading, Mr. Sibal?

14

15 **KAPIL SIBAL:** 5th of March My Lord, that entry. Because I've already read 22nd of October
16 letter of Lord Mountbatten. On the 5th of March... My Lord has that? Volume 1, PDF page 38.
17 My Lord, 5th of March 1948.

18

19 **JUSTICE SANJAY KISHAN KAUL:** 5th of March 1948.

20

21 **KAPIL SIBAL:** Item 23. The ruler.... Your Lordship has that? The ruler, Maharaja...

22

23 **JUSTICE SANJIV KHANNA:** One minute please.

24

25 **KAPIL SIBAL:** I'm sorry.

26

27 **JUSTICE SANJIV KHANNA:** Volume 2.

28

29 **KAPIL SIBAL:** Volume one My Lords.

30

31 **JUSTICE SANJIV KHANNA:** Same place where I was reading. Some cases it's Volume 2,
32 in some cases it's...

33

34 **KAPIL SIBAL:** Yeah, Written Submissions Compilation, Volume 2. That's correct. Yes, yes.
35 WS Volume 2.

36

37 **CHIEF JUSTICE CHANDRACHUD:** PDF?

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37

KAPIL SIBAL: PDF 38, WS Volume 2. 5th of March 1948, the ruler, Maharaja Hari Singh issued a proclamation under which a popular interim government was established in the state of Jammu and Kashmir, pending the framing of Constitution for the state, proclamation *inter alia*. My Lords, it's better if we read the whole proclamation. This is at Volume 6, PDF, page 242. That's Volume 6, PDF page 2... sorry 242.

JUSTICE B.R. GAVAI: Volume 6?

KAPIL SIBAL: It says My Lords, if Your Lordship has it? My Lord, Justice Surya Kant has it?

JUSTICE SURYA KANT: Volume 2?

KAPIL SIBAL: 242, My Lords. Volume 6, PDF page 242. Running page is 1291. As Maharaja on the 5th of March 1948... that's the one. Running page 1291. That's correct. That's correct. Well, we have to show PDF My Lords, otherwise it becomes difficult.

CHIEF JUSTICEDRACHUD: Yes.

KAPIL SIBAL: In accordance with the tradition, My Lords, all of them correspond to the provisions of the Government of India Act. They were more there, but they were whittled down, that's all. But they do correspond. Just wanted to answer Your Lordships. 'In accordance with the traditions of my dynasty, I have from time to time provided for increasing association of my people with the administration of the State with the object of realizing the goal of full responsible Government at as early a date as possible and in pursuance of that object, have by the Jammu and Kashmir Constitution Act 1996, established a Constitutional Government with the Council of Ministers, the Legislature with the majority,'- That's the Praja Sabha - 'with the majority of elected members and an independent Judiciary. I've noted with gratification and pride the progress so far made and the legitimate desire of my people for the immediate establishment of a fully Democratic Constitution based on adult franchise with a hereditary Ruler from my dynasty as the Constitutional Head of an Executive responsible to the legislature. I've already appointed the popular leader of my people, Sheikh Mohammad Abdullah, as the Head of the emergency administration. It is now my desire to replace the emergency administration by a popular Interim Government and to provide for its powers, duties, and functions, pending the formation of a fully Democratic Constitution. I accordingly, hereby, ordain as follows - my Council of Ministers shall consist of the Prime Minister and

1 such other Ministers as may be appointed on the advice of the Prime Minister. I have by royal
 2 warrant appointed Sheikh Abdullah as the Prime Minister with the effect from today. The
 3 Prime Minister and the other Ministers shall function as a cabinet and act on the principle of
 4 joint responsibility. Diwan appointed by me, shall also be a member of the Cabinet. I take this
 5 opportunity of giving once again a solemn assurance that all sections of my people will have
 6 opportunities of service, both civil and military, solely on the basis their merits and
 7 irrespective of creed and community. My Council of Ministers shall take appropriate steps as
 8 soon as restoration of normal conditions has been completed. To convene a National Assembly
 9 based upon adult franchise suffrage, having due regards to the principle that the number of
 10 representatives from each voting area should, as far as practicable, be proportionate to the
 11 population of that area.'

12 In a way he was adopting the principles My Lords, adopted by us. 'The Constitution to be
 13 framed by the National Assembly shall provide adequate safeguards for the minorities and
 14 contain appropriate provisions guaranteeing into the freedom of conscience, freedom of
 15 speech, and freedom of assembly. The National Assembly as soon as the work of framing the
 16 new Constitution is completed, submit it through the Council of Ministers for my acceptance.
 17 In conclusion, I repeat and hope that the formation of a popular Interim Government and the
 18 inauguration in the near future of a fully Democratic Constitution will ensure the
 19 contentment, happiness, and moral, material advancement of the people.'

20

21 So, go back to Volume II. Written Submissions compilation, Volume II, PDF Page 38 again. In
 22 1949, Item 24... Volume II, PDF page 38. My Lords, in a football field when there is no play,
 23 My Lords, that time has to be excluded.

24

25 **JUSTICE SANJAY KISHAN KAUL:** There's always a play going around.

26

27 **KAPIL SIBAL:** I submit to that.

28

29 **JUSTICE SANJAY KISHAN KAUL:** Who would better know about players than you, Mr.
 30 Sibal?

31

32 **KAPIL SIBAL:** I submit to that.

33

34 **CHIEF JUSTICE DY CHANDRACHUD:** Time out.

35

36 **KAPIL SIBAL:** 'Maharaja Hari Singh issued a proclamation delegating his power and
 37 authority to Yuvraj Karan Singh, who would function as the Ruler of the State.' We don't have

1 to go to that. 'Following his appointment as Ruler, Karan Singh nominated four
 2 representatives from Jammu and Kashmir to the Constituent Assembly of India. 'My Lords,
 3 the Constituent Assembly actually was formed in 1951. These are Constituent Assembly sorry.
 4 Sorry. Now 'December 1947 to September '49, Princely States underwent the process of
 5 integration into the Indian Union by signing merger agreements or covenants of unionization.
 6 The State of Jammu and Kashmir was not a part of this process of integration.' That's
 7 important. 'By the covenants of unionization, various Princely States entered into covenants
 8 with each other to form single units. For example, through a covenant, the Princely State of
 9 Bhavnagar....' - My Lords Your Lordships need not read it because this is... Your Lordships
 10 want.... - 'Junagadh and numerous others form the United States of Saurashtra. Through a
 11 separate covenant, Gwalior, Indore, and 18 other princely states formed the Union State of
 12 Gwalior, Indore and Malwa. Similar covenants led to the formation of Patiala, East Punjab
 13 States Union (PEPSU), the United State of Rajasthan and the United State of Travancore and
 14 Cochin. Between May '48 to September '49, the States of Saurashtra, Madhya Bharat, PEPSU,
 15 Matsya, Rajasthan, and Travancore and Cochin signed revised Instruments of Accession,
 16 which *inter alia* enlarged the power of the dominion legislature, permitting it to enact laws on
 17 all matters in Lists 1 and 3, the Government of India Act 1935, and cancelled all previous
 18 Instruments of Accession entered into by rulers of princely states that had entered the
 19 covenants referred to above.

20

21 My Lords, Your Lordships may note that no revised Instrument of Accession was signed by
 22 the Ruler of Jammu and Kashmir. Just note that fact My Lords. That's, we're talking about
 23 December '47 to September 1949. Now November 1949, through their respective rulers,
 24 Rajpramukhs, the States of Saurashtra, PEPSU, Rajasthan, Madhya Bharat, Mysore and
 25 Travancore and Cochin amongst others, issued proclamation stating that the Constitution of
 26 India, shortly to be adopted by the Constituent Assembly, shall be the constitution for the
 27 state, as for other parts of India, and shall be enforced as such in accordance with the tenor of
 28 its provisions. 25th of November '49, following the proclamations above, Yuvraj Karan Singh
 29 issued a proclamation for the State of Jammu in Kashmir that the Constitution of India shortly
 30 to be adopted by the Constituent Assembly of India shall, in so far as applicable to the State of
 31 Jammu and Kashmir, govern the constitutional relationship between the state and the
 32 contemplated Union of India. We don't have to go through that document because it's all set
 33 out here.

34

35 Then 26th of January 1950. In exercise of its constituent part, the Constituent Assembly
 36 drafted the Constitution of India, which was adopted on November 26, 1949. The Constitution
 37 of India came into force in January 26 '50, repealing *inter alia* the Indian Independence Act.

1 The Government of India act, the relationship between the Constitution and the state of
2 Jammu and Kashmir was governed by Article 370 of the Constitution. It is evident that both
3 the text of Article 370 and the negotiation that preceded its formulation, Article 370, could not
4 be changed unilaterally by Parliament. That's My Lords, of great significance. Then My Lords,
5 26th of January 1950, same day, in exercise of powers under Article 370(1) of the Constitution,
6 the following consultation with the Government of Jammu and Kashmir, the President issued.
7 This is the first Constitution Application to Jammu and Kashmir Order 1950. Under paragraph
8 2 of this order, matters in the first schedule to the order were declared to correspond to matters
9 ceded to the Union of India through the Instrument of Accession and subsequently the power
10 of Parliament to make laws for Jammu and Kashmir was limited to such matters.
11 Furthermore, paragraph 3 of the Order declared that in addition to Articles 1 and 370 of the
12 Constitution, provisions specified in the second Schedule to the Order would apply to the State
13 of Jammu and Kashmir. It's important My Lords to go to this document. Volume 3 of the
14 documents and My Lords PDF, page 470. Sorry, page 4. Page 4, not 470. Yes, yes, this is the
15 First Constitution Order.

16

17 My Lords, and, kindly note this. This is on the same day, on the Republic Day that he signed
18 this. That's of great significance. In exercise of the powers conferred by Clause 1 of Article 370
19 of the Constitution of India, the President, in consultation with the Government of the State
20 of Jammu and Kashmir, is [UNCLEAR] to make the following... this order issued so and so
21 and so, for the purposes of Subclause B(1) of Clause 1 of Article 370 of the Constitution, the
22 matter specified in the first schedule to this order, being matters in the union list are hereby
23 declared to correspond to matters specified in the Instrument of Accession, governing the
24 accession of the State of Jammu and Kashmir to the Union of India as the matter with regard
25 to which the dominion legislature may make laws for the State, and accordingly, the power of
26 Parliament to make laws for the State shall be limited to the matter specified in the First
27 Schedule. In addition to the provisions of Article 1 and Article 370 of the Constitution, the only
28 other provisions of the Constitution which shall apply in relation to the State of Jammu and
29 Kashmir shall be those specified in the Second Schedule to the Order, and shall so apply
30 subject to the exceptions and modifications specified in the said Schedule and to the
31 modifications that all references in the said provisions to the Rajpramukh shall be construed
32 as references to the Sadr-e-Riyasat of Jammu and Kashmir. So, My Lords, if you look at the
33 First Schedule, you will find defence, what I had indicated earlier in the Instrument of
34 Accession. You'll find naval military. Then you will find de-limitation. Naval arms, atomic
35 energy, preventive detention, foreign affairs, diplomatic relations, United Nations,
36 participation in international conferences, war and peace, foreign jurisdiction, admission into

1 an Immigration, emigration and expulsion from India, passports, pilgrimages, railways,
2 piracies maritime. All that Your Lordships will find. That's part
3 of the First Schedule. And then in the Second Schedule...

4

5 **JUSTICE B.R. GAVAI:** About 96 items?

6

7 **KAPIL SIBAL:** Sorry?

8

9 **JUSTICE B.R. GAVAI:** About 96 items.

10

11 **KAPIL SIBAL:** Yes, they've taken the entries of the Constitution.

12

13 **CHIEF JUSTICE DY CHANDRACHUD:** It's less than the...

14

15 **KAPIL SIBAL:** Some are skipped My Lord. They are not 96. See, 31 to 41 is missing.

16

17 **JUSTICE B.R. GAVAI:** 72?

18

19 **KAPIL SIBAL:** Yes, several of them are missing.

20

21 **JUSTICE B.R. GAVAI:** It's only the same [UNCLEAR] number.

22

23 **KAPIL SIBAL:** That's correct. That's all that there is.

24

25 **JUSTICE B.R. GAVAI:** At least one.

26

27 **KAPIL SIBAL:** Correspond to the Instrument of Accession actually, My Lords. The defence,
28 military...

29

30 **JUSTICE SANJIV KHANNA:** No, that cannot be correct Mr. Sibal. The Instrument of
31 Accession, the Schedule which you showed was far more restrictive. These are, you can say,
32 these are more elaborate.

33

34 **KAPIL SIBAL:** No, My Lords, these....

35

36 **JUSTICE SANJIV KHANNA:** They do not correspond. They..

37

1 **KAPIL SIBAL:** No, correspond in the sense that they relate to defence. Then, I'm not saying
2 anything more than that. They relate to defence. They relate to external affairs. That's all that
3 I'm saying. Because the entries in the union list...

4

5 **JUSTICE SANJIV KHANNA:** You read out the second Schedule earlier at page 2..., if I'm
6 not mistaken 196.

7

8 **KAPIL SIBAL:** Correct, correct. I'm not disputing that.

9

10 **JUSTICE SANJIV KHANNA:** 176.

11

12 **CHIEF JUSTICE DY CHANDRACHUD:** 176.

13

14 **KAPIL SIBAL:** When I said correspondence, I said the broad heads My Lord. That's all that
15 I meant. Then My Lords, say this, Schedule 2 My Lords is important. Article 72(1)(c), 72(3),
16 133, 134, 13...

17

18 **JUSTICE SANJIV KHANNA:** Just one more clarification. This is by an order?

19

20 **KAPIL SIBAL:** Yes.

21

22 **JUSTICE SANJIV KHANNA:** This is by an administrative order?

23

24 **KAPIL SIBAL:** Under Article 370.

25

26 **JUSTICE SANJIV KHANNA:** 370.

27

28 **KAPIL SIBAL:** Yes, yes, that's all. That's what I told Your Lordship in the initial stage.
29 Constitution of India, as applicable to the State of Jammu & Kashmir.

30

31 **JUSTICE SANJIV KHANNA:** Correct, correct.

32

33 **KAPIL SIBAL:** That's all I meant. Now, My Lords, kindly see these exceptions are at 72(1)(c),
34 72(3). 133, 134, 135, 136,138, 145, 151. Articles 80 and 81 shall apply, subject to the
35 modification that the representatives of the State to the Council of States and the House of the
36 People respectively, shall be chosen by the President in consultation with the Government of
37 the State. So that was My Lord, the variation. Article 54, 55 shall apply, subject to the

1 modifications that references therein to the elected members of both Houses of Parliament
2 and to each elected member of either House of Parliament shall be deemed to include
3 respectively a reference to the representatives of the State in these House, those Houses, and
4 to each such representative. The references to the elected members of the legislative
5 assemblies of the State and to each such elected members shall be deemed to include,
6 respectively, a reference to the members of the Constituent Assembly of the State and to each
7 such member, and that the population of the State shall be deemed to be 44,10,000.' - My
8 Lords at the moment, it's about 14 million... 140 million, My Lords, 14 crores. Now - 'Articles
9 149, 150 shall apply subject to the modifications that the references therein in the state shall
10 be construed as not including State of Jammu and Kashmir. Then Article 246 shall apply,
11 subject to the provisions of paragraph 2 of this order, and Clause 2 and 3 of Article 246 shall
12 not apply in relation to the State.' So no issue of repugnancy or anything like that. They can't,
13 My Lords, pass a law because of the residuary power of the State. 'Then 259 shall apply subject
14 to the modification is after the word until Parliament by law, otherwise provides the words
15 and the concurrence of the State to such law has been obtained shall be deemed to be inserted.
16 Article 266 shall apply only insofar as it relates to the Consolidated Fund of India and the
17 Public Account of India. Article 282, 284 shall apply only in insofar it relates to the Union of
18 the Public Account of India. 298, 299, 300 shall apply insofar as they relate to the Union and
19 324 shall apply only insofar as it relates to elections to Parliament and to the offices of Vice
20 President, which doesn't apply to the elections in the State. 324, then 335 and then provisions
21 of this part 361 shall apply only as far as it relates to President. 364, 368 shall apply provided
22 further that no such amendment shall effect in relation to Jammu and Kashmir unless applied
23 by order of the President under Clause 1 of 370.' So, My Lords, the point that I'm making here
24 is very simple, that the Government of the day accepted the fact that our relationships with the
25 Jammu and Kashmir Government are on a separate footing. The provisions of the Constitution
26 unless made applicable through a Presidential Order and agreed to by the Government, shall
27 not apply. The residuary power will vest in the state. It is the state which must pass laws.
28 Government of India can't under... the issue of repugnancy doesn't apply. So My Lords this
29 status is accepted, that's how 370 came into being and it continued. Then the distribution of
30 revenues comes My Lords, that we are not really concerned with at the moment. Now kindly
31 come back to Volume II, My Lords of the Written Submissions Volume II, page 41. Page 41. So
32 the assumption is that if the President passes a notification for the application of any law to
33 the State of Jammu and Kashmir, he has to seek concurrency. He cannot do it without
34 concurrency. Consultation. So it was a collaborative relationship in a sense. There was a
35 constant dialogue going on. This is what we wish to do and My Lords consult, the State, the
36 State agrees. Which is why most of the laws were made applicable. There was hardly any law

1 that was left. So in a sense, they were incorporated separately in the Constitution of India, in
2 its application of the State of Jammu and Kashmir Orders.

3

4 **CHIEF JUSTICE DY CHANDRACHUD:** What happened to currency, for instance?

5

6 **KAPIL SIBAL:** Karan Singh, My Lords was the Sadr-e-Riyasat, as your Lordship knows, My
7 Lord.

8

9 **CHIEF JUSTICE DY CHANDRACHUD:** Currency?

10

11 **KAPIL SIBAL:** Currency? No, currency was Indian currency.

12

13 **CHIEF JUSTICE DY CHANDRACHUD:** Because if you see currency, currency in the
14 Constitution is governed by entry 36 of List 1.

15

16 **KAPIL SIBAL:** Yes.

17

18 **CHIEF JUSTICE DY CHANDRACHUD:** But there is no reference to entry 36 of List 1 in
19 the Adaptation Order.

20

21 **KAPIL SIBAL:** My Lords, it will come later. There was adaptation order. Subsequent
22 adaptation order. I'll come to that I'll show that to Your Lordship. Because several... this
23 comes... in 1954 we have another Adaptation Order. There are several. Give me the list of
24 several... we have gotten a list for Your Lordship.

25

26 **CHIEF JUSTICE DY CHANDRACHUD:** So were the subjects broadened by the
27 subsequent Adaptation Order?

28

29 **KAPIL SIBAL:** Of course My Lords. Of course. They were broadened, My Lord. Every stage
30 they were broadened. We have an order of 52. We have an order of 54. We have an order of 71,
31 an order of 74. Because the powers were extended My Lords and the state My Lords, after
32 consultation it was done. The state was *ad idem* with the Union My Lords. The state itself, in
33 its Constitution, says that we are integrated into India. There was no question. The
34 Constitution of Jammu and Kashmir itself says that we are an integral part of India. So where's
35 the question? The only thing that there's this unique structural system in place, a
36 constitutional structure, which was in place, which suddenly My Lords, on the 6th of August,
37 was done away with. And My Lords, with the greatest respect, though I don't want to use that

1 expression, suddenly, My Lords, in Parliament, it was said that we are doing this at 11 o' clock.
2 Nobody knew about it. There was no consultation of any sort. So it was My Lords, as I said,
3 the Governor of the State and Parliament, and of course, the powers that be, they decided to
4 do this one fine morning and tossed it out.

5

6 So My Lords, page 41. The Government of India published its white paper on Indian States,
7 clarifying the nature of Article 370. The effect of this provision. This is important. We're talking
8 about 1950 itself. The effect of this provision is that the State of Jammu and Kashmir continues
9 to be a part of India. Nobody disputes it. Nobody ever disputed it. It is a unit of the Indian
10 Union and the Union Parliament will have jurisdiction to make laws for the State on matters
11 specified either in the Instrument of Accession or by later additions, with a concurrence of the
12 Government of the State. My Lords asked me that question. Steps will be taken for the purpose
13 of convening a Constituent Assembly. Your Lordship knows, My Lords, this is very important.
14 At that time when My Lords, we became a Republic, 370 was there, and 370 mentions the
15 Constituent Assembly. But the Constituent Assembly had not yet been convened in the State
16 of Jammu and Kashmir. That was convened in 1951. December. Point is, that there was this
17 understanding between the Government of India and the State, that we will have a Constituent
18 Assembly which will determine the future course of action. Determine whether or not, in fact,
19 370 should be abrogated at all or not. That decision was with the Constituent Assembly, which
20 is why it is called a temporary provision. Not for any other reason. It's in that chapter of the
21 Constitution. So this whole argument that this temporary provision was, 370 was temporary.
22 No. It was temporary because between 1951...

23

24 **JUSTICE SANJIV KHANNA:** Mr Sibal what is the date of this white paper?

25

26 **KAPIL SIBAL:** 1950.

27

28 **JUSTICE SANJIV KHANNA:** No you have not given the date.

29

30 **KAPIL SIBAL:** I'm sorry. I'll give it's at page 121. Just see the date. We'll just give it to you in
31 a minute. I'll give it to Your Lordship. So, on the 1st of May 1951 now, Karan Singh, Yuvraj
32 Karan Singh issued a proclamation directing the establishment of an elected Constituent
33 Assembly. March, 1950, I will give the exact date.

34

35 **JUSTICE SANJIV KHANNA:** Okay.

36

37 **KAPIL SIBAL:** It is March 1950.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35

JUSTICE SANJIV KHANNA: It cannot be 5th July '48.

KAPIL SIBAL: It can't be. We'll give the date. I thought it was March.

JUSTICE SANJIV KHANNA: Article 370, wouldn't have been then.

KAPIL SIBAL: But in any case the idea is that it is prior to 1951. That's the whole point. Whatever the date is My Lord, it's prior to 1951. In other words, the Constitution envisaged a Constituent Assembly, which was to decide as to what would be the fate of Jammu and Kashmir. 15th March 1950, is what I'm told, My Lords.

JUSTICE SANJIV KHANNA: 15th March?

KAPIL SIBAL: Anyway, let's not get into this. We'll give this. It's prior to 1951.

JUSTICE SANJAY KISHAN KAUL: Mr. Sibal, you can verify it and then give it to us later.

KAPIL SIBAL: I will give it. I will give it to Your Lordships. 15, sorry. They didn't correspond the 1950 of, the order didn't correspond. But if you look at the 50 order, it says para 2, for the purposes of Subclause B(1) and Clause 1 of 370, matters specified in the First Schedule to this order being matters in the Union, which are thereby declared to correspond to matters specified in the Instrument of Accession. Just wanted to mention that. Para 2 itself. So My Lords, on the 1st of May 1951, Karan Singh issued a proclamation directing establishment of an elected Constituent Assembly to draft a Constitution for the State of Jammu and Kashmir. Then 20th of March 1952, under Article 370, Sub Article 1 of the Constitution and following consultation with the Government of Jammu and Kashmir, the President issued the co...

JUSTICE SANJIV KHANNA: Just wait, just one minute.

KAPIL SIBAL: I'm going to... read it now... that also is the same thing... the same Article...370 for a minute but I will give Your Lordships some...

JUSTICE SANJIV KHANNA: Just continue. Where you want, whichever way you want.

1 **KAPIL SIBAL:** No, let's read 370 because context will be clear My Lords. That's how it was
2 understood at that point in time. Now we're talking about January 26, 1950. My Lords, have
3 The Constitution?

4

5 **CHIEF JUSTICE DY CHANDRACHUD:** Yes.

6

7 **KAPIL SIBAL:** It says My Lords. Notwithstanding anything in this Constitution, the
8 provisions of Article 238 shall not apply in relation to the State of Jammu and Kashmir. Now
9 238 My Lords, part A, part B, part C, part D states. That's what 238 was. So it couldn't apply.
10 The Jammu Kashmir didn't fall under that category. *Sui generis*. The power of Parliament to
11 make laws for the said State shall be limited to those matters in the union list and the
12 concurrent list, which, in consultation with the Government of the State are declared by the
13 President to correspond to matters specified in the Instrument of Accession governing the
14 accession of the State to the Dominion of India as the matters with respect to which the
15 Dominion Legislature may make laws for that state and such other matters in the said list, as
16 with the concurrence of the Government of the state the President may, by order specify. So
17 the items My Lords, Communication, Defence, Foreign Affairs and Consultation for all matters
18 concurrence. For all of the matters concurrence.

19 'Explanation - For the purposes of this Article, the Government of the State means the person
20 for the time being recognized by the President as the Maharaja of Jammu and Kashmir being
21 acting on the advice of the Council of Ministers for the time being enforced in office under the
22 Maharaja's proclamation dated 5th day of March 1948.' - This explanation was added later,
23 My Lord and I will point that out to Your Lordships later. It was amended later, this particular
24 explanation. - 'The provisions of Article 1 of this Article shall apply in relation to that State.
25 Such of the other provisions of this Constitution shall apply in relation to the State, subject to
26 such exceptions and modifications as the President may, by order specify, provided that no
27 such order which relates to matters specified in the Instrument of Accession of the State
28 referred to in paragraph 1 of Subclause B shall be issued except in consultation with the
29 Government of the State. Provided further, that no such order, which relates to matters other
30 than those referred to in the last proceeding proviso, shall be issued, except with a concurrence
31 of that Government. If the concurrence of the Government of the State referred to in paragraph
32 2 of Subclause B of Clause 1 or in second proviso to Subclause D of that clause be given before
33 the Constituent Assembly for the purposes of framing the Constitution of the State is
34 convened, it shall be placed before such Assembly for just decision as may be taken there on.
35 Notwithstanding anything in the foregoing provisions of this Article the President may, by
36 public notification, declare that this Article shall cease to be operated or shall be operated only
37 with such exceptions and modifications, and from such date as he may specify, provided that

1 the recommendations of the Legislative Assembly of the State shall be necessary before the
2 President issues a notification.' Constituent Assembly... this is now, My Lords, replaced by
3 Legislative Assembly. The Constituent Assembly. So you have to have a recommendation of
4 the Constituent Assembly before you could efface 370. That's what the Constitution members
5 themselves thought in 1950 and that operated till 6th of August. How could it change?

6

7 **CHIEF JUSTICE DY CHANDRACHUD:** But how long would the tenure of the Constituent
8 Assembly of the state be...

9

10 **KAPIL SIBAL:** 7 years.

11

12 **CHIEF JUSTICE DY CHANDRACHUD:** Sorry?

13

14 **KAPIL SIBAL:** 7 years. My Lords, '51 to '57.

15

16 **CHIEF JUSTICE DY CHANDRACHUD:** So therefore with the end of the 7 years, the very
17 institution of the Constituent Assembly of the State lapses. Then there's no Constituent
18 Assembly left.

19

20 **KAPIL SIBAL:** Absolutely right.

21

22 **CHIEF JUSTICE DY CHANDRACHUD:** But then what happens to the proviso?

23

24 **KAPIL SIBAL:** This is the point, My Lord.

25

26 **CHIEF JUSTICE DY CHANDRACHUD:** What happens to the proviso then?

27

28 **KAPIL SIBAL:** This is the exactly the point My Lords. This is exactly the point. My Lords,
29 the in between, between '51 and '57, the Constituent Assembly could take that decision.

30

31 **CHIEF JUSTICE DY CHANDRACHUD:** But thereafter...

32

33 **KAPIL SIBAL:** Thereafter, My Lords, there's no question because they formed... My Lords
34 take the Constituent Assembly...

35

36 **CHIEF JUSTICE DY CHANDRACHUD:** What happens after the Constituent Assembly
37 has come to an end because no Constituent Assembly can have an indefinite life.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36

KAPIL SIBAL: That precisely the point, My Lords. That is my point. The Constituent Assembly in India, when it drafted the Constitution can't have a life after the Constitution is framed..

CHIEF JUSTICE DY CHANDRACHUD: No, but equally the proviso to Clause 3 refers to the recommendation of the Constituent Assembly of the state.

KAPIL SIBAL: Yes.

CHIEF JUSTICE DY CHANDRACHUD: The substantive provision says that the President may by a notification, declare that the Article shall cease to be operative. Right?

KAPIL SIBAL: Yes.

CHIEF JUSTICE DY CHANDRACHUD: Now, the only safeguard is that before the President does so, the recommendation of the Constituent Assembly of the State has to be taken.

KAPIL SIBAL: Yes.

CHIEF JUSTICE DY CHANDRACHUD: Now, what happens at a point of time where the Constituent Assembly of the State ceases to exist?

KAPIL SIBAL: But that's the point. The President can't issue such a notification.

JUSTICE B.R. GAVAI: According to you after '57, it can't be done at all?

KAPIL SIBAL: No. After '57 it can't be.

CHIEF JUSTICE DY CHANDRACHUD: Then Clause 3 [UNCLEAR].

JUSTICE B R GAVAI: [UNCLEAR]

KAPIL SIBAL: That is why the temporary provision.

1 **CHIEF JUSTICE DY CHANDRACHUD:** One more fundamental issue, which is that
2 notwithstanding the fact that the proviso ceases to operate, Clause 3, the substantive part
3 continues to hold the field.

4

5 **KAPIL SIBAL:** No, it is dependent on the proviso.

6

7 **CHIEF JUSTICE DY CHANDRACHUD:** No.

8

9 **KAPIL SIBAL:** With respect no My Lords. With respect, any proviso....

10

11 **CHIEF JUSTICE DY CHANDRACHUD:** If the proviso, I mean, there are ways in which
12 you can construe a proviso. But if the proviso ceases to operate by virtue of the fact that the
13 tenure of a Constituent Assembly of the state has ceased to exist, surely the substantive part
14 of 3 still continues to remain.

15

16 **KAPIL SIBAL:** Kindly see the scheme of 370, My Lord, with the greatest respect. Kindly see
17 the scheme of 370. On the four items My Lords, that is Defence, Communications, External
18 Affairs, and ancillary matters, My Lords, the consultation of the State is necessary under 370.
19 For all other matters the concurrence of the State is necessary. So can you say you do away
20 with the concurrence? And then the third thing is if you want to abrogate 370, then it... or
21 amend it, you have to get the recommendation of the Constituent Assembly.

22

23 **CHIEF JUSTICE DY CHANDRACHUD:** So long as it exists.

24

25 **KAPIL SIBAL:** I'm sorry, My Lord. This is the point. That's why I said initially, the
26 Constituent Assembly has served its term when a Constitution is framed.

27

28 **CHIEF JUSTICE DY CHANDRACHUD:** So in which case, then what happens is if your
29 construction is right, 370, which is essentially a transitional provision assumes the character
30 of a permanent position..

31

32 **KAPIL SIBAL:** No, it is a transitional...

33

34 **CHIEF JUSTICE DY CHANDRACHUD:** ... by virtue of the fact that there is no
35 Constituent Assembly of the state after 1957. constraint to simply have the state after 1957.

36

1 **KAPIL SIBAL:** Absolutely. It's a transitional provision between 1951 and 1957, when the
2 Constituent Assembly could take that decision. Could take that decision, it was left to the
3 people of Kashmir.

4

5 **JUSTICE B R GAVAI:** According to you, after 1957, Sub-article 3 has become redundant?

6

7 **KAPIL SIBAL:** My Lords Constituent Assembly, even in the context of Constitution of India,
8 is redundant.

9

10 **JUSTICE SANJAY KISHAN KAUL:** So there is no...

11

12 **KAPIL SIBAL:** You can't revive a Constituent Assembly.

13

14 **JUSTICE SANJAY KISHAN KAUL:** So, there is no method according to you...

15

16 **KAPIL SIBAL:** Yes.

17

18 **JUSTICE SANJAY KISHAN KAUL:** ... by which either with consultation assembly or
19 advice can 370 at all be...

20

21 **KAPIL SIBAL:** My Lords, even the amendment that is made ultimately, they convert the
22 Legislature into a Constituent Assembly.

23

24 **JUSTICE SANJAY KISHAN KAUL:** That's a different matter. I...

25

26 **KAPIL SIBAL:** No, no. That tells you their understanding. Please appreciate that. It is their
27 understanding of the Constitution.

28

29 **JUSTICE SANJIV KHANNA:** Mr. Sibal, there are two separate aspects. One is
30 interpretation of Clause 3 of Article 370 and the proviso to that.

31

32 **KAPIL SIBAL:** Yes.

33

34 **JUSTICE SANJIV KHANNA:** The second part is what the amendments have been made,
35 and how you interpret it.

36

37 **KAPIL SIBAL:** Yes. My Lords, I can't hear Your Lordships.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37

JUSTICE SANJIV KHANNA: One is, interpretation of Clause 3 to Article 370, has to be done independently of the amendments. So your contention is the proviso specifically applies, and unless the proviso is resorted to and cannot be resorted to after 1957, Clause 3 will not be applicable. That's your sum and substance.

KAPIL SIBAL: Yes, yes absolutely. That is absolutely right, My Lord. That's absolutely right. Just as Clause 2(3) has worked itself out. The point is, why was this Clause put in 1950? Because in 1950 they said, we'll have a Constituent Assembly. See the Constituent Assembly debates. It will be made clear. No. But the fact is, in 370 at that time the Constituent Assembly was not there. The whole purpose was...

CHIEF JUSTICE DY CHANDRACHUD: To offset your submission, we'll have to postulate that Clause 3 becomes a sort of a constitutional article which falls into [UNCLEAR] after seven years.

KAPIL SIBAL: Yes, yes, absolutely.

CHIEF JUSTICE DY CHANDRACHUD: How can that be? Clause 3 still continues to survive.

KAPIL SIBAL: My Lords I...

CHIEF JUSTICE DY CHANDRACHUD: The limitation on Clause 3 may not, may cease to operate.

KAPIL SIBAL: My Lords, kindly see 369. Continues, My Lords. Kindly see, 369. Temporary powers to Parliament to make laws. That's the part. Part 21 My Lords.

CHIEF JUSTICE DY CHANDRACHUD: See, 371 begins with a *non obstante* clause. It overrides the entirety of the Constitution.

KAPIL SIBAL: Absolutely My Lord.

CHIEF JUSTICE DY CHANDRACHUD: But Clause 3 contains a *non obstante* clause, which overrides Clause 1 as well.

1 **KAPIL SIBAL:** Yes.

2

3 **CHIEF JUSTICE DY CHANDRACHUD:** So therefore, notwithstanding, because 371
4 makes special provisions in relation to the State of Jammu and Kashmir.

5

6 **KAPIL SIBAL:** Correct. Correct.

7

8 **CHIEF JUSTICE DY CHANDRACHUD:** But 373 has a *non obstante* provision that
9 overrides the *non obstante* clause in Clause 1.

10

11 **KAPIL SIBAL:** For that period. My Lord, we are not disputing that. What Your Lordships is
12 putting to me, there is a structure in place that was envisaged by the Constitution in 1950. At
13 that time there was no Constituent Assembly. Why did they mention Constituent Assembly?
14 Need not have mentioned it. Kindly, look at it from that point of view. What was the reason to
15 mention Constituent Assembly in 370, when it was not even in place? They could have said
16 Government of Jammu and Kashmir. Why did the Constitution makers My Lords, include the
17 term Constituent Assembly in 3? Because they knew that the Constituent Assembly will frame
18 a Constitution.

19

20 **CHIEF JUSTICE DY CHANDRACHUD:** Really, there was no limited... the acceptance of
21 sovereignty of the dominion of India was complete. They didn't say in the Instrument of
22 Accession that we accept the sovereignty of the Union of India for some limited purposes. They
23 accepted the sovereignty for all intents and purposes. Now that acceptance of sovereignty was
24 complete. But they reserved certain rights to themselves over certain legislative subjects. So in
25 that sense, the accession was complete. The acceptance of sovereignty was complete. Now
26 consistent with that, therefore it said, that in Clause 3, that the Union of India would have, the
27 President of India would have the right to abrogate Article 370.

28

29 **KAPIL SIBAL:** Not the Union of India.

30

31 **CHIEF JUSTICE DY CHANDRACHUD:** The condition that subject to the
32 recommendation of the President...

33

34 **KAPIL SIBAL:** Not the Union of India, My Lord. On the recommendation of the Constituent
35 Assembly. No, Union of India has no right to tell it is recommended. The word is
36 recommendation of the Constituent Assembly. Then they can exercise that right. That's how
37 you interpret a proviso. You can't say that, they are the right sovereign. Forget the proviso.

1 Even the recommendation of the Constituent Assembly because it doesn't exist. Then 63, 68(2)
2 proviso also goes My Lords. Therefore, and the reason is simple, My Lords. The genesis of
3 which was the fact that in 370 itself, it was mentioned that the Constituent Assembly has a role
4 to play in the abrogation of 370. Otherwise, if Your Lordship says, it had no role to play, there
5 was no need for 370, Sub-article 3. And My Lords, look at the concurrence power. Even those
6 powers were of no relevance thereafter, because the Constitution of Jammu and Kashmir was
7 in place. There was no need for concurrence anymore. Because now you have a Constitution
8 of the Jammu and Kashmir. So, that also became otiose. You have to see My Lords, the
9 historical perspective in the context of a Jammu and Kashmir ultimately signed the
10 Instrument of Accession. Nobody disputes they are integrated into India but, subjected to a
11 constitutional provision.

12

13 **CHIEF JUSTICE DY CHANDRACHUD:** Therefore, the submission is that once the period
14 stipulated in the proviso to Clause 3 had come to an end...

15

16 **KAPIL SIBAL:** Yes.

17

18 **CHIEF JUSTICE DY CHANDRACHUD:** the power under Clause 3 itself came to end?

19

20 **KAPIL SIBAL:** Because it's no longer alive. The Constituent Assembly, like in India, My
21 Lords, can for example, today, today, My Lords there can't be a provision in the Constitution
22 of India with reference to a Constituent Assembly because the Constituent Assembly has
23 worked itself out. It has formed the Constitution. Now, if it is decided that they would abrogate
24 370, the Constituent Assembly would have said we abrogate 370. Which is why it was a
25 temporary provision, not because of the fact that under the, as a Union of India it was deemed
26 to be temporary. How could it...

27

28 **JUSTICE SANJIV KHANNA:** Sorry, interrupting you at this stage.

29

30 That may be... just putting a question... I am not...If one looks at Article 370 Clause.. Clause
31 1(b).

32

33 **KAPIL SIBAL:** 1(b), yes.

34

35 **JUSTICE SANJIV KHANNA:** 'The power of the Parliament to make laws for the State shall
36 be limited to' - it says - 'Matters in the union list and the concurrent list in consultation with
37 the... which in consultation with the Government of the States are declared by the President

1 to correspond to matters specified in the Instrument of Accession governing the accession of
2 the State to the Dominion of India.'

3

4 **KAPIL SIBAL:** Right

5

6 **JUSTICE SANJIV KHANNA:** '(2) such other matters in the list, as with the concurrence of
7 the State... Government of the State, the President may in the order may specify.'

8

9 **KAPIL SIBAL:** Yes

10

11 **JUSTICE SANJIV KHANNA:** Then explanation deals with what is meant by the
12 concurrence of the State.

13

14 **KAPIL SIBAL:** Right.

15

16 **JUSTICE SANJIV KHANNA:** Then it says that provided that no such order... the first
17 proviso - 'Provided that no such order is relates to the matter specified in the Instrument of
18 Accession of the State referred to in paragraph 1 of Sub clause (b) shall be issued except in
19 consultation with the Government of the State.'

20

21 **KAPIL SIBAL:** Correct.

22

23 **JUSTICE SANJIV KHANNA:** 'Provided further that no such order which relates to matters
24 other than those specified in the last preceding proviso shall be issued, except with the
25 concurrence of the Government.'

26

27 **KAPIL SIBAL:** That's right.

28

29 **JUSTICE SANJIV KHANNA:** So the second proviso talks about concurrence of the
30 Government. Now if one looks at Clause 2...

31

32 **KAPIL SIBAL:** Yes

33

34 **JUSTICE SANJIV KHANNA:** It deals with a situation where the Assembly or the
35 Government or the State is not there. It deals with the period when the Constitution Assembly
36 was... of the State was in existence but the Government or the elected Assembly was not in
37 existence. And therefore the proviso to Clause 3 will only be applicable as long as the

1 Government of the State or the Assembly is not elected because election of the Assembly will
2 take place after the Constituent Assembly of the State of the Jammu and Kashmir enacts the
3 Constitution.

4

5 **KAPIL SIBAL:** The Government was always in place from day one, My Lord...

6

7 **JUSTICE SANJIV KHANNA:** No, no, maybe so.

8

9 **KAPIL SIBAL:** Government is there since day one.

10

11 **JUSTICE SANJIV KHANNA:** That appears to be the broad... that appears to be the broad
12 outline of this.... outline of Article 370. What Clause 2... when it refers to the Constituent
13 Assembly of the State, which is for the purpose of Constitution of the framing Constitution of
14 the State which shall be placed before the Assembly for such decision as may be taken thereon.

15

16 **KAPIL SIBAL:** Correct.

17

18 **JUSTICE SANJIV KHANNA:** So Constituent Assembly of the State makes a Constitution,
19 frames the Constitution. It goes before the Constitution.

20

21 **KAPIL SIBAL:** No. It can state in the Constitution that 370 is abrogated. What problem does
22 it... it has the power. That's why there is a Constituent Assembly. And it says My Lords,
23 notwithstanding anything in the foregoing provisions, kindly note that. Notwithstanding. My
24 Lords, 37(1)(b)(1) and 37(2) notwithstanding any of that. So My Lords, you start the Article
25 by saying, notwithstanding anything in this Constitution and 3 starts with notwithstanding
26 anything in the foregoing provisions. That is, notwithstanding the opening part of the Article
27 also. There was a Government... Yes.

28

29 **JUSTICE SURYA KANT:** Still the Constituent Assembly of the State...

30

31 **KAPIL SIBAL:** Yes.

32

33 **JUSTICE SURYA KANT:** If Sub-article 3 according to you, has become non-existent ceased
34 to be operative, then how the very temporary nature of Article 370 will survive?

35

1 **KAPIL SIBAL:** That's why. Because it's temporary, because the Constituent Assembly had
2 not been framed My Lord. At that point in time it not been constituted in 1950, when this
3 provision was added in the Constitution.

4

5 **JUSTICE SURYA KANT:** No. If Sub-Article 3 goes then that means Article 370 can never
6 be abrogated.

7

8 **KAPIL SIBAL:** Yes, that's the whole point, My Lords. That is our case.

9

10 **JUSTICE SURYA KANT:** Then how it is temporary?

11

12 **KAPIL SIBAL:** It is temporary, because when this article was framed, My Lords, there was
13 no Constituent Assembly, it was a Constituent Assembly, which they could have taken the
14 decision that we will abrogate 370 and merge completely with the Union of India, like any
15 other state..

16

17 **JUSTICE SANJAY KISHAN KAUL:** Mr Sibal, your contention if I've understood you
18 correctly, is that the temporary nature of 370 is co-relatable to the Constituent Assembly life.
19 And in a way Sub-clause 3 becomes otiose once the Constituent Assembly ceased to exist. This
20 is your contention.

21

22 **KAPIL SIBAL:** This is my contention.

23

24 **JUSTICE B.R. GAVAI:** From '51 to '57 is temporary

25

26 **KAPIL SIBAL:** And Your Lordships in the Constituent Assembly, they say the same thing.
27 <UNCLEAR>, they say the same thing, what I am saying.

28

29 **JUSTICE SANJAY KISHAN KAUL:** I'm just trying to phrase it as I understand it.

30

31 **KAPIL SIBAL:** I'm clear Your Lordships have understood it. And I also understand Your
32 Lordships, what Your Lordships are thinking. So I have to respond to it.

33

34 **JUSTICE B.R. GAVAI:** According to you it was temporary between '51 to '57.

35

36 **KAPIL SIBAL:** That's correct.

37

1 **JUSTICE B.R. GAVAI:** And thereafter permanent.

2

3 **KAPIL SIBAL:** The reason is simple My Lords. All Constituent Assemblies are temporary.
4 There is no permanence in a Constituent Assembly.

5

6 **JUSTICE B.R. GAVAI:** Role is limited to framing the Constitution.

7

8 **KAPIL SIBAL:** Yes. Therefore My Lords, if it is temporary by its nature, which is why I
9 started by saying this is a political exercise. That's why I started with that submission before
10 Your Lordships. The formation of a Constituent Assembly is a political exercise to ensure that
11 the people within the territory of a particular region, their aspirations are taken into account
12 to formulate a law and a Constitution to ensure that those aspirations are met in future times
13 to come. This is not a lawmaking exercise, then they frame the Constitution to take into
14 account those aspirations. That's how our Republic came into force. Because there was a 1935
15 Act, there was diversity. My Lords, kindly look at it historically. Let's once forget the law for a
16 moment. Look at it historically. If you look at Europe and the making of the nation states in
17 Europe, how did that happen? It happened because there were large empires. The Austro-
18 Hungarian Empire, Russian Empire, and those large empires had communities and within
19 those empires, there were peoples of different languages, of different cultures, of different
20 ethnic lot. So it is the breakup of the Empire that led to the rise of the nation state. The Treaty
21 of Utrecht, the 1848 revolutions, right? In India, the process was the opposite. It's the only
22 exception. The purpose was just the opposite. There was disparity, they were existing
23 disparities. There were 562 princely states. There were states which were part of the British
24 Crown. They had to be amalgamated, and each of them had certain conditions. But then
25 ultimately, they all agreed. Okay, for the states that were part of 562, all agreed. But this
26 particular state of Jammu and Kashmir was an exception. And the exception was
27 constitutionally grafted in Article 370 and the terms of the exception were constitutionally
28 engrafted in 370. You can't jettison the people of the of the State of Jammu and Kashmir and
29 decide that what's the difference between this and My Lords, the act of the Crown. What's the
30 difference between this and the annexation of Junagadh? Or the annexation of Hyderabad?
31 Then it's an act of paramountcy, that I am the Union and I will decide. When you have
32 constitutionally committed yourself that if this is to be done, you have to follow a process
33 which two sovereign authorities have agreed upon and is grafted in Article 370. Otherwise My
34 Lord, then it's exercise of paramount power.

35

1 **JUSTICE SANJAY KISHAN KAUL:** In the assimilative exercise carried out, your
2 submission as I understand is J&K is an exception because a temporary provision was created
3 for a period of time and after that it is engrafted permanently into the Constitution.

4

5 **KAPIL SIBAL:** Because you can't revive the Constituent Assembly.

6

7 **JUSTICE SANJAY KISHAN KAUL:** I'm just saying. I understand what you are saying.

8

9 **KAPIL SIBAL:** That's what my submission is. I appreciate. Your Lordships have fully
10 understood what I am trying to say. What is it that we have? You have a state of Jammu and
11 Kashmir with today 14 million people. At that time, there were much less. They have no role
12 to play in their own state, they have no role to play. If in 1950 it was part of the Union, there
13 would be no issue. The aspirations, the desires of the people, whatever it is My Lord. After all,
14 this was something that also had international repercussions at that point in time.

15

16 **JUSTICE SANJAY KISHAN KAUL:** If an elected assembly would want to abrogate 370
17 even that is not possible?

18

19 **KAPIL SIBAL:** Not possible. Not possible. That is why they had to My Lords do these things
20 in the manner that they did.

21

22 **CHIEF JUSTICE DY CHANDRACHUD:** But the only way we can reach to that conclusion
23 is by saying that once the period for the work of the Constituent Assembly of the State comes
24 to an end, then what is essentially a temporary provision assumes a permanent character in
25 the Constitution.

26

27 **KAPIL SIBAL:** But that... yes. Your Lordship is right, except...

28

29 **CHIEF JUSTICE DY CHANDRACHUD:** But if that hypothesis is not accepted, then the
30 only basis on which you can really place your petitions here, is that by asserting that a pre-
31 constitution compact, which were entered into between an independent state and a state in
32 which it has merged, so to speak, is enforceable, irrespective of what the legislative power of
33 the merging state is.

34

35 **KAPIL SIBAL:** Because My Lord, the legislative power, both of the Parliament here cannot
36 override My Lords the powers under 356 of the Constitution. Because what is being used is
37 356, there is no such power by, under 356 that can My Lord take.....

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37

CHIEF JUSTICE DY CHANDRACHUD: Can an independent state which accepts the sovereignty of another state unconditionally still say that, well, if the Parliament of that State, to which we have assumed sovereignty of, is still restrained in terms of the original compact?

KAPIL SIBAL: It's unconditional, My Lords, it's unconditional. And apart from... forget about that. Can Parliament of India, My Lord, Parliament of India, in the context of its responsibilities and powers under the Constitution of India, do an act beyond 356? Can't. There are very complex issues that Your Lordships will have to decide. This power is exercised under 356. How is that can be exercised under 356? 356 itself is a temporary power. Whatever you are trying to say to me...

JUSTICE SANJAY KISHAN KAUL: Sibal, what you are saying is you see, which means even, let us say a hypothesis that the will of the people is to abrogate it which is reflected by an assembly election. You are saying, even that scenario it cannot be done. Try to understand the context. Sequitur would be even then it cannot be done.

KAPIL SIBAL: But that would be a political act My Lords. I would say that if that situation arises, it would be a political act. That's not been done, but be that as it may. My Lords, kindly look at it from this point of view. 356 itself is a temporary provision. What's the purpose of 356? To distort democracy. Is the intention behind a 356 provision, which is a temporary provision to decimate democracy?

JUSTICE SANJIV KHANNA: No Mr. Sibal, let's keep 356 aside for the time being because we are now interpreting, we are interpreting Clause 3.

KAPIL SIBAL: Yeah, yeah, yeah. I appreciate what My Lords...

JUSTICE SANJIV KHANNA: We can't bring...

KAPIL SIBAL: No, no, I'm only saying these are issues that will arise.

JUSTICE SANJIV KHANNA: If one looks at it carefully, Clause, Sub Clause (b)(2) says such are the matters in the said list with the concurrence of the government of the state, the President may by order specify. So, all other matters which are not included in Clause 1...

KAPIL SIBAL: Requirement.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36

JUSTICE SANJIV KHANNA:can be, can be, now the Parliament of the country can legislate with the concurrence...

KAPIL SIBAL: Yes.

JUSTICE SANJIV KHANNA: ...of the Government of the state. Now what is meant by the concurrence of the government of the state is specified in Clause 2...

KAPIL SIBAL: Yes.

JUSTICE KHANNA: ...as long as there is no Legislative Assembly. In that case, it's a Constituent Assembly, which will have the power.

KAPIL SIBAL: Yes.

JUSTICE SANJIV KHANNA: And after the State Assembly has been constituted, then it will be placed before the State Assembly.

KAPIL SIBAL: Correct.

JUSTICE SANJIV KHANNA: That's the purpose of Clause 2.

KAPIL SIBAL: Yes, you are absolutely right. So that has also worked itself out.

JUSTICE SANJIV KHANNA: But, once the State Assembly has been constituted in terms of the Constitution of the state, then it is governed by the proviso first, and the second proviso to Clause 1, which says, provided that no such order, which relates to matter specified, matters specified so and so, so and so in consultation with the Government of the State, concurrence is not required because it's already included in the order of Accession. The second proviso applies when it is not included in the order of Accession it says, provided further, that no such order which relates to matters referred to in the last provision shall be accepted with the concurrence of the Government. So all that is required is concurrence of the Government.

KAPIL SIBAL: Right.

1 **JUSTICE SANJIV KHANNA:** But to say that the proviso to Clause 3 will operate even after
2 the Constitution...

3

4 **KAPIL SIBAL:** No, it says -'This Article shall cease to operate', not just any law. That 'this
5 Article shall cease to operate'. There's a difference My Lords. Actually, proviso 1 and proviso 2
6 have worked themselves out because now you have a Constitution.

7

8 **JUSTICE SANJIV KHANNA:** Yes, it's not worked itself out. It will continue to apply as long
9 as it is based on concurrence of the State.

10

11 **KAPIL SIBAL:** That's right. And in between the Constitution in 1957 is framed My Lords. So
12 that there was no CO after that except for the ones. There were a couple of COs, but ultimately
13 it's in three. It's in... that is different. See it says - 'notwithstanding anything in foregoing
14 reason of this Article, this Article.'

15

16 **CHIEF JUSTICE DY CHANDRACHUD:** We are interpreting 370. Let's look at Clause B,
17 C, and D for a moment.

18

19 **KAPIL SIBAL:** Yeah.

20

21 **CHIEF JUSTICE DY CHANDRACHUD:** B, C, and D cover two types of situations. One, it
22 covers entries of the union list and the concurrent list.

23

24 **KAPIL SIBAL:** Yes.

25

26 **CHIEF JUSTICE DY CHANDRACHUD:** And it covers substantive provisions of the
27 Constitution also. Now Clause B refers to the power of Parliament to make laws for the State.

28

29 **KAPIL SIBAL:** Yes.

30

31 **CHIEF JUSTICE DY CHANDRACHUD:** And it restricts it in two ways. First - those
32 matters which are governed by the Instrument of Accession, those entries in the union list and
33 in the concurrent list which are referable to the Instrument of Accession...

34

35 **KAPIL SIBAL:** The Instrument of Accession.

36

1 **CHIEF JUSTICE DY CHANDRACHUD:** ...insofar as it reserves powers to Parliament,
2 those have to be specified by the Government of India, by the President in consultation with
3 the State.

4

5 **KAPIL SIBAL:** Absolutely.

6

7 **CHIEF JUSTICE DY CHANDRACHUD:** So (b)(1) refers to those matters in the union list
8 and the concurrent list.

9

10 **KAPIL SIBAL:** Right.

11

12 **CHIEF JUSTICE DY CHANDRACHUD:** (b)(2) refers to such other matters in the said
13 lists, in which concurrence of the Government of the State is concerned, right? So the entirety
14 of (b) is confined to matters in the union list and the concurrent list.

15

16 **KAPIL SIBAL:** Correct. Correct.

17

18 **CHIEF JUSTICE DY CHANDRACHUD:** Now come to Clause C.

19

20 **KAPIL SIBAL:** Yes.

21

22 **CHIEF JUSTICE DY CHANDRACHUD:** Clause C refers to substantive article of the
23 Constitution. Article 1.

24

25 **KAPIL SIBAL:** Yes.

26

27 **CHIEF JUSTICE DY CHANDRACHUD:** Right? Now we come to Clause D.

28

29 **KAPIL SIBAL:** And 370, not just Article 1.

30

31 **CHIEF JUSTICE DY CHANDRACHUD:** Right. And of this Article'.

32

33 **KAPIL SIBAL:** You are right. And of this Article.

34

35 **CHIEF JUSTICE DY CHANDRACHUD:** And now Clause D. Clause D refers to such of the
36 other provisions of this Constitution, they shall apply in relation to that State, subject to such
37 exceptions and modification as the President may by order specify.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37

KAPIL SIBAL: Correct.

CHIEF JUSTICE DY CHANDRACHUD: So Clause D now is beyond the ambit of Clause A. Clause A refers only to the entries of the union list and the concurrent list, right? Clause B refers to the other provisions of the Constitution, apart from the union and the concurrent list.

KAPIL SIBAL: 1 and 370. This is the problem.

CHIEF JUSTICE DY CHANDRACHUD: Right. Now look at the proviso it to Clause D.

KAPIL SIBAL: Yes.

CHIEF JUSTICE DY CHANDRACHUD: The proviso says that - 'No such order which relates to the matters specified in the Instrument of Accession of the State referred to in paragraph 1 of Subclause B shall be issued except in consultation of the Government of the State.' In other words, the first proviso refers to the entries of the union list and the concurrent list, right?

KAPIL SIBAL: Yes.

CHIEF JUSTICE DY CHANDRACHUD: The second proviso further 'provided further, that no such order' - now, which is such order? It refers to the order which is referred to in the first proviso. Therefore, the use of the word 'such order'- 'which relates to matters other than those referred to in the last preceding proviso, shall be issued except with the concurrence of that Government.' In other words, the whole area of concurrence, consultation and consent is confined to the entries of the union list and the concurrent list because it's very clear from the whole scheme. (B)(1) - Matters in the union list and the concurrent list. (B)(2) - Such as the matters in the union and the concurrent list. Then go to Clause D. Clause D refers to the provisions of the Constitution.

KAPIL SIBAL: Provisions of this Constitution.

CHIEF JUSTICE DY CHANDRACHUD: Of this Constitution.

KAPIL SIBAL: Yeah.

1 **CHIEF JUSTICE DY CHANDRACHUD:** Right?

2

3 **KAPIL SIBAL:** Subject to...

4

5 **CHIEF JUSTICE DY CHANDRACHUD:** Now, the Presidential power, the Presidential
6 power to, the Presidential power... the power of Parliament or such of the provision of this
7 Constitution shall apply in relation to the State, subject to such exceptions and modification
8 of the President, may by order, specify. In other words, the President is given an untrammelled
9 power to specify which are the provisions of the Constitution, which shall apply to the State of
10 Jammu and Kashmir. That is conditioned by the first proviso and the second proviso.

11

12 **KAPIL SIBAL:** Right.

13

14 **CHIEF JUSTICE DY CHANDRACHUD:** But the first proviso and the second proviso don't
15 relate to the substantive provision of the Constitution at all. They only refer to the matters
16 governed in the union list and the concurrent list.

17

18 **KAPIL SIBAL:** Only the first proviso, not second.

19

20 **CHIEF JUSTICE DY CHANDRACHUD:** One second.

21

22 **KAPIL SIBAL:** Orders My Lord.

23

24 **CHIEF JUSTICE DY CHANDRACHUD:** Right. You're right. Deals with the Presidential
25 order.

26

27 **KAPIL SIBAL:** The first proviso mentions the list, not the second proviso.

28

29 **CHIEF JUSTICE DY CHANDRACHUD:** D recognizes as inhering in the President, the
30 power to decide which of the substantive provision of the Constitution shall apply to Jammu
31 and Kashmir. Now that power of the President is conditioned by the first and the second
32 proviso.

33

34 **KAPIL SIBAL:** Yes.

35

36 **CHIEF JUSTICE DY CHANDRACHUD:** But the first and second proviso to Clause D....

37

1 **KAPIL SIBAL:** No see, provided further that no such order shall relate.

2

3 **CHIEF JUSTICE DY CHANDRACHUD:** So no such order means the order referred to in
4 the first proviso. And the first proviso only refers to Clause 1 of Subclause D.

5

6 **KAPIL SIBAL:** These are only orders, My Lords, these are only orders. These are orders My
7 Lord.

8

9 **CHIEF JUSTICE DY CHANDRACHUD:** I understand that. Yes. No, no, one second.
10 You're not getting the point. The point is this that D refers to an order which may be passed
11 by the President, making applicable provisions of the Constitution to the state of Jammu and
12 Kashmir with adaptations or modification. Now the question, including the list.. Now, yes,
13 now what the first proviso says is that, "No such order, which relates to matters specified in
14 the Instrument of Accession specified in paragraph 1 of Clause B shall be issued except with
15 consultation."

16

17 **KAPIL SIBAL:** Correct. That is Instrument of Accession, My Lord.

18

19 **CHIEF JUSTICE DY CHANDRACHUD:** But that pertains only to the entries in the union
20 list and the concurrent list.

21

22 **JUSTICE SANJIV KHANNA:** Yes.

23

24 **CHIEF JUSTICE DY CHANDRACHUD:** Absolutely.

25

26 **KAPIL SIBAL:** The second proviso, My Lord.

27

28 **CHIEF JUSTICE DY CHANDRACHUD:** Now the second proviso. Now the second proviso
29 says, "Provided, that no such order.."

30

31 **KAPIL SIBAL:** Yes.

32

33 **CHIEF JUSTICE DY CHANDRACHUD:** "..which relates to matters other than those
34 referred to in the last preceding proviso."

35

36 **KAPIL SIBAL:** Concurrence.

37

1 **CHIEF JUSTICE DY CHANDRACHUD:** Therefore...

2

3 **KAPIL SIBAL:** Which includes D, My Lord?

4

5 **CHIEF JUSTICE DY CHANDRACHUD:** No. It refers only... It cannot. I'll tell you why.
6 Provided further, that no such order. No such order means which order? The order referred to
7 in the first proviso. And the order.....

8

9 **KAPIL SIBAL:** D also mentions orders, My Lord.

10

11 **CHIEF JUSTICE DY CHANDRACHUD:** Sorry?

12

13 **KAPIL SIBAL:** D also mentions the order.

14

15 **GOPAL SHANKARANARAYANAN:** Both provisos towards such <UNCLEAR> order in
16 D.

17

18 **CHIEF JUSTICE DY CHANDRACHUD:** Just one minute.

19

20 **KAPIL SIBAL:** D also says the same thing. Order specify.

21

22 **CHANDER UDAY SINGH:** Honourable Chief Justice, My Lords in the morning I'd
23 mentioned a matter. I had a urgency that there are 23 protests going on simultaneously. We
24 have a very volatile situation due to very unfortunate situations that happened in the
25 neighbouring state in Haryana and Nuh. Now there are 23 protests going on in Delhi.

26

27 **CHIEF JUSTICE DY CHANDRACHUD:** Have you circulated your email?

28

29 **CHANDER UDAY SINGH:** We have sent it to the...

30

31 **CHIEF JUSTICE DY CHANDRACHUD:** I'll pass orders immediately.

32

33 **CHANDER UDAY SINGH:** If Your Lordship could please...<UNCLEAR>

34

35 **CHIEF JUSTICE DY CHANDRACHUD:** Of course. Thats what the circulates it,... I'll do
36 that.

37

1 **CHANDER UDAY SINGH:** Can I hand over hard copies of the IA, My Lords.

2

3 **CHIEF JUSTICE DY CHANDRACHUD:** You have circulated an email right? I'll pass
4 orders.

5

6 **CHANDER UDAY SINGH:** But the email went to the learned registrar judicial because we
7 couldn't find another email that...

8

9 **CHIEF JUSTICE DY CHANDRACHUD:** He doesn't even allow me to use the washroom.
10 He's waiting just outside to take orders the moment I come to my chambers.

11

12 **CHANDER UDAY SINGH:** Right. We also circulated to the Honourable Court Master My
13 Lord. Your Lordship's Court Master.

14

15

16 <<LUNCH BREAK>>

17

18

19

20

21 **CHIEF JUSTICE DY CHANDRACHUD:** Yes please.

22

23 **KAPIL SIBAL:** May I just My Lords very simply state, what I think is the architecture of 370.

24

25 **CHIEF JUSTICE DY CHANDRACHUD:** Yes.

26

27 **KAPIL SIBAL:** Let's go back to it My Lords. Notwithstanding anything in this Constitution,
28 the provisions of Article 238 shall not reply in relation to Jammu and Kashmir. That's done
29 away with now My Lords, because those are Part A, Part B, Part C, Part D states, therefore My
30 Lord that's over. We are not part of any of those States. The power of Parliament, now here My
31 Lords, it is relates to the power of Parliament, to make laws. Just kindly note that.

32

33 **CHIEF JUSTICE DY CHANDRACHUD:** That's the ordinary lawmaking power.

34

35 **KAPIL SIBAL:** The ordinary lawmaking power for the State shall be limited, now that's
36 important. Even the lawmaking power is limited to those matters in the union list and the
37 concurrent list. Your Lordships will see, state list is out because residuary power is in the state,

1 which in consultation with the Government of the State are declared by the President, to
2 correspond to matters specified in the Instrument of Accession governing the accession of the
3 state to the Dominion of India as the matters with respect to which the Dominion Legislature
4 may make laws in that state. So that's that list My Lord.

5

6 **CHIEF JUSTICE DY CHANDRACHUD:** We saw the list in the morning.

7

8 **KAPIL SIBAL:** The list in the morning. So it is only qua those that Parliament may make
9 laws but that also with consultation, and consultation is mentioned here itself. Doesn't have
10 to be repeated in the proviso, it's mentioned here itself. Correct, My Lords? That also has to be
11 consultation. And just My Lords clarify the architecture, that's with consultation. Now you
12 come to B. Such other matters that is again, the power of Parliament to make laws. Such other
13 matters in the said list so, apart from the list that are in the Instrument of Accession such other
14 matters in the said list...

15

16 **CHIEF JUSTICE DY CHANDRACHUD:** No, This list refers to union and concurrent list.

17

18 **KAPIL SIBAL:** Yes, only List 1 and 3.

19

20 **CHIEF JUSTICE DY CHANDRACHUD:** 1 and 3.

21

22 **KAPIL SIBAL:** Right. As with the concurrence of the government, so now My Lords, the law
23 has to be also with concurrence of the government. So we are dealing only with laws here. Law
24 making power, that's the first My Lords, limb of the argument.

25

26 **CHIEF JUSTICE DY CHANDRACHUD:** That's the restriction on the lawmaking power.

27

28 **KAPIL SIBAL:** That's the law making power. Concurrence is mentioned here in respect of
29 other matters. No proviso is required. Here no proviso is required. Now, let's leave the
30 explanation for the moment. The provisions of Article 1 and this article shall apply, 'C' the
31 provisions of Article 1 and of this article shall apply in relation to that state. So this is Article 1
32 and this Article 370, this becomes relevant for D, My Lords ultimately. Now come to D. 'D'
33 starts with the word..... Now, D doesn't deal with laws. It deals with proclamation and orders
34 of the President. Provisions, such of the other provisions of this... I pause here, My Lords,
35 others excluding 1 and 370. So D is, C says the provisions of Article 1 and of this Article shall
36 apply in relation to that state and D says such of the other provisions that is excluding 1 and

1 370 shall apply in relation to that state, subject to such exceptions and modifications as the
2 President may, by order specify.

3

4 **JUSTICE SANJIV KHANNA:** Just one minute. C cannot be read in isolation without
5 reading Sub-clause 1. Notwithstanding anything contained in this Constitution...

6

7 **KAPIL SIBAL:** Correct.

8

9 **JUSTICE SANJIV KHANNA:** ... the provisions of Article 1, and this Article shall apply in
10 relation to that state. So that means only that Article 1 and this Article will apply, only in
11 relation to that state.

12

13 **KAPIL SIBAL:** That's what I'm saying My Lord, nothing more. Then read D.

14

15 **JUSTICE SANJIV KHANNA:** if one reads D...

16

17 **KAPIL SIBAL:** Such of the other provisions.

18

19 **JUSTICE SANJIV KHANNA:** Correct.

20

21 **KAPIL SIBAL:** Which means 1 and 370.

22

23 **CHIEF JUSTICE DY CHANDRACHUD:** ... as well as other than the matters in the
24 concurrent and the union list.

25

26 **JUSTICE SANJIV KHANNA:** Correct.

27

28 **KAPIL SIBAL:** That also. I agree. and 238 also.

29

30 **JUSTICE SANJIV KHANNA:** Just one minute.

31

32 **CHIEF JUSTICE DY CHANDRACHUD:** My Lord Khanna's reading is that, it will include
33 D... sorry, C, but exclude A, and B.

34

35 **KAPIL SIBAL:** That cannot be, My Lord.

36

1 **JUSTICE SANJIV KHANNA:** It will, it will. Otherwise, it will lead to a situation, you are
2 saying that 370 is a permanent article.

3

4 **KAPIL SIBAL:** My Lords, we come to that later.

5

6 **JUSTICE SANJIV KHANNA:** One second. That's your argument. 370 is a permanent
7 article which cannot be undone by... even with a concurrence...

8

9 **KAPIL SIBAL:** That we forget that I made that argument.

10

11 **CHIEF JUSTICE DY CHANDRACHUD:** Right now, you're just giving us the structure of
12 the Article.

13

14 **KAPIL SIBAL:** Forget that what I made that argument. It is temporary, it is temporary on
15 26th of January 1950. Let's forget about anything else. It is temporary. Why? Because My
16 Lords, the Constituent Assembly may still choose to, so it's temporary. There's nothing wrong
17 with that heading. Let me finish the architecture, and then I'll come back My Lord. So, My
18 Lords, I was reading, these such of the other provisions of the Constitution... so that is other
19 than 1 and 370... shall... and 238... shall apply in relation to that state, subject to such
20 exceptions and modifications as the President may, by order, specify. Now, you come to
21 Orders, not to Laws... provided that no such order... What order? Order under D: See the colon
22 My Lords. Specify colon, right? ... provided that no such order, which relates to the matter
23 specified in the Instrument of Accession. Again, My Lords... of the State, referred to in
24 paragraph 1 of sub-clause B, shall be issued except in consultation with the government of that
25 state. Again, a colon. Provided further, that no such order, which relates to matters other than
26 those referred to in the last preceding proviso, shall be issued except with the concurrence.
27 You go to B(1) and B(2). So, that was the law, the same template. Now the orders for the rest
28 of the provisions. Then read 2, My Lords. If the concurrence of the government of the state,
29 referred to in paragraph 2 of sub-clause B of Clause 1, or in 2nd proviso to sub-clause D of that
30 Clause be given before the Constituent Assembly, for the purpose of framing the Constitution
31 of the state is convened, it shall be placed before such assembly for such decision that may be
32 taken thereon. Same template of B and D My Lords. And they can reject it, they need not
33 confirm it. That's how you that's how you retain sovereignty, which is the Instrument of
34 Accession. And, if you don't retain it, it's temporary. That's why it's temporary. I'm just trying
35 to explain...

36

1 **CHIEF JUSTICE DY CHANDRACHUD:** ...the structure of 370. You complete Clause 3,
2 then I have one question.

3

4 **KAPIL SIBAL:** Sure, I'll...

5

6 **CHIEF JUSTICE DY CHANDRACHUD:** No, first you can complete, otherwise I'll be
7 breaking your link. It's on some unrelated area, before...

8

9 **KAPIL SIBAL:** Notwithstanding anything in the foregoing provision. So, My Lords, it's
10 notwithstanding, the 'notwithstanding' in the beginning of the Article, please note that.
11 Notwithstanding anything in the foregoing provisions of this Article. So notwithstanding the
12 notwithstanding in 370, the President may, by public notification declare that the Article shall
13 cease to be operative or shall be operative only with such exceptions and modifications, and
14 from such date as he may specify provided that the recommendation of the Constituent
15 Assembly shall be necessary before the President issues such a notification. So if the
16 Constituent Assembly recommends it, namely, that we want to abrogate 370, then on that
17 recommendation, the President will issue a notification and this Article is contained in Sub
18 Clause 3. It doesn't have to be in D. So that according to me is the architecture of 370.

19

20 **CHIEF JUSTICE DY CHANDRACHUD:** Mr. Sibal, I have just one question on this. D(1)
21 refers to those matters in the instruments of Accession, which have been ceded by the
22 Maharaja to the Union, the Dominion's power. B(2) refers to all other matters in the union
23 and concurrent list other than what is covered by 1..

24

25 **KAPIL SIBAL:** Fair enough.

26

27 **CHIEF JUSTICE DY CHANDRACHUD:** Now suppose in the area of the union and the
28 concurrent list something is not covered by B (1) or by B (2). In other words it's not referable
29 to those subjects mentioned in the instrument of accession, and it's not covered by B (2) at all.
30 That power is not entrusted to the state?

31

32 **KAPIL SIBAL:** B (2) are all are the list, My Lord.

33

34 **CHIEF JUSTICE DY CHANDRACHUD:** No, no. B(2) says such other matters in the said
35 list, as with the concurrence of the Government, the President may order specific
36 <UNCLEAR>

37

1 **KAPIL SIBAL:** Almost all matters in the list.

2

3 **CHIEF JUSTICE DY CHANDRACHUD:** Right, right. Of course it covers....It's a
4 residuary.

5

6 **KAPIL SIBAL:** Everything, My Lord, everything.

7

8 **CHIEF JUSTICE DY CHANDRACHUD:** Yeah, so you have to take concurrence of the
9 state.

10

11 **KAPIL SIBAL:** Yes.

12

13 **CHIEF JUSTICE DY CHANDRACHUD:** Now suppose this is not covered by B(2) in the
14 sense that there is no concurrence of the State. right. It's not covered by B(1), and you have not
15 taken the concurrence of the State under B(2).

16

17 **KAPIL SIBAL:** Correct.

18

19 **CHIEF JUSTICE DY CHANDRACHUD:** On such an aspect, the State Legislature cannot
20 exercise power because it's not in the state list. One second...

21

22 **KABIL SIBAL:** Residuary power of the State.

23

24 **CHIEF JUSTICE DY CHANDRACHUD:** One second. The state legislature is operating on
25 the state list.

26

27 **KAPIL SIBAL:** And residuary power, My Lords.

28

29 **CHIEF JUSTICE DY CHANDRACHUD:** Residuary power came in when and under what?

30

31 **KAPIL SIBAL:** In Kashmir it was there from the beginning .

32

33 **CHIEF JUSTICE DY CHANDRACHUD:** Where does the residuary power find...

34

35 **KAPIL SIBAL:** Yes I'll show that Your Lordship, this is part of the instrument itself.

36

37 **CHIEF JUSTICE DY CHANDRACHUD:** Instrument of accession?

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37

KAPIL SIBAL: Yes, it is part of My Lords, all orders of the government.

CHIEF JUSTICE DY CHANDRACHUD: No, but has specifically there is a

KAPIL SIBAL: It's also part of the Constitution, My Lords...I'll show that.

CHIEF JUSTICE DY CHANDRACHUD: I just wanted to see whether it's part of the Constitution

KAPIL SIBAL: Yes, yes. Your Lordships may take it.

CHIEF JUSTICE DY CHANDRACHUD: Otherwise, there'll be a peculiar situation, where neither Parliament can exercise power nor can the State Legislature exercise power.

KAPIL SIBAL: I will take Your Lordships' point. I will demonstrate to Your Lordships, the residuary power was with the State Legislature throughout and with the State Government throughout. That was the condition on which My Lords the accession took place. And I will demonstrate that Your Lordships. That's the least of my problems.

JUSTICE SANJIV KHANNA: Mr. Sibal, it's slightly different.

KAPIL SIBAL: Yes.

JUSTICE SANJIV KHANNA: Which is very different from what is subject matter of 1 and 2.

KAPIL SIBAL: Yes. Right.

JUSTICE SANJIV KHANNA: Because they do not deal with abrogation of the Article.

KAPIL SIBAL: Absolutely yes, Absolutely. Your Lordship is right.

JUSTICE SANJIV KHANNA: And therefore when we read at that power, which is specifically conferred on the President, then proviso, leave aside for the time being the proviso. Do you agree with that interpretation?

1 **KAPIL SIBAL:** No, I don't...

2

3 **JUSTICE SANJIV KHANNA:** For the time being just leave the proviso.

4

5 **KAPIL SIBAL:** I can't read the Constitution in this fashion. I can't even act in that fashion,
6 let's forget the Constitution. How do I leave the proviso when the Constitution is staring us in
7 the face?

8

9 **JUSTICE SANJIV KHANNA:** No, no the question was...

10

11 **KAPIL SIBAL:** Your Lordship is putting...

12

13 **JUSTICE SANJIV KHANNA:** Clause 3 deals with abrogation of the Article itself, which is
14 not the subject matter of 1 and 2.

15

16 **KAPIL SIBAL:** No. It's subject matter of C, Article 1 shall apply to the State, My Lords.

17

18 **JUSTICE SANJIV KHANNA:** Correct. but it deals with complete abrogation of the article
19 itself.

20

21 **KAPIL SIBAL:** Agreed.

22

23 **JUSTICE SANJIV KHANNA:** And in that context you may argue that your argument of the
24 first fold was, it will be only if the condition of the proviso is satisfied that Clause 3 will apply
25 Otherwise if the conditions of the proviso is not satisfied Clause 3 will not apply.

26

27 **KAPIL SIBAL:** That's how Your Lordships have interpreted proviso since 1950. That's all
28 that I can say. I can't say more than that.

29

30 **CHIEF JUSTICE DY CHANDRACHUD:** Proviso may, in some cases be an exception, a
31 proviso may in some cases be an elaboration.

32

33 **KAPIL SIBAL:** There's a difference, My Lords.

34

35 **CHIEF JUSTICE DY CHANDRACHUD:** It depends upon the nature of the...

36

37 **JUSTICE SANJIV KHANNA:** Provisos are sometimes change colours.

1

2 **KAPIL SIBAL:** Proviso, that the recommendation, provided that the recommendation of the
3 Legislative of the Constituent Assembly shall be necessary. It's a restriction on the exercise of
4 power. That's referred to in Clause 2, My Lords.

5

6 **JUSTICE SANJIV KHANNA:** To interpret Clause 3, to say that the power existed and then
7 will vanish once the Constituent Assembly of the State is no longer exists.

8

9 **KAPIL SIBAL:** Kindly read 2, My Lords. If the concurrence of the government of the State
10 referred to in Para 2, Subclause B, of 1 or the second proviso to D of that clause be given before
11 the Constituent Assembly for the purpose of, for the purpose of framing of the Constitution,
12 of... that is the purpose.

13

14 **JUSTICE SANJIV KHANNA:** Mr Sibal, you have contradicted yourself. When you referred
15 to Clause C, subclause C as an independent clause and Clause D not applicable to Clause C,
16 then the second proviso will not apply.

17

18 **KAPIL SIBAL:** No, what I am saying is in both cases,

19

20 **JUSTICE KHANNA:** And therefore only Subclause 3 will apply.

21

22 **KAPIL SIBAL:** My Lords, the point is Clause 2 says that even for the purposes of those
23 notifications...

24

25 **JUSTICE KHANNA:** Anyway we will examine that.

26

27 **KAPIL SIBAL:** Yes.

28

29 **JUSTICE KHANNA:** We have understood your line of argument.

30

31 **KAPIL SIBAL:** No, no there is something that's missing My Lords. The proviso says,
32 provided that the recommendations of the Constituent Assembly of the State referred to in
33 Clause 2. Why are they saying that My Lords? The purpose is given in Clause 2, provided that
34 the recommendations of the Constituent Assembly of the State referred to in Clause 2 shall be
35 necessary for the President, before the President, before the President issued such a
36 notification. It is necessary... and before he issues it. How can you say it is explanatory, or that

1 it's an independent clause? It specifies how it is to happen. It has to happen before, that is the
2 permission has to be had before.

3

4 **CHIEF JUSTICE DY CHANDRACHUD:** You know, the reason why it refers Clause 3,
5 refers to the Constituent Assembly of the State referred to in Clause 2 is because Clause 2 refers
6 to the Constituent Assembly for the purpose of framing the Constitution.

7

8 **KAPIL SIBAL:** That's correct. That's exactly my point.

9

10 **CHIEF JUSTICE DY CHANDRACHUD:** That's your point. We get your point. Now,
11 therefore the reference the recommendation of which Constituent Assembly. This makes it
12 very clear that one and only Constituent Assembly, which was formed for the purpose of
13 framing of the State Constitution.

14

15 **KAPIL SIBAL:** Absolutely right.

16

17 **CHIEF JUSTICE DY CHANDRACHUD:** Once the framing of the Constitution was done
18 then that purpose of Constituent Assembly, Constituent Assembly is not like a permanent
19 body, like Parliament is a permanent body. The Supreme Court is a permanent body.

20

21 **KAPIL SIBAL:** No doubt about it

22

23 **CHIEF JUSTICE DY CHANDRACHUD:** It's a body which has a specific purpose and
24 thereafter it becomes *functus officio* so to speak. Therefore, once the Constituent Assembly
25 had fulfilled its purpose then the proviso itself has no application.

26

27 **KAPIL SIBAL:** This is the problem, My Lords. The problem there is, then you are applying,
28 applying 3 without the proviso and saying this is a blanket power. Then it's a, then the
29 President can do it anytime without any consultation. He just passes an order.

30

31 **CHIEF JUSTICE DY CHANDRACHUD:** Mr Sibal?

32

33 **KAPIL SIBAL:** I integrate...I integrate...

34

35 **CHIEF JUSTICE DY CHANDRACHUD:** Mr Sibal, one thing which we have to bear in
36 mind is all these provisions are in Part 21. Part 21 has used three expressions temporary,
37 transitional and special.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37

KAPIL SIBAL: Correct.

CHIEF JUSTICE DY CHANDRACHUD: Temporary provisions are those which are intended to be in existence for a limited period of time,

KAPIL SIBAL: That's right.

CHIEF JUSTICE DY CHANDRACHUD: But without a point of terminus, right? A temporary government servant, that person is temporary for a limited period of time but whose services are to be terminated. Until you are terminating the service of that person, that person still continues. That's the broad concept, you know of temporary.

KAPIL SIBAL: Absolutely.

CHIEF JUSTICE DY CHANDRACHUD: Transitional means something which necessarily has a terminus.

KAPIL SIBAL: That's right. Laws made earlier...

CHIEF JUSTICE DY CHANDRACHUD: I will show you some of the transitional provisions of this part. And third is special. Now we'll see for instance, after 370, we'll get some idea from the provisions after 370, say 371. Special provision with respect to Maharashtra and Gujarat. 371 A - special provision for Nagaland.

KAPIL SIBAL: Yes. Yes.

CHIEF JUSTICE DY CHANDRACHUD: Then we get 371 B - special provision for Assam.

KAPIL SIBAL: Correct.

CHIEF JUSTICE DY CHANDRACHUD: 371 C - special division for Manipur.

KAPIL SIBAL: That's correct.

CHIEF JUSTICE DY CHANDRACHUD: D - for the state of Andhra Pradesh and Telangana. E - establishment of central university in AP. F - a special provision for Sikkim,

1 which came in '75. G - Mizoram. H - special provision for Arunachal. Then I - for state of Goa.
2 J - for the state of Karnataka.

3

4 **KAPIL SIBIL:** Right.

5

6 **CHIEF JUSTICE DY CHANDRACHUD:** Now, after these special provisions end, we come
7 to 372, which continues continuance in force of existing laws. Which then says, "Shall continue
8 in force until altered or repealed or amended by competent legislature, or by any other..." like
9 the Penal Code. It just continued in force until it is altered. Then similarly now, we have 372-
10 A, power of the President adopt laws. And it says, the President may by order, made before the
11 1st of November 1957, make such adaptations and modifications. So, this was a transitional
12 provision, that the President had to make those adaptations by the 1st of November 1957. So,
13 it was a transitional provision. After that, the power lapses. So, similarly, 373 was... Then, came
14 the provisions relating to the judges. Judges whose services had to be taken over by the Union
15 of India, Public Service Commissions, so on and so forth. And then, 392, the power of the
16 President to remove difficulties.

17

18 **KAPIL SIBIL:** Right.

19

20 **CHIEF JUSTICE DY CHANDRACHUD:** So therefore, Part 21, basically covers special
21 provisions, temporary provisions, and transitional provisions. Now, it doesn't use the
22 expression 'transitional' in any headnote or marginal note to the Article. But, 'temporary' and
23 'special' are used in the marginal notes to specific articles of Part 21. And 370 specifically use
24 uses the expression 'temporary'.

25

26 **KAPIL SIBIL:** It had to, My Lords. It had to.

27

28 **CHIEF JUSTICE DY CHANDRACHUD:** Can we then by saying that the power under
29 Clause 3 goes once the Constituent Assembly comes to an end, really convert this into a
30 permanent provision, which it was never intend it to be by the Constitution?

31

32 **KAPIL SIBIL:** Your Lordships are not putting to me, it was never intended to. Within 370
33 when it was put in, it had to be a temporary provision. It had to be, My Lord. There was nothing
34 there at that point in time. It had to be, My Lords. It could never be a permanent thing.

35

36 **CHIEF JUSTICE DY CHANDRACHUD:** But, why did the Constitution then, put it in Part
37 21?

1

2 **KAPIL SIBIL:** Because My Lords, it is separate. It relates to a particular state where the two
3 sovereigns have come together, and made a compact which is incorporated and integrated...

4

5 **JUSTICE B.R. GAVAI:** No, no, Part 21 does not deal only with Jammu & Kashmir, it deals
6 with other states also.

7

8 **KAPIL SIBIL:** I'm sorry. I didn't get it.

9

10 **JUSTICE B.R. GAVAI:** Part 21 does not deal only with Jammu & Kashmir.

11

12 **KAPIL SIBIL:** No, of course, not. That's why I'm saying it's a separate independent provision,
13 and has to be interpreted on its own terms. You can't incorporate concepts outside of 370 and
14 integrate them into 370 and say, this is how we'll read 370. 370 is not temporary. 370 is not
15 temporary.

16

17 **CHIEF JUSTICE DY CHANDRACHUD:** The note expressly says it's temporary.

18

19 **KAPIL SIBIL:** No, it's says temporary provisions with respect to... Temporary provisions. In
20 other words, this is a provision which is temporary, till such time as a Constituent Assembly
21 decides this way or that way. That's the whole purpose, My Lords. Because when the
22 Constitution came into force, there was no such thing as a Constituent Assembly even. How
23 did the Constitution add this here? Because there was an understanding. Otherwise, why
24 would you bring in the term 'Constituent Assembly' in 370? It was not anywhere else.
25 Supposing... not that I should say so. I mean, one never knows. Suppose the Constituent
26 Assembly decided not to be with India then what happens? You would have to do what we did
27 to Junagadh.

28

29 **CHIEF JUSTICE DY CHANDRACHUD:** Because, there are two types of temporary
30 provisions in Part 21. One type is Article 369. 369 says, Parliament had the power to make
31 laws for a period of 5 years on certain matters, even if they may not be in the concurrent list.

32

33 **KAPIL SIBIL:** Absolutely.

34

35 **CHIEF JUSTICE DY CHANDRACHUD:** So, they were temporary with reference to time.
36 They were temporal. Then 370 is an illustration of a case which is temporary, in the sense, it
37 will operate till abrogated. Would it be? I mean....

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37

KAPIL SIBIL: Not till abrogated.

CHIEF JUSTICE DY CHANDRACHUD: When we are putting your point, we are actually thinking.

KAPIL SIBIL: I understand My Lords. Your Lordships have always done this, My Lords. This is a very fruitful debate, because we all have to understand. We are here standing for the people of India.

CHIEF JUSTICE DY CHANDRACHUD: And it's only in that process that we can....

KAPIL SIBAL: This is not something that we believe we are totally integrated into India. That's not an issue My Lords. We have said so. Therefore there is no as far as... I mean the Constitution says, we are an integral part of India. So where's the question of moving away from that? There were only two choices, My Lords,, we said the Constituency Assembly of said all of constitutional to reply we'd be like to be any other state.

GOPAL SANKARANARAYANAN: Then they don't have to make a Constitution of their own.

KAPIL SIBAL: Then they don't have to make a Constitution of their own.

GOPAL SANKARANARAYANAN: Indian Constitution....

KAPIL SIBAL: One second, they don't have to make a Constitution of their own. The Constituent Assembly would say we integrate into India. We're part of India. We're like any other state. We don't need a Constitution. And all those lists will apply. That power is there. So why was it called a temporary provision? Because that had to be decided by the Constituent Assembly. And then you interpret the terms to find out how that power is to be exercised, because it was unlike any other state. The residuary power was always with the state. In the Delhi Agreement in 1952, I have....

CHIEF JUSTICE DY CHANDRACHUD: 370, came in with the original Constitution.

KAPIL SIBAL: Yes.

1 **CHIEF JUSTICE DY CHANDRACHUD:** Is there anything in the Constituent Assembly
2 debates which throws light on why they introduced it.

3

4 **KAPIL SIBAL:** I'll do that straight away. Yes. I will give Your Lordships that. Exactly what
5 I'm saying is what they said.

6

7 **CHIEF JUSTICE DY CHANDRACHUD:** Let us see the...

8

9 **GOPAL SANKARANARAYANAN:** Volume 8.

10

11 **KAPIL SIBAL:** Volume 8. Kindly see volume 8, PDF page 1173. 1174 actually. Volume 8, PDF
12 page 1174.

13

14 **JUSTICE SANJIV KHANNA:** 1174?

15

16 **KAPIL SIBAL:** PDF 1174. Running page 4035.

17

18 **JUSTICE SANJIV KHANNA:** 4035?

19

20 **KAPIL SIBAL:** Yes running page, but PDF 1174.

21

22 **JUSTICE SANJIV KHANNA:** Volume 8?

23

24 **KAPIL SIBAL:** Volume 8. By now we know... we know Your Lordships illicit answers in
25 order to find out what we wish to say. Not that Your Lordships have ever decided on one way
26 or the other. You always do that. And I've seen....

27

28 **CHIEF JUSTICE DY CHANDRACHUD:** The last word is said in a manner Mr. Sibal,
29 everything is open.

30

31 **KAPIL SIBAL:** When the printed word comes, that's the last word.

32

33 **JUSTICE SANJAY KISHAN KAUL:** As I've always said this, Mr Sibal if the judge is very
34 quiet there is a problem.

35

36 **KAPIL SIBAL:** That's a real problem. It's a real problem

37

1 **CHIEF JUSTICE DY CHANDRACHUD:** And Mr Sibal there are times when you start
2 dictating a judgment. You start dictating ...

3

4 **KAPIL SIBAL:** And then you change your mind.

5

6 **CHIEF JUSTICE DY CHANDRACHUD:** And you start dictating with a certain conclusion
7 in mind because that's what you form. When you start dictating it, then you realize that your
8 line of reasoning is wrong, because when you dictate the logical syntax has to fall in place and
9 you are engaged with yourself. Then you realize no, no, no it's not going to fit in like this...

10

11 **KAPIL SIBAL:** Quite frankly, My Lords, and I'll be honest when I looked at it myself, I asked
12 this question that Your Lordships is asking. I myself that question.

13

14 **CHIEF JUSTICE DY CHANDRACHUD:** 4034?

15

16 **KAPIL SIBAL:** Yes 4035.

17

18 **CHIEF JUSTICE DY CHANDRACHUD:** Sorry. 1174.

19

20 **KAPIL SIBAL:** Yes 1174. Then kindly come to My Lords, the sentence starting... Sir, this
21 matter Your Lordship has that? They set out My Lords...

22

23 **CHIEF JUSTICE DY CHANDRACHUD:** Gopalaswamy Iyengar ?

24

25 **KAPIL SIBAL:** Yes, Gopalaswamy Iyengar. Then it says, sir, this matter, the matter of this
26 particular motion relates to Jammu and Kashmir. The House is fully aware of the fact that the
27 State has acceded to the Dominion of India. The history of this accession is also well known.
28 The accession took place on 26th October 1947. Since then, the state had a checkered history.
29 Conditions are yet not normal. The meaning of this accession is that the present, that at
30 present the state is a unit of a federal state, namely, the Dominion of India. This Dominion is
31 getting transformed into a Republic which will be inaugurated on 26 January 1950. The
32 Jammu and Kashmir State, therefore, has to become a unit of the new Republic of India. As
33 the House is aware, accession to the Dominion always took place by means of an instrument
34 which had to be signed by the ruler of the state and which had to be accepted by the Governor
35 General of India. That has taken place in this case. As the House is also aware, instruments of
36 accession are a thing of the past in the new Constitution, will be a thing of the past of the new
37 Constitution. The States have been integrated with the Federal Republic in such manner that

1 they do not have to accede or execute a document of accession for the purpose of becoming
 2 units of the Republic but they are mentioned in the Constitution itself. And in the case of
 3 practically all States other than the State of Jammu and Kashmir their constitutions also have
 4 been embodied in the Constitution for the whole of India, and all those other States have
 5 agreed to integrate themselves in that way and accept the Constitution provided. The
 6 discrimination is due to the special... why this discrimination? That's the question asked. The
 7 discrimination is due to the special conditions of Kashmir. That particular state is not yet ripe
 8 for this kind of integration. It is the hope of everybody here, that in due course even Jammu
 9 and Kashmir will become ripe for the same sort of integration as has taken place in the case of
 10 other States. At present it is not possible to achieve that integration. There are various reasons
 11 why this is not possible. Now, I shall refer again to this a little later. In the case of other Indian
 12 States or unions of States, there are two or three points which have got to be remembered.
 13 They have all accepted the Constitution framed for States in Part 1 of the new Constitution,
 14 and those provisions have been adapted so as to suit conditions of Indian States and Union of
 15 States. Secondly, the centre that is the Republican Federal Centre, will have power to make
 16 laws applying in every such state or union to all unions and concurrent subjects. Thirdly, a
 17 uniformity of relationship has been established between those States and unions and the
 18 centre. Kashmir's conditions are, as I have said special and requires special treatment. I do not
 19 want to take much time of the house, but I should briefly indicate the special conditions are.
 20 In the first place, there has been a war going on within the limits of Jammu and Kashmir.
 21 There was a ceasefire agreed to at the beginning of this year, and that ceasefire is still on. But
 22 the conditions in the State are still unusual and abnormal. They have not settled down. It is
 23 therefore necessary that the administration of the State should be geared to these unusual
 24 conditions until normal life is restored. Part of the State is still in the hands of rebels. We are
 25 entangled with the United Nations in regard to Jammu and Kashmir, and it is not possible to
 26 say, now, when we shall be free from this entanglement. That can take place only when
 27 Kashmir's problem is satisfactorily settled. Again the Government of India have committed
 28 themselves to the people of Kashmir in certain respects. They have committed themselves to
 29 the position that an opportunity would be given to the people of the state to decide for
 30 themselves whether they will remain with the Republic or wish to go out of it. We are also
 31 committed to ascertaining the will of the people by means of a plebiscite,
 32 provided that peaceful and normal conditions are restored and the impartiality of the
 33 plebiscite.... This is not relevant anymore.

34

35 **GOPAL SANKARANARAYANAN:** Next sentence.

36

37 **KAPIL SIBAL:** This is not relevant. The plebiscite issue is not relevant

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36

JUSTICE SANJIV KHANNA: Which part is not relevant as per your comment? Even the part before that?

KAPIL SIBAL: Yes, now see further My Lords. We have also agreed that the will of people through the instrument of a Constituent Assembly will determine the Constitution of the State, as well as the sphere of union jurisdiction for the state. That's why it was a temporary provision. Now next paragraph, at present the Legislature, which was known as the Praja Sabha in the State, is dead. Neither that Legislature, nor a Constituent Assembly can be invoked or can function until complete peace comes to prevail in the State. We therefore, to deal with the government of the State, which has represented in its Council of Ministers, reflect the opinion of the largest political party in the State. Till a Constituent Assembly comes into being, only an interim arrangement is possible. Which is why it is temporary... and not an arrangement which could, at once, be brought into line with the arrangement that exists in the case of other states. This tells Your Lordships why it is temporary. Now, if you remember the viewpoint that I have mentioned, it is an inevitable conclusion, that at the present moment we could establish only an interim system... interim system, Article 306(a). Now, what is 306(a)? 370... is an attempt to establish such a system, interim, till the Constituent Assembly decides. I shall now proceed... that's not relevant. So clearly, My Lords, clearly, it gives you an indication why it was interim, it gives you an indication why it was temporary. Because there was nothing in place. Legislature was not working, Constituent Assembly was not in place, and the will of the people had to be taken, which was reflected in the Constituent Assembly. Therefore, it was temporary, and therefore 370 My Lords. Now, remember this, when 370 is enacted in 1950, at that point in time, nothing is in place. And yet in 373, they say, you will have to get the recommendation of the Constituent Assembly. That is *dehors* the Constituent Assembly having been formed. *Dehors* its Constitution. Why would, My Lords, the Constitution say that? Then kindly come to 4039, 2nd paragraph of 4039. Yes. Now, it's very interesting My Lords. Let's read the paragraph, then we come to Clause 2. First that, and then I'll read the other paragraph. Then we come to Clause 2. My Lords, have that? That's PDF 1178. 4039, that's right. Now My Lords, actually....Maybe My Lords, I should start with Volume 8, 1176. Let's take 1176. PDF 1176. Running page 4037.

GOPAL SANKARNARAYANAN: Maybe you can read the whole thing.

KAPIL SIBAL: Yeah, I'll read the whole thing.

1 **GOPAL SANKARNARAYANAN:** Because, it will be the interpretation they asked you
2 before lunch.

3

4 **KAPIL SIBAL:** My Lords, most of Your Lordships' questions hopefully are answered in this.
5 There's the second portion of this Article. 1076, My Lords. I shall now proceed to take the
6 House through the provisions of this Article, that is, 306(a), which is 370. As honourable
7 members will remember, the Constitution of Indian States is mainly governed by Article 211(a)
8 of this Constitution, which applies to the Constitution to Indian States. The Constitution to
9 Indian States... subject to the modifications contained in Part 6(a) of the Schedule. So far as
10 that provision is concerned, I've already indicated to you that the provisions regarding the
11 Constitution of other states could not, at present, be applied for Jammu & Kashmir. Therefore,
12 Clause 1 of A of this Article say that the provisions of 211(a) of this Constitution, shall not apply
13 to the State of Jammu & Kashmir. That's 238, My Lords. 211(a) is 238. The second portion of
14 this Article relates to the legislative authority of Parliament. So Parliament may, by law,
15 ...that's B over the State of Jammu and Kashmir. This is governed primarily by the Instrument
16 of Accession. Broadly speaking, that legislative power is confined to the three subjects of
17 defence, foreign affairs, and communications. But as a matter of fact, these broad categories
18 include a number of items which are listed in the Instrument of Accession. I believe they
19 include... I believe they are numbered some 20 to 25. Now these items have undergone a
20 change in description, in numbering and arrangement, as among themselves in list 1 and list
21 3 of the new Constitution. It is therefore necessary that the items mentioned in the Instrument
22 of Accession should be brought in line with the changed designations of entries in the lists 1
23 and 3 of the new Constitution. So Clause 1 (B) of 306(A) says that, 'this listing of items, as per
24 the terms of the new Constitution, should be done by the President in consultation with the
25 Government of the State'. That explains B(1). Clause B(2) refers to possible additions to the
26 list in the Instrument of Accession, and these additions could be made according to the
27 provisions of this Article with the concurrence of the Government of the State. The idea is that
28 even before the Constituent Assembly meets, it may be necessary in the interests of both the
29 centre and the state that certain items which are not included in the Instrument of Accession
30 would be appropriately added to the list in that instrument so that administration, legislation,
31 and executive action might be furthered. And as this may happen before the Constituent
32 Assembly meets, the only authority from whom we can get consent for the addition is the
33 Government of the State that is provided for. Then there is the explanation which defines what
34 the Government of the State means. The Government of the State is defined both in the
35 Constitution, which is now supposed to be in the force in Jammu and Kashmir, the State, as
36 well as the proclamation with the Maharaja issued on 5th March 1948 the terms of which are
37 as follows.

1
 2 Then kindly come to... now kindly come to C and D. Yes. Second last paragraph in 1177. PDF
 3 1177. 4038. My Lord has that? Clause C and D refer to the provisions of the Constitution other
 4 than matters listed in 1 and 3. These various provisions have been divided into certain
 5 categories. The first according to this draft, is that 'Article 1 of the Constitution will
 6 automatically apply'. As you know, it describes the territory of India and includes among those
 7 territories, all the States mentioned in part 3, and Jammu and Kashmir is one of the States
 8 mentioned in part 3. With regard to the other provisions in the Constitution, these will apply
 9 to the Jammu and Kashmir State with such exceptions and modifications, as may be decided
 10 on when the President issues an order to that effect. The order can be issued....

11

12 **JUSTICE SANJIV KHANNA:** Just read the sentence once again. With regard to other
 13 provisions of the Constitution, these will apply when the President issues an order to that
 14 effect. That order can be issued with regard to subjects mentioned in the Instrument of
 15 Accession only after consultation with the Government of the State. With regard to other
 16 matters, concurrence of the Government has to be taken.

17

18 **KAPIL SIBAL:** That's B (1) and B (2). Two provisos. B(1), and B(2). That order can be issued
 19 in regard to subjects mentioned in the instrument only after consultation in regard to the
 20 others in concurrence. Now it is not the case, nor is it the contention of the members of
 21 Kashmir Government, whom I took the opportunity of consulting before this draft was
 22 finalized. It's not their intentions as the other provisions of the Constitution are not to apply.
 23 That particular point of view is that with these provisions would apply only in cases where they
 24 can suitably apply and only subject to such modifications, with exceptions in the particular
 25 conditions of Jammu and Kashmir may require. I wish to say that no more about that
 26 particular point at the present moment. Then we come to Clause 2. You will remember that
 27 several of these clauses provide for concurrence of the government of Jammu and Kashmir
 28 State. Now these relate particularly to matters not mentioned in the Instrument of Accession
 29 and it is one of our commitments to the people and Government of Kashmir that no such
 30 additions should be made except with the consent of the Constituent Assembly, which may be
 31 called in the State for the purpose of framing its Constitution. In other words, what we are
 32 committed to is, that these additions are matters for determination by the Constituent
 33 Assembly of the state. This is commitment. Now, you will recall that in some of the clauses of
 34 this Article we have provided for concurrence of the government of the State. The government
 35 of the State feel that in view of the commitments already entered between the State and the
 36 centre, they cannot be regarded as final authorities for the giving of this concurrence, though
 37 they are prepared to give it in the interim period. But if they do not give this concurrence this

1 clause, if they do give this concurrence, the clause provides that, that concurrence should be
2 placed before the Constituent Assembly, when it meets on the Constituent Assembly will take
3 whatever decision it likes to take. My Lords, what can be clearer than this? The last clause
4 refers to what may happen later on which is why it is temporary.

5

6 **JUSTICE SANJIV KHANNA:** The paragraph which you read, is with reference to Clause 2,
7 not with reference to Clause 3...

8

9 **KAPIL SIBAL:** Yes, I'm not saying that I am just reading

10

11 **JUSTICE SANJIV KHANNA:** The last Clause is Clause 3?

12

13 **KAPIL SIBAL:** I am not saying that. I am saying, I am reading it holistically. So you know
14 why it is called temporary.

15

16 **GOPALA SANKARANARAYANAN:** 2 and 3 are temporary.

17

18 **KAPIL SIBAL:** 2 and 3 are temporary, no doubt about it because they have to be actually
19 agreed upon by the legislature by the Constituent Assembly. Now see 3. The last clause refers
20 to what may happen later on. We have said Article 211(a), which is 238(a) will not apply to
21 Jammu and Kashmir. That cannot be a permanent feature of the Constitution of the State and
22 hope it will not be. So, the provision is made that when the Constituent Assembly of the State
23 has met and taken its decision both on the Constitution for that state and on the range of
24 federal jurisdiction over the state. The President may, on the recommendation of the
25 Constituent Assembly, issue an order that this Article 306(a) shall either cease to be operative
26 or shall be operative only subject to such exceptions and modifications, as is specified by him.
27 But before he issues any order of that kind, the recommendation of the Constituent Assembly
28 will be a condition precedent, that explains the whole of the Article. There can be nothing
29 clearer than this. I mean, we in hindsight sitting in 2023 can't interpret a provision except on
30 its terms. We are here to interpret the Constitution. We are not here to legitimize a process
31 which is inconsistent with the express terms of the Constitution. Next paragraph. The effect of
32 this article is, that the Jammu and Kashmir State, which is now a part of India, will continue
33 to be a part of India, will be a unit of the future Federal Republic of India, and the Union
34 Legislature will get jurisdiction to enact laws on matters specified either in the instrument of
35 accession or by later addition, with the concurrence of the Government of the state and steps
36 have to be taken for the purpose of convening a Constituent Assembly in due course, which
37 will go into the matters I have already referred to. When it comes to a decision on the different

1 matters, it will make a recommendation to the President, who will either abrogate 306(a) or
2 direct that it should apply with such modification and the exception of the Constituent
3 Assembly may recommend. That Sir, is briefly a description of the effect of this Article and I
4 hope the house will carry it. This explains several things. One, why it was a temporary
5 provision. Two, Constituent Assembly had not been constituted then. It was envisaged in our
6 Constitution, that it will be constituted. And the ultimate authority of abrogating 370 will be
7 left to the Constituent Assembly.

8

9 And a precondition of that would be a recommendation of... the recommendation of the
10 Constituent Assembly for the President to pass an order. Absent that, it can't be done. That
11 was the understanding of the lawmakers, of the Constitution makers of India, of the
12 Constituent Assembly. That is why it was put in. It was not a temporary provision, in the sense,
13 that it had ultimately... 370 had to be abrogated. That's not the meaning of the temporary
14 provision that we're talking about. In any case, My Lords, a heading of an article can't
15 determine the content of the article. Content of the article is clear. So, My Lords, the
16 government of the day was staring at the provisions of Article 370, and according to me,
17 through a political act, not a constitutional procedure, declared that 370 is gone. That's why I
18 said, it was tossed out of the window through a political act, not through a Constitutional act.
19 Such a political act cannot be determined by the Parliament of India. It's not in the remit of
20 the Parliament of India to take a political decision to abrogate 370. Now I'll demonstrate as we
21 move along My Lords, how it was done and in what matter it was done. Nobody can deny, that
22 the people of Jammu & Kashmir are with the Union; it is an integral part. Nobody can deny
23 that. But there is a special relationship, there is a unique relationship which is engrafted in
24 370 itself. You can't jettison that, except by following a process which is ordained by law. So
25 My Lordships asked me on the constituent... I wanted to just mention this. These are the... My
26 Lords...

27

28 {NO AUDIO}

29

30 **KAPIL SIBAL:** My Lords I just want to mention that all the amendments sought, My Lords
31 were all rejected and withdrawn.

32

33 **JUSTICE B.R. GAVAI:** Not moved to?

34

35 **KAPIL SIBAL:** Not moved.

36

37 **JUSTICE B.R. GAVAI:** [UNCLEAR], he did not move those amendments?

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37

KAPIL SIBAL: Yes. So My Lords, may I go back to the list of dates now that I have put my provision on Article 370, straightaway? Let's go back to the list of dates. My Lords kindly come to my written submissions, Volume 2 and the PDF page is 41.

JUSTICE B.R. GAVAI: Same page?

KAPIL SIBAL: Same page that I left.

JUSTICE SANJAY KISHAN KAUL: We are on the list of dates that serial where you left?

KAPIL SIBAL: Yes you are right. Unless we have a clear picture of 370 My Lord, it will be difficult to.... item 33 at page PDF 41. My Lords have that? Justice Surya Kant?

JUSTICE SURYA KANT: Yes.

KAPIL SIBAL: Under 370, sub-article 1 of the Constitution and following consultation of the Government of Jammu and Kashmir, the President issued the Constitution Application of Jammu & Kashmir's Amendment Order 39, modifying Articles 54, 55 of the Constitution as long as they applied to State of Jammu and Kashmir. Now My Lords, Your Lordships will notice each of these orders were issued under D(1), D(1) all of these orders.

CHIEF JUSTICE DY CHANDRACHUD: B(1)?

KAPIL SIBAL: D(1), all of these orders. Then in 1952, on the 10th of June, My Lords on June 10th, '52, the basic principles of Committee of Jammu and Kashmir Constituent Assembly submitted its interim report to the Jammu and Kashmir's Constituent Assembly and recommended that the form of the future Constitution of Jammu and Kashmir shall be wholly democratic. The institution of hereditary rulership shall be terminated. The office of the Head of State shall be elective. Then the next is very important. In 1952, the Delhi Government, Delhi Agreement of 1952 was entered into between the Government of India and the Government of Jammu and Kashmir. Under this agreement, the Government of India agreed that while residuary powers of the Legislature vested in Parliament in respect of other States, in the case of Jammu and Kashmir, such powers vested in the State itself. This is what My Lords asked me the question. Now, My Lords, kindly read this document. It's very important. Volume 1 of the Compilation of Documents. Pages 13, PDF 13. Your Lordship has that, the Delhi Agreement 1952? Justice Surya Kant has that? This is My Lords, page 13, PDF 13.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37

CHIEF JUSTICE DY CHANDRACHUD: This doesn't seem to be the main agreement. This seems to be some summary of the features of the agreement.

KAPIL SIBAL: Yes, yes.

JUSTICE SANJAY KISHAN KAUL: Yes it's a summary of what are perceived.

KAPIL SIBAL: What the features are.

CHIEF JUSTICE DY CHANDRACHUD: Where is the summary taken from because the authenticity will depend on that?

KAPIL SIBAL: The very next page it's there, My Lord, I believe. It is Sheikh Muhammad Abdullah's statement to the Constituent Assembly on the Delhi Agreement on 11th August 1952, that's at PDF 16.

JUSTICE SANJAY KISHAN KAUL: That's the actual extract?

KAPIL SIBAL: Yes. I can read that My Lords. I can read that. That's not the original either. I will get you the original. They will have it in any case. What is at page 13 is an is an extract of the original. Summary.

CHIEF JUSTICE DY CHANDRACHUD: It's the summary, actually.

KAPIL SIBAL: Page 16 is the extract.

CHIEF JUSTICE DY CHANDRACHUD: Page 15 is actually Sheikh Mohammad Abdullah's statement to the Constituent Assembly.

KAPIL SIBAL: Statement My Lords. Can I read the summary, My Lords? This is not something that will be...

JUSTICE SANJAY KISHAN KAUL: You want to read the summary?

KAPIL SIBAL: It says that, in view of the uniform and consistent stand taken by the Jammu & Kashmir Constituent Assembly, the sovereignty, in all matters, other than those specified in

1 the Instrument of Accession, continues to reside in the state. The Government of India agreed
2 that while the residuary power of the legislature vested at the centre in respect of all states
3 other than Jammu and Kashmir, in the case of the latter, they vested in the state itself. It was
4 agreed between the two governments, that in accordance with Article 5 of the Indian
5 Constitution, persons who have their domicile... we're not concerned so much with the
6 domicile issue. And, I can read it... that the two governments in accordance with Article 5,
7 persons who have their domicile in Jammu & Kashmir shall be regarded as citizens of India...

8

9 **JUSTICE SANJAY KISHAN KAUL:** This is a state subject, Mr. Sibal. It may not be directly
10 relevant.

11

12 **KAPIL SIBAL:** That's why I said My Lords. Then 4 is, the Union Government agreed that
13 the state should have its own flag in addition to the Union flag, but it is agreed by the State
14 Government, that the state flag would not be a rival to the Union. It is also recognized... keep
15 that out.

16

17 **JUSTICE SANJAY KISHAN KAUL:** How Sadr-e-Riyasat has to be...

18

19 **KAPIL SIBAL:** Yeah, so that also. Then (vi). With regard to the fundamental rights, some
20 basic principles agreed between the parties were enunciated. It was accepted, that the people
21 of the states were to have their fundamental rights. But in view of the peculiar position in
22 which the state was placed, the whole chapter relating to fundamental rights of the Indian
23 Constitution could not be made applicable to the state. The question which remained to be
24 determined was, whether the chapter on fundamental rights should form a part of the state
25 Constitution of the Constitution of India, as applicable to the state. So, it was not My Lords,
26 applied at that time, fully. With regard to the jurisdiction... I'll leave that out, that's on the
27 Supreme Court. And then My Lords, there was a great deal of discussion, Item 8. With regard
28 to the emergency power, the Government of India insisted on the application of Article 352,
29 empowering the President to proclaim a general emergency in the state. State Government
30 argued that in the exercise of its powers of a defence, Item 1 of the union list, in the event of
31 war and external aggression, the government would have full authority to take steps and
32 proclaim emergency. But the state delegation was, however, averse to President exercising the
33 power to proclaim a general emergency on account of internal disturbance, which ultimately
34 Your Lordship knows, was also taken out of the Indian Constitution under 352.

35

36 **JUSTICE SANJAY KISHAN KAUL:** At the relevant time it was there.

37

1 **KAPIL SIBAL:** It was there at the relevant time, but the state said we will not allow it to be
2 exercised.

3

4 **JUSTICE SANJAY KISHAN KAUL:** Just trying to think aloud, at the relevant time in '75...

5

6 **KAPIL SIBAL:** Yes, it was there.

7

8 **JUSTICE SANJAY KISHAN KAUL:** It was there. Then, this, through some subsequent
9 orders, equally applied to Jammu & Kashmir at that time.

10

11 **KAPIL SIBAL:** That's correct. Absolutely right.

12

13 **DINESH DWIVEDI:** This summary which my friend [UNCLEAR] Agreement Summary,
14 this seems to have been taken out of this book by Justice A.S. Anand.

15

16 **KAPIL SIBAL:** It's not publicly available, but Justice Anand has that.

17

18 **DINESH DWIVEDI:** No, it's published. Constitution of Jammu & Kashmir.

19

20 **KAPIL SIBAL:** The agreement is not publicly available.

21

22 **DINESH DWIVEDI:** No, he has given the authoritative statement, in the sense, what does
23 it imply?

24

25 **KAPIL SIBAL:** This is also part of the compilation My Lord.

26

27 **DINESH DWIVEDI:** Yes, yes.

28

29 **KAPIL SIBAL:** Then My Lords, in order to meet the viewpoint of the state delegation,
30 Government of India agreed to the modification of 352 in its application to Kashmir, while the
31 addition of the following work, but in regard to internal [UNCLEAR] of the request, or with
32 the concurrence of the government of the state. That's how My Lords. But, the parties agreed
33 that the application of 356 dealing with suspension of the State Constitution, and 360, dealing
34 with financial emergency, was not necessary.

35

36 Then My Lords, Sheikh Abdullah's statement to the Constituent Assembly on 11th August. "I
37 create permission to make a statement before the House in regard to the constitutional

1 relationship with Jammu & Kashmir and the Indian Union. The honourable members are
2 aware during the last session of the Constituent Assembly, the Basic Principles Committee had
3 submitted a report making certain specific recommendations about the future Head of the
4 State. House while accepting these recommendations had chart the Drafting Committee to
5 present for the consideration of the Assembly, a draft resolution, incorporating the proposed
6 principles for the election of the Head of State. Drafting Committee will no doubt submit its
7 report to the House, since the changes proposed in the assembly involved corresponding
8 adjustments in the Indian Constitution, Government of India desired that it should have time
9 to discuss with our representative other matters pertaining to the constitutional relationship
10 of our state with the Union. During the last stage of these discussions, it became necessary for
11 me and some of my other colleagues in the government to participate in the talks. I'm now in
12 a position to inform the House that certain broad principles have been laid down and certain
13 decisions have been tentatively arrived at between the two Governments. The basis of our
14 relationship with India is the Instrument of Accession, which enabled our state to enter into a
15 Union with India in accordance with the terms of instrument. Of the Instrument certain
16 powers were transferred to the centre. The principle matter specified as a purpose in respect
17 to Dominion Legislature made Laws for the state, were they arranged this arrangement
18 involved a division of sovereignty, which is the normal feature of a Federation beyond the
19 powers transferred to it by to the Union. The State enjoyed complete residuary sovereignty."
20 That's why My Lords, when you read 370, you can't read into it, the other matters. But these
21 terms of the association of our state with the Dominion were maintained, and subsequently,
22 when the Constituent Assembly of India was charged with a task for framing of Constitution
23 this overriding consideration was kept in view in determining the position of the State in the
24 proposed Constitution. Earlier to this, it had been agreed between the two governments that
25 in view of the special problems arising in respect of the State and the fact that the Government
26 of India have assured its people they would themselves finally determine the political future,
27 a special position should be accorded to Jammu and Kashmir in the future Constitution so,
28 that a limited field of the Union powers over the State is ensured. Our representatives were
29 nominated by the Jammu and Kashmir State of the Constituent Assembly of India. These
30 representatives participated in the deliberation of the Assembly in India at a time, when the
31 bulk of the Indian Constitution has already been adopted. It was at this stage, that the
32 constitutional position of the State was determined in the Constitution of India. This is very
33 important. It was a collaborative exercise... a dialogue. It was not My Lords behind the back of
34 the Union of India or anything like that. They knew what was to happen in the future.
35 Representatives of Jammu and Kashmir reiterated their views that Association with India
36 should be based on the term of the Instrument of Accession. It was at this stage that the
37 constitutional position was determined. The representatives of the Jammu and Kashmir State

1 reiterated their views that an Association with India should be based on the terms of the
2 Instrument of Accession. It was also made clear that while the accession of Jammu and
3 Kashmir State with India was complete, in fact and law to the extent of the subjects
4 enumerated in this instrument, the autonomy of the State with regard to all other subjects
5 outside the ambit of the Instrument of Accession should be preserved. And hence, a good deal
6 of confused thinking and uninformed criticism is indulged in some interested people, I would
7 like to point out that the Constitution has confined the scope and jurisdiction of the Union
8 powers to the terms of the Instrument of Accession with the proviso. They may be extended to
9 such of the matters as the President may, by order specify with the incurrence of the Jammu
10 and Kashmir Assembly. This is qua, My Lords, the concurrent list matters. The special
11 problems facing the State was thus taken into account and under the Constitution, the
12 relationship approximated to that subsisting under the instrument of Accession. The
13 Constitution of India, of the Indian Union, therefore clearly envisioned the convening of a
14 Constituent Assembly for the Jammu and Kashmir State, which would be finally competent to
15 determine the ultimate position of the State in respect to the sphere of its succession, which
16 would be incorporated as in the shape of permanent provisions of the Constitution. That's why
17 temporary. The rest really need not trouble, Your Lordships. So I need not trouble Your
18 Lordships.

19

20 Then, My Lords, residuary powers, its important. Page 19. PDF 19. There is a heading of
21 Residuary Powers. It was agreed that while under the present Indian Constitution, the
22 Residuary Powers vested in the centre in respect of all the States, other than Jammu and
23 Kashmir. In the case of our State, they vested in the state itself. This position is compatible,
24 compatible with Article 370 of the Constitution of India and the Instrument of Accession on
25 which this article is based. We have always held that the ultimate source of sovereignty resides
26 in the people. It is therefore, from the people that all powers can flow under these
27 circumstances. It is up to the people of Kashmir through this assembly to transfer more powers
28 of mutual advantage to the custody of the Union. So, but what happens ultimately, since I will
29 come to that later, is that Parliament exercised the will of the people of Jammu and Kashmir
30 when they abrogated the Article. That's what happened. They took upon themselves the
31 constitutional responsibility of saying that we are now the legislature, we are the Constituent
32 Assembly and we will exercise the will of the people of State of Jammu and Kashmir, to say
33 that we abrogate 370. In essence, that's what happened. Is that possible constitutionally? Is
34 that envisaged by 370? Is this not an exercise of political power, without reference to 370? And
35 can such a power be exercised in the manner in which it was exercised? That's a matter of
36 procedure. Then there is citizenship. We need not go into it. Fundamental rights. We don't

1 have to go into all this. Now, kindly come to list of dates again. Right back at 42, item 37 Article
2 370. Sub- Article 3, PDF My Lords 42. My Lord Justice Gavai has it?

3

4 **JUSTICE B.R. GAVAI:** Yes, 37?

5

6 **KAPIL SIBAL:** Yes. Under.... just wondering whether all of Your Lordships have it? I have
7 to say, My Lords, that I've been a... and even though I say it to myself, a good student, because
8 I can access it immediately.

9

10 **JUSTICE SANJAY KISHAN KAUL:** This is my second Constitution Bench, wherein the
11 Chief Justice made me take to this.

12

13 **KAPIL SIBAL:** My Lord said to me, I am not going to allow you to argue... so I had to learn.

14

15 **CHIEF JUSTICE DY CHANDRACHUD:** Yes.

16

17 **KAPIL SIBAL:** 37, My Lords. Under Article 370, sub-article 3 of the Constitution, the
18 President, after a recommendation for J&K Assembly, issued Notification 44 modifying 370
19 to include an explanation with the phrase State Government meant the Sadr-e-Riyasat, acting
20 in Indian advice of the Council. Kindly note that, that was done by the Constituent Assembly.
21 That's the only time My Lords, they exercised their powers with reference to 370. On 14th of
22 May 1954, with the concurrence of the Government of Jammu and Kashmir, the President
23 issued the Constitution Adaptation to Jammu and Kashmir Order of 1954, which came into
24 force on May 14, 1954. This order superseded the Constitution Application to Jammu and
25 Kashmir order of 1950, which had only those limited provisions. Paragraph 2 of the said Order
26 set those provisions of the Constitution, which, in addition to Articles 1 and 370, because that
27 order only had Article 1 and 370 would be applicable and other than 1, sorry, other than 1
28 would be applicable to the State of Jammu and Kashmir. Notably, a second proviso was
29 introduced into Article 3 as applied to the State of Jammu and Kashmir in the following terms,
30 provided that no bill providing for increasing or diminishing the area, this is also very
31 important, of the State of Jammu & Kashmir altering the name of boundary of that State shall
32 be introduced in Parliament without the consent of the legislature of that state.

33

34 Your Lordship knows, My Lords, Article 3, they can change the boundaries. What happened
35 in this case was, not that they changed the boundaries My Lords, they converted it into a union
36 territory, which is the other problematic issue, which of course, we'll have to argue later. You
37 can change the boundaries of a state, you can bifurcate the boundaries of a large state into

1 smaller states, but never in the history of this country has a state been converted into a union
2 territory.

3

4 **JUSTICE SANJAY KISHAN KAUL:** You can carve out a union territory out of a state.

5

6 **KAPIL SIBAL:** You can carve out, but you can't have all of Madhya Pradesh be a union
7 territory tomorrow.

8

9 **JUSTICE SANJAY KISHAN KAUL:** As per my understanding [UNCLEAR] some
10 assurance that on assembly elections being held, Jammu & Kashmir will be a state.

11

12 **KAPIL SIBAL:** No, that's true. But, My Lords, what they have converted it into a union
13 territory as of now. I mean, that's unthinkable. And, under the Article for Jammu & Kashmir,
14 there was a special provision that that has to be consented to. That was also not done. So My
15 Lords, you move away from representative democracy, convert it into a union territory under
16 your direct rule, you do away with representative democracy, and five years have passed. Every
17 day we hear that we are going to soon have elections. But, there has to be a constitutional basis
18 for doing this My Lords. And, kindly note one thing. In May 2019, there were parliamentary
19 elections in the state of Jammu & Kashmir. In 2019. May, three months after this. This
20 happened on the 6th of August. September, October, November, December... May you have
21 parliamentary elections. So, you can hold parliamentary elections, but you will not hold state
22 elections. But, that's moving away to another issue, altogether.

23

24 So My Lords, then 39, 17-11-1956, the Constituent Assembly of Jammu & Kashmir, in exercise
25 of its constituent powers, approved and adopted the Constitution of Jammu & Kashmir. Which
26 is why I started off with a proposition, that the concept of a Constituent Assembly is a political
27 exercise. That political authority, that political body, can decide on the future of the state;
28 could have decided on the future of the state. But, that's a political decision. You want to
29 abrogate 370, abrogate 370. You want to go integrate it into India completely, say we don't
30 need a Constitution. But, that's a political act. That political act cannot be, cannot be exercised
31 by Parliament, by a legislative body, because that legislative body is controlled by the
32 Constitution, and its functions are controlled by the Constitution. It can't go beyond that.
33 Which is why I made that statement at the beginning. Then My Lords, 40. The Constitution of
34 Jammu & Kashmir, 1957, came into force on January 26th, 1957. By means of this
35 Constitution, the people of the state of Jammu & Kashmir, having solemnly resolved in the
36 presence of the accession of the state of India, which took place on 26th day of October, 1947,
37 to further define the existing relationship of the state of the Union of India as an integral part

1 thereof. That's declared in the Constitution. So, nobody can question that. Nobody need
2 question that. Nobody can say that we are not being regarded. We were not saying that we are
3 not an integral part of India. Article 1 applies, and the Constitution defined that relationship.
4 And, having defined that relationship, you can't just difficile it.

5

6 Section 5 of the Constitution of Jammu & Kashmir provided, that the legislative part of the
7 state extended to all matters, except those with respect to which Parliament had power to make
8 laws for the state under the Constitution of India as applicable. Sorry. As applicable to the
9 State of Jammu and Kashmir. Legislative powers in the State were to lie with the Legislative
10 Assembly and the Legislative Council. Significantly, Section 147, which dealt with
11 amendments to the Constitution of Jammu and Kashmir provided that no bill or amendment
12 seeing to change the provisions of the Constitution of India, as they applied to Jammu and
13 Kashmir, would be introduced or moved in either of the state legislature. They had no
14 authority once the Constitution has come into force and the orders passed. Then on 21-11-
15 1964, the Constitution Application to Jammu & Kashmir's Third Amendment Order of 1964,
16 that is CO 71, which amended the 54 order, made Article 356 applicable to the State with one
17 modification that, 'the expression included the Constitution'... Sorry... Excluded the
18 Constitution of Jammu and Kashmir... Included... Yes... Included the Constitution of Jammu
19 and Kashmir.

20

21 **JUSTICE SANJIV KHANNA:** Orders are there in all which had been passed?

22

23 **KAPIL SIBAL:** My Lords...Just, I have a list.

24

25 **JUSTICE SANJIV KHANNA:** You can just give the list ...

26

27 **KAPIL SIBAL:** Volume Three, you have all the orders.

28

29 **JUSTICE SANJIV KHANNA:** This... You have now made your point on this... All the
30 orders...

31

32 **KAPIL SIBAL:** I'm not asking Your Lordships to go through... I'm not even going to read it,
33 My Lords. We are not going to go into all this.

34

35 **GOPALA SANKARANARAYANAN:** 53-54. About 54 orders are there.

36

37 **KAPIL SIBAL:** 54 orders are there. Around 54 orders.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37

JUSTICE SANJIV KHANNA: [UNCLEAR]

KAPIL SIBAL: Yes, yes. Of course, of the Assembly.

GOPALA SANKARANARAYANAN: Government.

KAPIL SIBAL: The Government, My Lords.

JUSTICE SANJIV KHANNA: Section, under D or under...?

KAPIL SIBAL: D... D(1).

JUSTICE KHANNA: D?

KAPIL SIBAL: D(1)

JUSTICE SANJIV KHANNA: Not... B(2) or D... B(2) or D(1)? D?

KAPIL SIBAL: D(2), My Lords.

JUSTICE SANJIV KHANNA: D(2)?

KAPIL SIBAL: D(1)...D(1).

JUSTICE KHANNA: D. Only has one... proviso... proviso.

KAPIL SIBAL: It's just D.

JUSTICE SANJIV KHANNA: It doesn't have a number 2 or...

KAPIL SIBAL: And most of them are amendments of the 54 Order My Lords. 50 order, 54 order, and then amendments to the 54 order. That's what it is.

[NO AUDIO]

Item 43...

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36

CHIEF JUSTICE DY CHANDRACHUD: Yes.

KAPIL SIBAL: If Your Lordships don't mind, it is PDF 44. 'The Kashmir Accord.' Now, that's a political document. 1975 was entered into... My Lords, have it? PDF 44. 'The Kashmir Accord' '75 was entered into between the Government of India and the Government of Jammu and Kashmir. Under 'Clause 1' of the accord, the relationship of the State of Jammu and Kashmir with the Union was to continue to be governed by Article 370 of the Constitution. Now kindly note My Lords, the temporary provision was over. Still be governed.

JUSTICE SANJAY KISHAN KAUL: Why was this required to say it is to be governed if it is a permanent feature?

KAPIL SIBAL: Sorry?

JUSTICE SANJAY KISHAN KAUL: Why was there a requirement in [UNCLEAR] to say this will continue to govern when it was a permanent....?

KAPIL SIBAL: My Lords, it also reiterates the Residuary Powers of the State. That's not the only thing that happened. It's just a reiteration of the position that was accepted by the Government of India throughout, which is the constitutional provision. After all, it's a political accord My Lords. It has no legal basis that way. But it tells you of the intent of the signatories, My Lords.

JUSTICE SANJAY KISHAN KAUL: Political change at that time.

KAPIL SIBAL: Yes, I know that. I know that. In any case, '75 is a momentous time in the history of this country. Luckily I was out of the country My Lords, so I...

DINESH DWIVEDI: Response to the Sheikh Abdullah settlement...

KAPIL SIBAL: Yes, yes. In fact, My Lords, the background is and Sheikh Abdullah has been in and out. It was in and out of jail for ultimately 14 years. The background is My Lord that whenever he came out, he was saying that no, give us autonomy, give us autonomy. It is in that context that the Accord was there that you can't get out of 370. That's really the background to it. He was put in jail even by Mrs. Gandhi. So My Lords the rest of the list of dates, kindly

1 now, come straight to PDF 47. On 29 March 2017.... Then, of course, the clamouring began
2 remove 370, do away with 370. That's a separate issue and you are not concerned with that...

3

4 **JUSTICE SANJAY KISHAN KAUL:** You are on 55 now?

5

6 **KAPIL SIBAL:** 55 exactly, My Lord. Justice Khanna has 55? Justice Gavai? Justice Surya
7 Kant? Member of Parliament Ratna De Nag raised the question whether the Minister of Law
8 and Justice as to whether the government proposes to amend and remove 370 related to
9 Jammu and Kashmir in the near future, if so details thereof, not the reason, therefore, whether
10 this will help in providing equitable justice to the people of the State and if so the details
11 thereof, Minister of State of Law and Justice at such so and so. At present there is no such
12 proposal under consideration.

13

14 **CHIEF JUSTICE DY CHANDRACHUD:** These are only proposals?

15

16 **KAPIL SIBAL:** These are only proposal laws. No, no, no, throughout. The list goes on My
17 Lords. Then 57 is My Lords. Section 92. This is important. Item 57 of Section 92 of the
18 Constitution of Jammu and Kashmir deals with provisions in case of a failure of the
19 constitutional machinery in the State. Provision permitted the Governor to, by proclamation,
20 assume to himself all the powers and functions of the government of the State. Such a
21 proclamation would, in terms of 92(5) require the concurrence of the President of India. Under
22 92(3), would cease to operate six months after it was issued. On June 20, 2018. The Governor,
23 with the concurrence or the President, issued a proclamation under 92, declaring Governor's
24 Rule in the State. This is important. Now we're coming to the present controversy. We can do
25 it tomorrow, My Lords.

26

27 **CHIEF JUSTICE DY CHANDRACHUD:** We can continue tomorrow.

28

29 **KAPIL SIBAL:** Deeply obliged My Lords.

30

31

32

33

34

END OF DAY'S PROCEEDINGS