

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

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2 **CHIEF JUSTICE DY CHANDRACHUD:** Before we begin the arguments for this morning,
3 I'd like to inform the members of the Bar of a very unique initiative of the Supreme Court. We
4 have prepared a handbook on combating gender stereotypes to assist judges and the legal
5 community in identifying, understanding, and combating stereotypes about women in legal
6 discourse. It contains a glossary of gender unjust terms and suggests alternative words of
7 phrases which may be used while drafting pleadings as well as orders and judgments. So it
8 reaches out to lawyers as well as judges. The handbook identifies common stereotypes about
9 women, many of which have been utilized by courts in the past and demonstrates why they are
10 inaccurate and how they may distort the application of the law. The intention is not to criticize
11 or cast doubts on past judgments, but merely to show how stereotypes may unwittingly be
12 employed. To raise awareness against the utilization of harmful stereotypes, particularly those
13 prejudicial to women, the handbook aims to explain what stereotypes are and helps judges
14 identify and avoid such stereotypes by, firstly, identifying language, that promotes gender
15 stereotypes and offering alternative words and phrases to identifying common reasoning
16 patterns that are based on gender stereotypes, particularly about women and discussing why
17 they are incorrect. And three, highlighting binding decisions of the Supreme Court of India
18 that have rejected these stereotypes and can be utilized by judges to dispel gender stereotypes.
19 So you have the first page of the document here on the screen and it's uploaded. It will be
20 uploaded very shortly in a minute or two on the website of the Supreme Court of India. We
21 have also uploaded on the website right now, the manual and FAQs for e-filing, and in a couple
22 of days we'll be also uploading a simple video tutorial, on how to do e-filing for members of
23 the Bar who just require a little bit of handholding on that. So that's all... it should be here on
24 the on the website in a minute now or a few minutes. Thank you. Dr. Guruswamy.

25

26 [INAUDIBLE].

27

28 **DINESH DWIVEDI:** [INAUDIBLE]

29

30 **CHIEF JUSTICE DY CHANDRACHUD:** No, but Mr. Dwivedi, if you start using it, you'll
31 find it so simple, actually.

32

33 **DINESH DWIVEDI:** [INAUDIBLE].

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35 **CHIEF JUSTICE DY CHANDRACHUD:** Please do answer them in your submissions. No
36 difficulties.

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DINESH DWIVEDI: [INAUDIBLE].

CHIEF JUSTICE DY CHANDRACHUD: Addition you will know ...We are making notes, so you can always make the addition in your oral arguments. You know, Mr.... sorry, you know Mr. Dwivedi, I'll give you a concrete example. I'm in the process of sort of formulating a judgment, we are still now it's almost done, on Hindu law as to whether a child wants to void a voidable marriage, is entitled to a share in the ancestral property. So today, over the last few days I've opened the file, we didn't have any such limit as we have now imposed here. Three or four written submissions by each member of the bar. Three or four compilations by each member of the bar. It's impossible to sit down, to dictate a judgment, because you know you have judgments of different genres and different submissions coming up and it becomes impossible for the judges to write judgments. So today in the morning, I was telling my secretary, I said, we first need to now look at all the judgments, prepare a separate file, put them in chronological order. But even then, it doesn't help, because you have marked what was being read out by the lawyer. So this is the real problem if you....

JUSTICE SANJAY KISHAN KAUL: There are two issues. Judicial precedents were never in such large volumes as it is available today, go back ten years even. I am going to the concept of giving written synopsis was comparatively not there. Everything is to be argued, we used to take down notes and dictate. Now, the purpose of a submission or a synopsis, as I understand is, to facilitate in dictating the judgment. Instead of that, it becomes so much more cumbersome that we don't know who is saying what, where. These kind of pleadings of thousands of pages used to not be filed. So that's....

DINESH DWIVEDI: [INAUDIBLE]

JUSTICE SANJAY KISHAN KAUL: There are many cases of this category. No, no.

CHIEF JUSTICE DY CHANDRACHUD: No.

JUSTICE SANJAY KISHAN KAUL: No, thinking they are subtle.

JUSTICE SANJIV KHANNA: Mr. Dwivedi, my take on this has been, if the homework in the office is thoroughly done, normally this problem doesn't arise.

DINESH DWIVEDI: It can never be complete.

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JUSTICE SANJIV KHANNA: Yes, it is, it is possible to do it.

JUSTICE SANJAY KISHAN KAUL: But the judgement can never be complete. The judgement can never be complete. The thought process will continue from your side, it will continue from our side.

CHIEF JUSTICE DY CHANDRACHUD: My fear has always as a judge is that in this process, I have missed out some very important point or judgement because it's all sort of placed in different silos. That's what is really worrying for us as judges. This reading, trying and collating can always do that. Can tell our law flex to put all the judgements together in a chronological order. Danger is when you feel, Oh my God! I might have just missed something because if things come in all driblets over a period of time. Supreme Courts give 30 minutes time and one hour's time so we need to now just...

JUSTICE SANJAY KISHAN KAUL: I think the US Supreme Court do it in 30 minutes. The most complicated case, they will only hear you for 30 minutes, including time interventions of the court.

CHIEF JUSTICE DY CHANDRACHUD: No, no we are far more advanced technologically. Actually trust me, we are almost at the high end of the curve in India.

DINESH DWIVEDI: [INAUDIBLE]

JUSTICE SANJAY KISHAN KAUL: Part of habit actually....

GOPAL SATYANARAYANAN: [INAUDIBLE]

CHIEF JUSTICE DY CHANDRACHUD: Yes, yes. So that you can just keep it on the dais as the hearing. That should be very useful. <UNCLEAR> you want to refer to... Again refer to that, very useful. Oh you have also put it in a plastic.... Oh excellent! Yes Dr. Dhavan.

RAJEEV DHAVAN: No library talk this time, My Lord. But start again, I appear for the JK People's Conference in Writ Petition 1165 of 2019. A question that Your Lordship put to Mr. Sibal was, "Have you challenged the Presidential Proclamation of 19th December?" We've challenged the suspension, My Lord and that is very important to our argument on Article 3.

1 There is also another petition My Lord, Soyaib Qureshi 1068 of 2019, which actually challenges
2 the proclamation.

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4 **CHIEF JUSTICE DY CHANDRACHUD:** 2068 right?

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6 **RAJEEV DHAVAN:** 1068.

7

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

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10 **RAJEEV DHAVAN:** Now, My Lords, I would begin by saying, as well from My Lord, the
11 Chief Justice, that this oral submission is in the nature of a dialogue, and a very important
12 dialogue, which even the US Supreme Court doesn't have. They assume everything is read and
13 a little bit of question and answer and that's it. And it is because of the nature of the dialogue,
14 we have to, in an ongoing basis, answer what fell from Your Lordships as well. I'll give Your
15 Lordships an example. My Lord, the Chief Justice made a reference to 249 and 252. Of course,
16 they are of a different genre, but nevertheless My Lord, that question is very, very important
17 for us to build the diversity argument, and whether there is transformative Constitutionalism,
18 whether there is a basic structure, whether that's a lost cause or not? Then My Lord, Your
19 Lordships had asked questions about Article 3(1)(d) [Article 31(d)], and whether Article 370,
20 Sub-Clause 3 survives? Now, this is important because it's been used only twice. It was used
21 in G.O. 44, and now it has been used once again in G.O. 273. Now, if it doesn't survive My
22 Lord, how can it be used in this particular way? We have to answer that question for Your
23 Lordships. In addition to that My Lord, there seems to have been some confusion or
24 misunderstanding on the status of merger agreements. The question that fell from Your
25 Lordships was, that once the instrument of accession is over, sovereignty is complete. Our
26 respectful submission, My Lord on this, which I will elaborate... I've done it in a note like Mr.
27 Zaffar. I'll hand over that note to Your Lordships. My Lord, as far as the Instrument of
28 Accession is concerned, it deals with external sovereignty. Kindly bear this in mind, it's very
29 important. External sovereignty is lost, with a few exceptions here and there. But, internal
30 sovereignty is not lost. That is why in *Premchand* they say the monarch was still an absolute
31 monarch... *Prem Nath Kaul*, sorry. So, My Lord, the purpose of the standstill agreement
32 was, what system would you have in the meanwhile? The Raja of J&K didn't sign didn't sign a
33 standstill. The records show there was some to-ing and fro-ing eventually, which means, he
34 retained all his power. So, as far as internal sovereignty is concerned, the standstill was very
35 important, because all the powers of the Maharajas and the coming states, retained their
36 internal sovereignty.

37

1 Now, come to the merger agreement. The merger agreement is important, My Lord, because
2 it finally indicates the extent of internal sovereignty. If there was no standstill agreement, and
3 if there was no merger agreement, the Maharaja would be absolute, as **Prem Nath Kaul**
4 says. So, I take 370 to be, My Lord, a substitute, a Constitutional substitute for a standstill and
5 merger agreement, without which, My Lord we are lost, and I'll explore that later when I come
6 to 370. Your Lordship also put a question to Mr. Zaffar Shah, that on the 4th of August, what
7 were the autonomies that you were allowed, you were going to lose?

8
9 He promised you a list, My Lord. One answer to that is everything. But I will indicate what
10 these autonomies meant and what was lost for Jammu and Kashmir. Which comes back to
11 Justice Kaul's question, are we flogging a dead horse? The answer is no, My Lords. It continues
12 and it has to continue to preserve My Lords, the federation and the conditions under which
13 the federation was created. So let me begin with, what I began with the other day My Lord,
14 and that is, that we have the greatest diversity in the world. Take many continents together
15 take many countries, this diversity is unparalleled. That is why My Lord, Professor Ravindra
16 Kumar, I asked him, I said, what should I say in my Colombo lecture? He said, say that the
17 Constitution of India is a Constitution for a civilization with many nations and many cultures.
18 And this is what makes our Constitution, more exciting than any other. On the question of
19 diversity, I was taking Your Lordships to.... I've done a list, which I'll give to Your Lordships,
20 but I was going to invite Your Lordship's attention to Article 3, first. All of Article 3, My Lord.
21 But I'm going to read one important aspect of it My Lord and that is the proviso, which says
22 that before anything is done under Article 3, it is mandatory for the President, to refer the Bill
23 to the legislature. Mandatory. It's a condition precedent before you invoke Article 3. Just as
24 there are conditions in Article 370, which have to be fulfilled by condition precedents. Now on
25 Article 3, My Lord, the proclamation of 19th December, virtually created an amendment of
26 Article 3, by taking the condition precedent out. Mr. Sibal, read all that to you, but I want to
27 refer Your Lordships, to that particular part of the proclamation...My copy somewhere here.
28 Your Lordships will find this My Lords, unlike Mr Dwivedi I have no problem with what Your
29 Lordship is doing. We just have to learn and catch up My Lord. This Your Lordships will find
30 in Volume 3, documents.

31

32 **CHIEF JUSTICE DY CHANDRACHUD:** Page 92.

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34 **RAJEEV DHAVAN:** And the PDF My Lords, I'll just give it to Your Lordships.

35

36 **CHIEF JUSTICE DY CHANDRACHUD:** Page 92.

37

1 **RAJEEV DHAVAN:** PDF 92. Now, My Lord, I want to take Your Lordship straight... away.
2 And it's very important that we should...

3

4 **CHIEF JUSTICE DY CHANDRACHUD:** Ultimately, everything boils down to this. Of
5 course, the Constitution itself, and so far as documents are concerned, in one page now we
6 have. In case something is missed, you can tell.... Dr. Dhavan's instructing advocate, they'll
7 just put it in and the...

8

9 **RAJEEV DHAVAN:** [UNCLEAR]. Your Lordship will see that there is a condition precedent
10 in Article 3 and this condition precedent was added to by C.O. 48, which I'll show to Your
11 Lordships in a moment. Which further required the bill to be sent to the legislature of the state,
12 but we're not concerned with that because it has to be sent to every single state. Now I take
13 Your Lordships to this notification, C Sub-Clause 2. So much of the first proviso of Article 3 of
14 the Constitution as it relates to the reference by the present to the legislature of the State, and
15 the second proviso to that Article, so that much of Clause 2 of 151, which is about audits My
16 Lord, of the Constitution as it relates to laying before the Legislature of the state off of the
17 report submitted by the Governor to the Controller Auditor General. You will see that the
18 opening sentence is 'the following provisions are suspended.' In other words, a mandatory
19 provision of Article 3, whether it applies to Kashmir or elsewhere is suspended. It's not a
20 question of just laying before Parliament as a substitute, Article 3 and Article 370 does not
21 tolerate substitutes.

22

23 Now, My Lord, what does this do? This is not, My Lord, that can be done under a proclamation
24 under 356. It is a Constitutional amendment, which is subversive of the Constitution itself. If
25 this suspension fails My Lord, President's rule will fail, and its extension in July will also fail.
26 You have amended the Constitution albeit to all states, and certainly to Jammu and Kashmir,
27 and this mandatory provision takes us to the core of the mandatory requirements of Article 3,
28 because the entire J&K Reorganization Act emanates from Article 3 and Article 4. Take away
29 this condition...

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31 **CHIEF JUSTICE DY CHANDRACHUD:** How do we deal with this Article 356(1)(c)?

32

33 **RAJEEV DHAVAN:** Sorry My Lord?

34

35 **CHIEF JUSTICE DY CHANDRACHUD:** Article 356(1)(c) says, that he may make a place
36 a proclamation, where a situation has arisen, that the Government cannot be carried on in
37 accordance with the provisions of this Constitution in any state, and then (c).

1

2 **RAJEEV DHAVAN:** ... make such incidental and consequential provisions as appear to the
3 President to be necessary or desirable for giving effect to the objects of the proclamation,
4 including provisions for suspending, in whole or in part, the operation of any provision of this
5 Constitution relating to anybody or authority.

6

7 **CHIEF JUSTICE DY CHANDRACHUD:** So, the President has a power to suspend certain
8 provisions of the Constitution during the operation of a proclamation under 356.

9

10 **RAJEEV DHAVAN:** The suspension, in this case, goes beyond supplemental, My Lord. It
11 goes to actually taking out a mandatory provision. Of course, My Lord, Article 4 says, that any
12 change that is made, will not... will be treated as not requiring an amendment. But leave that
13 aside, My Lord. How is 3 and 4 to operate after this? The Presidential duty My Lord, has to be
14 a little more careful, because this was tailored way back in 19th December 2018 to start a
15 process, My Lord, of amending the Constitution for the purposes of which...

16

17 **CHIEF JUSTICE DY CHANDRACHUD:** Normally, when the legislature, here, of course,
18 it's the Constitution, uses the expression 'means' and 'includes'... Here it's not 'means', but it
19 says 'make' and 'includes'. When 'means' and 'includes' is used by the legislature, it's an
20 indication of expanding the power. So, when the Constitution says... we begin by saying, make
21 incidental or supplementary provisions, and then says 'including'. So, this 'including' seems to
22 be to widen the ambit of what was stated earlier, namely... The earlier part says, you will make
23 only... you'll make incidental or supplemental provisions. But then it says, 'including'. So
24 'including' would mean that, what was otherwise not a supplemental or incidental provision,
25 is within the ambit of the Presidential Proclamation, isn't it? Because, suppose the Clause C
26 read just up to 'proclamation', and didn't have 'and including'... it's not 'an including', it's
27 'including'.

28

29 **RAJEEV DHAVAN:** That's right.

30

31 **CHIEF JUSTICE DY CHANDRACHUD:** Suppose it ended with the word 'proclamation'...

32

33 **RAJEEV DHAVAN:** ... the operation of any provisions of the Constitution...

34

35 **CHIEF JUSTICE DY CHANDRACHUD:** So, if the last part of Article 356(1)(c) was not
36 there, you could have challenged any amendment of the Constitution on the ground, that you

1 don't have the power to make an amendment to the Constitution in the guise of making it
2 incidental or supplemental provision.

3

4 **RAJEEV DHAVAN:** My Lord, this is the basis of our challenge. In our petition, we have
5 challenged only the suspension.

6

7 **CHIEF JUSTICE DY CHANDRACHUD:** My question is this, suppose the President, in a
8 proclamation, suspends the operation of any provision of the Constitution, is that amenable
9 to a challenge on the ground that it is not incidental or supplemental? Or are these words of
10 widening the ambit of the first part of 356(1)(b) so as to be immune from such a challenge?

11

12 **RAJEEV DHAVAN:** This Lord has remained within the limits of 356, that is for the
13 Governor, you read the President, for the Legislature, you read the Legislature. But I've never
14 seen a provision in any proclamation My Lords, throughout these decades, which actually uses
15 the supplemental and in including, I've never seen it take away a mandatory provision of the
16 Constitution. This is exceptional My Lord. Now you can read it together in one way. You can
17 read it together in the other way. If you expand 356(c) My Lords, then you will say, that the
18 President has a *carte blanche* to amend any part of the Constitution, as part of the
19 supplementary provisions.

20

21 **CHIEF JUSTICE DY CHANDRACHUD:** Can you, for example, say that there'll be no
22 judiciary in the State?

23

24 **RAJEEV DHAVAN:** That's right My Lord.

25

26 **CHIEF JUSTICE DY CHANDRACHUD:** That's what you are...

27

28 **RAJEEV DHAVAN:** That maybe covered by the *proviso*, but any...

29

30 **CHIEF JUSTICE DY CHANDRACHUD:** *Proviso*, oh yes...

31

32 **RAJEEV DHAVAN:** So My Lord, supplementally this 356(c), has to be read with the
33 mandatory provisions, which it cannot dilute.

34

35 **CHIEF JUSTICE DY CHANDRACHUD:** But actually the proviso, Dr. Dhavan the proviso,
36 seems to indicate that if the Parliament, if the Constitution wanted to exclude a particular
37 power from the authority to suspend the provision of the Constitution, then that has been

1 specifically defined. So the provider says that you will not suspend anything pertaining to a
2 High Court, or you will not assume to yourself as a President any of the powers which are
3 vested by the Constitution in a High Court, during the operation of a proclamation under
4 Article 356. So where it wanted to introduce a restraint on the Presidential power, it has done
5 so in the form of the proviso.

6

7 **RAJEEV DHAVAN:** Right.

8

9 **CHIEF JUSTICE DY CHANDRACHUD:** Do we now say that well apart from the proviso,
10 there may be certain other parts of the Constitution which the President cannot suspend?

11

12 **RAJEEV DHAVAN:** No, that is...

13

14 **CHIEF JUSTICE DY CHANDRACHUD:** Or would that be reading into Article 356 words
15 which are not there?

16

17 **JUSTICE SANJIV KHANNA:** Just one thing, I think coupled with the words, appears to
18 the President to be necessary or desirable for giving effect to the objects of the proclamation.

19

20 **RAJEEV DHAVAN:** Yes.

21

22 **JUSTICE SANJIV KHANNA:** So there has to be connect, and a nexus with the object of
23 enforcing the proclamation. That's a restriction.

24

25 **RAJEEV DHAVAN:** It must relate to 356. In other words, whatever is required to materialize
26 356, it must be related to that. And therefore My Lords, these words necessary or desirable,
27 are not *carte blanche* powers of the President. Could he have under these provisions
28 suspended Part 3? It has been done My Lords.

29

30 **JUSTICE SANJIV KHANNA:** Part 3?

31

32 **RAJEEV DHAVAN:** That's fundamental rights, directive principles. Could he have done all
33 that the My Lord? Therefore, My Lord, it has to be given, even with the caveat of regards the
34 High Court, it has to be given a limited meaning where Your Lordship finds that in every State
35 that has been created under Article 3 and 4, this has been treated as a mandatory provision.
36 There is a caveat that Your Lordships has imposed, on Article 3 and 4, that all that it requires
37 is a reference to the Legislature and the Union is not bound by it. Those My Lords, when I

1 come to my written submissions, I'll run through them very fast because, I don't need to take
2 out the books or refer to the cases. This to my mind, My Lord taints the entire process.

3

4 Gopal Sankaranarayanan My Lord, "On the inclusion provisions for suspending, in whole or
5 in part the operation of any provisions of this Constitution, relating to anybody or authority of
6 the state" and then a colon. This further subscribes the extent of the Presidential Proclamation.
7 Otherwise My Lord, 356 is an exception. It overrides federalism. It collapses democracy in a
8 State.

9

10 [NO AUDIO]

11

12 ...Your Lordships because if the Presidential Proclamation does something that is irreversible
13 and that is the test Your Lordship will use. And Justice Khanna, is right My Lord, when he
14 emphasizes necessary or desirable in relation to body and authority, as I pointed out. If this
15 proclamation is bad then it's extension in July is also bad because that was a Parliamentary
16 extension for the further six months.

17

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

19

20 **RAJEEV DHAVAN:** Now Article 358, Suspense Article 19, during the proclamation, not
21 beyond. This is now My Lord, and Your Lordships will see that further when I present C.O.
22 272 and 273, they go well beyond the period and the genesis of all this is the Presidential
23 Proclamation. Even assuming it goes for one year, it takes away conditionalities which cannot
24 be taken away. Later, My Lord, I'm sorry. I'm sorry if I'm a little loud, I'm not used to
25 whispering into microphones, like my predecessors. Now, My Lord, I'm going to place....

26

27 **PETITIONER'S COUNSEL:** [INAUDIBLE].

28

29 **RAJEEV DHAVAN:** No, classrooms they are very soft. Classrooms are a wonderful exchange
30 with students, unparalleled. Just as this is an exchange between the Bench and us, My Lord,
31 and it is the nature of this exchange, My Lord, that we must honour, under limitations of time,
32 of course, but we must honour this exchange as the most important part of arguing in this
33 court. Now, My Lord, in Article 3, Your Lordships will see, that... because Your Lordship raised
34 a question, what did you lose on 4th August... after 4th August? The C.O. 48, PDF 13. I'm going
35 to have nightmares about PDFs, My Lord. Now, if Your Lordships were to come to page 10 of
36 Volume 3... 406, sorry, not external.

37

1 **JUSTICE SURYA KANT:** And PDF?

2

3 **RAJEEV DHAVAN:** PDF 13.

4

5 **CHIEF JUSTICE DY CHANDRACHUD:** 13? Same volume?

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7 **RAJEEV DHAVAN:** Same volume. This is the...

8

9 **JUSTICE SURYA KANT:** 1954.

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11 **RAJEEV DHAVAN:** '54 Order. My Lord, in a sense, the '54 Order and 370, represents the
12 Constitution as it relates to Kashmir. They were brought in by the Constituent Assembly. Now
13 I'll just read out that particular portion, My Lord, so that I complete the 3, 4 argument, before
14 I go into the business of how elaborate our Constitution is. At the bottom of that page 406,
15 "Provided further, that no bill providing for increasing or diminishing the area of the State of
16 Jammu and Kashmir, or altering the name or boundary of that state, shall be introduced in
17 Parliament without the consent of the Legislature of the State". It puts in a conditionality My
18 Lord, not just to circulate it, but a conditionality emanating from the state itself. Now, whether
19 all this can be wiped out by C.O. 272 and 273, is another matter altogether. I'm going to make
20 one further proposition, My Lord, about President's Rule, lest I forget. I'll refer to it later, My
21 Lord, if I can. Now, the further proposition, which is a wider proposition, is this, that during
22 President's Rule, Article 3 and 4 and 370, cannot be invoked.

23

24 **CHIEF JUSTICE DY CHANDRACHUD:** Article?

25

26 **RAJEEV DHAVAN:** Cannot be invoked.

27

28 **CHIEF JUSTICE DY CHANDRACHUD:** Article 3 and 4?

29

30 **RAJEEV DHAVAN:** 3 and 4 My Lord. Why? Because they have conditionalities My Lords
31 and the conditionality is specific to the Legislature of the state, to the Government of the state,
32 and the Legislature becomes Parliament. The Governor becomes the President. Therefore the
33 conditionalities that exist in 3 and 4 in Article 370, neither Parliament nor the President, can
34 be substitutes for the conditionalities that exist in Article 3, 4 and 370. You don't go through
35 that process...

36

1 **JUSTICE SANJEEV KHANNA:** Dr. Dhavan, such a broad proposition with regard to
2 Article 3, 4, forget about 370 for the time being, may not be correct in terms of the language
3 used of Clause 3 to 356. Let's hope it never happens, but in a given case it can happen. There
4 can be disputes...

5

6 **RAJEEV DHAVAN:** My Lord...

7

8 **JUSTICE SANJEEV KHANNA:** ...between two States, which is impossible to resolve until
9 or unless the centre steps in, with regard to boundary or something like that. So broad
10 proposition, don't...

11

12 **RAJEEV DHAVAN:** My Lord,

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14 **JUSTICE SANJIV KHANNA:** If you're making a broad proposition like that it's very
15 difficult. It's very difficult to accept.

16

17 **RAJEEV DHAVAN:** I am responding, I am responding..

18

19 **JUSTICE SANJIV KHANNA:** Because we can be [UNCLEAR] of situations which we may
20 not be able to postulate as of today.

21

22 **RAJEEV DHAVAN:** My Lord, I'm making a proposition about process and substitution,
23 because 370 Subclause (1), My Lords has its discipline, just as 3 and 4 has its mandatory
24 discipline.

25

26 **JUSTICE SANJIV KHANNA:** Leave, 370 for the time being, but a broad proposition that
27 Article 3 and 4, the *proviso* can never be suspended in terms of Article 356...

28

29 **RAJEEV DHAVAN:** My Lord, the Parliament cannot be and I'll show the debate when Amit
30 Shah introduced this, My Lord in the Lok Sabha. Parliament cannot be a substitute for the
31 Legislature of the state. That's a very narrow proposition. I'm being prompted, My Lord nicely.
32 And when Mr. Sibal talked about the political uses and abuses of the Constitution then
33 proclamation 19th December, is an abuse of the Constitution, and it would be a further abuse
34 of the Constitution if we substitute for legislature....

35

36 **JUSTICE SANJIV KHANNA:** Dr. Dhavan, Dr. Dhavan there's difference between existence
37 of power and abuse of power or use of power.

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RAJEEV DHAVAN: Of course My Lord.

JUSTICE SANJIV KHANNA: So let's not confuse the two.

RAJEEV DHAVAN: Sorry My Lord?

JUSTICE SANJIV KHANNA: There is a difference between existence of power or use of the power or abuse of the power, so let's not...

RAJEEV DHAVAN: There is a power, no doubt. Its exercise is equally fundamental. We can't wish away the exercise, as being purely nominal in nature. Now My Lord, when Maharashtra was broken, in the judgments are all there in my written submissions. I'll take Your Lordships, very fast through them, they said you have to refer whether you like it or not. Likewise. Punjab My Lord. You have to refer the bill to the Legislature of the State. You can't self-refer it to Parliament. And the Constitution says, no bill can be introduced, My Lord. It's a complete [UNCLEAR] because we have to understand, the limitations of President's Rule and this is one of the important limitations My Lord, that during President's Rule you may have the power to do whatever you want in 3, 4 and 370, but the process My Lord are conditions, which can't be substituted by simply saying, the Governor will now become the President, and the Legislature will become Parliament. This process of substitution, My Lord, is subversive with the Constitution.

CHIEF JUSTICE DY CHANDRACHUD: Dr. Dhavan, can Parliament enact a law during the subsistence of a proclamation under Article 356, in exercise of the power under Article 246(2), or in respect of a state list item?

RAJEEV DHAVAN: My Lord, they can pass a law My Lord, no doubt about that, subject to all the limitations that exist, except My Lord, whereas when it passes a law, under Article 3 and 4, it must observe the conditionalities.

CHIEF JUSTICE DY CHANDRACHUD: In other words, what you are trying to...

your argument would be this that while Parliament can exercise the lawmaking power of the state legislature during the subsistence....

RAJEEV DHAVAN: With all its limitations.

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CHIEF JUSTICE DY CHANDRACHUD: Yes, with all its limitations.

RAJEEV DHAVAN: The State list comes to them.

CHIEF JUSTICE DY CHANDRACHUD: The state list comes to them. But certain other functions of the State Legislature, namely, in terms of the first proviso to discuss legislative proposals for altering the boundaries of the state or under the second proviso for giving consent, that power can't be assumed by Parliament.

RAJEEV DHAVAN: My Lord....

CHIEF JUSTICE DY CHANDRACHUD: Because then we are creating an exception with the language, I mean, you may possibly argue that you have to create that exception to give a purpose of interpretation to that provision. But this one, one part is very clear that to accept your argument, we are then creating an exception to 356(1)(b). Because 356(1)(a) says that the powers of the state government are vested in the President or in the Governor, as the proclamation would say. Other than the powers of the legislature of the State. Then 356(1)(b) says, declared that the power of the Legislature of the State shall be exercisable by or under the authority of Parliament. So we will then, to accept your argument we have to then hold, of course, maybe by a process of construction that those powers which are referable to Article 3 and 4, which are powers of the legislature of the state. No doubt they are powers of the legislature of the state...

RAJEEV DHAVAN: Difference between the legislative powers of this and the consultative and other powers of the Legislature. If Your Lordship will see 357...

CHIEF JUSTICE DY CHANDRACHUD: But it says, declare that the powers of the legislature of the state. Now, which are the powers of the legislature of the state?

RAJEEV DHAVAN: Legislative powers, My Lord.

CHIEF JUSTICE DY CHANDRACHUD: Not just the powers in Article 246, but it could be all the power of the Legislature of the State, which are vested in the Constitution. Would that be not a more natural construct of that....?

1 **RAJEEV DHAVAN:** I will take Your Lordship to Article 257, Sub-clause 2 My Lord. 357....
2 357(1) My Lord, declares that the powers of the Legislature shall be exercisable by or under
3 the authority of Parliament. It shall be competent for Parliament to confer on the President
4 the power of the legislative of the State to make laws, and to authorize the President to
5 delegate, subject to such conditions as they may think fit, the power so conferred to any other
6 authority. For Parliament, or the President, or any other authority in whom such power to
7 make laws is vested under Sub-Clause A, to make laws conferring and imposing duties or
8 authorizing the conferring of powers and the imposition of duties upon the Union or the
9 officers and authorities thereof. For the President to authorize when the people, also the
10 people is not in session, expenditure from the consolidated fund of the State, pending the
11 sanction of such expenditure by Parliament. More important My Lord is two, any law made in
12 the exercise of power of the Legislature by Parliament, all this President to other authority
13 referred to in subclause so and so, which Parliament or the President or such authority would
14 not, but for the issue of the proclamation of 356 have been competent to make after the
15 proclamation is ceased to operate, continue in force until altered or repealed or amended by a
16 competent legislature. Which is the competent legislature My Lord? So even as regards the
17 functions of Parliament, they are specified. 356, is not plenary in nature, it's important to
18 understand that. It is the bane of the Indian Constitution, My Lord. It's introduced again, and
19 again, and again. In fact, My Lord, when I was doing my work in the Indian Law Institute, I
20 was reading the 1935 debates, My Lord, where Churchill interjects and says, "Create the
21 situation in every single province" Now, My Lord, 356, has been used and abused to a point
22 where there must be some discipline to it. It is certainly not, My Lord, a power to amend the
23 Constitution. My Lord, transferring executive and parliamentary functions, that is, the power
24 to legislate alone, is the core of 356 and 357. There are many provisions in the Constitution, I
25 have a list here, My Lords, where legislatures exercise many other kinds of powers as well, My
26 Lord. Powers of election, powers of negation, powers of consultation. So, it has to be limited,
27 My Lord, otherwise, what happened in the 5th August onwards, can happen to any other state
28 during President's Rule. That is why the broad proposition.

29

30 **CHIEF JUSTICE DY CHANDRACHUD:** Dr. Dhavan, legislatures exercise other powers.
31 You said consultation. Which were the other ones? I just missed that.

32

33 **RAJEEV DHAVAN:** My Lord, I have a list here. Article 3, for example, My Lord.

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35 **CHIEF JUSTICE DY CHANDRACHUD:** So, how do we conceptualize those other powers?
36 Consultation, you said... you used some phrase, which I just lost. You said legislatures exercise
37 other powers...

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RAJEEV DHAVAN: No, there are legislative powers, which emanate from...

CHIEF JUSTICE DY CHANDRACHUD: That's 246.

RAJEEV DHAVAN: Article 245, which says subject to the provisions of the Constitution. And, it's important, My Lord.

CHIEF JUSTICE DY CHANDRACHUD: What are the other powers that you said? You said consultative...

RAJEEV DHAVAN: Article 3 is a consultative power to express views. Article 54 is the right to vote in Presidential elections. J&K was not able to participate, My Lord, in the last Presidential elections. Article 80, is to elect members to the Rajya Sabha. Article 169, is to pass a resolution for the creation of legislative councils in a state. Article 171, 243 M, My Lord, I'll come to those because I want to go into the question of the diversity of the Constitution.

CHIEF JUSTICE DY CHANDRACHUD: 243 M?

RAJEEV DHAVAN: Then My Lord, 243 M. Then, of course, most important My Lord, the list of them, I'll give it to Your Lordships, I think it's better.

CHIEF JUSTICE DY CHANDRACHUD: Sure.

RAJEEV DHAVAN: But the important part is it's limited to the legislative powers. It certainly cannot amend the Constitution My Lord, or I'm going one step further, or deprive the Constitution of its mandatory processable requirements. It's an argument about process and power. And this in my submission My Lord, taints My Lords, also the extension of the President 's rule.

CHIEF JUSTICE DY CHANDRACHUD: That point you have made.

RAJEEV DHAVAN: Which is done by Parliament, which I've already indicated to Your Lordships. This is fundamental My Lord, to how this process, of diluting 370 occurred. And how Article 4, My Lord eventually got used, with all these incidental provisions, which were limited to legislative powers, and none other. Now My Lords, I wanted to get back to the point I started with, about the diversity of the Indian Constitution. I'll quickly take Your Lordships

1 through it, because Your Lordship is concerned with how this diversity can be preserved.
2 Bodoland, My Lord is mentioned in the Constitution. Nagaland has My Lord and others have
3 autonomous councils. I'll take Your Lordships through that. Now My Lords, if this can be done
4 under President's Rule, anything can happen. What I've done My Lord, to save time is I've
5 prepared a list of the articles that take us to diversity. I'll quickly run through them in the
6 Constitution itself. I know, Your Lordship doesn't like paper being handed over My Lord but
7 we can put it on the website My Lord.

8

9 **JUSTICE SANJAY KISHAN KAUL:** This is acceptable because these are only articles of
10 the Constitution.

11

12 **RAJEEV DHAVAN:** Quite right My Lord, quite right. My Lord it saves time, it saves time.
13 That permission is permissible, because when Your Lordships didn't permit Mr. Sibal to give
14 supplementary submissions, I thought that's a harshness that might be imposed on handing
15 anything over to the court My Lords. Now My Lords, come to Article 2, My Lord. This is
16 important, My Lord. It's Parliament's power to admit to the Union new States on such terms
17 and conditions as it thinks fit. This is very, very different My Lord from the assimilation My
18 Lord, of the princes etc. Into the Constitution. That is, you go through an Instrument of
19 Accession, you go through standstill, you go through merger, which then determines what is
20 really entered into.

21

22 Of course, My Lords, in **Poudyal's** case, the majority judgment of Justice Venkatachaliah
23 takes into account the entire history of the negotiations and says that although the
24 Constitution says one person, one vote, nevertheless we will permit reservations for Bhutias,
25 Lepchas, <UNCLEAR>. In the context of that history, we will nevertheless prohibit it. And
26 there were two defence by Chief Justice Sharma and Justice Agarwal. Now **Poudyal** reminds
27 us that these negotiations are important, even though it says as it thinks flit. 2A, was removed
28 in the Constitution because second was given associated statement first. Now kindly come to
29 3 which I've dealt with, 3 and 4. Then My Lord, kindly come to a very interesting provision
30 when we're dealing with affirmative action, that's Article 35. Now this is a very interesting
31 provision relating to Article 16(3). I'll just read it because it's important, "Notwithstanding
32 anything in this Constitution, parliament shall have, and the legislature of a State shall not
33 have power to make laws with respect to matters in Article 16(3), 32(3), 33, 34 of a prescribing
34 punishment for those Act which are declared offenses under this part and Parliament shall as
35 soon after the Constitution make laws prescribing punishment laws immediately." Now, here's
36 a very interesting provision My Lord. In relation to affirmative action, the power of the
37 Legislature is taken away. To change this My Lord would require an amendment to the

1 Constitution. Two judgments have dealt with it starting which have dealt with Andhra Pradesh
2 and Jharkhand, but we needn't go into that. Then if Your Lordships will come to Article 164, I
3 pointed this out on the other day, these are safeguards, My Lord, for the federal unity of India.
4 As a deal was 370 for the federal unity of India. It is part of the basic structure of federalism in
5 our Constitution. When I was formulating this argument, I was told Your Lordships might be
6 averse to a basic structure argument, so don't make it too strongly. So I'll stay within my limits,
7 saying these are limits that a Constitution has in relation to federalism. Now 164. I've given
8 Your Lordships the list. I'm going down the list where taking Your Lordship through the
9 important provisions. Article 164...[NO AUDIO]

10

11 My Lord has a proviso, "Provided that in the States of Chhattisgarh, Jharkhand, Madhya
12 Pradesh and Odisha, there shall be a minister in charge of Tribal Welfare, who may in addition,
13 to be in charge of the welfare of scheduled castes and backward classes, or any other work".
14 My Lord, this, if it is to be changed, requires a Constitutional amendment. It can't be done
15 under President's Rule, saying we will have this minister or that minister. Then, My Lord, if I
16 may take My Lords straight to 168, which empowers the legislature, My Lord, much in the
17 same way as the J&K Constitution empowered the legislatures. Article 169, My Lord. 168 and
18 169. This relates to whether there should be two Houses in Parliament or not. Kindly bear in
19 mind, Jammu and Kashmir had a Legislative Council under its Constitution. I'm reading
20 169(1). "Notwithstanding anything in Article 168, Parliament may, by law, provide for the
21 abolition of the Legislative Council of a State, having such a council, or for the creation of such
22 a council in a state having no such council, if the Legislative Assembly of the State passes a
23 resolution to that effect, by a majority of the total membership of the Assembly and two thirds
24 of those present and voting". And, in our case My Lord, the Legislative Council is gone. Well,
25 actually, the whole of the J&K Constitution is impliedly gone. Where was the power to do away
26 with that, that's another question that I'll come to. Then, My Lord, kindly come to Article 239.
27 I had earlier said the other day, that most of the union territories, other than Chandigarh, were
28 created by Constitutional amendment, or under the aegis of a Constitutional amendment, like
29 the 6th Amendment.

30 239A, My Lords, deals with how union territories are to be created, and the creation of local
31 legislatures. This can't be given the go by My Lord. "Parliament may, by law create for the
32 Union Territory of Puducherry, a body elected partly or partly nominated, partly elected, to
33 function as a Legislature and Council of Ministers, or both, with such Constitutional powers
34 and functions, in each case, as may be specified". Now, My Lord, compare with what has
35 happened in the case of J&K. State has become union territory. Two union territories, one
36 without a legislature, one with. This was not within the remit of Article 3 and 4, as an incidental
37 provision, where you lose your character as a state, and there are two union territories that

1 have been created, not by reference to Article 239A or 239AA. If you wanted an elaborate
2 Constitution, put in place as in the J&K Reorganization Act, you should have done what is
3 done with Delhi.

4
5 Now My Lord, Your Lordships are very familiar with the two Delhi judgments. My Lord. I'm
6 not going to take. I'm going to refer to passages of it because they deal with diversity. But when
7 I read my written submissions, they'll be there. I won't have to ask Your Lordships to PDF.
8 Now, My Lord, come to Article 240. Power of the President to make regulations for certain
9 Union Territories, Puducherry is mentioned My Lord, as E. Do we add JK, My Lord and
10 Ladakh to it? Because if 240 is applied to J&K, as it must be My Lord, it's a Union Territory
11 now, or perhaps that has to be added by Constitutional Amendment. But My Lord, the
12 President will make regulations for peace, progress and good government of Union Territories.
13 Is this applicable, My Lord? If so My Lord, it undermines not just federalism My Lord, but
14 democracy itself. Now My Lord, may I take Your Lordships to 243, particularly to 243 M and
15 243 ZC. Now 243 M says, part Panchayat, so fundamental to three tier federalism, shall not
16 apply to certain areas. I'm just showing the diversity My Lord, that exists. Now My Lords, if
17 Your Lordships will come to Subclause 2(3)(a), this will not apply to the District of Darjeeling
18 of West Bengal, for which the Darjeeling Gorkha Council exists under any law for the time
19 being enforced. Even the Panchayat amendments My Lords, have been curtailed in this
20 balance of federalism. Not My Lord, by any executive exercise and then My Lord, 3A, that it
21 won't apply to Arunachal Pradesh, and then once again, My Lords, here is a non-legislative
22 function My Lord, in Article 4 Legislature of the State may by extend this part to the State
23 accept the areas referred to in Clause 1, 'if the Legislative Assembly of that State passes a
24 resolution to that effect by a majority of the total membership of the house and by a majority
25 of not less than two thirds' . Here is once again a provision, My Lord, the most fundamental
26 exercise of three tier federalism My Lord, which is a part of our Constitution.

27
28 Then My Lord ZC, 243 ZC says the same thing My Lord, about the Darjeeling Gorkha Hill
29 Council. First My Lord, 243 Z D, My Lord,, which is about municipalities. It applies to Union
30 Territories which have a Legislative Assembly. What happens to Ladakh. 243 ZC, My Lord
31 has similar provisions, as regards municipalities as it does to Panchayats in relation to the
32 Darjeeling Gorkha Hill Council. 275 My Lord, very fast. Sorry 244. This is dealing with
33 scheduled and tribal areas. None of this can be wished away, certainly not by executive action
34 My Lord. it is so crucial to understand this diversity of our Constitution. 244 says,
35 'Administration of Scheduled Areas and Tribal Areas shall apply to the administration and
36 control of Scheduled Areas in any state other than the States of Assam, Meghalaya, Tripura
37 and Mizoram. And then 244 A is a very important provision because it relates to autonomous

1 States. Our Constitution doesn't shy away from creating autonomous States. In fact, it
2 reinforces them. And if there was that measure of autonomy My Lord in JK, then it is not
3 inconsistent with so many provisions in our Constitution, which respect autonomy for what
4 it's worth in special areas. 244 A is very important and when I come to Schedule 6, because if
5 this can be done under President's rule, place any under President's rule expanded beyond the
6 legislative function, simply can't be done My Lord. These are mandatory provisions of the
7 Constitution. 244 A, formation of an autonomous state concerning tribal areas in Assam, and
8 the creation of local Legislative Council. Parliament may by law, from within the state of Assam
9 and an autonomous State, comprising whether wholly or in part of tribal areas. Autonomy of
10 the States is fundamental to our Constitution. I rely on the two Delhi judgments, My Lord of
11 Your Lordships to reinforce this, where Your Lordship respected the autonomy of the
12 legislatures and their existence. Those passages I'll show to Your Lordships very fast, because
13 they are in my written submissions. Autonomy My Lords, is not alien to our Constitution. You
14 can't just standardize all the provisions and say, look, we gave autonomy here, but we're not
15 going to give autonomy to J&K. Why? Because on 19 December, we took away a provision.
16 J&K is not a dead horse, to be flogged, or not to be flogged. It is the Constitution of an
17 autonomous region through the merger agreements, which are part of 370. I'll come to 370 in
18 a moment. It's very important to understand and not wish away the autonomy in Indian
19 federalism. Then if I may take Your Lordships to 275. It has special provisions made in 275,
20 Subclause 1 A.

21

22 Now, My Lord, kindly see what happens to the disbursement of grants to autonomous states
23 in 275(1)(a). Next 279 A, which is the GST Amendment. I put it in summary form, My Lord, in
24 the table, so that it will be a little easier for Your Lordships. Even in the distribution, My Lord,
25 as far as the GST applies, 279 A, Sub-Clause (4)(g) says, "Special provision..." Sorry. I'm sorry
26 about where I put in my chart 279, it should say 279 A. Now, My Lords, (4)(g) is a very
27 interesting proposition. "Special provision might be made to the states of Arunachal, Assam,
28 Jammu and Kashmir, Manipur, Meghalaya, Mizoram, Nagaland, Sikkim, Tripura, Himachal
29 Pradesh and Uttarakhand.

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31 **JUSTICE BR GAVAI:** This must be on account of geographical reasons.

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33 **RAJEEV DHAVAN:** Sorry, My Lord?

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35 **JUSTICE BR GAVAI:** This will be on account of geographical reasons, or these are hilly
36 states?

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1 **RAJEEV DHAVAN:** Partly that, and partly because of the nature of the states. Your Lordship
2 is right. But this can be reversed and it will be placed before the GST, because it says later on,
3 that the GST Council will look at this. Now, My Lord, I come to Article 330. Very important
4 provision, My Lord. To say that special provisions can't be made in the Constitution is
5 [UNCLEAR]. These special provisions relate to certain classes, Scheduled Caste, Scheduled
6 Tribe, Anglo-Indians, etc. Special provisions are a regular feature of our Constitution. I don't
7 want to take Your Lordship through this, but these special provisions exist, without which My
8 Lord, so much could not be done for the SC/STs or the OBCs. In fact, all these commissions,
9 My Lord, they report. And when the Government of the State... it is a very interesting
10 provision... that it shall be laid before the Legislature of the State, explaining with a
11 memorandum the action taken or proposed to be taken on the recommendations relating to
12 the reasons for the non-acceptance. This is 338(7). This is what should be done with
13 President's Rule, My Lord. Even the Governor's Report was not placed. This is what has to be
14 written in, just as Your Lordships, with **Nagaraj**, added conditionalities. This is what should
15 be written into 356. You put in all the information you have, you put in the Governor's Report,
16 and you give the reasons for the non-acceptance. This runs for the other commissions as well.
17 Otherwise, My Lord, 356 has become a farce. When I was doing my book on President's Rule,
18 the elaborate discussion on Kerala, when President's Rule was imposed. As we come down the
19 line, there is hardly any discussion in Parliament.

20
21 Why? Because all the information is not even there. And in the case, My Lord, of Jammu and
22 Kashmir, it wasn't there. The entire correspondence, My Lord. I'm just building My Lord,
23 something that is here in 338(7), which is also for the other commissions, My Lord. Something
24 My Lord, that gives information to the people and those people who have to, Parliament then
25 has to bless or un-bless, as the case may be, President's Rule. That entire cache of information,
26 which is so fundamental to democracy and federalism, is missing in the Proclamations. Then
27 My Lord, if I may take My Lord's, to an interesting provision, My Lord, 330, My Lord. which
28 makes special provision for reservation of Scheduled Caste and Scheduled Tribes.

29
30 **CHIEF JUSTICE DY CHANDRACHUD:** We saw 330. We have seen 330.

31
32 **RAJEEV DHAVAN:** Assam is mentioned, you have done that. 343, My Lord. This has to be
33 read with the 8th Schedule, Kashmiri, My Lord is one of the languages recognized by the 8th
34 Schedule. Kindly just bear this in mind. So in communications, in complaints, etc.
35 Kashmir...Kashmiri can be used. That has not been taken away and cannot be taken away. Part
36 of the spirit My Lord, of a region or a State, is its language. Now, Your Lordships, when you
37 look at the language of the Union, a commission is appointed. 347 makes special provisions

1 for language spoken by a section of the population and of course My Lord, Chapter 4, that's
2 350, has Special Directives in relation to language. Who is going to make those Special
3 Directives now? The President? Parliament? What is the status of Kashmiri now? Does it
4 disappear from the 8th Schedule, My Lord? Then My Lord, 371 A My Lord, has a very
5 interesting provision. 368, My Lord, I have kind of dealt with My Lord, so I won't take Your
6 Lordships, through that, but 371 A My Lord. This is a very interesting provision My Lord, with
7 all this discussion on the Uniform Civil Code. These are also unamendable provisions, My
8 Lord. Just as we are arguing the 370 was unamendable, My Lord, by 368 subject to a certain
9 procedure. 371 A says notwithstanding anything in this Constitution no act of Parliament in
10 respect of the religious and social practices of the Nagas. Naga Customary Law and Procedure
11 Administration of civil and criminal justice involving decisions according to Naga Customary
12 Law shall apply to the State of Nagaland unless the Legislative Assembly of Nagaland by a
13 resolution so decides. Non-legislative power. And the same is repeated, My Lord, The
14 important provision. My Lord, in 371, of course, concerns the hill areas of Manipur. Very
15 relevant. My learned friend has a point, that if there is President's Rule, the Legislative
16 Assembly has this power. Can Parliament exercise this My Lord? That is why My Lord it is
17 restrained in 356.

18
19 Now, a controversial provision in which Your Lordship has given a judgment is 371 F. Capital
20 F. Subclause F. This is **Poudyal**. If I have time, I'll take Your Lordship or if not, I will just
21 refer to paragraphs. Parliament for the purpose of protecting the rights and interests of
22 different sections of the population of Sikkim, may make provisions for the number of seats in
23 the Legislative Assembly of the State of Sikkim, which may be filled by candidates belonging
24 to such sections, for the delimitation of the assembly constituencies from which candidates
25 belonging to such sections alone may stand for election to the Legislative Assembly. This was
26 examined in **Poudyal**. I'll give Your Lordships for reference which volume is it in. It's in
27 Volume 14. The argument was a very interesting argument. Baba Saheb Ambedkar himself
28 said in Parliament that there will be one person, one vote apart from the reservation for SC/ST,
29 etc. So the argument that was advanced which led to a 3:2 decision was that, although this is
30 their part of the Constitution, we have to take the history of Sikkim into account and
31 reservations for Bhutias, Lepchas and the son <UNCLEAR>. This Your Lordships will find in
32 Volume 14, 6350. The majority starts at 6392. Mandatory provisions respecting what the
33 people of Sikkim had asked for, albeit with adjustments to the Constitution. Now My Lord,
34 while you are on it, will Your Lordship just turn to **Poudyal** because it's important to bear in
35 mind. Volume 14, 305. Starts with...

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37 **CHIEF JUSTICE DY CHANDRACHUD:** Volume 14. Page?

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RAJEEV DHAVAN: Cases volume.

CHIEF JUSTICE DY CHANDRACHUD: 30?

RAJEEV DHAVAN: Now, My Lord, if Your Lordships will turn to 6394, which is PDF 349.

CHIEF JUSTICE DY CHANDRACHUD: Where does it actually begin? The judgment? Oh yes, I got it.

RAJEEV DHAVAN: Sorry My Lord?

CHIEF JUSTICE DY CHANDRACHUD: It begins at 305.

RAJEEV DHAVAN: Where it starts, My Lord.

CHIEF JUSTICE DY CHANDRACHUD: Yes.

RAJEEV DHAVAN: And I am referring to the discussion in Chief Justice Venkatachaliah's judgment My Lord at PDF 349. Now, here I'll go through it very, very quickly. When learned Chief Justice My Lord, goes from paras 66 onwards to all the proclamations and discussions, till para 76.... 74, in particular at page 6396. The year 1973 saw the culmination of a series of successive political movements in Kashmir towards the Government responsible to the people. Then it mentions the Tripartite Agreement, Clause 5, of which is mentioned there in para 74 and various other provisions are made. My Lords, give me a moment. Para 120, My Lord.

JUSTICE SANJAY KISHAN KAUL: Of the judgment?

RAJEEV DHAVAN: PDF 364. Why was this, My Lord, promise to the people honoured, despite a provision of the Constitution? And this is explained by the majority at para 126, 409.

JUSTICE SANJAY KISHAN KAUL: Para?

RAJEEV DHAVAN: 364.

JUSTICE SANJAY KISHAN KAUL: Para?

1 **RAJEEV DHAVAN:** Para 120. What was the rationale of respecting what the people of
2 Sikkim wanted, despite the provision in this Constitution, one person, one vote and no vote on
3 account of religion? “The rationale and constitutionality of Clause F and other provisions of
4 the electoral laws, impugned in these petitions, are sought to be justified by the Respondents,
5 on grounds that a perfect arithmetical equality or value of votes is not constitutionally
6 mandated, imperative of democracy. And second, even if the impugned provisions make a
7 departure from tolerance limits and Constitutional... and the Constitutional permissible
8 limits, the discriminations arise, are justifiable on the basis of the historical conditions
9 peculiar to and characteristic of the evolution of Sikkim's political institutions”. And the
10 characteristic of the evolution of Sikkim's political Institutions. Therefore, Your Lordship has
11 been taken into the discussions that were held as far as J&K was concerned. And why it is
12 important, My Lord, particularly as I indicated, the merger agreement, which deals with
13 internal sovereignty, unlike the Instrument of Accession which deals with external
14 sovereignty. Then My Lord, the last four lines are important. “Article 120, 371F and the
15 electoral laws in relation to Sikkim, seek to provide, it is urged, is to maintain this balance in
16 the peculiar historical setting of the development of Sikkim and its political institutions”.
17 Sikkim is the only other example we have, other than Kashmir, where it was entered into. And
18 therefore, you take into account, all the antecedent discussions, and see if they make out a
19 case, whether for 370 or otherwise.

20
21 Now My Lords, I'll take Your Lordships to Schedule 5. I'll skip My Lords the.... Schedule 5 My
22 Lord, deals with the administration of Schedule Areas and Scheduled Tribes. Some of us are
23 not happy with the Constitution Bench decision in ***Chebrolu*** My Lord, on how you apply
24 Legislative Powers. But My Lord, there's a Tribal Advisory Council. So, when the Governor My
25 Lord, applies laws under 5, Subclause 2, Subclause 5 says no regulation under this paragraph
26 unless the Governor making the regulation as in the case where there is a Tribal Advisory
27 Council consulted such Council.

28
29 **CHIEF JUSTICE DY CHANDRACHUD:** Where's that Dr. Dhavan?

30
31 **RAJEEV DHAVAN:** My Lord, this is in sub-para 5 My Lord. 5(5).

32
33 **CHIEF JUSTICE DY CHANDRACHUD:** Consultation of the Tribes Advisory Council.

34
35 **RAJEEV DHAVAN:** Now, here, My Lord, even if there is power you must consult the Tribal
36 Advisory Council. Then My Lord, I come to the most important article on Schedule on
37 Autonomy, Schedule 5... uh 6. My Lord, my learned friend rightly points out that Schedule 5 ,

1 My Lord deals with Assam, Meghalaya, Tripura and Mizoram excludes them and then this My
2 Lord, is applied in Schedule 6. Now, My Lord, we come to the question of autonomy of the
3 Northeast My Lord. Without all these autonomies My Lord, India would have collapsed by
4 now. Because unless all this was given My Lord, to the States in question in the light of
5 antecedent discussions My Lord, this quest for uniformity across the board which 272 and 273
6 seem to countenance My Lord, is not the heart and soul of the Indian Constitution. It is
7 autonomy... Autonomous, autonomy within federations. Special Provisions in relation to
8 people. Take that away, My Lord, we don't need such a big Constitution. And all the antecedent
9 discussions My Lord, become part of these autonomies and special provisions. We can't wish
10 them away, My Lord and say they are just history. Okay so far. Now My Lord kindly come to
11 Schedule 6. There is My Lord, apart from the ones that are dealt in Schedule 5, as my learned
12 friend pointed out this applies to tribal areas in Assam, Meghalaya, Tripura and Mizoram. And
13 sub-para 1, My Lord, is headed Autonomous Districts and Autonomous Regions. They have an
14 in-between status between Panchayats, My Lord and Union Territories.

15

16 Now My Lord, under Article 1, Subclause 3, the Governor, no doubt with the advice of his
17 Council of Ministers, wherever we read Governor, it is rarely in his personal capacity, apart
18 from their penalty cases from which Your Lordships have ruled. The Governor may by public
19 notification, include any area in any of the parts of the said table, exclude any area in any of
20 the parts of the said table, create a new autonomous district, increase the area of any
21 autonomous district, diminish the area of any autonomous district, unite two or more
22 autonomous district, or parts thereof, first to form an autonomous district, alter the name of
23 any autonomous district, define the body, boundaries of any autonomous district. This is a
24 little akin to Article 3. And this is where the entire politics of the Northeast and the provisions
25 relating to the Northeast arise. Gorkhas say we want Gorkha land, somebody says I want
26 Bodoland. All this emanates from Schedule 5, 6, and the concept of autonomy.

27

28 Then at sub-para 2, there shall be a District Council for each autonomous district consisting
29 of not so many members shall of which four will be nominated by the Governor. And then My
30 Lord, there shall be a separate Regional Council for each area constituted an autonomous
31 region under sub-para 2 of each District and Regional Council shall be a body, corporate law,
32 with its seal, etc. What is important My Lord is also, what do these autonomous Councils do?
33 Kindly come to paragraph 3. Powers of the District and Regional Councils to make laws... Has
34 Your Lordships got it? To each of these is given a lawmaking power with, of course some limits,
35 without which we might lose the Northeast. It is this democratization of power that has
36 enabled us to make special concessions where they are necessary, given the antecedent history
37 as I've explained in the case of Sikkim. Then My Lord the Regional Councils, District Councils

1 and Regional Councils to make laws. And then there are series....Now, there are two interesting
2 provisions, which Your Lordships will probably find in the footnote to the Sixth Schedule. That
3 is an Article A... sub-para 3 A, wasn't without My Lord, protest and accommodation. Has Your
4 Lordship got 3 A somewhere in that? Probably in the footnote.

5

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

7

8 **RAJEEV DHAVAN:** Additional powers of North Cachar Hills Autonomous Council and
9 Karbi Anglong Autonomous Council to make laws. And this includes subject to the provisions,
10 of course of, list 17 and 52. Interesting part is, my learned friend points out in 371(3)(a)(b),
11 communication My Lord is given to the... It says, "to the [UNCLEAR] as is to say, roads,
12 bridges, ferries, and other means of communication not specified in List 1 of Schedule 7". Now,
13 My Lord, come to 3(b). Your Lordships are familiar with the Bodoland agitation, I needn't
14 explore that further, although we have material on it. 3(b) says, "Additional powers of the
15 Bodoland Territorial Council to make laws", and then lists on what they can make laws.
16 Paragraph 4, My Lord. I'm almost done, but not with this diversification point My Lord. Now,
17 come to paragraph 4 - Administration of Justice in Autonomous Districts and Autonomous
18 Regions. Which goes on to then say, "May appoint suitable persons to be members of such
19 village councils and presiding officers of such courts". It's a little lower down, in that
20 paragraph.

21

22 **CHIEF JUSTICE DY CHANDRACHUD:** Which is the next clause? Para 4, you were
23 saying?

24

25 **RAJEEV DHAVAN:** I was taking Your Lordships to para 4, My Lords.

26

27 **CHIEF JUSTICE DY CHANDRACHUD:** That's the administration of justice?

28

29 **RAJEEV DHAVAN:** That's the administration of justice. Of course, sub-para 3 says, "The
30 High Court shall exercise jurisdiction over the suits and cases to which provisions of sub-para
31 2 of this paragraph apply, as the Governor may, for time to time, specify". Even as regards the
32 High Court.

33

34 **CHIEF JUSTICE DY CHANDRACHUD:** Yes Doctor.

35

36 **RAJEEV DHAVAN:** Then, My Lord, 121. Sorry, paragraph 12 and 12A. 12A and 12AA, I want
37 to point out how in the state of Meghalaya and Tripura, My Lord, autonomous districts have

1 laws which are subject to what is equivalent to the 254 Procedure. And, Your Lordships will
2 see in 12A, “Notwithstanding anything in the Constitution”. Likewise, 12AA, “Notwithstanding
3 anything in the Constitution”. Then, 12B, from Mizoram, “Notwithstanding anything in this
4 Constitution.” It limits even the powers of the legislature. My Lord, the reason why I've cited
5 all this My Lord, is because of the diversity this Constitution My Lord, makes in Federalism
6 and Democracy. A diversity that is to be treasured not wished away in the name of uniformity.
7 There are no dead horses to be flogged.

8

9 **JUSTICE SANJAY KISHAN KAUL:** Diversity, I mean, you are right. It's possibly more
10 diverse than the whole of Europe. combined together.

11

12 **RAJEEV DHAVAN:** Europe, America, or Sub Saharan Africa, take parts of the South Seas
13 this is.... and so is Jammu and Kashmir My Lords, with its history. It has its own diversities.
14 Diversity is necessitated because of the absence of the merger agreement My Lord. So what
15 I'm going to call this, although in my submission, I've called these asymmetrical provisions,
16 these are, in fact, multi-symmetrical provisions. This makes our Constitution unlike any other
17 in the world. Simple examples of asymmetry of Canada, you will have French in one area, and
18 English, in the other or Belgium. The three language formula. Those are, asymmetrical. The
19 Indian Constitution is multi-symmetrical, of which J&K is a part for its reasons. I'll now come
20 My Lords a lot straight away to 370. Much of it has been argued, so I don't have to take Your
21 Lordships to all of it, My Lord.

22

23 **CHIEF JUSTICE DY CHANDRACHUD:** May be after lunch that..

24

25 **RAJEEV DHAVAN:** I'm sorry I've taken some time My Lord, because as soon as Your
26 Lordship asks for a list, as you ask, Mr. Zaffar Shah, Your Lordship said you've done with point
27 6 now what you come to another one? I have a list which I'll give to Your Lordships after lunch.

28

29 **CHIEF JUSTICE DY CHANDRACHUD:** Dr. Dhavan, how long would you now take after
30 lunch? So that the next question...

31

32 **RAJEEV DHAVAN:** An hour or so if possible My Lord.

33

34 **CHIEF JUSTICE DY CHANDRACHUD:** Could we possibly curtail it to half an hour after
35 lunch. Half an hour after lunch can be concluded maybe?

36

37 **RAJEEV DHAVAN:** May not be enough. Just give me that...

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CHIEF JUSTICE DY CHANDRACHUD: Alright 45 minutes. 2:45 we'll move on to the next...

RAJEEV DHAVAN: Usually you arrive late My Lord, that knocks off ten minutes.

CHIEF JUSTICE DY CHANDRACHUD: That's why I said 45 minutes. We didn't say 02:45. We'll be here at 02:00.

RAJEEV DHAVAN: Your Lordship, has not eaten into my time...

CHIEF JUSTICE DY CHANDRACHUD: Absolutely not, 2:55.

RAJEEV DHAVAN: No, My Lord. There's Mr. Dinesh Dwivedi's time, My Lord. He took my time on technical incompetence as I did on libraries. All that has to be adjusted. I'll do my best, My Lord, I'll do my best because what I've done now, My Lord, as I put summary at the end, which I'll hand over like Mr. Zaffar Shah did. But what I can't resist, My Lord, on the diversity argument a passage from TMA Pai, which is not in Your Lordships' compilation. So I've made copies. May I hand them over? My Lord, I'll take Your Lordships straight away to para 157, which is on page 586 and just below placitum D. This is the most evocative understanding of the diversity of our Constitution apart from the two Delhi judgments, My Lord, which went into it in depth. Now just below placitum D, My Lord, may I just read?

CHIEF JUSTICE DY CHANDRACHUD: Yes.

RAJEEV DHAVAN: 'All the people of India are not alike. And that is why preferential treatment to a special section of society is not frowned upon. Article 30 is a special right conferred on the religious and linguistic minorities because of their numerical handicap and to instil in them a sense of security and confidence even though the minorities cannot per se be regarded as weaker sections or underprivileged sections. Now, 158 is the evocative passage that I want to read. The 1 billion population of India, consisting of six main ethnic groups, 52 major tribes, six major religions, 6,400 castes and subcastes 18 major languages and 1600 minor languages and dialects. The essence of secularism can best be depicted if a relief map of India is made in mosaic, where the aforesaid 1 billion people are the small pieces of marble that go into the making of the map. Each person, whatever his/her language, caste religion, has his or her individual identity which has to be preserved. So, that when pieced together it goes to form a depiction with the different geographical features of India. These small pieces

1 of marble in the form of human beings which may be individually be dissimilar to each other
2 when placed together in a systematic manner, produced the beautiful map of India. Each piece,
3 like a citizen of India, plays an important part in the making of the whole. The variations of
4 the colour as well as the different shades of the same colour in a map are the result of these
5 small pieces of different shades and colours.

6
7 But even when one small piece of marble is removed, the whole map of India would be scarred
8 and the beauty lost...' Just over the page. 'Each of the people of India has an important place
9 in the formation of a nation. Each piece has to retain its colour. By itself. It may be an
10 insignificant stone, but when placed in a proper manner, going into the making of a full picture
11 of India, in all its different colours and hues. A citizen of India stands in a similar position. The
12 Constitution recognizes the differences amongst the people of India but it gives equal
13 importance to each of them, their differences notwithstanding. For only then, there can there
14 be a unified, secular nation. Recognizing the need for the preservation and retention of
15 different pieces that go into the making of the nation, the Constitution, while maintaining *inter*
16 *alia* the basic principles of equality contain adequate provisions that ensure the preservation
17 of these different pieces.' I wanted to read this, My Lord. It's a very evocative passage My Lord.
18 Now, My Lord...

19

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

21

22 **RAJEEV DHAVAN:** Your Lordship will be dealing with pieces of marble My Lord. How you
23 deal with it My Lord, will come later. Now My Lord, may I invite My Lords to my submissions?

24

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

26

27 **RAJEEV DHAVAN:** Which is in Volume 1, page 195, PDF 195. I'm going to go at super speed
28 mode because there's a guillotine on my head, very sharp one I might add. Now, My Lord, I'll
29 just take Your Lordship very quickly. Come to the 198, Your Lord, page. The external, Your
30 Lordship's page. Skip all that and come to page 200, which is...

31

32 **CHIEF JUSTICE DY CHANDRACHUD:** Which, which, which file are you...?

33

34 **RAJEEV DHAVAN:** Volume 1 of the written submissions My Lord.

35

36 [INAUDIBLE]

37

1 **RAJEEV DHAVAN:** I'm sorry, My Lord.

2

3 **CHIEF JUSTICE DY CHANDRACHUD:** Your PDF page, 195?

4

5 **RAJEEV DHAVAN:** Page 195, where it starts My Lord.

6

7 **JUSTICE BR GAVAI:** 195 to 288?

8

9 **RAJEEV DHAVAN:** There is an index, which I won't trouble Your Lordships with, My Lord.

10

11 **JUSTICE SANJIV KHANNA:** Volume 2?

12

13 **RAJEEV DHAVAN:** But I think...Volume 1.

14

15 **JUSTICE BR GAVAI:** Volume 1.

16

17 **RAJEEV DHAVAN:** Volume 2, was Mr. Sibal's submission which came My Lords, a few days
18 late.

19

20 **JUSTICE BR GAVAI:** Volume 1 *pe hai*.

21

22 **RAJEEV DHAVAN:** [INAUDIBLE] 200. Your Lordships have it now?

23

24 **JUSTICE BR GAVAI:** Yes.

25

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

27

28 **RAJEEV DHAVAN:** I'm taking Your Lordships on PDF 200 in para 1.5, because all the other
29 documents have been read, I'm not going to repeat them. The history has been shown to Your
30 Lordships. But I made a point, My Lord, about why the merger agreement was important and
31 why 370, in one sense represents the standstill and merger agreements. I'm going to read this
32 passage My Lord, from Prem Nath Kaul in para 1.5. Has Your Lordship got it?

33

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

35

36 **RAJEEV DHAVAN:** Referring to the past My Lord. 'Thus, there can be no doubt that this
37 Act of 1939 marked the second step taken by the Highness in associating his subjects with the

1 administration of the State. It did not constitute even a partial surrender of His Highness of
2 his sovereign rights in favour of the Praja Sabha. Even after the instrument of accession. He
3 had not given up his rights that Your Lordship will come over the page. I can get the PDF
4 numbers to this if Your Lordship wants My Lord, but it's...

5

6 **CHIEF JUSTICE DY CHANDRACHUD:** No, we've got it.

7

8 **RAJEEV DHAVAN:** Now My Lords dealing with after the Instrument of Accession.

9

10 **CHIEF JUSTICE DY CHANDRACHUD:** How many judges for *Prem Nath Kaul*?

11

12 **RAJEEV DHAVAN:** Yes 5 judges. These are all Constitution Benches. Now My Lord may I
13 take Your Lordships to 1.7.

14

15 **CHIEF JUSTICE DY CHANDRACHUD:** This is in relationship in regard to the
16 relationship of the Maharaja with the Praja Sabha.

17

18 **RAJEEV DHAVAN:** This is Praja Sabha. I'm now building on that My Lord.

19

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

21

22 **RAJEEV DHAVAN:** Therefore, My Lord, what actually 370 represents is two powerful
23 Democratic movements. One in the people of India. My Lord, and the other My Lord in the
24 people of Kashmir, demanding of their Maharaja, which is eventually what he did. He gave a
25 Praja Sabha. He wanted a National Assembly but he didn't agree to a Constituent Assembly
26 which came later My Lord. Now My Lord 1.7. Maharaja Hari Singh continued to be the
27 absolute monarch of the State. And in the eyes of international law, he might conceivably have
28 claimed the status of a sovereign and independent state because all the Instrument of
29 Accession did is put in these four conditions and fed externally. That's why I made the
30 distinction between external sovereignty and internal sovereignty.

31

32 **JUSTICE SANJIV KHANNA:** This is with reference to date as 15th August 1947 not with
33 reference to the...

34

35 **RAJEEV DHAVAN:** I'm coming out to the Instrument of Accession.

36

37 **JUSTICE SANJIV KHANNA:** That is 1.9.

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RAJEEV DHAVAN: That's right My Lord. That's the Instrument of Accession. Immediately after that comes 1.10. Thus, by the Instrument of Accession, the Maharaja took the very important step of recognizing the fact that his State was a part of the Dominion of India. That's all that the Instrument of Accession represented. We can't say at that point that he had surrendered all his sovereignty. He had not My Lord. That process began partly politically because of the political movement and partly because of 370 because that's why we see a coming together of the Constituent Assembly, the Governor, the President, all that comes together because there was no merger or standstill agreement. Now I won't read the proclamation of the Maharaja of 1948 where he talks about his Council of ministers. I'll just come straight away to what Sardar Patel said over the page in 1.13. 'In view of the special problems with which the Government of Kashmir is faced, we have made a special provision for the continuance of the constitutional relationship of the State on the existing basis.' And it's very important to understand what 370 really represented and what the Instrument of Accession really did. It bound itself to India. But the rest of the process of democratization, of adjustments, of sharing of power was never done in the case of Jammu and Kashmir. Even in the White Paper on the States there is one paragraph it says, we are not dealing with Jammu and Kashmir.

Then Your Lordships will just come to 1.21. On the 12th of November, pursuant to a resolution of the Constituent Assembly resolving to end hereditary rulership in the state, Yuvraj Karan Singh was elected to the post of so and so and dynastic rule in J&K came to an end. Now, Your Lordships have already been shown how C.O. 48 emanated from the Assembly of Jammu and Kashmir Constituent Assembly and became part of our Constitution. This part, My Lord, Your Lordships, I needn't give you cross references. Need I My Lord?

CHIEF JUSTICE DY CHANDRACHUD: No... that's...

RAJEEV DHAVAN: Now, My Lord, I'll skip the rest. 1.24. My Lord, I've already read, the second proviso to Article 3(2).

CHIEF JUSTICE DY CHANDRACHUD: Yes, we saw.

RAJEEV DHAVAN: So, I won't read it again, My Lord, but I come, My Lord, to page 11, 1.30. Before that, My Lord, just one thing...

1 **CHIEF JUSTICE DY CHANDRACHUD:** Dr. Dhavan, just one thing. Just... more for your
2 juniors than for you. The dates which you have given in the written submissions if anything is
3 missing in Mr. Sibal's list of dates, perhaps it might be good if you have it in one place.
4 Likewise, when the Respondents begin, it would be very nice if we had one consolidated list of
5 dates. So, that we don't have to, you know, sort of then...

6

7 **RAJEEV DHAVAN:** That's right.

8

9 **CHIEF JUSTICE DY CHANDRACHUD:** ... shuffle between two or three different...

10

11 **TUSHAR MEHTA:** Showing Mr. Sibal's list of dates in a separate font or separate colour or
12 something.

13

14 **CHIEF JUSTICE DY CHANDRACHUD:** And something which you are adding because I
15 think we were reading Mr. Sibal's list of dates. There's no innuendo in any of the lists. So, it's
16 just straight the dates. So, if you feel that there's something missed out, then you can make
17 track changes in that list of dates, so it will be a little easier for us, ultimately after the...

18

19 **RAJEEV DHAVAN:** My Lord, what I'm endeavouring to do, My Lord, is to add substance to
20 the list of dates.

21

22 **CHIEF JUSTICE DY CHANDRACHUD:** Alright, fair enough.

23

24 **RAJEEV DHAVAN:** This is what I'm trying to do.

25

26 **CHIEF JUSTICE DY CHANDRACHUD:** Fair enough, then there's...

27

28 **RAJEEV DHAVAN:** Not just reading it as a list of dates...

29

30 **CHIEF JUSTICE DY CHANDRACHUD:** Fair enough.

31

32 **RAJEEV DHAVAN:** Now 1.25, My Lord. 1.25, My Lord, on the 17 October 1956, the
33 Constitution of Jammu and Kashmir was adopted by the J&K Assembly. All the details are
34 given there My Lord?

35

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

37

1 **RAJEEV DHAVAN:** Now, My Lord, this singular aspect of Indian federalism to have a
2 separate Constitution for a state. For others you gave autonomous regions you bound them
3 together, you expanded it. But this... can the J&K Constitution of 1957 be wished away by an
4 amendment to C.O. 272, 273 and Article 3? It simply can't My Lord. So, one of the big losses
5 is where has it... It's like Macbeth, "the thane of Fife, he had a wife, where is she now?" J&K
6 had a Constitution. Where is it now? Has it been subsumed by 273? And when I go to 273, My
7 Lord, I'll deal with that. Now, My Lord, I come to asymmetrical federalism at 1.30. Kindly
8 change that to multi-symmetrical as I have argued, My Lord. Now, My Lord, all those
9 references are there but... and of course, I've given Your Lordships a list which I don't want
10 to... which is not repeated here. So, I'll come straight away to 1.33. The importance of the Delhi
11 decisions, My Lord. I'll take up the second decision first. The Chief Justice, after reviewing the
12 asymmetrical provisions described above in State of Delhi so and so, in 2023, held that regard
13 must be had to the principles of asymmetrical federalism embodied in the Indian Constitution,
14 and that constitutional principle must be given substantive weight to this underlying principle.
15 I'll read that paragraph. Actually, I should read it at the end, but I'll read it now, My Lord. 'This
16 variance in the constitutional treatment of union territories, as well as the absence of a
17 homogeneous class, is not unique only to union territories. The Constitution is replete with
18 instances of special arrangements being made to accommodate the specific regional needs of
19 state in specific areas. Therefore, NCTD is not the first territory which has received special
20 treatment through a constitutional provision, but it is another example in line with the practice
21 of the Constitution and visiting arrangements which treat federal units differently from each
22 other to account for their specific circumstances. For instance, Article 371 of the Constitution
23 contains special provisions for certain area of various states, as well as the entirety of some
24 states. The marginal notes to these Articles, composed of rubric of 371, provide an overview of
25 a number of states arrangements in the nature of asymmetrical federalism, are made in the
26 spirit of accommodating the different and specific requirements of regions across the nation.'

27
28 The next My Lord, line, para 41. I'm not taking Your Lordships to the PDFs because this is
29 enough of what I want to refer to. 'The design of our Constitution is such that it accommodates
30 the interests of different regions while providing a larger constitutional umbrella to different
31 states and union territories. It preserves the local aspirations of different regions. Unity in
32 diversity is not only used in common parlance, but is also embedded in our Constitutional
33 structure. Our interpretation of the Constitution must give substantive weight to the
34 underlying principles.' This is My Lord, how we approach the Constitution, just has been done
35 otherwise also. Now My Lord, I add to this My Lord, the huge number of precedents of what
36 is called Transformative Constitution. 1.36. 'The ultimate goal,' that's from Navtej Singh Johar,
37 'of our magnificent Constitution is to make right the upheaval which existed in Indian society

1 before the adopting of the Constitution. The Court in so and so observed that the Indian
2 Constitution is a great social document, almost revolutionary in its aim of transforming a
3 medieval hierarchical society into a modern, egalitarian democracy and its provisions can only
4 be comprehended only by a spacious social science approach, not a pedantic traditional
5 legalism. The whole idea of having a Constitution is to guide the nation towards the
6 resplendent future. Therefore, the purpose of having a Constitution is to transform the society
7 for the better. And this objective is for the fundamental pillar of Transformative Constitutions.'
8 Then My Lord, the Chief Justice, as he then was in the 2019 decision My Lord, of the Delhi
9 decision. 'The Constitution is a transformative document. The realization of this
10 transformative potential rests ultimately in the ability to breed life and meaning into its
11 abstract concepts. For above all, the Constitution was not intended by its draft persons,' was
12 intended, sorry...' by its draft persons to be a significant instrument of bringing about social
13 change in a caste based feudal society witnessed by centuries of oppression and discrimination
14 against the marginalized. As our Constitutional jurisprudence has evolved, the realization of
15 the transformative potential of the Constitution has been founded on the evolution of equality
16 away from its formal underpinnings to its substantial potential.'

17 My Lords, I cite this for a reason, My Lord. When this hearing began, My Lord, it appeared to
18 me that we were reading the Constitution as if it was a statute. For a long time My Lord, we
19 were going to this word and that word, and this proviso and that proviso My Lord. That is not
20 how Constitutions were meant to be read or to be transformed. Then My Lord, if Your Lordship
21 will come to this question 1.41, I won't read it My Lord, because Constitutional morality is also
22 mentioned in various judgments of, My Lord, the Chief Justice, when you refer to Pratap
23 Bhanu Mehta's, contribution, etc My Lord. Now My Lords, State of NCT versus Union of India.
24 If the moral values of our Constitution were not held, upheld at every stage, the text of the
25 Constitution may not be enough to protect its democratic values. In order to truly understand
26 what Constitutional morality reflects, it is to answer, necessary to answer what is that
27 Constitution trying to say, and to identify the broadest possible range to fix the meaning of the
28 text. Constitutional morality does not mean an allegiance to the substantive provisions and
29 principles of the Constitution. It signifies a Constitutional culture, which each individual in
30 the democracy must imbibe. Pratap Bhanu Mehta identifies certain features of constitutional
31 morality, chief amongst them being liberal values which govern the making of India's
32 Constitution and created expectations from the polity. One of the essential features of
33 constitutional morality thus is the ability and commitment to arrive at decisions on important
34 issues consensually. It requires despite all differences, we are part of a deliberative exercise. It
35 is going to be my submission, that this deliberative exercise has not taken place with the
36 changes of the J&K Constitution.

37

1 Now, Mr. Sibal had a number of questions that were asked in Parliament till the last day. Your
2 Lordship has seen that. Are you changing 370? The answer was no, no. And suddenly out of
3 the blue we enter into 4th August, 5th August. This consultation of concurrence is fundamental
4 to the manner in which we read constitutions, and how each provision comes into place. Then
5 My Lord, I will just read the NCT decision. That's the earlier one. 'While interpreting the
6 provisions of the Constitution, the safe and most sound approach for the Constitutional Court
7 to adopt this is to read the words of the Constitution in the light of the spirit of the Constitution,
8 so that the quintessential democratic nature of our Constitution and the paradigm of
9 representative participation by way of citizenry engagement are not annihilated. This Court
10 must adopt an interpretation which glorifies the democratic spirit of the Constitution. The
11 Constitution has mandated a federal balance wherein the independence of certain required
12 degree is assured to the State Governments. As opposed to centralism a balanced federal
13 structure mandates that the Union does not use up all the powers and the states enjoy freedom
14 without any unsolicited interference from the central government with respect to matters
15 while exclusively falling in its domain.'

16 So this is the approach towards constitution to multi-symmetric federalism.

17

18 Now I will take Your Lordship straight away to 370. I think at some stage a question fell from
19 Your Lordships, weren't any protests made before that My Lord. I just want to take Your
20 Lordships to 2.15 at page 221, external. My Lord, there is a literature that could fill a library
21 on the protests over 370 and then the State Autonomy Committee read this out and of course,
22 it goes to a slightly further extreme. But this is the constitutional understanding which is not
23 too dissimilar with other federations. I won't read it. I just wanted pointed it out to Your
24 Lordships. Once again, My Lord, I've reproduced here the debates. I'm not going to read those
25 out. I understand the speech has been read out to Your Lordships two or three times. It's just
26 that on page 224, whatever I've highlighted in bold, 'again, the Government of India have
27 committed themselves to the people of Kashmir in certain respects. They have committed
28 themselves to the position that an opportunity would be given to the people of the state to
29 decide for themselves whether they will remain with the Republic or to wish to go out of it. We
30 are also committed to ascertaining the will of the people by means of plebiscite, provided that
31 peaceful and normal conditions are restored and the impartiality of the plebiscite could be
32 guaranteed. We have also agreed that the will of the people through the instrument of the
33 Constituent Assembly will determine the Constitution of the State, as well as the sphere of
34 union jurisdiction over the State.' This is the commitment My Lord that lies behind Article
35 370. Then My Lord, the bottom of the page till a Constituent Assembly comes into being only
36 an interim arrangement is possible, not an arrangement which could at once be brought in line
37 with the arrangement that exists with other States. Now, if you remember the viewpoints I've

1 mentioned, it's an inevitable conclusion that at the present, we could establish an interim
2 system, is an attempt to establish such a system. Then, My Lord, I will skip other passages that
3 have been read out to Your Lordships. The J&K Constituent Assembly, My Lord, 11.21. I am
4 coming to page, external page 217... sorry 217... 227... why is it...

5

6 [NO AUDIO]

7

8 ... Sheikh Abdullah's speech has been read, but this is their understanding in the absence of a
9 merger agreement. As I indicated earlier, My Lord, the 370 is in the nature of establishing the
10 relationships. And in that portion that I have highlighted, 'this arrangement involved a
11 division of sovereignty, which is the normal feature of federation beyond the powers
12 transferred it to... by it to the dominion, the State enjoyed complete residuary.... uh
13 sovereignty, which is what is reflected in the J&K Constitution.' So, My Lord the Instrument
14 of Accession says List 1, List 3, they have their place but we have all the residuary powers.
15 Therefore, control over this state list My Lord as far as they are concerned. Then, My Lord,
16 when the Draft Constitution, My Lord, was introduced, I am coming to, My Lord, 11.25, at 231
17 and 232. Just at 232, just above 11.26. 'By this, I mean, that all these special constitutional
18 privileges which our State enjoyed prior to 1953 are enjoyed by her even today.' In other words,
19 the state enjoys the same kind of autonomy which it stood prior to 1953. Therefore, to say the
20 Instrument of Accession wiped things out, My Lord, is simply not correct. Now, My Lord,
21 11.28, I've already read it out to Your Lordships, My Lord, because it imposes a limit. One
22 question that was put, can 370 be amended or not amended permanently? Mr. Sibal said that's
23 not before Your Lordship, but at any rate, it may not have been a sufficient answer. There is a
24 proviso, My Lord, that was added by C.O. 48. C.O 48 is a foundational document, My Lord and
25 that is at 11.28. 'Provided further, that no such amendment shall have the effect in relation to
26 the State of Jammu and Kashmir unless applied by the order of the President under Clause 1
27 of 370.' In other words, after you go through the amendment process....

28 [NO AUDIO]

29

30 **CHIEF JUSTICE DY CHANDRACHUD:** Yeah.

31

32 **RAJEEV DHAVAN:** Now My Lords, can this proviso...What has happened is My Lord, when
33 the microphone was on, somethings emerged there which I didn't want to emerge because I
34 was talking to my colleagues. I hope they will be excised.

35

36 **TUSHAR MEHTA:** That's what. I went to him and told him that your whispers are also being
37 recorded.

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RAJEEV DHAVAN: My Lord, we will deal with all that My Lord, with a pinch of salt My Lord.

JUSTICE SANJIV KHANNA: It's quite accurate.

RAJEEV DHAVAN: I shudder to think, My Lord, if this was the case when we were arguing Babri Masjid, what would come in the transcription. Such a huge amount of exchange took place My Lord. Now My Lords, therefore My Lord, how do you amend with 370? You amend it through the 368 process. But, there was in C.O.48, a provision that you will then go to 370 and follow the procedure in 371. And that's very important My Lord. Your Lordship asked, what was lost from the 4th of August? This is something that was lost and they didn't even use the amendment power which is the only power available to them My Lord, to delete 370. Not the circuitous process that they used in 272 and 273. Now My Lords, on 235, 11.32 onwards. My Lord, Your Lordships conferred. That took time, as well. Happy though I am, that Your Lordships did [UNCLEAR]. My Lord, I'm going to be super quick. Just give me that indulgence. Now, My Lord, here are all the cases.

Your Lordship needs to go through *Prem Nath Kaul*, which I've summarized in 11.33, because it actually explains what the situation was after 1950, when there was an Instrument of Accession, but no merger agreement. On page 236, my submission from *Prem Nath Kaul*, is application of 370 of the Constitution to the State of JK, also does not impact the plenary parts of the Maharaja. The form of the Constitution to be applied to JK was a matter left to be determined by the State Constituent Assembly and until such decision was taken the constitutional relationship between Union and the States was governed by the terms of the IoA. So the internal relationship had to still be determined under 370. Now My Lords an argument has been made on the basis of *Puran and Lakhanpal* etc. What is the meaning of modification? And they say it's very wide. But My Lord, Your Lordship has to read it in context. And that is when the matter was not referred to the seven Judge Bench. Your Lordship took the view that Please read these decisions in context. Don't read them outside the context. Now My Lord I'll come to 370. What I've done in the meanwhile, My Lord I have done a short page, page and a half My Lord but I'm not giving it now, because Your Lordship may introduce the guillotine earlier. Now My Lord kindly come to 370.

CHIEF JUSTICE DY CHANDRACHUD: Does that begin at 239. Dr. Dhavan?

RAJEEV DHAVAN: Sorry My Lord?

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CHIEF JUSTICE DY CHANDRACHUD: Oh sorry. I thought you are referring to your submissions.

RAJEEV DHAVAN: I'm not going to repeat what's in the submission. I'm going to just stress what is not in the submission, that I've stressed orally.

CHIEF JUSTICE DY CHANDRACHUD: Fair enough.

RAJEEV DHAVAN: Now My Lord, we need not be troubled by temporary provisions at all. That has been the great call. This is a temporary provision. It's temporary to the extent that 370 indicates. Therefore My Lords in my personal view 370 Sub-clause 2 and 3, which deal with the Constituent Assembly My Lord has become otiose. They have invoked this My Lord in C.O. 273. All of a sudden, a provision which is constitutionally beyond the extension of the Assembly has suddenly been used in C.O. 273. That and I think it's C.O.44, is it? 44 is the only time My Lord 370 Sub-clause (3) was used. In 1952 and now in the year 2019. So My Lord what remains My Lord after the Constituent Assembly? In our submission, what remains is 370 Sub-clause (1). Not to be read as a statute but to be read in context. And what are the provisions here? I'm not going to read them out. It's been read *ad nauseam* My Lord. It says, follow the Instrumental of Accession as far as consultation is concerned. For rest there must be concurrence and the same is true My Lord of (d), 371(d). Those provisions are governed by the two provisos, which then talk of consultation and concurrence again. The reason why I said, My Lord, that 370 could not be tinkered with during President's Rule is because there is a mandatory requirement, as it was in Article 3, about consultation and concurrence. You can't say we wiped out the Constitution, we wiped out all the treaties so that 370 is gone. Amend it. Go through that particular process. But by the circuitous route, My Lord, mandatory provisions which survive in 370 Sub-Clause 1, are violated and they can't be done under President's Rule for a very simple reason because it says the State Government, My Lord, consultation with the Government of the State is declared by the President to correspond in such matters, other matters in such list with the concurrence of the Government of the State. Of course, Provision 1 in this article shall apply in relation to the State. And then My Lord, once again in D. Now My Lord, can we wish this away by some circuitous route? 370 by far from being a relic, My Lord is in fact what is there in the merger of agreement read with the Instrument of Accession. In fact, My Lord, I say that this is part and parcel of the multiple federalism that exists. You can't use these provisions, My Lord without subjecting them to the discipline of Article 370. And that's what **Damnoo** My Lord, **Damnoo** Your Lordships will get the... also says you can't do it. So, My Lord, I ask to come back to my broader proposition

1 that while President's Rule was in operation, you could not use Article 3, because you can't
2 substitute one legislature for another. And you can't, My Lord, do away with 370 for a very
3 simple reason that mandatory provisions of the Constitution do not say that Parliament can
4 do this, and the President can do this. It says it must be done by the Government of J&K, which
5 is not, My Lord the [UNCLEAR] Government of J&K but in 272, it says with the Council of
6 Ministers. And that is fundamental to the operation of any government. So, you don't do it
7 with the Council of Ministers. Can you do it simply, My Lord, the way it was introduced in
8 Parliament by Mr. Amit Shah? That you simply do it by saying, we're using 370 and this is how
9 it's done. In President's Rule, My Lord, it cannot be done. There is no tearing hurry, My Lord,
10 in our Constitution to say that the amendment power can be used and abused whenever you
11 wanted to.

12

13 My Lord I want to show quickly two decisions, My Lord, on why the merger is separated from...
14 It is in Volume Six, My Lord, of the cases and the case is *Promod Chandra Deb* it's at page
15 1587... and I am on PDF 144. The steps that were required and I'm saying that this in fact, in a
16 sense, My Lord, the merger agreement is really what 370 is. Now, My Lords...

17

18 **JUSTICE B.R. GAVAI:** Volume?

19

20 **RAJEEV DHAVAN:** I'll take Your Lordships to page 1596.

21

22 **JUSTICE B.R. GAVAI:** Dr. Dhavan which volume?

23

24 **RAJEEV DHAVAN:** Sorry, My Lord, Volume 6. Cases Volume 6, Item Number 10, page 1587
25 PDF. It starts at 135, and I'm taking Your Lordships to 1596 at 144. This is in para 10 on page
26 1596 My Lord. The bottom of the page My Lord. This was, My Lord, some...

27

28 **CHIEF JUSTICE DY CHANDRACHUD:** Which PDF page will that be actually?

29

30 **RAJEEV DHAVAN:** 144. It says of the Instrument of Accession, My Lord, in the last four,
31 five lines of page 1596. Does Your Lordship have it? This accession that is Instrument of
32 Accession did not affect the continuance of sovereignty of the rulers entering into the
33 agreement save as provided by or under the Instrument of Accession. So there was no...
34 external sovereignty was lost, but internal sovereignty remained where it was. And then, going
35 over the page, at 1597, four lines from the top, "The second step was the signing of what has
36 been termed "the standstill agreement", the form of which appears in the white paper. And a
37 few, the acceding states signed the standstill agreement which provided for the continuance

1 and time of all subsisting agreements and administrative arrangements in the matters of
2 common concern between the states and the Dominion of India. The first phase of the process
3 of integration of the Indian states into the Indian Dominion was the accession of states as
4 aforesaid. The second phase followed on the merger of the states into the Dominion of India
5 as a result of the merger agreement.' Now there was no merger agreement My Lord. So where
6 was the merger agreement, My Lord? Either we continue the sovereignty as was said in **Prem**
7 **Nath Kaul** or we say that this is the essential step by which internal sovereignty and internal
8 arrangements are worked out. Then it says, a little further down, about four lines below that,
9 "as a result of the merger agreement signed by the rulers of these states on or after 14th
10 December but before the 1st of January '48, the Dominion of India was vested with sovereign
11 powers, and the ex-rulers were left only with their private property and their annual privy
12 purses." This was the effect of the merger agreement. And it's all there in the white paper of
13 the states, which I don't want to go into. So where was this lost, this arrangement of internal
14 sovereignty worked out? In Article 370 My Lord. The only two other States were Hyderabad
15 and Junagadh, they stand on a footing of their own. And that is why My Lord, I emphasize that
16 370 is the repository of the merger agreement, read with the Instrument of Accession. In this
17 very volume I want to refer to one other, which is the first privy purse's case. It starts at...

18

19 **JUSTICE SANJIV KHANNA:** PDF?

20

21 **RAJEEV DHAVAN:** It starts at PDF 390 and I want to take Your Lordships straightaway....
22 Of course the amendment came later, in taking the privy purses amendment, power away. So,
23 My Lord, I'll take, we're still on Volume 6, and I'm taking Your Lordship to PDF 457. Just one
24 small paragraph. Paragraph 111, on page 1909, PDF 457.

25

26 **JUSTICE SANJAY KISHAN KAUL:** Para 111 Mr. Dhavan?

27

28 **RAJEEV DHAVAN:** May I read out My Lord? Para 111.

29

30 **JUSTICE SANJAY KISHAN KAUL:** Yes.

31

32 **RAJEEV DHAVAN:** The plea raised by the Union must be considered in the light of these
33 developments. The political developments and the history of negotiations and agreements
34 were certainly not intended to be an exercise in futility. The argument that the parties to the
35 instruments were entering into a solemn undertaking, intended the arrangements to be
36 temporary and likely to be set at not by the unilateral act of the Union of India must be rejected.
37 This is building on Mr. Sibal's argument My Lord. A unilateral act My Lord. The assumption

1 you don't take into account history. So the argument based by the Union that this is an exercise
2 in futility going back. The response is, 'the argument that the parties to the Instruments were
3 entering into solemn undertaking and intending the arrangements to be temporary and liable
4 to be set at not by the unilateral act of the Union of India must be rejected.' Now I have one
5 submission and I will hand over and go through it. One of my arguments My Lord, whether it
6 is run by transformational morality, because of the antecedents, or whether it's done by basic
7 structure or which transformational morality, in my view, is a part. That 370 to that extent is
8 part of the basic structure. As a substitute for the merger agreement, as an interpretation My
9 Lord... 356 My Lord. I'm coming back to Volume 1 of the submissions. The PDF number is
10 267. I put in a table to show how President's rule has been exercised in Section 92 has been
11 exercised. My Lord it is my respectful submission they cannot be exercised in tandem. As it
12 was My Lord, Governor's Rule had taken place and now President's Rule was imposed. On that
13 My Lord if Your Lordships will see, I've given all the cases that I want to cite. I won't bother
14 Your Lordships with them, except page 276, which is PDF 276. 4.25.

15

16 **JUSTICE SANJIV KHANNA:** I'm sorry, Mr. Dhavan, what are you referring to?

17

18 **RAJEEV DHAVAN:** My Lord my submissions.

19

20 **JUSTICE SANJIV KHANNA:** Your written submissions.

21

22 **RAJEEV DHAVAN:** I am now winding up.

23

24 **JUSTICE SANJIV KHANNA:** Page number?

25

26 **RAJEEV DHAVAN:** Mercifully. 276. An important aspect, *Bomma*, of course, is there.
27 You can't remember that in *Bomma* My Lord it was just the action of President's. 32 was not
28 involved with the same extent, but I'm relying on 14. 4.25 *Rameshwar Prasad's* case. Has
29 Hour Lordship got it?

30

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

32

33 **RAJEEV DHAVAN:** It is open to the Court an exercise of judicial review to examine the
34 question whether the Governor's report is based on relevant material or not, whether it is made
35 bonafide or not, and whether the facts have been duly verified or not. This is what Your
36 Lordships have indicated on the extent of judicial review. Now what has happened in this case
37 and Your Lordships, as in *Nagaraj*, can lay down conditionalities for the exercise of 356. All

1 the documents must be made publicly available and placed before Parliament. In this case,
2 even the Governor's Report was not placed before Parliament or before the Court. So, when
3 Your Lordships, My Lords, say 356 is justice-able, what are the contours of this justiciability?
4 A full, frank and complete disclosure to Parliament and to the people. Just to say that this is...
5 I've received this message, there it is, and not even to place the report. That is why I say, My
6 Lord, the entire exercise of President's Rule needs to be examined by Your Lordships in this
7 case. Others will argue, My Lord, more on this when their turn comes. Now, My Lord, I am
8 going to give Your Lordships, my summary, My Lord. Because this, My Lord, is the substance
9 of what I've added to my written submissions. May I read it out My Lord?

10

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

12

13 **RAJEEV DHAVAN:** India has a multi-symmetrical Constitution to be interpreted as
14 transformational in nature. It's unique and that is why Your Lordship insists on these
15 transformations despite the many amendments, despite the length. This is a multi-
16 symmetrical Constitution. My second submission, the Instrument of Accession represents,
17 subject to conditions, the loss of external sovereignty. However, standstill and merger
18 agreements finalizes the internal sovereignty arrangement. And that, My Lord, is to be...
19 internal sovereignty arrangements is to be found in 370. 370, is the result of a binding
20 historical agreement. The Instrument of Accession deals *inter alia* with conditions of external
21 sovereignty. But in the absence of standstill and merger agreements 370 represents a
22 substituted constitutionally consecrated merger agreement for finalizing internal and external
23 sovereignty, resulting in two interactive, *sui generis* constitutions unlike any other States. It is
24 unique and part of the basic structure in terms of democracy and federalism. For basic
25 structure, My Lord, read transformational constitutionalism. 370(1) alone survives, and 370
26 (2) and (3) have exhausted their invocation. Why is this important, My Lord? Because, My
27 Lord, after 1954 the first time 370(3) was used was in 273. The provision is gone. The
28 Constituent Assembly is gone, and the substitution is for the Constituent Assembly read
29 Legislature of the State. How can you resurrect, My Lord, 370 Sub-Clause 3, all of a sudden,
30 years later, after the Assembly is over and there is J&K Constitution? Now, My Lord, as far as
31 the width of power under 1(d) is there, My Lord, it's subject to constraints. I needn't say more
32 than what has been said, My Lord. It's subject to its two provisos and for the rest of the
33 Constitution consultation and concurrence. Now, My Lord, Article 3(4), and 370 contain
34 mandatory requirements on information to be laid before the House and *inter alia*, requiring
35 concurrence and consultation. Unfortunately, the mandatory requirements of Article 3, for
36 sending the Bill to the legislature was suspended by the Presidential Proclamation of 19th
37 December 2018, which is *ultra vires* and taints both the Declaration and the extension of

1 President's Rule in 2018 and 2019. Then, My Lord on President's Rule, the President's Rule
2 Provisions of 356 and 392 and Section 92 of the J&K Constitution cannot be imposed in
3 tandem. 3 and 4 and 370 cannot be invoked during President's Rule at all, since they require
4 the existence of a Legislature and State Government for which the President and Parliament
5 cannot be constitutionally [UNCLEAR].

6

7 Then President rule as required by ***S.R. Bommai and Rameshwar Prasad***, is justiciable,
8 requiring objective basis, which includes the Governor's report and all material should be
9 placed before the people and Parliament justifying itself.

10

11 **CHIEF JUSTICE DY CHANDRACHUD:** No. I was just telling my colleague that you have
12 really summarized very precisely, all that you have argued. We've taken down what you have
13 argued. But now this formulates...

14

15 **RAJEEV DHAVAN:** Just let me read it out My Lord?

16

17 **CHIEF JUSTICE DY CHANDRACHUD:** Certainly. Certainly.

18

19 **RAJEEV DHAVAN:** Then I'll sit down. And that's a promise. Now My Lord, Article 370. So
20 I've said all the materials. Article 370 can be amended, subject to the caveat in C.O. 48, that
21 all amendments relating to JK must follow the procedure in Article 370 Subclause 1. It is not
22 enough, in 273 says all treaties are out and the Constitution is gone. How can a Constitution
23 disappear like this My Lord? Many federations My Lord, have two state Constitutions and JK,
24 because of its nature, did. Accordingly, 272 and 273 are invalid as being excessive and the JK
25 Re-Organization Act 2019, under 3 and 4, was going beyond the mandatory provisions and in
26 violation of the process of Article 3, wrongly suspended by the Presidential Notification of 19th
27 December. Now, My Lord, I ask, answering Your Lordship's question. "What was lost?"

28

29 **CHIEF JUSTICE DY CHANDRACHUD:** Yes. That's point 9.

30

31 **RAJEEV DHAVAN:** Mr. Zaffar Shah, My Lord, will give Your Lordships, a detailed...

32

33 **CHIEF JUSTICE DY CHANDRACHUD:** <UNCLEAR>

34

35 **RAJEEV DHAVAN:** This is my summary account. What was lost? The loss of statehood, by
36 degrading it to union territory. That was lost. Indirect abolishment of the JK Constitution, loss
37 of residuary power, loss of territory contrary to the JK Constitution Section 3, Section 4, sorry.

1 Abolition of mandatory informatory, concurrent and consultation provisions. Conversion of
2 statehood into union territories without adequate safeguards, especially for JK and Ladakh
3 Constitution, without a proper amendment and consultative process and concurrent
4 procedure of Article 370, for which C.O. 48 was added to 368. The right of permanent residents
5 of JK on their right to property and to vote because 31, My Lord, Article 31 was not suspended,
6 only the later. Article 31 remained. In the light of the above, which is predated, restore
7 statehood to JK, permit the continuance of the JK Constitution have immediate elections
8 under the JK Constitution, abrogate President's Rule. This is what I have to say. I'm sorry I
9 have stepped over my time.

10

11 **CHIEF JUSTICE DY CHANDRACHUD:** Thank you, thank you, Dr. Dhavan. Thank you
12 very much.

13

14 **DUSHYANT DAVE:** Allow me to begin with these, My Lord, profound words of Justice
15 Aharon Barak, or the President of the Israeli Supreme Court. He was reported in Harvard Law
16 Review, way back in 2002. Since My Lord, we are expounding Constitution, these are
17 extremely apt words and I quote him, "The task of expounding a Constitution is crucially
18 different from that of construing a statute. A Constitution is drafted with an eye to the future.
19 Its function is to provide a continuing framework for the legitimate exercise of Governmental
20 power."

21

22 Now My Lord, 370 is perhaps the most brilliant articulation of statesmanship on the part of
23 the Constitutional framers. You are at a time when My Lord calls for plebiscite in Kashmir are
24 being raised. You are at a time when raiders are raiding My Lord in plain clothes and trying to
25 take away. You are at the time when Maharaja is uncertain whether he wants to join the
26 Dominion of India or Pakistan. You are at a time when India is just being born as a what,
27 dominion nation. At a time like that My Lord, it was a brilliant compromise that was arrived
28 at, which led to producing this article which persuaded the people of Jammu and Kashmir to
29 accede to India. We gave them a promise. You cannot not breach that promise in the manner
30 that you have done or for that matter, at any point of time. And that's why what Dr. Dhavan
31 very rightly points out that ultimately each article of the Constitution deals with this kind of
32 diversity, which My Lord if we were to start tinkering with then My Lord, nothing will be left
33 of the Constitution. So, My Lord, Your Lordships may have to consider, in my respectful
34 submission, three My Lord submissions. One, that Article 370 is a piece of unusual draftsman
35 ship. It is temporary, but it is not temporary by efflux of time as most temporary statutes are.
36 It is temporary by object, the purpose. Once that object is achieved, once that purpose is
37 subserved then My Lord nothing remains for the President to exercise. So it is going to be my

1 respectful submission that 370(3) has served its purpose that day Constituent Assembly of
2 Jammu and Kashmir, agreed that yes, Article 370 must remain on the Constitution of India
3 and subject to following modification and President accepted and issued that modification in
4 C.O. 44. That's the end of the story. Your Lordships have taken the view right from Federal
5 Court and I will show series of judgment that temporary statutes My Lord general Clauses Act
6 does not apply. If that is so, then the exercise is one time exercise. You cannot exercise it again
7 and again. It was never intended to be exercised again and again. Now if it is not a continuing
8 exercise on a demurer, in my respectful submission then the only way Parliament could do it
9 is by amending the Constitution under Article 368 and repealing Article 370 and in no other
10 manner. And I will show that's the view eight of Your Lordships have taken in **Berubari's**
11 case where Your Lordships interpreted a treaty and said that you cannot do this unless you
12 amend the Constitution. And lastly, it's going to be my respectful submission for Your
13 Lordship's kind acceptance, that the exercise of power by the President on 5th of August and
14 6th of August 2019, are nothing but fraud on the Constitution. As Dr. Dhavan, rightly points
15 out, there is nothing on record why a provision which has successfully survived from 25th
16 October 1947 till My Lord 6th of August 2019 should have been repealed as they claim, or
17 should have been withdrawn. There was no material whatsoever. The only material with
18 respect was that the ruling party in its manifesto in 2019 had said, we will abrogate Article
19 370. Your Lordships in **DC Wadhwa's** case have said that you cannot exercise Constitutional
20 powers to achieve political ends. My Lord it's a classic case of fraud on Constitution. So, My
21 Lord, you have a government in, My Lord, association with a local party in Jammu and
22 Kashmir, it is working well. You suddenly withdraw the support from that government. Then
23 you pursue the Governor to issue a... President to issue a 356 order. Then you pursue a
24 President to issue a dissolution of the Assembly. You... Parliament apparently takes control of
25 legislative and executive functions and then you say, now President will exercise all powers
26 into one and more... pass orders under 370. My Lords, what more classic example of abuse of
27 power than this can be? My Lord, as Chief Justice [UNCLEAR] said, My Lord, way back when
28 the fight began with the King, that what King can do everything except making a man a woman,
29 and a woman a man. My Lord, surely President could not have exercised these powers under
30 370(3) assuming himself to be everything. My Lord as much has been pointed out at great
31 pains and very brilliantly, that My Lord 356 is a temporary provision. Now, My Lords 356
32 being a temporary situation, can you take actions which are permanent, My Lord or
33 permanency or permanent in nature? Forget anything else because, My Lord, 356 itself says
34 that everything that you have done in the interregnum will come to an end and maximum
35 period for which you can exercise 356 is 3 years. So, My Lord, to do this, My Lord, in my
36 respectful submission, it really strikes at a very basic, My Lord, features of our Constitution.
37 Democracy, federalism...

1
2 My Lord, Government of India in their affidavit before Your Lordships categorically admits
3 this, and this is very important, the counter, which I'll read at the appropriate stage, that
4 Constituent Assembly of J&K did not in any manner deviate from the provisions of the
5 Constitution of India, which would be applicable to J&K. This is their profound statement.
6 Then, My Lord, they try and, My Lord, they say that, My Lord, ultimately that what we have
7 done is because of national interest. Now, My Lord, nobody knows what this national interest
8 is because it's not been defined in the counter affidavit, there was no material whatsoever. As
9 I said, My Lord, it has survived. Of course, there is an insurgency. Nobody can deny that. But
10 then we have insurgency in so many States, in Northeast India. We had insurgency in Punjab
11 for a long time. If we were to start, My Lord, disintegrating states into union territories in this
12 manner, no state will be saved in this My Lord, under political class that we have today.
13 Tomorrow it may so happen that my party cannot get elected in a state, I will disintegrate into
14 union territories because there is law and order problem. This is something which Your
15 Lordships will have to very seriously consider. It's not just one time exercise. It has such
16 ramifications for future of India, for the Constitution of India, for federalism, for very
17 existence, that My Lord, it will really be giving now this kind of a power to a majoritarian
18 Government, will be destructive of rule of law. It would be terribly destructive of rule of law.
19 And I beseech Your Lordships. That's why in Coelho, Your Lordships have very beautifully put
20 it, that constitutionalism demands that Your Lordships should oversee every act of the
21 Parliament and the Executive. And the moment Your Lordships will find that there is
22 infraction of Constitution, Your Lordships will come down heavily on them. So, My Lord, to
23 create all this atmosphere of fear all around, nobody even got one thing. I must tell Your
24 Lordships, very interesting, very few people, My Lord, way back, on 27th May 1949 in the
25 Constituent Assembly, a debate was going on about the bringing four representatives of J&K,
26 who had not been invited so far. Question was whether they should be nominated or not
27 because everybody felt that they should be present. So, Mr. K. T. Shah, who was an advisor to
28 Government of Jammu and Kashmir and who had Professor K. T. Shah work there very
29 extensively, he made this statement, which was very interesting, which was, perhaps quite
30 inappropriate. He said. "It has been the declaration of highest authority of India and also that
31 of Accession of the State made by the Maharaja, who was the complete constitutional head on
32 the day that accession was agreed to, was subject to confirmation by result of plebiscite." Now
33 please see Pandit Jawahar Lal Nehru's retort to that. Jawahar Lal Nehru retorts by saying "This
34 is absolutely incorrect. Cent percent incorrect. I am amazed, surprised and astounded that
35 such a statement is made by Professor Shah." Why? Because Kashmir has certainly become
36 part of India, and it will always be a part of India. Nobody denies that. Article, Section 3 of the
37 Jammu and Kashmir Constitution itself provides that we are part and parcel of India. Question

1 is, that when, My Lord, you have, now as Your Lordships have very rightly questioned about
2 sovereignty, you can acquire, new land by either accession or by secession or by occupation.
3 In each of these cases, My Lord, you can take away complete sovereignty as My Lord the Chief
4 Justice observed. But what happens in a situation like this where you have agreed as a nation,
5 as a dominion, as a state taking over that territory that I, take your territory subject to this
6 condition. What happens then? There, My Lord, **Berubari** says that you cannot now get out
7 of those conditions and the only way you can do it is by amending the Constitution of India.
8 Now you don't want to amend the Constitution of India because then you have to follow the
9 procedure. You need two-third majority in both Houses. You may even need to go to the
10 Legislatures of the state because you are taking away representation of the state in Lok Sabha
11 and Rajya Sabha. So you will need 50% of the states to agree to that provision. So these are the
12 safeguards. If these safeguards are thrown out of window in this light manner, who else can
13 protect except Your Lordships? So it is very, therefore important for us to understand, that
14 this is not just about Jammu and Kashmir. Jammu and Kashmir was, is and will always remain
15 part of India. But the promise that India made to Jammu and Kashmir, this secession, which
16 came about, on terms and conditions, how do you interpret those terms and conditions? So,
17 Your Lordships are called upon to expound this constitutional provision, which in my
18 respectful submission is, and I must tell Your Lordships, that **Prem Nath**, first, Your
19 Lordship said that, "yes, we have to await, the confirmation by the Constituent Assembly." I
20 will show those passages. Then in **Sampath Kumar** Your Lordships said "Constituent
21 Assembly has given that assent. People have agreed to abide by this and President has
22 accepted." So both ways Your Lordships spoke, in these two judgements give complete finality
23 to what is the eventuality under Article 370 Sub Article 3. So in my respectful submission this
24 is what, this calls for a very different kind of approach, than what Government of India would
25 like Your Lordships to take. That's an extremely, I would say, it's a narrower approach. That's
26 not how constitutions are interpreted. They have to be...these are durable provisions. They
27 must go through the test of times. If merely because something has happened or is happening
28 in Jammu and Kashmir you have to do this, then My Lord it may happen in another state and
29 you might be called upon to do that again. So the power cannot be exercised because of certain
30 situation prevailing at a particular point of time. Constitutional provisions can't be tinkered
31 with in that. So how do you make them durable? You make them durable by really
32 understanding. The need of the hour was that we wanted Kashmir to get into us. Jammu and
33 Kashmir. So at that point of time, we were left with no option but to accept what they offered
34 us. Otherwise, we were afraid Maharaja may run away to... there was one fear that he might
35 go to Pakistan. He might join Pakistan. So My Lord nobody knows what exactly was
36 happening, but who were the people who really were aware? The constitutional framers. And
37 Dr. Ayyangar's exposition of 370 is really the complete answer. Although I am conscious that

1 Constituent Assembly debates may or may not be relied upon but it gives a complete answer
2 to what government tells us on 370. He also says that all that we need is the wishes of the
3 people expressed through a Constituent Assembly. Once that wish is expressed it is the end of
4 the matter. He says that and I will read that My Lord two paragraphs of this. So whichever way
5 one looks at this provision in my respectful submission, this controversy needs a very, very
6 delicate approach from Your Lordships so that we do not end up giving, creating a situation.
7 Today let us assume for the sake of argument that today this decision is in national interest.
8 Let us assume for the sake of argument. Tomorrow, somewhere other political party in power
9 with majority may try and take a decision which is not in national interest. You have to
10 therefore lay down law which will stop all these exercises for all times to come and that's where
11 constitutionalism comes into play. And I beseech Your Lordship with all humility at my
12 command that Your Lordships may therefore look at it this way. Now, take therefore My Lord
13 in this regard kindly turn straight away to one judgment of your... My Lord I have a
14 compilation of judgments which are... you can also Prasanna, you can add them. My Lord it is
15 already with Prasanna, he can add them in just one second if Your Lordships permit.

16

17 **CHIEF JUSTICE DY CHANDRACHUD:** Is it part of the existing compilation now?

18

19 **DUSHYANT DAVE:** It's not with Your Lordships. It is with learned court master Volume
20 30. Case Law Compilation.

21

22 **CHIEF JUSTICE DY CHANDRACHUD:** Volume 29? We stopped at Volume 28.

23

24 S. PRASANNA: 29 and 30 have not been allowed Your Lordships. [INAUDIBLE]

25

26 **DUSHYANT DAVE:** These are judgments only.

27 [NO AUDIO]

28

29 **CHIEF JUSTICE DY CHANDRACHUD:** Judgments are in the compilation? Mr. Dave I'm
30 sorry.

31

32 **DUSHYANT DAVE:** No, many of them are, but five of them are not. Which My Lord Your
33 Lordship knows, our research goes on all the time.

34

35 **CHIEF JUSTICE DY CHANDRACHUD:** Mr. Dave, but at some point of time we have to
36 freeze it all. Otherwise you know...

37

1 **DUSHYANT DAVE:** These are judgements. Your Lordship can't certainly stop us from citing
2 judgments. Submissions, yes, I agree, but...

3

4 **CHIEF JUSTICE DY CHANDRACHUD:** Even judgments, should it not be frozen when
5 you submit written compilation?

6

7 **DUSHYANT DAVE:** My Lord, it's not easy. It's not easy to do it. Let me tell Your Lordships
8 honestly, because this is a thinking process. We are constantly thinking and constantly
9 rethinking and rethinking and rethinking.

10

11 **JUSTICE SANJAY KISHAN KAUL:** Rethink...

12

13 **DUSHYANT DAVE:** To five judgments, I have seen more than 500 judgments, I can assure
14 Your Lordships.

15

16 **JUSTICE SANJAY KISHAN KAUL:** Mr. Dave, if we apply this principle to ourself on the
17 lighter side, then we'll think, keep on thinking, not produce any judgment and keep on
18 thinking only.

19

20 **DUSHYANT DAVE:** My Lords, it's...

21

22 **JUSTICE SANJAY KISHAN KAUL:** All that will happen...

23

24 **DUSHYANT DAVE:** My Lord, Your Lordships once the matter ends. Certainly we'll be
25 thinking many a times over...

26

27 **JUSTICE SANJAY KISHAN KAUL:** Yes, but we, see...

28

29 **CHIEF JUSTICE DY CHANDRACHUD:** Yes, sometimes we have to also say all right now.

30

31 **DUSHYANT DAVE:** No, no. That's... that's...

32

33 **CHIEF JUSTICE DY CHANDRACHUD:** This is the guillotine. Now, I'm not going to think
34 anymore.

35

36 **DUSHYANT DAVE:** All right, my arguments are beginning.

37

1 **CHIEF JUSTICE DY CHANDRACHUD:** All right, but if so many of your judgments are
2 repeated in the compilation already...

3

4 **DUSHYANT DAVE:** I'm not repeating those are there. Those are there which I'm not...

5

6 **CHIEF JUSTICE DY CHANDRACHUD:** Which are the five... which are the five
7 judgments which are not in...? Then give us the judgments.

8

9 **DUSHYANT DAVE:** Judgements which are already given, I'm not My Lords...

10

11 **JUSTICE SANJIV KHANNA:** Actually, the back office work has to be done before the
12 arguments.

13

14 **CHIEF JUSTICE DY CHANDRACHUD:** Much before the arguments. You know,
15 otherwise, it becomes impossible.

16

17 **JUSTICE SANJAY KISHAN KAUL:** Mr. Dave the problem is, if you were a singular
18 counsel arguing...

19

20 **DUSHYANT DAVE:** My Lord once the debate begins in the court, Your Lordships put
21 questions...

22

23 **CHIEF JUSTICE DY CHANDRACHUD:** You know Mr. Dave what happens is, that's why
24 if we don't do this, essentially, difficult matters will never get argued because the whole
25 purpose is to restrict time. If you don't restrict time, we cannot carve out time for big matters.

26

27 **DUSHYANT DAVE:** I have promised one and a half to 2 hours. I'll finish it. I'm not going to
28 take, My Lords...

29

30 **JUSTICE SANJAY KISHAN KAUL:** Mr. Dave, if you were the only Counsel, it doesn't
31 really make so much of a difference because you have added something subtracted something.
32 When there are multiple counsels, 10 counsels, 12 counsels, each person starts doing it. Where
33 do we go? This is the concern. [UNCLEAR]

34

35 **DUSHYANT DAVE:** It's law declared by this Court, My Lord, Your Lordships would always
36 like to see. It's law declared by Your Lordship's Court, My Lord.

37

1 **CHIEF JUSTICE DY CHANDRACHUD:** No but I mean there has to be a certain procedure
2 also, an orderliness in making...

3

4 **JUSTICE SANJAY KISHAN KAUL:** Every year SCC online creates some 19-20 volumes.
5 This is another problem.

6

7 **DUSHYANT DAVE:** My Lord, I'm sure, My Lord Your Lordships directed us to give
8 submissions, I, we never thought that so far as judgments are concerned, because it's a
9 constant research. Nobody can, My Lord, do it at one go. You are trying to find out again and
10 again and again answers. Questions fall from Your Lordships, My Lord Bench. So, My Lord to
11 that, Your Lordships rightly asked about sovereignty...

12

13 **CHIEF JUSTICE DY CHANDRACHUD:** Two volumes, Mr. Dave?

14

15 **DUSHYANT DAVE:** I don't know. 29 is...

16

17 **S PRASANNA:** 29 is Mr. Naphade's. That has also not been allowed by the Court.

18

19 **JUSTICE SANJAY KISHAN KAUL:** This is the problem. How can we do this?

20

21 **CHIEF JUSTICE DY CHANDRACHUD:** How many volumes will we have actually? We
22 should actually be having one volume now of Case Law.

23

24 **DUSHYANT DAVE:** My 28 was allowed already earlier but 30 is what an additional one. I
25 have got printed copies also if Your Lordships like.

26

27 **CHIEF JUSTICE DY CHANDRACHUD:** So, Volume 30 is 5 judgments.?

28

29 **DUSHYANT DAVE:** 5 judgments.

30

31 [NO AUDIO]

32

33 **CHIEF JUSTICE DY CHANDRACHUD:** 29 also has just Case Law, right?

34

35 **DUSHYANT DAVE:** Yes, yes, My Lord. There are no submissions. These are only
36 judgments. 28, 29, 30 are Case Law Compilations.

37

1 **CHIEF JUSTICE DY CHANDRACHUD:** All right, you can...

2

3 **DUSHYANT DAVE:** My apologies for it but My Lord...

4

5 **CHIEF JUSTICE DY CHANDRACHUD:** What's sauce for the goose is not sauce for the
6 gander. So, you will not...

7

8 **DUSHYANT DAVE:** I'm sure My Lord, Mr. Mehta will definitely like to cite, My Lord, new
9 judgments to counter us.

10

11 **CHIEF JUSTICE DY CHANDRACHUD:** I don't think so. He's not saying that I'm going
12 to cite it. Don't give him ideas.

13

14 **DUSHYANT DAVE:** My Lord, his smile tells us otherwise, My Lord.

15

16 **TUSHAR MEHTA:** My learned friend [UNCLEAR]

17

18 **CHIEF JUSTICE DY CHANDRACHUD:** What is it that you [UNCLEAR]? Alright, Mr.
19 Dave, let's quickly run through it. Give us... why don't you give us the soft copies?

20

21 **DUSHYANT DAVE:** It's in the drive.

22

23 **CHIEF JUSTICE DY CHANDRACHUD:** Judgements or...?

24

25 **DUSHYANT DAVE:** No. Yes My Lord, I would like to.

26

27 **CHIEF JUSTICE DY CHANDRACHUD:** You want to... why don't you then give the
28 judgements in ten minutes that we have today, you can really, give us the framework. What
29 are the judgements you want to cite? What is the principle? Just formulate the principle.

30

31 **DUSHYANT DAVE:** As I said the three points that I want to urge, one is that 370 by itself
32 is a self-exhausting provision.

33

34 **CHIEF JUSTICE DY CHANDRACHUD:** Alright. What are the judgements? Tell us, that
35 you have cited. Volume 29. Page?

36

37 **DUSHYANT DAVE:** 1959.

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CHIEF JUSTICE DY CHANDRACHUD: Volume 30 right? Volume 30. Just give us the PDF page.

DUSHYANT DAVE: PDF page 16161.

CHIEF JUSTICE DY CHANDRACHUD: No, no, it can't be 16161.

DUSHYANT DAVE: Page 2 of Volume 30, page 2.

CHIEF JUSTICE DY CHANDRACHUD: Volume? What is the site? What is the name of the case?

DUSHYANT DAVE: This is *Dalmia Dadri Cement versus CIT*. For this, interpreted, this very, Letter of Accession and said that this is a treaty and My Lord....

CHIEF JUSTICE DY CHANDRACHUD: Para?

DUSHYANT DAVE: Yes My Lord, paragraph 3, 5 and 8. 8(ii).

CHIEF JUSTICE DY CHANDRACHUD: 8(ii)?

DUSHYANT DAVE: Yes My Lord.

CHIEF JUSTICE DY CHANDRACHUD: Why don't you read out the relevant part?

DUSHYANT DAVE: Yes. So My Lord.

CHIEF JUSTICE DY CHANDRACHUD: Yes.

DUSHYANT DAVE: Here Your Lordships said, and I.. what fell from the Honourable Chief Justice's....

CHIEF JUSTICE DY CHANDRACHUD: What did it interpret?

DUSHYANT DAVE: Sorry?

1 **CHIEF JUSTICE DY CHANDRACHUD:** What did it interpret you said?

2

3 **DUSHYANT DAVE:** My Lord, interpreted the accession agreement and held it to be a treaty
4 and then said sovereignty stood transferred.

5

6 **CHIEF JUSTICE DY CHANDRACHUD:** Sovereignty transferred?

7

8 **DUSHYANT DAVE:** Yes My Lord. But in the subsequent case, in *Berubari*, which is
9 already on record...

10

11 **CHIEF JUSTICE DY CHANDRACHUD:** Now, *Berubari*, where will we get the citation?

12

13 **DUSHYANT DAVE:** *Berubari* is at, I'll tell Your Lordship.

14

15 **CHIEF JUSTICE DY CHANDRACHUD:** Which case compilation?

16

17 **DUSHYANT DAVE:** PDF page 13, CLCP 492.

18

19 **CHIEF JUSTICE DY CHANDRACHUD:** No, what is the volume?

20

21 **DUSHYANT DAVE:** Volume 13, page 492.

22

23 **JUSTICE SANJAY KISHAN KAUL:** Volume 30 or 13?

24

25 **DUSHYANT DAVE:** One three.

26

27 **JUSTICE SANJAY KISHAN KAUL:** Volume 13 page?

28

29 **DUSHYANT DAVE:** 92. 492. This will have to be read in extenso, because this is a brilliant
30 exposition of a treaty and why Your Lordships held, that you cannot get out of this treaty except
31 by constitutional amendment.

32

33 **JUSTICE SANJAY KISHAN KAUL:** Volume 13.

34

35 **DUSHYANT DAVE:** I know, Your Lordship knows that Mrs. Dave had to assist me.
36 <UNCLEAR> embarrassment to Your Lordships at that point of time. [INAUDIBLE] That's
37 why I proudly call myself technologically challenged.

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CHIEF JUSTICE DY CHANDRACHUD: It's so simple, Mr. Dave. Just try, give it a try for one day and you'll never go back.

JUSTICE SANJAY KISHAN KAUL: To encourage you on the lighter side by saying, I had an equivalent mind block to it. Among the mind blocks I had, I used to tell the Chief, "See, don't deprive me the privilege of, after a miscellaneous matter, throwing the file down," that's the only privilege a judge has after a badly argued matter. But in these kind of matters, having done it last time, I realized that the volumes become so many. In a small matter it is fine, but in a bulky matter, it works better.

CHIEF JUSTICE DY CHANDRACHUD: So we are encouraging you Mr. Dave that, please, get on board.

DUSHYANT DAVE: I am. I am giving Your Lordships PDF pages.

CHIEF JUSTICE DY CHANDRACHUD: That is what your junior is relaying to you. You have to give it to us yourself.

DUSHYANT DAVE: <UNCLEAR> don't take away this from me.

CHIEF JUSTICE DY CHANDRACHUD: Volume 13, page 492. *Berubari*.

DUSHYANT DAVE: Turn to conclusion. Para 31. My Lords have got it? May I read it please?

CHIEF JUSTICE DY CHANDRACHUD: Please.

DUSHYANT DAVE: 'What then is the nature of the treaty making power of a sovereign state? That is the next problem with which we must consider before addressing ourselves to the questions referred to us for our opinion. As we have already pointed out, it is essential attribute of sovereignty that a sovereign state can acquire foreign territory and can in case of necessity see the part of its territory in favour of a foreign state, and this can be done in exercise of its treaty making power. Session of a national territory in law amounts to transfer of sovereignty over the state territory by the owner state in favour of another state. There can be no doubt that such session is possible and indeed history presents several examples of such transfer of sovereignty. It is true, as often highness has observed that hardship is involved in fact, in all cases of session. The inhabitants of the territory who remain, lose their old

1 citizenship and are handed over to a new sovereign, whether they like it or not. And he has
2 pointed out that it may be possible to mitigate this hardship by stipulating an option to
3 emigrate within a certain period in favour of the inhabitants of the ceded territory as being so
4 everting the charge that inhabitants are handed over to a new sovereignty against their will...'
5 But now similar these words, and I place them for Your Lordships acceptance 'but though from
6 the human point of view, great hardship is inevitably involved in session of a territory by one
7 country to the other. There can be no doubt that a sovereign state can exercise its right to cede
8 a part of its territory to a foreign state.

9
10 This power, it may be added, is of course, subject to the limitations which the Constitution of
11 the state may either expressly or by necessary implication impose in that behalf. In other
12 words, the question is to how treaties can be made by a sovereign state in regard to session of
13 national territory, and how treaties, when made can be implemented, would be governed by
14 provisions in the Constitution of the country. Stated broadly, treaty making power would have
15 to be exercised in the manner contemplated by Constitution and subject to limitations
16 imposed by it. Whether the treaty made can be implemented by ordinary legislation or by
17 Constitutional amendment will naturally depend on the provisions of the Constitution itself.
18 We must therefore now turn to the aspect that problem and consider the position under our
19 Constitution. In dealing with this aspect, we are proceeding on the assumption that some
20 legislation is necessary to implement the agreement in question.' Then, Your Lordships may
21 omit, My Lord, 5-7 lines and please come to the words unlike other federations.

22
23 **CHIEF JUSTICE DY CHANDRACHUD:** But before that something very interesting. The
24 Attorney General appearing for the Union of India in that case, argued that there is something
25 called the Basic Structure.

26
27 **DUSHYANT DAVE:** Correct.

28
29 **CHIEF JUSTICE DY CHANDRACHUD:** They say that the learned Attorney General has
30 asked us to bear in mind the special features of the Basic Structure of the Constitution...

31
32 **DUSHYANT DAVE:** Correct, My Lord.

33
34 **CHIEF JUSTICE DY CHANDRACHUD:** In construing the relevant provision of Article 3.
35 He contends that the Basic Structure of the Constitution is the same as that of the Government
36 of India Act 1935.

37

1 **DUSHYANT DAVE:** That's how... that's how, My Lord '60, 1960.

2

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

4

5 **DUSHYANT DAVE:** Mr. Setalvad, he alone could do that, My Lord. Now, please see My
6 Lord, 'unlike other federations, the federation embodied in the said act was not the result of a
7 pact or union between separate, independent communities of states who came together for
8 certain purposes and surrendered a part of that sovereignty. The constituent units of
9 federation were deliberately created and it is significant that they, unlike the units of other
10 federations, had no organic roots. Hence, in the Indian Constitution, by contrast with other
11 Federal Constitutions, emphasis on preservation of the territorial integrity of Constituent
12 states is absent. Now My Lords this is important. But, now, My Lord, kindly turn to paragraph
13 44 at page 515.

14

15 **JUSTICE SANJIV KHANNA:** First read the lower portion.

16

17 **DUSHYANT DAVE:** Just read what, My Lord?

18

19 **JUSTICE SANJIV KHANNA:** Paragraph 32, the lower portion.

20

21 **CHIEF JUSTICE DY CHANDRACHUD:** In fact, you can start reading from...

22

23 **DUSHYANT DAVE:** Yes.

24

25 **CHIEF JUSTICE DY CHANDRACHUD:** 'It is a... in fact it is well-known' and then go to
26 end as my learned brother says. 'In fact it is well-known', last 10 lines.

27

28 **DUSHYANT DAVE:** That as a result of States Re-Organization Act in place of original 27
29 states and one area which was mentioned in Part D of the First Schedule with the Constitution,
30 there are now only 14 states in 6 other areas which constitute Union Territory as mentioned
31 in First Schedule. The changes thus made clearly illustrated the working of peculiar and
32 striking feature of the Indian Constitution. There may be some force in this contention. It may
33 therefore, be assumed that in construing Article 3, we would take into account the fact that
34 Constitution contemplated changes of territorial limits of the Constituent States and there was
35 no guarantee about their territorial integrity. Undoubtedly. Question is, can they be turned in
36 union territories? Of course, they can be changed, territories, no difficulty. That's an express
37 provision. And My Lord, the word, if Your Lordships were to read the word 'union territory'

1 for every word 'state' in, My Lord, Article 3(b), then, My Lord, result will be absolutely, very,
2 very, unbelievable. So, My Lord, although the explanation says that state includes union
3 territory, but if you are to read it...

4

5 **JUSTICE SANJIV KHANNA:** Mr. Dave, I didn't want to interrupt, but if it can be done for
6 the state, why not for union territory until and unless it's something you can make out
7 otherwise. And when the explanation goes, explanation says 'state' and 'union territory' is used
8 interchangeably...

9

10 **DUSHYANT DAVE:** My Lord, I must tell Your Lordships, I am not dealing with that part of
11 the argument, which has been very beautifully...

12

13 **JUSTICE SANJIV KHANNA:** That's fine. Okay then, come down.

14

15 **DUSHYANT DAVE:** ...done by my worthy predecessors. But, My Lord, I must tell Your
16 Lordships, that what is really worrying me is this. Your Lordships are right, it can be done.
17 Question is that, My Lord, if it can be done in Jammu and Kashmir, why can't it be done in
18 Gujarat? Why can't it be done in Maharashtra?

19

20 **JUSTICE SANJIV KHANNA:** Okay.

21

22 **DUSHYANT DAVE:** So, My Lord...

23

24 **JUSTICE SANJIV KHANNA:** Let's proceed.

25

26 **DUSHYANT DAVE:** That's something which you have to bear in mind. It can't...

27

28 **JUSTICE SANJIV KHANNA:** Let's proceed.

29

30 **DUSHYANT DAVE:** Now, My Lord, please turn to para 44 straight at page...

31

32 [NO AUDIO]

33

34 Our conclusion is that it would not be competent to Parliament to make a law relating to
35 Article 3, of the Constitution for the purposes of implementing the agreement. It is considered
36 by learned Attorney General that this conclusion must inevitably mean that the law necessary
37 to implement the agreement has to be passed under Article 368. Then, My Lord, 368 is

1 extended... extracted. And then Your Lordships may kindly turn to, My Lord, page 516, para
2 47. On the other hand, now, My Lord, this is very important. Just see, My Lord, how Your
3 Lordships are viewing, My Lord democracy... on the other hand [INAUDIBLE] is to be passed
4 under Article 368. It has to satisfy the requirements prescribed by the said article. The Bill has
5 to be passed in each House by a majority of the total membership of the House and by a
6 majority of not less than two-thirds of the House present and voting. That is to say, it should
7 obtain concurrence of a substantial section of the House, which may normally mean the
8 consent of the major parties of the House.

9

10 **CHIEF JUSTICE DY CHANDRACHUD:** Alright we'll come tomorrow.

11

12 **DUSHYANT DAVE:** So, My Lord, look at it this way. Your Lordships not construed even
13 majority, what... to be major parties of the House...

14

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

16

17 **DUSHYANT DAVE:** Meaning you must carry everybody on board.

18

19 **CHIEF JUSTICE DY CHANDRACHUD:** After this we have Mr. Dwivedi, will be arguing.
20 Or Mr. Naphade? All right, between the three of you, if you could please request that... could
21 you apportion the time so that, you know, by lunch tomorrow we have completed with Mr.
22 Dave, Mr. Dwivedi and Mr...

23

24 **DUSHYANT DAVE:** I said two hours but I'll finish in one and a half hours.

25

26 **PETITIONER'S COUNSEL:** [INAUDIBLE]

27

28 **CHIEF JUSTICE DY CHANDRACHUD:** Mr. Dave, could we... could we do this? Maybe if
29 we give an hour... an hour to Mr. Dave, 10:30 to 11:30 tomorrow. Then Mr. Naphade about
30 half an hour. Would that be all right?

31

32 **SHEKHAR NAPHADE:** I would require at least an hour.

33

34 **CHIEF JUSTICE DY CHANDRACHUD:** Make it...

35

36 **SHEKHAR NAPHADE:** Every one of us has his own nuance. I will see that overlap is
37 minimal, but some overlap is bound to be there. It can't be helped.

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DINESH DWIVEDI: [INAUDIBLE]

CHIEF JUSTICE DY CHANDRACHUD: What we were thinking, was that by tomorrow, because tomorrow is Thursday, Thursday we complete one side, so that, then, next week, the other side can open. So...

SHEKHAR NAPHADE: I am told Your Lordships are continuing on Friday also?

CHIEF JUSTICE DY CHANDRACHUD: No, no, Friday is miscellaneous. So if you could in the evening today, just as you step out of the court, Mr. Dave, Mr. Naphade, Mr. Dwivedi and Mr. C. U. Singh...I don't know Gopal is a moving force behind many of the arguments which have preceded him and then Dr. Menaka.

SANJAY PARIKH: My Lord, I am appearing in the matter.

CHIEF JUSTICE DY CHANDRACHUD: The six of the learned Counsel, if you could just meet for five minutes after we rise, between all of you so that we wrap up by tomorrow on this side.

PETITIONER'S COUNSEL: <UNCLEAR>

CHIEF JUSTICE DY CHANDRACHUD: Absolutely.

PETITIONER'S COUNSEL: <UNCLEAR>

CHIEF JUSTICE DY CHANDRACHUD: Interveners may give us short one page written submissions on both sides so that, Interveners can give us one page written, written note on both sides. So we will not hear Interveners on this side and interveners on this side. We'll have written notes of arguments I think.

TUSHAR MEHTA: But I must point out, on this side, I think except the Government rest are Interveners. So they may be....

RESPONDENT'S COUNSEL: But then, My Lord, just as the petitioners challenged, we also have an interest in seeing that...

1 **CHIEF JUSTICE DY CHANDRACHUD:** Alright, we'll see tomorrow, but what we'll do is,
2 please, do sit down tomorrow between yourselves.

3

4 **SHEKHAR NAPHADE:** <UNCLEAR> is required in matters like this.

5

6 **CHIEF JUSTICE DY CHANDRACHUD:** So, Mr. Parikh is also there. So between
7 yourselves, if you could just, apportion time, so that we don't really err on the side of giving
8 someone more than...

9

10 **DUSHYANT DAVE:** I think Your Lordship will have to give us <UNCLEAR>, considering
11 the amount of seriousness with which my distinguished friends, all of them have been at.

12

13 **CHIEF JUSTICE DY CHANDRACHUD:** All right, we'll give you up to Tuesday, but
14 tomorrow now, tomorrow, if you could please do this, that you can give us, now exactly how
15 we'll finish, wrap up with, by Tuesday. So just five minutes of all of you sit down on this side
16 after we rise, it'll help. Thank you, thank you.

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18 **DUSHYANT DAVE:** Certainly. Deeply obliged.

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END OF DAY'S PROCEEDINGS