

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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BIMAL ROY JAD: I'm sorry, My Lord. In furtherance to my affidavit which I filed day before yesterday, I filed another affidavit giving more details, which is completely spreading a venom. That is, he states in his statements, like while talking to the [UNCLEAR].

KAPIL SIBAL: May I make a request My Lords? As it is we are short of time. Let us...

CHIEF JUSTICE DY CHANDRACHUD: Yes. Mr. Solicitor... let's see what the solicitor has to say, and we'll come back to you in a moment because we want to get on with the merits.

TUSHAR MEHTA: Correct, correct. That's what our intention is. With a sense of responsibility, I received the affidavit yesterday. I went through in the night. I would request Your Lordships to see three statements. And I leave it to Your Lordships conscience, please come to page 6. And I'm saying this with a responsibility.

CHIEF JUSTICE DY CHANDRACHUD: I'm sure Mr. Sibal will place the affidavit before us in the morning.

KAPIL SIBAL: I was not there...

TUSHAR MEHTA: As a citizen of India, forget...

CHIEF JUSTICE DY CHANDRACHUD: All right.

TUSHAR MEHTA: We are all citizens of India.

CHIEF JUSTICE DY CHANDRACHUD: All right. Just a second. Mr. Sibal, yes, please...

KAPIL SIBAL: Deeply honoured.

CHIEF JUSTICE DY CHANDRACHUD: Let's have a look at the....

TUSHAR MEHTA: Can I show only three pages, few lines.

KAPIL SIBAL: Again it's just, I'm sorry to say, this is all being televised.

1 **RAKESH DWIVEDI:** So you file an affidavit.

2

3 **KAPIL SIBAL:** It's all being televised.

4

5 **BIMAL ROY JAD:** [UNCLEAR].

6

7 **TUSHAR MEHTA:** [UNCLEAR].

8

9 **CHIEF JUSTICE DY CHANDRACHUD:** Mr. Jad, Mr. Jad, Mr. Jad, one second. Solicitor
10 is in charge on this side. Let them...

11

12 **TUSHAR MEHTA:** Allow me, My Lord. Before Mr. Sibal responds, allow me to...

13

14 **CHIEF JUSTICE DY CHANDRACHUD:** Of course, I am only telling Mr. Jad that you are
15 in charge on your side, so let one person...

16

17 **TUSHAR MEHTA:** Kindly see My Lord, page 6.

18

19 **CHIEF JUSTICE DY CHANDRACHUD:** All right.

20

21 **TUSHAR MEHTA:** I'll not read everything.

22

23 **CHIEF JUSTICE DY CHANDRACHUD:** I will immediately come back to Mr. Sibal.

24

25 **TUSHAR MEHTA:** Page 6 My Lord.

26

27 **CHIEF JUSTICE DY CHANDRACHUD:** Don't read it. Just let's...

28

29 **TUSHAR MEHTA:** Para 2. I'll not read My Lord, para 2. The first thing which was yesterday,
30 highlighted was in the assembly. Para 2, this is in Kupwara, in a public rally. My learned friend
31 has an objection of it being televised. He said this in a public rally. Then please see 4, 18th
32 March 2019, before the Presidential Proclamation. Then 5, My Lord, 5 may look innocuous,
33 but I'll show how it is not. 5 but whenever a terrorist attack takes place, the terrorist is killed,
34 the civilian is casualty and the security forces are killed. Sympathy is only for terrorists and
35 the civilians. Please come to page 8 directly. As per report in Greater Kashmir, and thereafter
36 the later part. Then kindly come to My Lord page 11, which is more serious My Lord, in my
37 personal view My Lord subject to Your Lordships followed accepting that. This is 19th March

1 2015. Please read, My Lord 1. Then please read 3. 3 Is My Lord very, very serious. It's not just
2 not *zindabad*. It is again 15th of September 2019. Then 4.

3

4 **CHIEF JUSTICE D Y CHANDRACHUD:** Yes. We have seen it.

5

6 **TUSHAR MEHTA:** My Lord 4 middle.

7

8 **CHIEF JUSTICE D Y CHANDRACHUD:** Yes. We have seen it.

9

10 **TUSHAR MEHTA:** My Lord. 4, at the bottom. India is referred to as if it's a foreign country.

11

12 **CHIEF JUSTICE D Y CHANDRACHUD:** Alright. Yes Mr. Sibal.

13

14 **TUSHAR MEHTA:** Therefore I was...

15

16 **KAPIL SIBAL:** Please allow me now Sir.

17

18 **TUSHAR MEHTA:** ...insisting yesterday that his affidavit must say that I withdraw this
19 statement. I do not support terrorism, I do not support any separatist activity and no citizen
20 in this country can logically.....

21

22 **KAPIL SIBAL:** You must have a have a uniform affidavit for every citizen to file this My
23 Lords in this court.

24

25 **GOPAL SANKARANARAYANAN:** Can I just say something My Lord, that point 3 at page
26 6. They say pushing a separatist agenda, filing a 370 petition in this Court is pushing a
27 separatist....

28

29 **TUSHAR MEHTA:** I'm sorry.

30

31 **GOPAL SANKARANARAYANAN:** I have a very strong objection to the Government of
32 India taking this kind of a....

33

34 **TUSHAR MEHTA:** I am sorry.

35

36 **GOPAL SANKARANARAYANAN:** All of us are pushing a separatist agenda by being....

37

1 **TUSHAR MEHTA:** Please, please, please.

2

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

4

5 **TUSHAR MEHTA:** No, no, I'll clarify.

6

7 **CHIEF JUSTICE DY CHANDRACHUD:** One second. Mr. Solicitor, please wait for a
8 second. Mr. Sankaranarayanan, I think this is unfortunate. Nobody can say that because the
9 petition under 32 has been filed. Up to this point, nobody has said that filing of the petition
10 constitutes a separatist agenda.

11

12 **RAKESH DWIVEDI:** Nobody is saying that.

13

14 **KAPIL SIBAL:** I have said why this date is mentioned even after filing he has.....

15

16 **CHIEF JUSTICE DY CHANDRACHUD:** One second. The access to a Court for ventilating
17 grievances of citizens within the framework of the Constitution is a constitutional right in
18 itself. Anyone who accesses justice under Article 32, cannot be turned out on the ground that
19 you are following out, following this agenda or that agenda. On merits which weigh any
20 individual petition goes is for the Court to separate the grain from the shaft, but I don' think....
21 We have not Mr. Sankaranarayanan... We have not heard the Government. We have not heard
22 either. One second Mr. Solicitor. One second. We'll put a lid on this now. Otherwise, this will
23 go on endlessly.

24

25 **TUSHAR MEHTA:** My Lord only give my....

26

27 **CHIEF JUSTICE DY CHANDRACHUD:** One second. We have not heard either the
28 Attorney General of India, who is leading arguments for the Union of India, the Solicitor
29 General who has shouldered a large part of the burden, say, that these petitions should be
30 dismissed on the ground that they are separatist agenda. They have argued the matter on
31 merits. It has been argued on constitutional terms. We have indicated that that's how we are
32 going to resolve this issue. And I don't think that's been the main plan of either the Solicitor,
33 Attorney or anybody who else will follow.

34

35 **GOPAL SANKARANARAYANAN:** That's all.

36

1 **CHIEF JUSTICE DY CHANDRACHUD:** Sometimes when individuals as interveners
2 come before the Court, we also as judges, understand that....

3

4 **TUSHAR MEHTA:** They are petitioners. They are the lead petitioner.

5

6 **CHIEF JUSTICE DY CHANDRACHUD:** ...and there is an anguish, there is an anguish
7 which was expressed. And that anguish, that anguish which many of the interveners have
8 expressed, we as judges know how to deal with that.

9

10 **TUSHAR MEHTA:** Give me a minute more. Give me a minute more. The date for 18th March
11 is mentioned, writ petition is filed to show that even subsequent to the filing of the petition in
12 May 2018, etc., etc. My Lord this continued. Filing of a petition is not a

13

14 **CHIEF JUSTICE DY CHANDRACHUD:** You have made your point, you have made your
15 point Mr. Solicitor. Mr. Sibal.

16

17 **KAPIL SIBAL:** My Lords I hope that sentiment applies to us also because we have not made
18 any submission other than on the law and the Constitution, just as the other side has done it.
19 At least we have not made any submission outside of that. We want to carry on this debate, My
20 Lords through the Constitution, not through processes of this nature. Anyway now, yesterday
21 Your Lordships asked me a question about merger. How many mergers have taken place?
22 Kindly come to Volume 4.

23

24 **BIMAL ROY JAD:** I'll leave it to the court My Lord. I'll just....

25

26 **CHIEF JUSTICE DY CHANDRACHUD:** Mr. Jad, please don't interrupt. There's a limit to
27 it.

28

29 **BIMAL ROY JAD:** There is a boundary.

30

31 **KAPIL SIBAL:** My Lords, Volume 4....

32

33 **CHIEF JUSTICE DY CHANDRACHUD:** Just one second Mr. Sibal. Mr. Sibal, has your
34 client, has he filed an affidavit? Pursuant to what...

35

36 **KAPIL SIBAL:** He's going to file. He's going to reach by 12:00.

37

1 **CHIEF JUSTICE DY CHANDRACHUD:** Alright. He has now [UNCLEAR] Mr. Sibal.

2

3 **KAPIL SIBAL:** So, My Lords, Volume, Documents Volume 4, PDF 303.

4

5 **CHIEF JUSTICE DY CHANDRACHUD:** Volume 4?

6

7 **KAPIL SIBAL:** Yes. PDF 303. This is in the white paper My Lords.

8

9 **JUSTICE SURYA KANT:** 303?

10

11 **KAPIL SIBAL:** 303 My Lords. This has taken 20 minutes, yesterday, half an hour, Lordships
12 had given us from Monday onwards, morning. How do we finish?

13

14 **CHIEF JUSTICE DY CHANDRACHUD:** This is in the white paper, that is...?

15

16 **KAPIL SIBAL:** White paper. Now My Lords, kindly see Appendix, Statement showing area
17 and population of states which have merged with the provinces.

18

19 **JUSTICE SANJIV KHANNA:** I'm sorry, which page are you reading from?

20

21 **KAPIL SIBAL:** Page 303. PDF 303.

22

23 **JUSTICE SANJIV KHANNA:** PDF 303 in volume number....

24

25 **KAPIL SIBAL:** In volume number 4, Document Volume 4. It's very important, My Lord. So
26 this is, as I told Your Lordships, all the states who joined the provinces, and then they were
27 merged. Provinces which merged. So they first joined the provinces. And the provinces
28 merged. And you have 21 such mergers, and the dates of the agreements are on the left side.
29 01-01-48, 01-01-48, 01-02-48. This is after January 20, before January 26, 1950. This is
30 important. This didn't happen as far as J&K is concerned. Now this is now one part. Now
31 kindly come to the next table. That is statement showing area and population of states
32 constituting central administered areas, which was a Chief Commissioners' provinces. Now
33 you see here, there's no question of any merger. No question of any merger. Was directly
34 administered, but through merger agreements.

35

36 **CHIEF JUSTICE DY CHANDRACHUD:** Now these.... just for factual clarification, these
37 centrally administered areas, what was their status under the Government of India Act? Were

1 they, they were treated as Chief Commissioners' provinces? And they become centrally
2 administered areas after [UNCLEAR]

3

4 **KAPIL SIBAL:** Correct. Now come to the third. These were princely states My Lords, which
5 actually went to the Unions. These are princely states, many of them. Kindly see My Lords,
6 Manipur, Tripura, Bilaspur, Kutch, Bharuch, Chamba, Mandi, these are all princely states,
7 Raja of Mandi. These are all princely states that merged into the Chief Commissioners'
8 provinces, which are termed as Chief Commissioner directly administered.

9

10 **CHIEF JUSTICE DY CHANDRACHUD:** Then the third statement is, those which
11 constituted Union.

12

13 **KAPIL SIBAL:** That's right. Now...

14

15 **CHIEF JUSTICE DY CHANDRACHUD:** They formed a Union of more than one of the...

16

17 **KAPIL SIBAL:** Correct. Now this is important, My Lords. Kindly see, how are the merger
18 agreements here, only five. Now you'll see My Lords, item 1, 22/22 units, as I told You
19 Lordships yesterday, in Saurashtra. Then Jodhpur, Jaipur, this was called originally
20 Rajputana, which included all these. Then you have 15-06-48, Madhya Bharat. Your Lordship
21 sees that? Madhya Bharat. Then 28-48, Patiala, East Punjab, Union Traven... and then
22 Travancore, Cochin. This is 552, total 275, grand Total 552. So, you have therefore the Chief
23 Commissioner's provinces, you had the province, the princes merging into the provinces and
24 you had these five states, all through merger agreements, no exceptions, except Jammu and
25 Kashmir. Because that was not conceived in terms of 370 itself. Now kindly come to 370(3),
26 My Lords. This is also important. PDF 370(3). Now in these five provinces, called the Union
27 of States, what were the kind of notifications issued? What were the kind of proclamations
28 issued? Your Lordships will find at 370(3) onwards.

29

30 **CHIEF JUSTICE DY CHANDRACHUD:** So this 552 was an addition of 216 plus 61, plus
31 275?

32

33 **KAPIL SIBAL:** Correct. Correct.

34

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

36

1 **KAPIL SIBAL:** Correct My Lords. Now, if Your Lordship comes to PDF 370(3). Now you see
2 that Raj Pramukh, of Union of Patiala, East Punjab States, Saurashtra, Travancore, Rajasthan,
3 Madhya Bharat, rulers of Hyderabad, Mysore, Jammu and Kashmir are published. This is a
4 proclamation. What does the proclamation say? Last paragraph, 'I now hereby declare..' Your
5 Lordship has that? My Lords have that? It says, 'I hereby declare that that the Constitution of
6 India, shortly to be adopted by the Constituent Assembly, shall be the Constitution for Patiala,
7 East Punjab, as well as other parts of India, and shall be enforced as such.' Come to the next
8 one My Lords. Each of them have the same proclamation. Each of them, and all that happened
9 prior to 1950. Except Jammu and Kashmir, and you'll find that at 379. And see if you...

10

11 **JUSTICE SANJIV KHANNA:** Mr. Sibal, do you think it would have been a unilateral
12 action? Or it was....

13

14 **KAPIL SIBAL:** Sorry, I can't hear you.

15

16 **JUSTICE SANJIV KHANNA:** It was an action on its own? Or it was something which was
17 the Government of India at that time, ensured that it happened? Obviously...

18

19 **KAPIL SIBAL:** Obviously there was no question on its own My Lord. It would never happen
20 like that. Some of them couldn't exist independently.

21

22 **JUSTICE SANJIV KHANNA:** Yeah, but this would be your argument on that. Then we
23 move on.

24

25 **KAPIL SIBAL:** Now look at PDF 379, with all those proclamations are different from the
26 proclamations qua Jammu Kashmir, which is 25th November 1950, before the 26th January
27 1949.

28

29 **CHIEF JUSTICE DY CHANDRACHUD:** The proclamation is the farman of the Nizam as
30 well. The Nizam you find at find at page 377 [UNCLEAR] November 1949.

31

32 **KAPIL SIBAL:** Yeah, but the language is different.

33

34 **CHIEF JUSTICE DY CHANDRACHUD:** This was certainly not voluntary.

35

36 **KAPIL SIBAL:** Of course not. Of course not, My Lords. I agree entirely. This is what I
37 responded to My Lord. But the language is different from Jammu and Kashmir.

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JUSTICE SANJIV KHANNA: So keeping a view probably in J&K, keeping at that time the political environment, it was something different... was something different...

KAPIL SIBAL: That's all that I am saying, My Lords.

JUSTICE SANJIV KHANNA: We have understood that argument.

KAPIL SIBAL: And therefore it was incorporated in these terms in the Constitution, which was not done qua anybody else. Which only shows to you that merger was never contemplated, except in terms of 370. All the others became these proclamations part of these States and then became part of B States. All these States became part of B States. Jammu, Kashmir, was not. It was the only State excluded from part B States.

CHIEF JUSTICE DY CHANDRACHUD: But equally, the proclamation which Yuvraj executed, which you find at Page 379, which we have seen earlier, says that the entire relationship between Jammu and Kashmir and the Union of India will now be governed by the Constitution of India. And all previous understandings....

KAPIL SIBAL: Are gone.

CHIEF JUSTICE DY CHANDRACHUD: ...are all superseded.

KAPIL SIBAL: Absolutely. And see what the language is. The Constitution of India, shortly to be adopted, shall be insofar as it is applicable to the State of Jammu and Kashmir governs the constitutional relationship. So you go back to that. That is 1 and 370 only My Lords. Nothing more than that. I just wanted to show Your Lordships, because Your Lordship has put me this question. I think it was a very significant My Lord's query. And they all follow the uniform pattern of integration, other than Jammu & Kashmir. And My Lords, the White Paper says the White Paper also says that the integration of States did not follow a uniform pattern. In all cases, you will find that My Lords at page PDF 46.

JUSTICE SANJIV KHANNA: Because you have to deal with them differently. All the...

KAPIL SIBAL: Naturally, naturally.

1 **JUSTICE SANJIV KHANNA:** We have understood that argument. Today the issue is not
2 this today the issue is whether 370 was really a temporary thing, and whether in terms of 370
3 could have...

4

5 **KAPIL SIBAL:** I am giving the historical background to show the difference and why did he
6 did not merge. Because in the meantime, many things had happened, including the matter
7 going to the UN. This all happened prior to this My Lords. Therefore, the question of merger
8 didn't arise. That's the point My Lord.

9

10 **JUSTICE B.R. GAVAI:** Mr. Sibal, that all has been argued in your opening arguments.

11

12 **KAPIL SIBAL:** No, no. I am only giving the background to 370 My Lords. I'm not arguing it,
13 My Lord. put it to me. I'm just giving the background nothing more. I'm not arguing. I've
14 argued 370 My Lords. I'm not arguing My Lords.

15

16 **JUSTICE B.R. GAVAI:** Yesterday in your background also, you have given in your opening
17 argument.

18

19 **KAPIL SIBAL:** No, not the merger. Because My Lord put me the merger agreements. There's
20 a difference between merger agreements in all other States at that time, that is the 552 States
21 except for Jammu and Kashmir. That's all My Lords. And they have argued merger I did not
22 argue. Anyway be that as it may My Lords, if just one other thing, My Lords, since we are at
23 this, Your Lordships put to me yesterday. And then I'll come back to My Lords the 355. Your
24 Lordships put to me that look, there is a silence here in the Constitution. My Lords I just want
25 to answer that I'll read what I have to say on this My Lords so that it is on the record. My first
26 statement is Integration was completed when the Constituent Assembly of Jammu and
27 Kashmir completed its task and the Constitution of Jammu and Kashmir was adopted on 26
28 January 1957. The governing structure comprising the Constitution of India and the
29 Constitution of Jammu and Kashmir complement each other, note here, complement each
30 other and through the bridge of Article 370 the scheme operated without conflict for 70 years.
31 This very scheme. There was never a conflict.

32

33 Two, through this complementary structure, the vast majority of provisions of the Constitution
34 of India are applicable to Jammu and Kashmir in one way or the other. This was the
35 integration meant nothing further needs to be integrated. Indian Constitutionalism is not
36 bound by a single scheme of legislative relations or any homogeneous understanding of the
37 concept of integration.

1

2 Three, Article 370, Sub-Article 3, is not silent. My Lords, my answer to that it is not silent as
3 to the consequences reflecting the relationship between Jammu and Kashmir and India after
4 the Constitution of Jammu and Kashmir was framed and the Constituent Assembly completed
5 its constitutional task. This is further buttressed by the fact that in 1954 by C.O. 48, a proviso
6 was added to 368(2). That can't My Lords, mean that 370 was silent on the consequences. If it
7 was silent, 368(2) proviso would never have been added and show that Article 370 could not
8 be amended even through the exercise of Constituent Power, and that by virtue of C.O. 48, the
9 boundaries of the State of Jammu Kashmir could also not be altered as long as 370 was in
10 place. That Article 368 does not apply to 370 is clear from the fact that 370 starts with a *non*
11 *obstante* clause. So it was not silent as to the consequences. Next. There were no silences left
12 to fill, except the silence of the people of Jammu and Kashmir, who were never consulted and
13 taken into confidence when issuing C.O. 272 and 273. That's the only silence that prevailed.
14 Bilateralism is at the heart of the mechanism, provided by Article 370, in terms of which laws
15 applicable in the Union of India through the Constitution of India, as applicable to Jammu
16 and Kashmir are to be applied. It is this bilateral process which allows for a process of
17 integration that is constitutionally envisaged in Article 370 of the Constitution, and any
18 adjustment of the relations between Jammu and Kashmir and the Union must follow this
19 bilateral process. And last of all, even with respect to 368 of the Constitution, the process of
20 exercise of Constituent power, resulting in the amendment of the Constitution is also given
21 effect through a bilateral process. Bilateralism is at the heart of the said process, because you
22 have to consult at least half, get agreements of at least half the members of the states. That too
23 is a bilateral process. Nothing can happen outside the... there can't be a unilateral act of an
24 Executive, not even Parliament. Consider this My Lords. What we are talking about, a
25 unilateral act of the President acting on the aid and advice of Council of Ministers, not
26 Parliament. So, with respect I say, there is no silence. So that was our submission on that issue.
27 And then kindly have a look quickly at the Constitution of India for a minute. Kindly, My Lords,
28 just look at this. Yes.

29

30 Now if you see, My Lords, I'm not going to read the language. Just want to ask Your Lordships
31 to notice three things. One, there are, entire Article 370 as two colons. The rest are all
32 semicolons. And the two colons are reside where My Lords? They reside in (d), there is a colon
33 after (d) and there is a colon after (3) 370 Sub-Article 3.

34

35 **CHIEF JUSTICE DY CHANDRACHUD:** Colon after....?

36

1 **KAPIL SIBAL:** (d), My Lords, 37(1)(d) and colon after 370 Sub-article 3. So you cannot
2 exercise that power independent, because it's integrated, that very, the process is integrated,
3 and it's only a process that we are talking about. We're not talking about powers here. 370 is
4 only a process of integration. And My Lords, Constitution Bench on *Manohar Lal* mentions
5 that. And we are dealing with the process adopted by the Government of India consistent with
6 this process of integration. We're not talking about anything else My Lords. There is no
7 unilateral notification issued by the Government of India by the President on the aid and
8 advise of the Council of Ministers, that's before you. There is no unilateral declaration. And I'll
9 assume for a moment, there is a silence. How will Your Lordships integrate that silence into
10 272 and 273? Because 272 and 273 deals with 370 Sub-Article 3 as it stands. You will still have
11 to say whether 272, 273 is consistent with the unilateral notification to be issued by the
12 President, which is not there, and which is not before you. It's not possible to match the two.
13 It's not possible for you to state constitutionally My Lords, that 370 notification, or under Sub-
14 article 3, will justify the action taken, which is 272 and 273, which has nothing to do with the
15 notification. If you uphold 272 and 273 you will have to uphold it on its own terms, not on
16 terms other than 272, 270 Sub-Article 3 and the proviso, because that's what they have
17 adopted. Even if you were to accept that argument, it's not possible for Your Lordships, with
18 the greatest respect to My Lords, uphold the action under 272 and 273.

19
20 So I was... That's one thing I was saying. Now, kindly see My Lords. Please kindly see kind...
21 and kindly see the absurdity of this. The absurdity is that when it comes to 370(1)(b) (1) and
22 (2), you have to consult or you have to... the state has to concur. If it comes to 370(1)(d), again
23 you have to consult or concur. When it comes to 370(3), you can abrogate without
24 consultation, without concurrence. How can that interpretation ever be accepted by a
25 Constitutional Court? Means that you don't need consultation, you don't need concurrence.
26 You can unilateral do it, for everything else you will need that. That's a constitutional
27 absurdity. For individual articles, you have to concur, but for the whole abrogation, you don't
28 have to concur. Even for a law, you have to concur My Lords. I... with the greatest respect, at
29 least take the text and the context, not a pretext.

30
31 Now My Lords, just want one other thing. If you look at Article 370(1), 'notwithstanding
32 anything in the Constitution' starts with it. Your Article 370(1)(a), 'notwithstanding, anything
33 in the Constitution.' Article, and then 370(1)(a), Sub-article (2), 'notwithstanding anything in
34 the Constitution'. Then My Lords, Special Provision with respect to State of Assam,
35 'notwithstanding anything in the Constitution.' 370(1)(c), 'notwithstanding anything in the
36 Constitution.' None, the 368 will not apply to any provision of the Constitution in this chapter.
37 Is that not against basic structure? If the argument is at least I didn't argue the basic structure,

1 but otherwise that's also against basic structure. Why don't you set aside the entire chapter?
2 Every provision other than (1), which relates to Andhra Pradesh, starts with 'notwithstanding
3 anything in the Constitution.'

4

5 Now, as far as Jammu Kashmir was concerned, they had an added protection. 'The proviso to
6 368' That constitutionally means that the complete merger that we are talking about *dehors*
7 'The Proviso' could never be done. There could be an argument as far as other articles are
8 concerned, you may still apply... use 368. You may argue that. To what extent it will be upheld
9 or not is a separate issue, because in some of these articles even treaties cannot be changed.
10 Some of these articles have treaties, My Lords, between the Government of India which was
11 entered into in the past, cannot be changed. So whether 368 will apply or not, we are not into
12 this. I'm just giving you all the scheme. I'm done with this. Now My Lords, I come back to my...
13 try and finish as quickly as possible, because lot of eminent Counsel waiting for me to finish,
14 which I wish to do. I want to.. Just one other thing before I move on. Off set my note, My Lords,
15 if Your Lordships don't mind, which is now rejoinder.

16

17 **JUSTICE SANJAY KISHAN KAUL:** What page, Mr. Sibal?

18

19 **KAPIL SIBAL:** That is rejoinder. I don't...

20

21 **JUSTICE SANJAY KISHAN KAUL:** What page of the rejoinder?

22

23 **KAPIL SIBAL:** Page. I'm just giving Your Lordships, page, kindly come to 23. Where is that
24 interpretation? I'm sorry. Gopalaswami. Sorry My Lords 17. I'm sorry. I apologize.

25

26 **JUSTICE SANJIV KHANNA:** Page 17?

27

28 **KAPIL SIBAL:** 16. Starts at 16, but at 1-7.

29

30 **CHIEF JUSTICE DY CHANDRACHUD:** Yes,

31

32 **KAPIL SIBAL:** Your Lordships will see the centrality of this, that he is part of the drafting
33 committee. He is My Lords piloting the Bill. My Lords, has it Justice Surya Kant?

34

35 **JUSTICE SURYA KANT:** Yes.

36

37 **JUSTICE SANJIV KHANNA:** This we have already...

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KAPIL SIBAL: No, no, My Lords, just one last sentence of this. But before he issues any order of that kind that is under 370(3), the recommendation of the Constituent Assembly would be a condition precedent that explains the goal of the Article.

JUSTICE SANJIV KHANNA: That's been [UNCLEAR]

KAPIL SIBAL: No, that's the understanding throughout My Lords till 5th August. And our interpretation is consistent with it, and their action is consistent with it which we are now challenging. So that was one. Then My Lords, now I come back to that argument My Lords that I made yesterday, that once the dissolution took place, 356 could not have been imposed as a matter of law.

CHIEF JUSTICE DY CHANDRACHUD: That point we noted.

KAPIL SIBAL: And 356 couldn't have been imposed, all that happened by virtue of the power under 356 is all illegal and void. Because the structure of the Jammu and Kashmir Constitution is entirely different. My Lord knows that any act of dissolution has to be done on the aid and advice of Council of Ministers. That applies not just to Jammu Kashmir, but to the rest of India. No dissolution of an Assembly can take place without the aid and advice of the Council of Ministers. Therefore, My Lords constitutionally the dissolution on the 21st November, was void. And you can't interpret the act of the Governor and the powers of the Governor and the responsibility of the Governor, different from other States in India that as far as Governor of Jammu & Kashmir he can do it, but the rest of the India Governor cannot do it because the provision is the same. So if that action is bad, 272 has to go, 273 has to go. And even if you assume that action is good, you can't exercise this power under 356, so 272, 273 will still have to go because the power is only the power to make law. You are the delegate of the legislature you can only make law. You can't change Article 3. And My Lords, my learned friends, the learned Solicitor General My Lords cited several instances of 356 where Article 3 is suspended, but not with reference to the change of Article 3. That's the usual procedure that was followed, but not to change Article... to amend Article (3). That is never the power given. And that is apparent in 357 Sub-Clause 2, My Lords. Kindly see 357 now. It's in my note itself, My Lords. I will just give Your Lordships the page. Page 25. PDF 25. Kindly see para 60 My Lords. All My Lords have 357....357 Sub- Article 2?

CHIEF JUSTICE DY CHANDRACHUD: Yes.

1 **KAPIL SIBAL:** Justice Gavai, has it My Lords. This is 25 PDF. 25, 357(2). Any law as
2 applicable to Jammu Kashmir, that's very important. Any law..... I'm sorry My Lords. Justice
3 Khanna? Any law made in exercise are part of the Legislature of the State by Parliament or the
4 President or other authority referred to in Sub-Clause A of Clause 1 which Parliament or the
5 President or such other authority would not, but for the issue of Proclamation under 356 have
6 been competent to make shall to the extent of the incompetency cease to have effect on the
7 expiration of one year after the Proclamation has ceased to operate. So how could 272 be
8 issued?

9
10 Any law made has to expire after 1 year under the Constitution of Jammu & Kashmir. One of
11 the distinguished councils on the other side didn't read this part. He read My Lord, 357(2)
12 which is different, which is the Constitution of India. Any law made in exercise of the power of
13 the Legislature of the State by Parliament or the President or other authority referred to in
14 Subclause (a) of Clause 1 which Parliament or the President or such other authority would not,
15 but for the issue of a Proclamation under 356, have been competent to make shall, after the
16 Proclamation has ceased to operate, continue in force until altered or repealed or amended by
17 a competent Legislature. So how do you My Lords, amend Article 3 of the Constitution and
18 justify it either under 356 or under 357, because the Legislature has the power to, not to... to
19 make law? How do you then do it? And that also temporary emergency laws, remedial laws.
20 It was original 356....

21
22 **JUSTICE SANJIV KHANNA:** Just read the last portion once again. One, it says law made.
23 Is it talking about Legislation made? Legislation in form of laws or [UNCLEAR].

24
25 **KAPIL SIBAL:** Yes.

26
27 **JUSTICE SANJIV KHANNA:** And read the last part.

28
29 **KAPIL SIBAL:** Last part. ...which shall so cease to have effect, sooner...

30
31 **JUSTICE SANJIV KHANNA:** Yes, cease to have effect on expiration or period after the
32 Proclamation has ceased to operate.

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

35
36 **JUSTICE SANJIV KHANNA:** Except as respect to things done or omitted to be done before
37 the expiration of the said period...

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KAPIL SIBAL: Yes.

JUSTICE SANJIV KHANNA: This part will have to be explained, unless the provisions which are so ceased to have effect are sooner repealed or re-enacted with or without modification by act of the appropriate Legislature.

KAPIL SIBAL: That's correct. So, My Lords, how can that appropriate Legislature, when it comes into being, ever do this?

JUSTICE SANJIV KHANNA: Just two things Mr. Sibal. One, is it dealing with laws made and not with the effect of will it apply also to Article 370? Or for that matter...

KAPIL SIBAL: Once there is, once 356, is there, it will apply.

JUSTICE SANJIV KHANNA: Just, we are not, it's a matter of interpretation, it's not a matter of taking sides.

KAPIL SIBAL: I agree, I agree My Lord. I'm not taking sides. I'm only taking my side, My Lord.

JUSTICE SANJIV KHANNA: You are doing that.

KAPIL SIBAL: That I am entitled to take. Hopefully, My Lord.

JUSTICE SANJIV KHANNA: One, it says "law made." Will it also apply to the power exercised by the Legislature in terms of the Constitution? One aspect. The second is, to the extent of incompetency, cease to have effect on expiration of period of one year...

KAPIL SIBAL: Correct.

JUSTICE SANJIV KHANNA:after the Proclamation ceased to operate, except as respects to things done or omitted to be have been done before expiration of that period.

KAPIL SIBAL: Correct.

1 **JUSTICE SANJIV KHANNA:** So what it also protects is whatever has been done or omitted
2 to be done before expiration of that period will be protected.

3

4 **KAPIL SIBAL:** Correct. Absolutely.

5

6 **JUSTICE SANJIV KHANNA:** Will this not get covered in that part?

7

8 **KAPIL SIBAL:** It won't, because this is an amendment of the Constitution. It's not a law.

9

10 **JUSTICE SANJIV KHANNA:** Then you are contradicting yourself?

11

12 **KAPIL SIBAL:** I'm not. It's not a law. This is not a law My Lord. This is an amendment to
13 the Constitution.

14

15 **JUSTICE SANJIV KHANNA:** So what it talks about is law.

16

17 **KAPIL SIBAL:** No. Because you're a delegate of the Legislature. In other words, whatever
18 power the Legislature has to make laws, you can make laws. My Lords, 356 is not an omnibus
19 position to take over the Legislature and do what you like.

20

21 **JUSTICE SANJIV KHANNA:** Mr. Sibal, when we interpret, we have to interpret the section
22 without taking... you may say in the contextual interpretation, you have to take the whole
23 background.

24

25 **KAPIL SIBAL:** I'm sorry to say that's covered by *Bomma*, My Lords, That's not, there's no
26 caveat to it. That's covered by *Bomma*. And I've cited all those passages of *Bomma*, to
27 Your Lordships already.

28

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

30

31 **KAPIL SIBAL:** Let's not find any other power, that's non-existent. The temporary provision.
32 When we interpret, especially because Your Lordships interprets the Constitution. We only
33 make arguments. It's for posterity, it's not for this case or that case.

34

35 **JUSTICE SANJIV KHANNA:** You don't have to remind us.

36

1 **KAPIL SIBAL:** Your Lordship knows that. If you give such a power to Parliament under 356,
2 Your Lordships, anything can happen. Anything can happen. Because I said that the other day,
3 I'm digressing a bit, with respect to Maharashtra, I said if Maharashtra is upheld, it'll happen
4 again and it happened in Maharashtra itself. Because we have to protect the Constitution. We
5 don't have to do anything more than that. However, at both sides, My Lords, endeavours to
6 protect the Constitution and Your Lordship upholds it. That's our task. And upholds it for
7 posterity, not for a particular case.

8

9 **JUSTICE SANJIV KHANNA:** 357(2) of the Constitution of India?

10

11 **KAPIL SIBAL:** Yes, I will, which was, I'm sorry, PDF, I got it. Yes, I will.. 'has ceased to
12 operate continue in force until altered or repealed or amended by the competent Legislature
13 or other authority.'

14

15 **JUSTICE SANJIV KHANNA:** What's the difference between the two?

16

17 **KAPIL SIBAL:** Difference is that is one year.

18

19 **JUSTICE SANJIV KHANNA:** One year?

20

21 **KAPIL SIBAL:** That's only..

22

23 **JUSTICE SANJIV KHANNA:** And protection whatever is [UNCLEAR].

24

25 **KAPIL SIBAL:** Yes, legislature [UNCLEAR]. Because it's been a delegate, before Parliament
26 is a delegate.

27

28 **JUSTICE SANJIV KHANNA:** But in both the cases, is law made in exercise of power of
29 legislature.

30

31 **KAPIL SIBAL:** Yes, absolutely. That if this is a law made, if Your Lordships believe it's a law
32 made, then within 356, because 356 is to restore democracy and it's only a temporary measure,
33 right? And My Lords, kindly note, not only that, you cannot take irreversible action. That also
34 is decided by this court, that during this time, Your Lordships knows the difference between
35 *State of Rajasthan* and *Bommai*. In *State of Rajasthan*, they said... in *Bommai* they
36 said, you must dissolve after the proclamation has been accepted by both houses of
37 Parliament. You can't do it before. Until there is suspension, which is what I was saying

1 yesterday to Your Lordships. That's irreversible. Therefore, **Bomma** said you can't do it.
2 **Rajasthan** said it's possible before approval, **Bomma** disagreed. That can only happen
3 after approval. But here what happened? It happened before. And it happened without aid and
4 advice. That's even worse. I could have understood if the Governor has sent a report way back
5 on 20th June. I could have understood then, but not in this fashion. Therefore, the whole
6 motive was political. And I've been saying that from day one, the motive was political, the
7 process was political, but the end result was unconstitutional. And what did... I have already
8 pointed that out, let's not take more time of the court. What did Ambedkar ji say? He said, "I
9 cannot altogether, deny that there is a possibility of these articles being employed for political
10 purposes." So what I've said before Your Lordships is no different from what Ambedkar ji said.
11 His fear have turned out to be right. So My Lords, therefore, now kindly come to... now come
12 to the argument. I've done with My Lords the dissolution part. I've done with 356. Your
13 Lordships have read all the judgments My Lords. I'm not going to repeat anything. Now I come
14 to the argument of impossibility. An argument not raised, not part of the counter affidavit, not
15 part of any pleadings, not part of any proclamation, not part of arguments the last time also,
16 not part of the first set of written submissions, and yet we have to deal with it. Now My Lords,
17 let me tell Your Lordships the principle of impossibility. Constitutional Principle. I will just
18 enunciate it. If there is a constitutional obligation to be performed and it has to be performed,
19 then in furtherance of that constitutional obligation, the principle of impossibility of
20 performing another obligation comes in. Give Your Lordships an example. The term of the
21 Assembly is 5 years. Assembly is dissolved in four-and- a half years. There is no Assembly and
22 the judgment my learned friend cited there is a Presidential election or election of the Vice
23 President and Members of Assembly have to vote but the term of the Assembly expires in 5
24 years' time. The Constitution says you have to perform that obligation. So if the Assembly is in
25 dissolution, it's impossible for them to vote. That's the Constitutional Principle. Where is the
26 obligation under 370? It has to be stated in the Constitution. You can't silently invoke it. And
27 370 says Free Bill may, not shall. There is no obligation. That's the principle of impossibility.
28 There's absolutely no application. How is it impossible, My Lords? Why is it impossible? No,
29 you made it possible by acting it the way you have done. That's the way to do it My Lords. Now,
30 whether that's constitutional or not is a different issue, but it's certainly not impossible. If you
31 uphold it, it's not impossible. If you don't uphold it, it's only unconstitutional. Beyond that,
32 Your Lordships are not asked to decide. So where is the question of impossibility? That's my
33 answer My Lords. And the judgment that my learning friend cited. what's that judgment...In
34 the Presidential election is exactly that namely, the election had to take place. Voting had to
35 be done the Assembly was dissolved. So how could they have voted? The proclamation was
36 there So that's the Constitutional Principle.

37

1 Quickly I will take about ten more minutes and I'm done. Kindly come to 272. Page 27. PDF
2 page 27 . Volume... My Rejoinder PDF 27. I mean it is just... I've already argued it. This is all
3 beyond powers of the President and in any case he has to act on the aid and advice of the
4 Council of Ministers, Parliament also has nothing to do with it. And My Lords, it doesn't need
5 concurrence, doesn't need consultation, that argument I've already made. And if that can't be
6 done, then we are left with nothing. Then 273.... My Lords, also kindly note....

7

8 Kindly come to my... the 367 argument that was made. The interpretation part. And then they
9 relied upon *Damnoo*, that argument has already been made. I'll not repeat it. *Damnoo* itself
10 says that this particular change at that point in time was not a change in the substance of 370.
11 In the Jammu and Kashmir Constitution is applicable the word Governor was already there.
12 Therefore, you couldn't have interpreted it in any other way. That's all, that has already been
13 argued.

14 Now come to Article 3. PDF 33.

15

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

17

18 **KAPIL SIBAL:** As far as Article 3 is concerned, My Lords, let's assume I've made my
19 arguments on the proviso already. Then under 356 it can't be done. But now let's assume the
20 proviso is not there. Let's assume that all this is valid. Let's assume. My Lords, how can they
21 make the Union, a state into a Union Territory? Under what provision of law? How can... under
22 which, what power? Then My Lord put to them, that there may be a situation of a national
23 security situation? Therefore, temporarily, you may need to do that. But the national security
24 situation is dealt with by Article 352 of the Constitution. 352 to 359 deals with all this. So how
25 can you use Article 3 to do that? You can't use a power in 3 and of course, that's not their case
26 also. It's nobody's case that this was being done because of national security. Pulwama
27 happened in February 2019 during President's rule. And then they had elections in May 2019.
28 And what is the justification of keeping, not constituting the state for four and a half years?
29 Under what constitutional basis can you say that, that I will keep a particular state as Union
30 Territory for four and a half years? You say, you are having, going to have municipal elections.
31 You want to have local Government elections. There are, number of, tourism has increased. So
32 what's the impediment, then? What's the constitutional logic My Lords, or basis, on the basis
33 of which you can deny the people of Kashmir a statehood? And, India is a Union of States. As
34 Your Lordship rightly said, My Lord the Chief Justice, that a Union Territory can get the status
35 of a state, but not the other way around. It's never happened in the history of this country.

36

1 Actually 272, 273 all this has never happened in the history of this country, not even during
2 emergency. So just one last thing, and then I am done. I want to show you the annexures in
3 this. This is my argument in 3, others will deal with it in some form. I want to show just one,
4 yes, kindly see PDF 42. Now this is dated 17th May 1949, Your Lordship will notice here, and
5 this is all documents are provided in the annexures, that at this time.. at this point in time,
6 Ayyangar Sheikh Abdullah and Vallabhbhai Patel and Nehru were all getting together to draft
7 370. And on 17th May 1949 is a letter written by Gopalaswami Ayyangar and he tells
8 Vallabhbhai ji, here's the draft. Jawahar Lalji has seen and approved of it. Will you kindly let
9 Jawaharlal ji know direct as to your approval of it. No direct.. you directly tell him as to your
10 approval of it. He will issue the letter to Sheikh Abdullah only after receiving your approval.
11 Vallabhbhai Patel was the architect of 370. Nothing was done without his approval. In fact, he
12 went to Parliament, kindly see there's another letter, another document here. 3rd November,
13 yes. It's very interesting, My Lords. 3rd November. No, not 3rd November. Yes, 3rd.

14

15 **CHIEF JUSTICE DY CHANDRACHUD:** Just look at Sardar Patel's letter at page 47... 46.

16

17 **KAPIL SIBAL:** 46, yes, correct. That's a draft of 306(s). Kindly come to 244 My Lords.

18

19 **CHIEF JUSTICE DY CHANDRACHUD:** Right, there's that letter.

20

21 **KAPIL SIBAL:** 'Thank you for your letter of 15th, which I have received only this afternoon
22 on my return from the...' One second. 'I find there are some substantial changes over the
23 original draft, particularly in regard to applicability of fundamental rights and directive
24 principles. You can yourself realize the anomaly of the state becoming part of India, and at the
25 same time not recognizing any of these provisions. I do not at all like any change after our
26 party had approved to the whole arrangement, in the presence of Sheikh Sahab himself.
27 Whenever the Sheikh Sahab wishes to back out, he always confronts us with his duty or to the
28 people. Of course, he owes no duty to India or to the Indian government or even on his
29 personal basis, to you and the Prime Minister who have gone all out to accommodate him. In
30 these circumstances, any question of my approval does not arise. If you feel it is right thing to
31 do, you can go ahead and do it.' Now see the next document, 3rd November. 'There was some...'
32 Again this is by Vallabhbhai Patel. 'There was some difficulty about the provision relating to
33 Kashmir. Sheikh Sahab went back on the agreement which he had reached with you, in regard
34 to the provision relating to Kashmir. He insisted on certain changes over fundamental
35 character which would exclude in their application to Kashmir, the provisions relating to
36 citizenship and fundamental rights and make it necessary in all these matters, as well as others
37 not covered by the accession to the subject to seek the concurrence of the State Government,

1 which is sought to define as the Maharaja acting on the aid and advise of Council of Ministers
2 appointed under the proclamation on 8th March 1948. After a great deal of discussion, I could
3 persuade the party to accept all the changes except the last one.' He was the one who was
4 interacting with the party. And he was the one who finally persuaded the party to accept all
5 the changes, except one. And of course Sheikh Abdullah...

6

7 **JUSTICE SANJIV KHANNA:** This is to ensure there is a political compromises to ensure
8 flexibility [UNCLEAR]...

9

10 **KAPIL SIBAL:** Absolutely, all I'm saying is everybody was part of that process.

11

12 **JUSTICE SANJIV KHANNA:** You are accepting the second part also that way. There was
13 flexibility to ensure that in future it works itself out.

14

15 **KAPIL SIBAL:** That's correct. All that I am saying is, this was, they were all collaborating,
16 the key players were collaborating in drafting 370, and this is how they understood 370.

17

18 **JUSTICE SANJIV KHANNA:** That argument you have already made.

19

20 **KAPIL SIBAL:** I've already made. I'm not repeating it, I just wanted to read these letters.
21 And then I've got this table of Jammu Kashmir, where Jammu and Kashmir is ahead of most
22 of the States in India in every parameter. But we are not concerned with that My Lords, I just
23 put it. So that's all I have to say, My Lords, I just want to say at the end that as I said, Your
24 Lordships ultimately is the arbiter of what this Constitution should look like and how it's to be
25 interpreted. But I only want to request Your Lordship to think of one thing that as I walk out
26 in silence of this Court, let the Court speak on behalf of the people of India. Because this Court,
27 this Government, or any Government, any administration acts for the people of India and it
28 should not be that acts are done when a part of the people of India are silent, who have never
29 been consulted and whose fate will be decided by the Cabinet sitting here without reference to
30 Parliament, without reference to Legislature, without reference to the people. My Lords,
31 people are central to the Constitution of India. We should not forget that. Thank you very much
32 for giving me this time. Excuse me for a while.

33

34 **CHIEF JUSTICE DY CHANDRACHUD:** Mr. Subramaniam, you'd be arguing.

35

36 **GOPAL SUBRAMANIAM:** Yes, My Lord. My Lord am I audible? Am I visible?

37

1 **JUSTICE SANJAY KISHAN KAUL:** Both Mr. Subramaniam.

2

3 **GOPAL SUBRAMANIAM:** Thank you My Lord. My Lord, I just want to make a few brief
4 submissions on Article 370 in the light of Your Lordship's questions and observations. My
5 Lords, it might have begun as a temporal probation, initially. I don't think anybody can dispute
6 that people envisaged it as of temporality. But My Lords the provision had adequate evidence,
7 intrinsic evidence, in its words, to suggest that it could be there to stay and that is what has
8 happened. And My Lords this is the crux of the matter. Has it happened in a manner known
9 to Article 370? My answer My Lord, is, Yes. In a manner known to Article 370, Article 370
10 stays. Now My Lords, how has this been achieved. As Your Lordships would notice that it was
11 a Constituent Assembly of India which gave the people of Jammu and Kashmir the ability to
12 determine their political future through a Constitution. The Instrument of Accession, My
13 Lords did not completely transfer sovereignty as held by Justice Gajendragadkar in **Prem**
14 **Nath Kaul's** case, the Instrument of Accession itself had reservations that it was intended to
15 abide by a future Constitution, a future determination by the people of India. Which is why
16 Justice Gajendragadkar said that until the 1939 Constitution was there the Maharaja was still
17 enjoying a certain kind of sovereignty to make laws, and therefore My Lord, upheld the law in
18 question. Now My Lord, when does integration become complete is the question? And My
19 Lord, in this case, unlike the cases of privy purses, unlike any other case, the sovereignty
20 actually transfers from the king, from the monarch to the people. And this transition from the
21 monarch to the people is the common framework of both the Constituent Assembly in India,
22 and a Constituent Assembly to be formed.

23

24 The notification of 25th November 1949, My Lord, expressly uses the words "Constitution" as
25 applicable or insofar as in applicable. Because that is how Article 306(a) of the Draft
26 Constitution presaged it. Article 306(a) is the only article which refers to the Instrument of
27 Accession and refers to the matters contained in the Instrument of Accession as limiting the
28 power of Parliament to make laws. Therefore, My Lord, the Instrument of Accession expressly
29 finds a place in Article 370(1) of the Constitution. The expression Constituent Assembly also
30 finds a place in Article 370 of the Constitution. But there was a very important question, which
31 the Chief Justice has voiced on a few occasions. "What is there to show that the Indian
32 Constitution recognized the Jammu and Kashmir Constitution?" I thought it was a very critical
33 question, and I have, My Lord, two answers. The Constitution does recognise the Jammu and
34 Kashmir Constitution. May I invite Your Lordships' attention to the text of Article 370 itself,
35 that recognizes that Constitution? Please look at Article 370 with me for a moment. In Article
36 370, after Sub-Article (1), (2), and if Your Lordship sees (2), if the concurrence of the
37 Government of the state referred to in para 2 of Subclause (b) of Clause 1, or in the second

1 proviso to Subclause (d) of that clause be given before the Constituent Assembly, and may I
2 request Your Lordships to look at the next few words. But the purpose of framing the
3 Constitution of the state is convened. Constitution of the state, is no other Constitution, except
4 the Jammu & Kashmir Constitution. And there is a second piece of evidence, in the
5 Constitution, which has not yet been brought to Your Lordship's attention. There was the state
6 reorganization in 1956. The concept of Part B, Part C, all of them disappeared, if Your
7 Lordships recollect. The Constitution's 7th Amendment Act, in Article 152, inserted the words
8 "excluding the State of Jammu & Kashmir", in Article 152. This is 7th Amendment, and My
9 Lord, the dates are slightly significant. Very important, My Lord is the date. The 7th
10 Amendment was assented on the 19 October 1956, and My Lord, by this time the draft
11 Constitution of Jammu and Kashmir was introduced on 10-10-1956. And the draft
12 Constitution of Jammu and Kashmir established the High Courts of Record and established
13 the Legislature under its Constitution.

14

15 **CHIEF JUSTICE DY CHANDRACHUD:** What happened on 10-10-56 Mr. Subramaniam?

16

17 **GOPAL SUBRAMANIAM:** 10-10-1956, the draft Constitution of Jammu and Kashmir was
18 introduced for adoption. And that Constitution clearly had provisions for Executives, the
19 Legislature, and the Judiciary to be established in terms of that Constitution. So, institutions
20 were established under that Constitution, and therefore Part 6 was rendered inapplicable by
21 the insertion of the words in the Constitution 7th Amendment Act excluding the State of
22 Jammu and Kashmir. So My Lords, it was a very valid question that Your Lordships put to us,
23 "Is there any evidence apart from conduct?" which I'll deal with separately; in terms of
24 Constitutional Conduct that the Constitution of Jammu and Kashmir is alluded, or is
25 cognitively taken note of. It is alluded in the words in my submission in Sub-article 2. It has
26 cognitively taken note of, because that chapter relating to Part 6 was rendered inapplicable
27 under Article 152, which is why Your Lordships noticed now the C.O. 273, it seeks to exclude
28 that exclusion. It refers to 152, it says, 'notwithstanding anything in this Constitution.' So My
29 Lord, I submit that the Jammu and Kashmir Constitution does find a place. But let's come to
30 the more critical point about the word recommendation in Sub-Article 3, and whether Sub-
31 Article 3 was in fact employed. It's a very critical question, Your Lordships asked. The word
32 'recommendation' was chosen consciously because the Constituent Assembly of Jammu and
33 Kashmir was not constituted by the Government of India or any initiative of the Government
34 of India. It was under the proclamation of the Maharaja, under the Jammu and Kashmir
35 Constitution. That Constituent Assembly was not an emanation of the Government of India's
36 Act.

37

1 Second, My Lord, an order which had to be issued under Article 370(1) necessarily have to be
2 an order in the name of the President and that's because all executive power vests in the
3 President. The argument of President being answerable to Parliament, I'm sorry My Lord with
4 respect, is completely contrary to the decisions of this court, with reference to in Westminster
5 style of Government, which we have adopted, which Dr. Ambedkar on the 4th November,
6 when he introduced the Constitution, he spoke about the role of the President. And My Lord,
7 I submit, under Article 81, the President, My Lord, is a part of Parliament. I was a little
8 surprised to see the President is answerable, My Lord, he is a part of the Parliament.
9 Parliament, by very definition, includes the President and two Houses, My Lord. And under
10 our Constitution, the President can never act without the aid and advice of the Council of
11 Ministers, the Governors could under Shamsher Singh, but not the President. So My Lord, a
12 claim of untrammelled discretion and power in the President under Article 370(1), itself My
13 Lord, is flawed.

14

15 But now, My Lord, let's see how events have played out. Your Lordships wanted to know what
16 Sub-Article 3 employed? Was there anything to show that it was effectuated and I say, My
17 Lord it was effectuated in four different ways. The *summum bonum* of all the four steps is it
18 was effectuated. And My Lord, the decision to abrogate Article 370 cannot be taken *ad*
19 *nauseum*. It was meant to be taken once. It had to be taken by the Constituent Assembly. Now
20 My Lord the law let us look for evidence of it. The first is, please look at My Lord, C.O..... if
21 Your Lordships will look at C.O. 42, Would Your Lordships kindly go to the Documents
22 Volume for a moment? Please go to Document Volume 3 and would Your Lordships kindly
23 come at page 12 of the PDF, C.O. 44. I'm sorry, C.O. 44. Please see My Lord this. My Lord, this
24 is on the recommendation of the Constituent Assembly. PDF 12, My Lord. And if Your
25 Lordship sees this is a Declaration under Article 370(3), of the Constitution and if Your
26 Lordships now sees the Declaration in exercise of the powers confirmed by Clause 3 of Article
27 370 of the Constitution of India, the President, on the recommendation of the Constituent
28 Assembly of the State of Jammu and Kashmir is pleased to declare that as from the 17th day
29 of November 1952, the said Article shall be operative with the modification that the
30 explanation in Clause 1 thereof the following explanation is substituted which My Lord, is
31 about the *Sadr-e-Riyasat*. But My Lord this is a decision under 370(3). What was the next
32 decision? The next decision was again a recommendation of the Constituent Assembly, namely
33 an invitation My Lord, to apply the provisions of the Constitution of India, subject to certain
34 modifications. That was the decision My Lord. Again of the Constituent Assembly. It was a
35 resolution of the Constituent Assembly and that My Lord, is significant, because that
36 resolution was on the 15 February 1954. Your Lordships will find that in Volume D-7, at page

1 978 and it was adopted in D-7, page 979. That annexure My Lord, which was the annexure
2 attached to the report of the drafting committee was tabled in the Constituent Assembly..

3

4 **CHIEF JUSTICE DY CHANDRACHUD:** Where do we get it? At page, 237.

5

6 **GOPAL SUBRAMANIAM:** Volume D-7, Yes, My Lords, could Your Lordship first see
7 Volume D-7, at page 937. Let me show you first.

8

9 **CHIEF JUSTICE DY CHANDRACHUD:** 937?

10

11 **GOPAL SUBRAMANIAM:** Yes, first 937 and then I'll show you My Lord the resolution.

12

13 **CHIEF JUSTICE DY CHANDRACHUD:** That's is the report of the Drafting Committee?

14

15 **GOPAL SUBRAMANIAM:** Yes. This, My Lord, was tabled before the Constituent Assembly,
16 and in this report of the drafting committee, Your Lordships will notice, at 938, PDF 938,
17 would Your Lordships look at the first sentence? The provisions of the Constitution of India,
18 which, in addition to Article 1 and Article 370, should apply in relation to the State of Jammu
19 and Kashmir, and the exceptions and modifications, subject to which they should so apply will
20 be as follows. And then all these are extracted. But what's important My Lord, is Article 1 and
21 Article 370, in addition. This is introduced on the 11 February 1954. And on 15 February 1954,
22 if Your Lordships go to page 978, My Lords, of the same volume, this was adopted. So, My
23 Lord, the first body, which looked at the matter was the Constituent Assembly. They invited
24 the application, of the provisions of the Indian Constitution, and at 978 Your Lordships will
25 see, at the bottom of the page, please look at the bottom My Lord. Resolution, that having
26 adopted the report of the drafting committee this day, the 15th February 54, and having thus
27 given its concurrence to the application of the provisions of the Constitution of India, in the
28 annexure to the aforesaid report, this Assembly authorizes that Government of the state to
29 forward a copy of the said annexure to the Government of India for appropriate action. And
30 that is how, on the 14 May 1954, the 1954 Order was passed. And Your Lordships will notice
31 the words of that order. It's in Volume D-3, My Lords, at page 13 Your Lordships will notice.

32

33 **JUSTICE SANJIV KHANNA:** Page number? Volume 3?

34

35 **GOPAL SUBRAMANIAM:** Yes. Volume D-3, page 13. Your Lordships will find an express
36 continuance of Article 370. Please see page 13. This is the '54 Order, and please come to 2.
37 "The provisions of the Constitution which, in addition to Article 1 and Article 370 shall apply

1 in relation to the State of Jammu and Kashmir, and the exceptions and modifications subject
2 to which they shall so apply shall be as follows. And, My Lord, this order of 1954 was again
3 tabled before the Constituent Assembly. If Your Lordships go to Volume D-7, at page 990. And
4 at page 990 My Lord, Your Lordships will notice, that in the Constituent Assembly, the 1954
5 Order is laid on the floor of the House. Please see 990. Mr. Dogra. The recommendations of
6 the House in this behalf had been sent to the President of India who in exercise of the powers
7 conferred under Clause 1 of Article 370 was pleased to issue Constitutional Order 1954. I lay
8 the copy of this order on the table of the House.

9

10 As I told Your Lordships a little while earlier, the Draft Constitution of Jammu and Kashmir
11 was introduced by Mr. Dogra on 10-10-1956. Your Lordships will find in the same volume at
12 page 1058, in that same volume. Your Lordships will see 1058 PDF.

13

14 **JUSTICE SURYAKANT:** Page number please repeat.

15

16 **GOPAL SUBRAMANIAM:** Page number 1058 PDF in Volume D-7. Otherwise it has a red
17 letter page of 2417.

18

19 **JUSTICE SURYAKANT:** That's it.

20

21 **GOPAL SUBRAMANIAM:** And Your Lordships will notice Mr. Dogra, 'Sir, I beg to present
22 the report of the drafting Committee and introduce the Draft Constitution as settled by the
23 committee.' And Your Lordships may just see four lines later, 'the fundamental principle on
24 which the draft is based are Parliamentary Democracy, Responsibility of the Executive to the
25 legislature, joined responsibility of the Cabinet, separation of the various powers of the State,
26 Executive, Legislative and Judicial and finally, the rule of law. One basic feature of the
27 Constitution is that we have once again affirmed that the State is an integral and inalienable,
28 part of India and will ever remain so.'

29

30 There was a very thoughtful observation from My Lord Justice Gvai on Dr. Ambedkar's
31 contrast of different models of federalism. But Dr. Ambedkar does say, even the Indian
32 Constitution shares sovereignty between the Centre and the States. However, it does not have
33 the same nature of the American Constitution, it comes to an end there, because they have
34 separate constitutions for each State and they have citizenship for each state. But My Lord
35 here, the word which is used is only 'Permanent Resident' not 'Citizen.' All Jammu and
36 Kashmir residents governed by that Constitution, claimed and asserted that they are Indian
37 citizens. I'm going to show that from in a moment. Now, this is the draft Constitution. Now,

1 would Your Lordships kindly come to 19-10-56. You just have to look at Article 152, in your,
2 My Lord, in the Constitution. Please have a look at Article 152.

3

4 **CHIEF JUSTICE DY CHANDRACHUD:** What is the date, Mr. Subramaniam?

5

6 **GOPAL SUBRAMANIAM:** That My Lord, came on 19th October, 1956. Your Lordships will
7 find that at page 101 of the Constitution, PDF.

8

9 **CHIEF JUSTICE DY CHANDRACHUD:** That is the 7th Amendment?

10

11 **GOPAL SUBRAMANIAM:** That is the 7th Amendment, My Lord.

12

13 **CHIEF JUSTICE DY CHANDRACHUD:** And it came into force on 1st November 1956.

14

15 **GOPAL SUBRAMANIAM:** Absolutely My Lord. And Your Lordships will notice the
16 parenthesis. This recognizes the J&K Constitution because the establishment of Raj Pramukh
17 or the Governor or the institutions of the Legislature, Executive and the Judiciary were
18 undertaken under that Constitution. So Your Lordships notice in the definition of Article 152,
19 'In this path, unless the context otherwise requires, the expression state and then does not
20 include the State of Jammu and Kashmir.' Now My Lord, the Constitution of J&K was adopted
21 after this, this is 01-11-56. The date of adoption of the Jammu and Kashmir Constitution was
22 actually 17th November 1956. And My Lord, in line with the date of coming into force of the
23 Indian Constitution, they make the effective date as 26th of January 1957. And the J&K
24 Constitution, Your Lordships will find is in Volume D-2, and it is at page 17,

25

26 **CHIEF JUSTICE DY CHANDRACHUD:** Volume D-2?

27

28 **GOPAL SUBRAMANIAM:** Page 17, My Lord.

29

30 **CHIEF JUSTICE DY CHANDRACHUD:** Mr. Subramaniam, what seems to have
31 happened was this. During the period when after our Constitution came into force on 26th
32 January, 1950 Jammu & Kashmir was a Part B State. Now in relation to the part B States,
33 Article 238 is a Constitution made provisions for modification of Part 6 of the Constitution.

34

35 **GOPAL SUBRAMANIAM:** Right. My Lord.

36

1 **CHIEF JUSTICE DY CHANDRACHUD:** Therefore, to the Part B States, Part 6 would
2 apply with the modifications which were spelt out in Article 238. Article 370(1)(a) however,
3 stipulated...

4

5 **GOPAL SUBRAMANIAM:** 238 will not apply...

6

7 **CHIEF JUSTICE DY CHANDRACHUD:** ...that 238 will not apply to the State of Jammu
8 and Kashmir, right. Now that is that period when the Constitution was yet to be drafted. After
9 with the 7th Amendment Jammu & Kashmir ceases to be a Part B State. It becomes a State
10 within the meaning of Article (1)(3)(a), of the Constitution. Because the distinction between
11 Part A, B, C, and Part B territories vanishes after the 7th Amendment. So, when Jammu &
12 Kashmir ceases to be a Part B State automatically some provision had to be made. It was not
13 governed by Article 238. So other Part B States which ceased to be part B States were governed
14 then by Part 6. Jammu and Kashmir was not within the fold of Part 6 for the reason that so
15 long as Jammu and Kashmir Constitution continued to hold the field, that Constitution made
16 provision for the Executive, the Legislature, the Judiciary, so on and so forth. So this provision
17 in Article 152 was in continuum.

18

19 **GOPAL SUBRAMANIAM:** Exactly.

20

21 **CHIEF JUSTICE DY CHANDRACHUD:** Because from the inception Article 238 had no
22 application and once it came within the fold of not a Part B State, you had to make some
23 provision. Now that provision according to you was made in the Constitution of Jammu and
24 Kashmir.

25

26 **GOPAL SUBRAMANIAM:** My Lord, absolutely. This is the point I'm making.

27

28 **CHIEF JUSTICE DY CHANDRACHUD:** Right. But that doesn't tell us the basic question
29 as to whether that was intended to be a permanent arrangement.

30

31 **GOPAL SUBRAMANIAM:** Yes. Now My Lord, for that purpose, if Your Lordships now take
32 the Jammu & Kashmir Constitution, because that's a little important. Your Lordships are
33 absolutely right, we have to look for evidence in the instruments themselves. Let's look at the
34 Constitution of Jammu and Kashmir, because the Jammu and Kashmir Constitution. My
35 Lord, actually, not only makes the integration absolutely beyond any pale of doubt. Unity and
36 integrity with India is beyond the pale of doubt in the Constitution. It My Lord, reserves
37 provisions for the application of the Constitution of India in the State of Jammu and Kashmir.

1 My Lord, that's quite significant if Your Lordship just takes that for a moment. Please look at,
2 My Lord, their Preamble. Because My Lord, what we are concerned with in this case we have
3 used different expressions, like consent of people. We have used the expression people but My
4 Lord, let us look at their Preamble. This Constitution was inspired quite rightly as My Lord,
5 the Chief Justice said, by various constitutional provisions and My Lord, it was many of the
6 exceptions in the 1954 Order were also inspired My Lord,. I'm going to show to you shortly
7 when we come to **Parate's** case by the American Constitution. But I'll show that in a moment,
8 please come to the Preamble. We the people of the State of Jammu and Kashmir, having
9 solemnly resolved in pursuance of the accession of the State to India, which took place on the
10 26th day of October 1947, to further define the existing relationship of the State with the Union
11 of India as an integral part thereof and to secure to ourselves justice, social, economic, and
12 political. This word "justice, political" will be of some significance in the light of Dr.
13 Ambedkar's own exposition. This is, My Lord, a resolve, and therefore, they adopt this
14 Constitution. What is now My Lord, important is, the Constitution of India and which Your
15 Lordships will notice is in (2)(1)(a), at page 17. The first definition is for the Constitution of
16 India. Constitution of India means the Constitution of India as applicable, in relation to this
17 state. And then Your Lordships may kindly see (3), (4) and (5). (3) is relationship of the state
18 with the Union of India, the State of Jammu and Kashmir is and shall be an integral part of
19 the Union of India. This is a part of a Constitution. What is the further integration we are
20 talking about? It is an article of faith. It is a parchment of pride, for the people of Jammu and
21 Kashmir. They have set this in the forefront in Article 3, which is called Section 3, by
22 commentators. Then please see (4), the territory of the state shall comprise all the territories
23 which, on the 15th day of 1947, were under the sovereignty or suzerainty of the ruler of the
24 state. And (5), My Lord, please notice (5). The Executive and Legislative power of the state
25 extends to all matters, except those with respect to which Parliament has power to make laws
26 for the state under the provisions of the Constitution of India. But My Lord, under the
27 provisions of the Constitution of India as applied under an order under 370(1). And My Lord,
28 thereafter Your Lordships will notice Section 6...

29

30 **CHIEF JUSTICE DY CHANDRACHUD:** Mr. Subramaniam, the domain of the
31 Constitution of Jammu and Kashmir was that which was defined by the Constitution of India.

32

33 **GOPAL SUBRAMANIAM:** Yes. Now, My Lord, I am now saying Constitution of India here
34 meant...

35

1 **CHIEF JUSTICE DY CHANDRACHUD:** Therefore, this was not therefore, a Constitution
2 which was at par, or superior to the Constitution of India. It can't be superior to the
3 Constitution of India.

4

5 **GOPAL SUBRAMANIAM:** No, it's not superior.

6

7 **CHIEF JUSTICE DY CHANDRACHUD:** Nor is it at par with the Constitution of India, for
8 the reason that, look at the two definitions- (2)(1)(a), Constitution means the Constitution of
9 India, as applicable in relation to the state.

10

11 **GOPAL SUBRAMANIAM:** Yes, My Lord.

12

13 **CHIEF JUSTICE DY CHANDRACHUD:** Now, where would we find the nature of the
14 application of the Constitution of India to the State of Jammu and Kashmir, not in the
15 Constitution of Jammu and Kashmir, but in the Constitution of India.

16

17 **GOPAL SUBRAMANIAM:** Agreed. That is why, Your Lordships are right. Under Section
18 5...

19

20 **CHIEF JUSTICE DY CHANDRACHUD:** Right. Section 5 also...

21

22 **GOPAL SUBRAMANIAM:** Yes. Under the provisions of the Constitution.

23

24 **CHIEF JUSTICE DY CHANDRACHUD:** Legislative power of the state extends to all
25 matters except those with respect to which Parliament has the power to make laws for the state
26 under the provisions of the Constitution of India. Now the domain of Parliament to make laws
27 for the state would be defined by the Constitution of India, not by this Constitution.

28

29 **GOPAL SUBRAMANIAM:**7 I'm grateful, My Lord. Now, I'm taking you a little closer to the
30 point, that if it meant under the Constitution of India, it also meant the Order under 370(1).
31 That's the point I'm making. And My Lord, that way there is nothing. In this case, the two
32 constitutions are... I am not saying this is superior. Please don't get me ever wrong. But My
33 Lord, I would not like to say easily that it is inferior because it has established courts of record
34 and a legislature. It's a constitution, My Lord. The Jammu and Kashmir High Court owes its
35 existence to this Constitution. The Legislature of Jammu and Kashmir owes its existence to
36 this Constitution. They have been established. These are institutions of a permanent nature,
37 established under the Constitution.

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CHIEF JUSTICE DY CHANDRACHUD: Who would appoint judges to the High Court of Jammu and Kashmir?

GOPAL SUBRAMANIAM: There is no question of superiority.

CHIEF JUSTICE DY CHANDRACHUD: Who would appoint judges to the High Court of Jammu and Kashmir?

GOPAL SUBRAMANIAM: My Lord, that also is provided. The Chief Justice is involved. The Chief Justice of India is referred to. This Constitution My Lord, refers...

CHIEF JUSTICE DY CHANDRACHUD: President could appoint judges to the High Court of Jammu and Kashmir.

GOPAL SUBRAMANIAM: Yes.

CHIEF JUSTICE DY CHANDRACHUD: The President would transfer judges from the High Court of Jammu and Kashmir.

GOPAL SUBRAMANIAM: Yes, I'm saying the establishment of the institutions or their genesis not to the Indian Constitution per se, but to the J&K Constitution. I'm on the establishment of the institutions. Thereafter, they are administered naturally by the Chief Justice of India, when appointments are made. But the important point, My Lord, is that this Constitution creates institutions. But in areas where it allows the Indian Constitution full play, it is silent. It creates its institutions, it is an additional act of affirmation, but that is what our Constituent Assembly did. Imagine My Lord, our Constituent Assembly in its wisdom, gave space, gave a certain sense of choice to people to determine. I think nothing could have been greater than that. And likewise, the response of the people of Jammu and Kashmir, in their Constituent Assembly, they matched it. They have matched it with the words of this Constitution. And this Constitution is also a parchment of pride. It defines them. It defines their persona. And they are not saying anything else. They're saying it cannot demise. A constitution cannot demise. A Constitution cannot evaporate or eviscerate. Unless it is done in a manner known to law. So Sub-Article 3, of Article 370 worked itself out. It was meant to be acted on. They acted on.

CHIEF JUSTICE DY CHANDRACHUD: Yes, Mr. Subramaniam.

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GOPAL SUBRAMANIAM: My Lord, I wanted to point out, they even kept out of their amending power in Section 147 of the Constitution at PDF page 85. Your Lordships will notice Section 3(5), and the provisions of the Constitution of India as applicable, they will never touch. My Lord, I don't think the resolve of people is clearer than this. The resolve of a Constituent Assembly cannot be clearer than this. That they celebrate the unity of India. And they say, we will never touch it. It will not amend.

JUSTICE SANJIV KHANNA: So, Mr. Gopal, on one aspect, there is no list at all. As far as integration into India is concerned, there is I don't think any of the sides are *ad idem*. So that we accept, that's a foundation on which we have proceeded.

GOPAL SUBRAMANIAM: Yes.

JUSTICE SANJIV KHANNA: And then the issue has arisen with regard to Article 370, the recognition of the Constitution of J&K, will be also or Constitution of India, as applicable to J&K...

GOPAL SUBRAMANIAM: That's right.

JUSTICE SANJIV KHANNA: ... predicated and formed on the basis of Article 370.

GOPAL SUBRAMANIAM: That's right My Lord. So now we look at the other two points about the validity of these two actions. Once we are clear that the provisions of the Constitution of India as applicable in relation to the State, can never be changed, this is called an acknowledgment in a Constitution. It's a total acknowledgment of the Constitution. And the question which arises for Your Lordship's consideration is, if the Constituent Assembly of Jammu and Kashmir, and the Jammu and Kashmir Constitution paid such and accorded such supremacy to the Constitution of India, we are now, My Lord, coming to the question which Justice Khanna posed, "What about the powers under 370?" We're coming straight to the point, what about the powers under 370. My Lords, I am not looking at the inconsistencies in the Government of India's pleading. I will assume that they can argue anything as long as they can show power and its valid exercise. Let me assume that they can raise any argument, but let them show where is the power and where is the exercise. Now let's start with the first. It was suggested that Article 367 was a root. The amendment of Article 367 was a root because we have done it in the past, we have done it once more, very simplistically put. But My Lord, when was it done? It was done in 1954 in C.O. 48, it was done in 1958 in C.O. 56 and it was

1 done a third time in 1965, in C.O. 74. Now My Lord, Your Lordships will be a trifle surprised
2 to know that the modifications to Article 367 in C.O. 48 and 56.... 48. is at Volume D-3, page
3 13 and C.O.56 is Volume D-3, page 25. They provided, these two orders, when it amended
4 Article 367...

5

6 **CHIEF JUSTICE DY CHANDRACHUD:** D-3, 13 and D-3, 25.

7

8 **GOPAL SUBRAMANIAM:** D-3 page 13, My Lord and D-3 page 25.

9

10 **CHIEF JUSTICE DY CHANDRACHUD:** Okay.

11

12 **GOPAL SUBRAMANIAM:** And if Your Lordship sees it, Article 367 was to provide for
13 definition for terms which appeared in the Order. Please look at it for a moment.

14

15 **CHIEF JUSTICE DY CHANDRACHUD:** What point you made Mr. Subramaniam?

16

17 **GOPAL SUBRAMANIAM:** That is the amendment proposed in 367 was to define terms in
18 the Presidential Order. The first two, if Your Lordships sees 13 for a moment, I can just
19 demonstrate it straight away. Please come to page 13, My Lord, it starts. please come to 18.

20

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

22

23 **GOPAL SUBRAMANIAM:** "For the purposes of this Constitution, as it applies in relation
24 to the State of Jammu and Kashmir, references to this Constitution or to the provisions thereof
25 shall be construed as references to the Constitution, or the provisions thereof as applied in
26 relation to the said state, and Your Lordships will find references to a High Court shall include
27 references to the High Court of Jammu and Kashmir, reference to the Legislature of the
28 Legislative Assembly shall be construed as including references to the Constituent Assembly
29 of the said state. And likewise, the 58 order C.O. 74 of 1965. Please take that date. It's a little
30 important. The 1965 Order was preceded by the J&K Amendment, Constitution Amendment
31 Act...

32

33 **CHIEF JUSTICE DY CHANDRACHUD:** Was preceded by?

34

35 **GOPAL SUBRAMANIAM:** It was preceded by the Constitution Amendment Act of 1965.
36 That was enacted on 10th April 1965. Sixth Amendment Act. And the C.O. 74 in *Damnoo's*
37 case was issued on 24-11-1965. Now, we come to the question about the power under 370. Any

1 power under the Constitution is not untrammelled, because we have a control in Constitution.
2 We have to see whether the power is exercised for the purpose for which it was conferred. And
3 if that purpose My Lord, implies, as My Lord the Chief Justice has perspicaciously pointed out,
4 either consultation or concurrence or in a one-time decision, the decision of the Constituent
5 Assembly, it is very clear that Article 370 itself negates unilateralism. It actually, is widely
6 worded but it still involves the state.

7
8 It involves the Legislature. It involves the Constituent Assembly. Mr. Sibal is perfectly right
9 when he says that those who have actually lived by the sword of the proviso and have taken
10 recourse to Article 367, they must actually be tested on that basis. But I am going to deal with
11 the argument fully. But I'm going to put it in very simple words. First was, you can ignore the
12 proviso. Second was, what is this word recommendation? It's a recommendation. You are the
13 ultimate, you are the President. But recommendation of a Constituent Assembly, in a context
14 in which that word is placed in Sub-article (3), tells us that it is a condition precedent.
15 Gopalaswami Ayyangar definitely called it a condition precedent. But on Principles of
16 Constitutional Construction, you would be justified in interpreting it as a condition precedent.
17 Which means My Lord, if that condition precedent was not satisfied, the power was
18 unavailable. This is not a normal proviso and marginal notes with great respect. After
19 ***Kesavananda Bharati***, all the learned judges said it doesn't control a constitutional
20 provision. But I'm starting My Lord, yes, we thought it was temporal. But by the will of people,
21 it became a mainstay. Now there was also a suggestion, there is a power coupled with a duty
22 to abrogate Article 370, because of this marginal note. Power coupled with a duty can
23 sometimes be implied but here it is a self-contained code, Article 370. The duties lie within
24 Article 370. The assumption of a duty outside the Constitution is never permissible.

25
26 **CHIEF JUSTICE DY CHANDRACHUD:** Mr. Subramaniam, I think we have given you
27 sufficient time in a rejoinder now?

28
29 **GOPAL SUBRAMANIAM:** Yes, My Lord, I'm quickly, quickly galloping.

30
31 **CHIEF JUSTICE DY CHANDRACHUD:** Yes.

32
33 **GOPAL SUBRAMANIAM:** My Lord, I can't look galloping, but I'm galloping. I'm galloping,
34 My Lord. I wouldn't necessarily inflict you, inflict on you a little more than needed. My Lord,
35 I'm only referring to the nature of the arguments with reference to marginal notes, with
36 reference to the proviso. And I am saying, My Lord, that they are completely untenable. But
37 My Lord, there is also something which must be brought to Your Lordship's notice. Ever since

1 1952 agreement, we all had a summary, we were looking for something more authentic. Then
2 My Lord, Justice Gvai, rightly said that, "Well, it is at least been introduced by the Prime
3 Minister of Jammu and Kashmir in the Constituent Assembly." My Lord, this was also
4 introduced by the Prime Minister in Parliament, the 52 Agreement. And Your Lordships, I'm
5 just giving the pages only, only the pages. It is in Volume D-9, the relevant pages are 53, 54.

6

7 **CHIEF JUSTICE DY CHANDRACHUD:** D-9?

8

9 **GOPAL SUBRAMANIAM:** D-9. These are parliamentary debates, 53, 54, 55, and 96. Now,
10 My Lord, I come to *Parate's case*.

11

12 **CHIEF JUSTICE DY CHANDRACHUD:** These are parliamentary debates on?

13

14 **GOPAL SUBRAMANIAM:** On My Lord, the 1952 agreement. There was a motion, it was
15 brought to the House My Lord. It was discussed before Parliament and of course, My Lord it's
16 a pretty long speech. But the Prime Minister spoke about this agreement and they seemed
17 broadly *ad idem* with what Prime Minister of Jammu and Kashmir said. Now My Lord, we
18 come to two points and I'm finished. Article 3, *Babulal Parate*. My Lord, *Babulal*
19 *Parate's case* is distinguishable. That My Lord is to be found in Case Law Compilation 6 at
20 page 124.

21

22 **CHIEF JUSTICE DY CHANDRACHUD:** 124?

23

24 **GOPAL SUBRAMANIAM:** Yes. And what is significant My Lord is Justice Das says in
25 Article 3, we do not have a similar provision like the corresponding Article in the American
26 Constitution that the consent of a State Legislature is necessary. This is very important My
27 Lord,. This is what Justice Das, observes correctly. And now My Lord, if you see the 1954 Order
28 and the proviso to Article 3 it is precisely that provision in the American Constitution.

29

30 **JUSTICE B.R. GAVAI:** You are at page ?

31

32 **GOPAL SUBRAMANIAM:** Page My Lord, 121 and 124 in Volume 6 . And then My Lord, I
33 now deal with one point quickly, which is privy purses. My Lords, there is no analogy between
34 privy purses in this case. Privy Purses, My Lord is a case of ex-rulers. Here My Lord
35 sovereignty passed on to the people in Jammu and Kashmir already and even the judgment
36 which has been relied upon very heavily My Lord, which is *Raghunathrao Ganpatrao*
37 case in Volume C-7, 537, at 562, My Lord's Justice Pandian speaks, glowingly about one basic

1 feature of the Constitution, called Political Justice, Political Rights. Political Justice and
2 Political Rights, Justice Pandian says, has not been touched by the Constitution's 26th
3 Amendment. My Lords, that very passage I rely upon to say in our case, what we are dealing
4 with My Lord, is not only in the Constitution, we are also dealing with the class of rights which
5 have been guaranteed to people in Jammu and Kashmir, both under the Indian Constitution
6 and the Jammu and Kashmir Constitution. I would therefore My Lord respectfully submit that
7 the outcomes of integration My Lord have been achieved. We may have different perspectives
8 on it My Lord but we are now only dealing with the validity and My Lord, 356 with very great
9 respect My Lord is never intended to use for the purpose of usurping State Legislatures as
10 bodies *eo nomine* by Parliament. No My Lord, it cannot be done. That notional vesting of
11 power My Lord is limited for a small purpose under 356. 370, My Lord, is not a purpose which
12 is *intra vires* 356. It is alien to 356, and in any event, My Lord, 370 says, notwithstanding
13 anything contained in the Constitution, which gives it a certain degree of immunity. My Lords,
14 any questions? I'm ready.

15

16 **CHIEF JUSTICE DY CHANDRACHUD:** Thank you. Thank you, Mr. Subramaniam.
17 Thank you very much.

18 Mr. Zaffar Shah?

19

20 **ZAFFAR SHAH:** May I please Your Lordships? It's a pleasure to hear My Lords, the Counsels
21 on both sides on various controversial issues which are very [UNCLEAR] in the case. What I
22 see is that, several issues have been raised in this matter, and the Court ultimately is to decide
23 whether this C.O. 272, and 273, whether they are constitutionally valid or invalid, that will be
24 the direction of the Court, and that would be the ultimate decision of this Court, whether they
25 need to be sustained or quashed. While making the submissions, My Lords, the Counsels have
26 made at a different level of abstraction as to what possibly could be the grounds on which these
27 two orders can be quashed. My approach would be to go on more fundamentals, the basics of
28 it. The first premise is, which to my mind is extremely important is the existence of the State
29 of Jammu and Kashmir at one point of time in history and the formation of the Union of India
30 at the same time in history. While as the India was being Unionised, Jammu and Kashmir
31 State by itself, was not a part of India, neither it was a part of British India. Now we have it
32 clear from the various statutes itself, whether it's Government of India Act, or whether it's
33 Indian Independence Act, that State of Jammu and Kashmir, not being a part of the Union of
34 India at that point of time, nor was a part of British India, it was altogether an independent
35 state. It had its own king, it had its own country, and it had its own laws. The king at that point
36 of time would run the affairs, like any other king, of any other princely state would do. And the
37 King of the state of Jammu and Kashmir, I will not go back too much in the history, also had

1 certain laws which governed the running of the Government. Either the State subject
2 definition, which was introduced way back in 1927 and 1932, which applied only to the people
3 who were residing in that state, or from time to time, as has happened in all countries of the
4 world, there have been changes. Democratization has taken place and ultimately the
5 Constitution Act of 1939 was also promulgated by the king. And he created certain institutions
6 in them, supposed to be democratic, but at the same time, he retained all the sovereign powers
7 with him. This was the situation with us. Now when Instrument of Accession executed, the
8 circumstance in which it was executed have been already said. They are evident from the letter
9 of 26th October 1947. What is the nature of the Instrument of Accession has already been read,
10 what was retained and what was transferred or donated to the Union of India. And the
11 subsequent letter of the Governor General dated 27 November 1947 has also been read saying
12 that we'll put it to the people of the state, whether this Instrument of Accession is acceptable
13 to them or not. These are facts of history. Having said that, thereafter, after 26th of October
14 1947, till 26th of January 1950 we have no other document evidencing as to the relationship
15 of the State with the Union except the Instrument of Accession. What was sought to be stated
16 by the Respondents was that there was this Proclamation of 25 November 1949.

17

18 The Constitution of India itself was adopted on 26th November 1949, a day before. That has
19 also been read today morning and it was read earlier also. It said nothing, except that the
20 Constitution of India as may be applicable to the State would be acceptable to us. At that point
21 of time. It was the successor of the king who was in chair, holding the position of the Maharaja.
22 So when the Constitution itself was being debated, that's again historical fact. What happened
23 in the Constituent Assembly? Who said what? May not be relevant, but ultimately the decision
24 of the Constituent Assembly was this that need to have Article 370 for State of Jammu and
25 Kashmir. To meet this decision appears to be the most significant and important because it
26 answers several other questions. Why for Jammu and Kashmir? Why can't we remove it today
27 in 2023? What is so great about Jammu and Kashmir? If it is a part of India, why should it
28 have a separate Constitution? Why should it have a separate flag? Why should the President
29 of India have to concur or consult in the matter of application of laws? These questions are
30 answered by the Constituent Assembly itself, by the debates of the Constituent Assembly itself,
31 and by the very existence of Article 370, as well as very existence of the Constitution of Jammu
32 and Kashmir. Now this is a fact of history, none of us can alter this fact of history. That is, to
33 my opinion, the premises of this case. And as we proceed further, we find that this basic
34 premise has continued over the years. Now it's a separate question whether it can be done
35 away with? And if so, in what method? By what procedures? By what process? That's a separate
36 question altogether. The first is, as I would submit for Your Lordship's consideration, this
37 fundamental premise that the state of Jammu and Kashmir was different, Union of India was

1 different. They agreed to join hands, but on certain conditions, which conditions came to be
2 incorporated in terms of initially Instrument of Accessions, later on by the Constitution of
3 Jammu and Kashmir, as well as by the Constitution of India.

4
5 Now where there was another factor, that was the matter went to United Nations, and
6 resolutions were passed. Those are also parts of Your Lordships Constituent Assembly
7 debates. Well, these matters were pending, the issue is this, that State of Jammu and Kashmir,
8 and Union of India agree so far as the integration. When I'm using this word 'Integration', I
9 mean the sense of Article 1 of the Constitution of India, as well as Section 3 of the State of
10 Jammu and Kashmir. While that stays but I, the state of Jammu and Kashmir, should have
11 the power to regulate my own affairs, except what I have given to you. This is what I'm
12 conditioned to that. So Instrument of Accession, I gave you something. I gave you defence,
13 foreign affairs and communication. This I gave it to you, you make laws for it. But for
14 remaining I will make my own laws. Now this was the position in 1950. If I put it differently, I
15 had the ocean of, ocean of, now later on today we call it now Constitutional Autonomy. Ocean
16 of autonomy available to me in 1950. This is also a fact of history and an important premise in
17 this case, that this position is accepted both by the Union of India, as well as by the people of
18 Jammu and Kashmir. My Lords will like to say something?

19
20 **JUSTICE SANJIV KHANNA:** I just wanted to point out look, we have referred to the
21 history, we have looked at the counter viewpoints...

22
23 **ZAFFAR SHAH:** I was making the premises only.

24
25 **JUSTICE SANJIV KHANNA:** But the fact of the matter is ultimately when the
26 constitutional document is drafted and adopted and applied by the people of India. And we
27 the people of India include the people of J&K. They're not separate from us.

28
29 **ZAFFAR SHAH:** Yes.

30
31 **JUSTICE SANJIV KHANNA:** They will be... Obviously in people of India, there will be
32 people from Punjab, there will be people from Gujarat, there will be people from J&K. Now
33 the only issue, that may not really be, because we have moved with the passage of time, we
34 have to move with the passage of time.

35
36 **ZAFFAR SHAH:** We have moved. That's what I'm saying.

37

1 **JUSTICE SANJIV KHANNA:** We have moved.

2

3 **ZAFFAR SHAH:** Yes, I understand.

4

5 **JUSTICE SANJIV KHANNA:** And now the assumption today is, really speaking, it's the
6 second part, which is Article 370, which is the main constitutional challenge before us, so let's
7 confine ourselves to that.

8

9 **ZAFFAR SHAH:** It's a question of how the court is weaving the matter. Firstly, we're weaving
10 the matter in an historical perspective, which becomes the foundation of this relationship
11 between Union and the State. But later on over the 69 years have this relationship moved
12 closer. Has this relationship moved forward, and whether there's any possibility in 2019, that
13 we could have done away with the relationship in a sense that Article 370 would go,
14 Constitution of Jammu and Kashmir would go, have we reached that stage or not? That I will
15 indicate Your Lordship.

16

17 **CHIEF JUSTICE DY CHANDRACHUD:** We will continue after lunch. But at lunchtime
18 the remaining Counsel may please ration out times, so that we are done by 04:00 this
19 evening....

20

21 **CHIEF JUSTICE DY CHANDRACHUD:** Mr. Zaffar Shah, I suggest that if you can
22 formulate your points now that we are in the rejoinder so that the others also have a look at it.

23

24 **ZAFFAR SHAH:** Point number 1 My Lord.

25

26 **CHIEF JUSTICE DY CHANDRACHUD:** Yes. My notes of your submissions this morning
27 end with an ocean of autonomy, which I found very interesting, a phrase. So I've put it into
28 inverted commas.

29

30 **ZAFFAR SHAH:** My Lord my first proposal for Your Lordship's consideration is this, which
31 I said earlier also and somehow there were different views on that. That's after the execution
32 of the Instrument of Accession, where did the sovereignty go? That's a very important point
33 we want to make.

34

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

36

37 **ZAFFAR SHAH:** Where did the sovereignty go?

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CHIEF JUSTICE DY CHANDRACHUD: So how will you formulate it actually?

ZAFFAR SHAH: Yes, that's what one of the issues involved in this case, because respondents argued...

CHIEF JUSTICE DY CHANDRACHUD: So the Instrument of Accession did not result in a loss of sovereignty, for whatever reason. Now what are those reasons? Let's just formulate them.

ZAFFAR SHAH: I'm not going to the reason. I will only cite the judgment of this court.

CHIEF JUSTICE DY CHANDRACHUD: All right.

ZAFFAR SHAH: That's *AIR (1962) Supreme Court 1288*.

CHIEF JUSTICE DY CHANDRACHUD: AIR?

ZAFFAR SHAH: *AIR (1962) Supreme Court 1288*. That is *Prem Kumar Dev's* case. That is also in the Your Lordship's documentation rather in this case of compilation. Volume 6 page number 10.

CHIEF JUSTICE DY CHANDRACHUD: Volume 6, page?

ZAFFAR SHAH: Page Number 10. PDF 135.

CHIEF JUSTICE DY CHANDRACHUD: 135.

ZAFFAR SHAH: Yes.

CHIEF JUSTICE DY CHANDRACHUD: This is the case dealing with the Constitution of the Union Territory cadre for... or no.

ZAFFAR SHAH: Yeah. There was some grant or something. What is important is that they go into this question when only Instrument of Accession is executed, that's all. No merger agreement, no supplementary agreement, nothing of that sort. What is its legal status? They categorically rule that the sovereignty will continue to vest in the ruler. This is what is in this

1 judgment. Paragraph 11 of the judgment My Lords, may see that. Paragraph 11, of that
2 judgment. I'll have read it, but I don't want to waste time.

3

4 **CHIEF JUSTICE DY CHANDRACHUD:** Yes you have read it already.

5

6 **ZAFFAR SHAH:** There 11 expressly rules that. For all that basis I am saying because earlier,
7 My Lords views were slightly different. Justice Khanna's were different. So I'm just citing the
8 judgment Constitution Bench decision, saying that the...

9

10 **CHIEF JUSTICE DY CHANDRACHUD:** You said 135?

11

12 **ZAFFAR SHAH:** Paragraph 11 PDF is 135.

13

14 **JUSTICE SANJAY KISHAN KAUL:** Which Volume?

15

16 **ZAFFAR SHAH:** Volume 6.

17

18 **CHIEF JUSTICE DY CHANDRACHUD:** Volume 6.

19

20 **JUSTICE SANJIV KHANNA:** Mr. Shah, these are just questions and queries, just like you
21 this side, other side. These are just questions and queries that's all.

22

23 **ZAFFAR SHAH:** No, My Lords asked me the question and I was just trying to respond to
24 that. So my first proportion was that Maharaja retained his sovereignty, that's all I'm saying.
25 Now I also use the word he retained Residual Sovereignty if Your Lordship may recall.

26

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

28

29 **ZAFFAR SHAH:** So Residual Sovereignty remained with him. Then what happened? After it
30 was retained by the Maharaja, later on at what stage it got transferred over to the people? It
31 did not go into Article 1. It did not go into Article 370. That's what I'm trying to say. It has gone
32 to the people and it is in exercise of that Residual Sovereignty that the Constitution of Jammu
33 and Kashmir was made. This is what I'm trying to say. It's incidentally meeting arguments of
34 the Respondents also that it was a concession. It was the rubber permission, so on and so forth.

35

36 **JUSTICE KHANNA:** To that extent you are taking a different projection from others.
37 There's a different argument as what was argued by Mr. Sibal and others.

1

2 **ZAFFAR SHAH:** No but on the question of sovereignty, we are. I don't think there should be
3 much. And it begins with the expression "We the people of State of Jammu and Kashmir", that
4 should be enough to indicate that it's by itself an independent, separate Constitution. But to
5 say that this is inferior, to say it is subordinate is slightly, something unpalatable to us that we
6 feel that this is our Constitution, like people of India would feel proud that they have a
7 Constitution, which though in our case, we had proper elections. And then only we had
8 representatives who made this Constitution, unlike the Constitution of India, which was that
9 no elections took place to form the Constituent Assembly. They were the representatives of
10 various provinces. So we're on a better footing. Now this Constitution, which we made for
11 ourselves. What did it do? In Section 3, it said, now we are calling our Constitution section,
12 whereas that of Indian Constitution as Articles. This is also another thing which has slipped
13 into our language. Actually, my Constitution also has Articles. This Section 3 straightway
14 stated that it shall be an integral part, that the same position as taken in Article 1 or Instrument
15 of Accession. That's there. But what's important is that when it says we will redefine our
16 constitutional relationship. Which was there in the morning, it is in the Preamble itself. Now
17 what would exactly mean, redefining constitutional relationships? What was the earlier
18 Constitutional relationship which we had and it had to be redefined. It had to be enlarged or
19 reduced or whatever was to be done. So we have two different entities, the Union of India and
20 a federating unit. Between them this was the mechanism in terms of which they would redefine
21 their constitutional relationship from time to time.

22

23 **TUSHAR MEHTA:** Not redefined. Further defined.

24

25 **ZAFFAR SHAH:** Defined, further defined Constitutional relationship.

26

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

28

29 **ZAFFAR SHAH:** This has happened from time to time, that were the C.O.s explained that,
30 that from time to time there was further defining of the Constitution. Prior to that what we
31 had was only Instrument of Accession and then 1950 order, then 52 order. Then ultimately
32 they got merged in 1954 Order. Subsequent C.O.s are all amendments made in 54 order. They
33 are not independent by themselves. Why it was so? Because 54 Order had been initiated by
34 the Constituent Assembly itself. One of the issues which Mr. Subramaniam, also pointed out,
35 I have a judgment division where judgment of the High Court of Jammu and Kashmir, where
36 they've gone into this question, that it was initiated by the Constituent Assembly itself. That
37 Your Lordship will see this is in *AIR 1971* Jammu and Kashmir, page 120. Justice [UNCLEAR]

1 has gone into this question. I will just read it quickly, because we deserve time for all to add to
2 Your Lordship. So I'll just read it. Should I read it for Your Lordships convenience? Now My
3 Lordship may not have a copy of it.

4

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

6

7 **ZAFFAR SHAH:** It simply says, I hereby, do hereby direct as follows: the Constituent
8 Assembly, consisting of representatives of the people elected on the base of adult franchise,
9 shall be constituted forthwith for the purpose of framing a Constitution for the Jammu And
10 Kashmir. This was published in Government Gazette on 1st of May 1951. In obedience, this is
11 a court finding, in obedience to this proclamation, a Constituent Assembly was convened for
12 the first time on 5th November 1951, as mentioned by petitioner para 13 of the amended
13 petition. On 15th February 1954, the Constituent Assembly passed a resolution adopting the
14 report of the Drafting Committee and the annexure thereto and thus by doing so the Assembly
15 gave its concurrence to the application of certain provisions of the Constitution of India to the
16 State in the manner indicated in the Annexure. The resolution of the Constituent Assembly
17 may be quoted thus. Then they quote that for the Government of India. Now this only leads to
18 conclusion that the process was initiated by the Constituent Assembly itself forwarded to the
19 Government of India. The President accepted this and then 1954 extension order was passed.
20 This gives the source, the history as to how this '54 order has come into existence. After this
21 comes into existence then follow the later on as many as in all '54 Constitution application
22 orders have been passed. Out of that this one is by the Constituent Assembly, remaining others
23 are by the Government of the State. And those are in the nature of amending this Constitution
24 Application Order 1954 because they could not do it otherwise. This is another aspect Lordship
25 needs to consider. This was approved by Constituent Assembly. Others were not. So what they
26 did was all these years they have been amending that particular order. Now, sir, as a result of
27 these Constitution Application Orders, what happens is that which Your Lordship found
28 interesting, ocean of my constitutional autonomy was reduced to a pond by 4th of August 2019.
29 Whatever it was My Lord Justice Kaul says it was a skeleton, I would not like to call it, but we
30 still had. What was that fundamentally, I had on that date? Broadly. I have given that in writing
31 also, broadly. I had my own permanent residence was one. I had the jobs reserved for the
32 people who are permanent residents to only in the State Government services. Number three,
33 nobody could acquire the land. These were three fundamental things which I had as on that
34 date.

35

36 Then, of course, we consider it to be our identity. This 370 was in the nature of the identity of
37 the people of State of Jammu and Kashmir, culturally and otherwise also. Linguistically also,

1 different languages were spoken. In Ladakh - Ladakhi, in Jammu - Dogra, in Kashmir -
2 Kashmiri. So over these 70 years, a certain kind of interaction, mixing up of these languages,
3 cultures had taken place, and it had evolved itself into a certain kind of a culture, with a
4 complete harmonious relationship between these three regions. This was the effect from time
5 to time, and nobody questioned these C.O.s. also for all these years, that why are you shrinking
6 our Constitutional autonomy? And I had raised an argument last time also. I said that, by
7 conceding that the Parliament of India will have power of legislature over me, I was indirectly
8 reducing the power of my own legislature, which otherwise it had. Name any act. I gave an
9 example there also, TADA Act; my own legislature could have made it. But then, this State
10 Cabinet recommended through the Governor, "You apply '97 in a specified manner", and we
11 had Indian TADA Act applicable to us. Of course, that is the fate of the history as it is. But
12 whatever was left, it was there as on 4th. Now, when you take this decision, what is to be done
13 on now 4th? Somebody took the decision that we want to get rid of it. Why should we get rid
14 of it? That I still don't understand. Why can't the Union of India accept there can be two
15 constitutions? Why can't Union of India accept that it's a kind of a federation in which there
16 can be two constitutions? There are examples all over the world where there can be two
17 constitutions; it is not this solitary case in the world. Why can't that fact be accepted? Third,
18 when you accept that you are an integral part of it, yet you have this Constitutional autonomy
19 between total integration, total merger, and some space between the state and therefore,
20 historical reasons... Not of its own, for historical reasons. That's an important part of it. So
21 therefore, there were some problems, some circumstances, rightly said by the Respondents
22 themselves. There were circumstances, situations, in which it was felt by whom? By both, the
23 leaders of Union of India, as well as the leaders of Jammu and Kashmir, to provide this space
24 for this autonomy to the people of the state. We're not going into why this autonomy was given,
25 but the fact of the Constitutional position that this autonomy was given to us, and this
26 autonomy could be taken, as all the counsels have correctly stated, by concurrence, by
27 consultation. You could take it away from us. We had to concede. We were on the giving side,
28 because it was with us. We had to donate. We had to surrender our power. The Union of India
29 had not to do anything. It had promised only what was in the Constitution. "List 2, would apply
30 to you, that is all". That was a promise not specifically to the State of Jammu and Kashmir, but
31 all the states in India. That's how the Constitution was framed. But so far as our Constitution
32 is concerned, we had to donate, from time to time, this power to Union of India. So, both had
33 to agree. Now, take a look at 370 by and large. I'm not reading because time is less. My Lords,
34 370 talked of three things. One, you need consultation, concurrence, and recommendation;
35 three words are used. This is one side. Two, who are the institutions involved? You have the
36 President of India, you have the Government of the State, and Constituent Assembly, three.
37 For all the provisions, Your Lordship, only three authorities are involved. But this Government

1 of the State is further requiring in terms of the explanation, that it means a person who is a
2 recognized prisoner of India, who has aid and advice of the Council of Ministers. I lay emphasis
3 on this, that this is a mandatory, indispensable part of Article 370, that you have to have, in all
4 situations, 356 or no 356, you need to have aid and advice of the Council of Ministers. You
5 cannot make... you cannot make any C.O. without the consulting... without the concurrence of
6 the Council of Ministers. I am doing a [UNCLEAR] on that part. Yes, sometime back, there
7 have been, out of 54 constituent application orders, there were about six of them which were
8 passed when the state was under Governor's rule or President's rule. But our stand on that,
9 they were questioned before this court; I am told some writ petition is pending. They
10 approached the Jammu and Kashmir High Court, the things remain. People did question
11 them. Of course, they did not reach the logical conclusions. But at the same time, I must say
12 that, if they are unconstitutional, they can be questioned at any point of time. Law of
13 [UNCLEAR] does not apply when the statute is unconstitutional or any action is
14 unconstitutional. So even today, when we see this Constituent Application of 2019, and we are
15 questioning that. So, we're free to question that on the basis that it was done without Council
16 of Ministers being in place.

17

18 This is the crux of our argument in this case. That's why I said earlier that, let us go to the
19 fundamentals. That the fundamentals in this case are this. Number one, that for this kind of
20 change...for this kind of change which was made, it is not relatable to Instrument of Accession,
21 therefore, consultation was not required. Concurrence was required. It is a mandatory
22 requirement of 370. Number one. Number two. The definition of the government given only
23 for purposes of 370. I must make little digression here. We have government of the State under
24 the Constitution of Jammu and Kashmir, and we have a far better provision there that is
25 Section 35, which says that the Governor will act only, the word used is "only" on the advice of
26 the Council of Minister, which was not, Your Lordship will not find it in the Constitution of
27 India at all. That way, how better our Constitution is. What Your Lordships rule by judicial
28 decision that the advice of the Council of Ministers is binding on the President. Our
29 Constitution already way back in 1957, contained this provision, that, it shall only act on the
30 aided advice of the Council of Ministers. Now, what do you do? So it means that the Governor
31 could not act without aid and advice of Council of Ministers in our Constitution and here in
32 this case, the Governor acts. Fundamentally, apart from the other jurisprudential basis of the
33 submission, which have been made at a different level. Fundamentally, could have they do
34 that. Could the Governor at that point of time do that. Now, see more additional reasons. At
35 that point of time I was under 356 President's Rule. What is its effect? Leave the 356. What
36 does it contain? 357. My Legislature is not by own. It is taken over by Parliament. My Governor
37 is not my own. His powers are taken over by the President. My Government of the State is not

1 my own. It is taken over by the President. All this is taken over by the President. Then in terms
2 of 370 who gives concurrence? And who accepts that concurrence? We have a judgment of this
3 court saying that when 356 is there, the powers are taken over by the President. How does he
4 act? The President will act on the basis of the advice of the Council of Ministers and this
5 Council of Ministers is like the Cabinet of the State Government. If this be the correct legal
6 position, it all is rolled into one, that is President of India. So it violates on the face of it the
7 text, the requirement of Article 370. Forget for the time being, of course without prejudice to
8 what brilliant arguments have already been made, without prejudice to them. How could the
9 President of India, when 356 is in operation act on the advice... on the recommendation made
10 by Governor of Jammu and Kashmir, which Governor had the status only some...Your
11 Lordship in some decision describing as an agent of the President during 356 or some
12 judgment to say that he acts as the President. In either of the situation he is not the Governor
13 who has aid and advice. So for purpose of 370 and for purpose of other functions of the
14 government. I respectfully submit there is a difference between the two. Specifically for 370,
15 Union of Council of Ministers. I'm not able to conceive of a situation where there cannot be
16 Council or Ministers. That's the third thing. And the fourth thing My Lords is very important
17 is this that you have applied 367, and modified it and applied it. Now for the consideration of
18 My Lord Justice Khanna, in particular. My Lord, have been observing. What do you think of
19 3(1)(d) where you apply constitutional procedure with modifications and exceptions. I am
20 saying something else. You first apply 367 by virtue of (3)(1)(d). You applied that to which
21 provision? You applied that to Sub-Clause 3 of 370. Sub- Clause 3 says notwithstanding
22 anything contained herein above. The question which immediately fall for consideration is if
23 you have carried out a modification in terms of 3(1)(d), but applied that modification to Sub-
24 Clause 3. When the 3 says notwithstanding anything contained here and above, isn't that 367
25 modification excluded from application to Sub-Clause 3 of 370.

26

27 Kindly consider this aspect of the matter. And it says, notwithstanding, anything above would
28 mean also any Constitutional application order issued under (3)(1)(d). will also not apply when
29 you want to act under Subclause 3 of 370. So therefore on that basis also it has to be faulted.
30 So therefore, I'm submitting is going by the basic premise, the basic principles that this action
31 of 272, it does two things. Best part then the last thing which I want to submit to the Lordship
32 to consider is one more thing. This power of concurrence. I say for Your Lordships'
33 consideration once again, in 1957 we adopted our own Constitution. Prior to that we have
34 Constituent Assembly. As rightly said, Constituent Assembly can do, undo things because it is
35 not subject to any fetter. There is no control on a Constituent Assembly because they're free
36 to evolve and deal with its affairs. But after the Constitution is adopted on 17th November
37 1956, I'm submitting this. The State Government comes into existence under the Constitution

1 of Jammu and Kashmir, but at the same time the State Government is required to give its
2 concurrence or consent under 370. I say my Constitution, Jammu and Kashmir Constitution
3 is in the nature of a limitation on the power to give concurrence after 1957. Meaning thereby
4 even if there was Council of Minister in place as on today they also could not give any
5 concurrence because it is subject to the limitations of the Constitution of Jammu and Kashmir.
6 Now, what are those limitations? On the prima facie, I will show. If Your Lordship will have a
7 look at 272. The first part says the Constitution of India as amended from time to time shall
8 apply subject to the modification as follows. That is 367. Means the entire Constitution is made
9 applicable on the so-called invalid, unconstitutional concurrence of the Governor. When you
10 do that you are contradicting Constitution of the State. And when you are contradicting
11 Constitution of the State, there is a limitation in your power of giving concurrence under the
12 Constitution of the State. Meaning thereby further, that our Constitution had to stay. It had to
13 permanently stay because the State Government no longer could give its concurrence in
14 contravention of the provisions of the Constitution of the State. That limitation will have to be
15 read into this power of concurrence after 57. Of course, there would be provisions which don't
16 come into conflict. For example, take the High Court. Somebody cited the example of the High
17 Court. Now it is established under my Constitution. When you say somebody gives
18 concurrence, the Article 215 of the Constitution will apply. It comes directly to constitute with
19 my Constitution. The question is not that that is superior or I am in inferior. No. The question
20 is did I have the power to give the concurrence for the application of 250 or any other provision
21 of the Constitution of India. My submission to Your Lordship is I am controlled in my
22 concurrences now. I'm controlled in my consultation is something different that relates to
23 Instrument of Accession. But in respect of application of these constitutional application
24 order, I am controlled today by the Constitution of Jammu and Kashmir. So therefore on that
25 second ground also I say that this 272 as well as 273 are both are constitutionally absolutely
26 invalid. Now, My Lords observed that okay, you are still in history. Let us progress further.
27 Isn't this C.O.s issued 54 in number from time to time? It was not a step in right direction? I
28 put it to myself. It was getting closer and closer. What made you to do it on 5th August. It is
29 not still forthcoming and there is something more to it also. Your Lordship may recall, I said
30 where this concurrence of, that concurrence is given by the Government, this Governor of
31 Jammu and Kashmir as stated in the text of 272 Order. When was their concurrence given?
32 Who gave that concurrence? What was the nature of concurrence? No material that is
33 concealed from this court. No material is produced before the court. It is not in their affidavits.
34 Despite having been stated in the petition that look here, we want to know who gave this
35 concurrence. What is the date of that concurrence? Who signed that concurrence? Was it done
36 one day before? Was it done ten years before? Who gave that concurrence? We are entitled to
37 know it. This court is entitled to know it. There is no material on that basis. So therefore, that

1 apart. But further than somebody says that we have given the concurrence it doesn't look like
2 to me. It doesn't look sustainable. It looks all against the Constitution itself. Then lastly, I
3 would like to submit My Lord many statements were made here. Insofar as the development
4 is concerned, I have only one thing to say to our learner friend, Solicitor General of India. They
5 say self-governance is better than good governance. That's all I can tell him. Give us our self-
6 governance back, that's number one. Number two, somebody also said it here, is very
7 important, the nation has to grow. We can't waste our time, we want to have a unified nation.
8 Of course, very noble thought, very good thought. But then, for that, you have to win over the
9 hearts of the people. You cannot form a nation by force, by compulsion. Win the hearts of the
10 people. If Your Lordships decides this matter in favour of the petitioners, Your Lordship will
11 be going a long way in winning over the hearts of the people of Jammu and Kashmir. That's
12 all I would say.

13

14 **CHIEF JUSTICE DY CHANDRACHUD:** Thank you, Mr. Zaffar Shah. Dr. Dhavan.

15

16 **ZAFFAR SHAH:** Just last thing, My Lords. Only last I want to say that, what initially we were
17 promised... I just look at it from another perspective, as the people would like to know that.
18 What initially was promised was, we'll put, in a short, accession to a referendum. It was not
19 done. They told us, not people of Jammu and Kashmir... it was Governor General's letter. They
20 took the matter to United Nations. They said, go for plebiscite, it is not done now. Now, after
21 that this Constitution autonomy was left all these years. But in 2019, even that is also taken
22 away. Who has lived up to his commitment? The great leaders of India, Jawaharlal Nehru and
23 Sardar Patel, they made? They were statesmen, they were not politicians. They made these
24 commitments to the people of the State of Jammu and Kashmir. It is in Parliamentary debates,
25 it is outside the Parliament, it's everywhere. But now, today, since there are no statesmen left,
26 we have politicians. Decisions have been taken. People feel betrayed, that's all I can say. Thank
27 you.

28

29 **CHIEF JUSTICE DY CHANDRACHUD:** Yes, Dr. Dhavan.

30

31 **DR. RAJEEV DHAVAN:** My Lord, I have five arguments. May I please My Lord? My Lord,
32 I have five submissions to make. The first is, relates to the temporality of Article 370 and its
33 interpretation, and how it impacts on C.O. 272, and 273? My second related proposition is,
34 that mandatory provisions of the Constitution are not defeasible, and cannot be derogated
35 from. The third is, My Lord, the basic structure argument, which has two aspects. Firstly, basic
36 structure is a Constitutional limitation. This is not the argument we wish to advance. That is,
37 if there is an amendment, basic structure will apply. That's the Constitutional limitation. What

1 we emphasize is, basic structure as a principle to be applied by all authorities, and especially
2 the courts. The fourth argument is, the location of sovereignty and the constituent power...

3

4 **CHIEF JUSTICE DY CHANDRACHUD:** Location of sovereignty in the constituent
5 power?

6

7 **DR. RAJEEV DHAVAN:** No, My Lord. The location of substitution of a statehood My Lord.

8

9 **CHIEF JUSTICE DY CHANDRACHUD:** Sorry, the fourth one?

10

11 **DR. RAJEEV DHAVAN:** Sorry, My Lord?

12

13 **CHIEF JUSTICE DY CHANDRACHUD:** How did you begin the fourth proposition? I
14 perhaps didn't take it correctly.

15

16 **DR. RAJEEV DHAVAN:** The sovereignty proposition, My Lord.

17

18 **CHIEF JUSTICE DY CHANDRACHUD:** Yes. How do you begin? Do you say location of
19 sovereignty, or...?

20

21 **DR. RAJEEV DHAVAN:** My Lord, I'll explain that when I...

22

23 **CHIEF JUSTICE DY CHANDRACHUD:** But just as a head, what would you like us to
24 take?

25

26 **DR. RAJEEV DHAVAN:** Broadly speaking, the argument is this, that generic, basic
27 sovereignty lies with the people. To operate this, there is sovereignty which is external in
28 nature, in terms of international law. That is, no other state can make you a vassal state or
29 have any power over you. And the third My Lord, is after the Constitution has been enacted,
30 where does the constituent power lie? On which Mr. Dwivedi had a few things to say. And the
31 fifth argument, My Lord, is the substitution of statehood by Union Territory, on which I want
32 to cite just one section of the Reorganization Act. What I propose to do is this that as far as the
33 citations I want to give, I put them on a piece of paper. I think they've been uploaded. I'll hand
34 it over to Your Lordships. So that Your lordships doesn't have to scribble. I think you've done
35 enough scribbling for quite some time.

36

1 So, My Lord, let's come to the first question of temporality. We've done our share of scribbling
2 too My Lords. Let's come to question of temporality because that goes to the real issue before
3 your court. Your Lordship's court. What does temporary mean in 370? Chief Justice pointed
4 out that when you contrast it with 369 where it says five years. Therefore, certain
5 conditionalities have to be met. If those conditionalities are met, then at that particular point
6 in time the temporariness goes. Now, what were the conditionalities that were available as far
7 as 370 is concerned. There were two sets of powers in 370, which were assigned to the
8 Constituent Assembly. The first power was to reject the Constitution making process
9 completely. That is 370 Sub-Clause 3. This is a power that the Constituent Assembly did not
10 exercise. C.O. 44. C.O. 44, My Lord, where this power was used it did not exercise this power
11 to abrogate the Constitution process completely. The second conditionality was to fulfil its task
12 of making a Constitution. This task was fulfilled in 1956 and came into effect on the 26th of
13 January 1957. So, both temporalities exhausted themselves in 1957. After that, 370 ceases to
14 be a temporary provision. I'm not saying cease, which has been argued on this side by one
15 counsel that it ceases to exist. I'm saying it ceases to be a temporary provision. In my respectful
16 submission, what follows is that it becomes a special provision of the Constitution, like 371A,
17 all the schedules, etc. So 370 would be read as a special provision just like the other special
18 provisions that you find in 3701A onwards or the many provisions that you find giving
19 autonomy in the Sixth Schedule which is such a vast schedule of autonomy, because by this
20 time autonomy was attained by the J&K Constitution. Now My Lords there was a...What kind
21 of Federalism is this, My Lord? It's an example of cooperative federalism where two powerful
22 democratic forces meet and decide of the fate of a particular area of the Constitution.

23
24 One powerful democratic force came from the people of Jammu and Kashmir themselves in
25 the antecedent discussions My Lord as well as through the Constituent Assembly that is a
26 powerful democratic movement had to be taken into account. The second My Lord is,
27 democracy had to be preserved as part of Cooperative Federalism. Hence, to make it a
28 balanced cooperative federalism, we find the words concurrence, consultation, recommend.
29 These are methods of cooperation in a cooperative federalism. And they are writ large in the
30 Sixth Schedule as well My Lord, I've taken Your Lordships through that, I won't do it again.
31 Now My Lord the argument on the other side is that it remained temporary for 60 odd years.
32 My Lord that argument is almost a farce. If a Constitution has continued for such a long period
33 of time and being used as such for a long period of time, you can't say it remains a temporary
34 provision. What is left of 370 is just 370 Subclause 1. Because 370, Sub-clause 2 and Sub-clause
35 3, are dependent on interaction with the Constituent Assembly. This is a mandatory provision
36 which is indefeasible. Therefore, My Lord, when I say a special provision survives My Lord in
37 the spirit of cooperative federalism, it is 370 Sub-clause 1. The rest My Lord because the

1 Constituent Assembly has completed both its tasks for conditionalities, one, in not going the
2 non-constitutional route or going the constitutional route, as the case may be. Nothing
3 survives in 370, Sub-clause 2 and 3. Nor is it possible in 370 Subclause 3, to argue a doctrine
4 of substitutability, that for Constituent Assembly you can substitute Legislature. No. And on
5 that I'll give a note on what the proviso says My Lord. The proviso My Lord has a symbiotic
6 relationship with the main provision of 370, Sub-clause 3. Now some arguments were made
7 My Lord and I must, because I don't know whether they made frivolously, that 370 is a
8 compromise. If My Lord 370 is a compromise, you'll find compromises right throughout the
9 Constitution. Take, for example, Article 25. Sikhs are allowed to carry their daggers. You want
10 to get rid of that My Lord, you have to have a constitutional amendment. This is a compromise.
11 The entire Sixth Schedule is a compromise. But the most important compromise of all
12 concerns the privy purses. It's a compromise between 271 and 362. They said, all right, you've
13 surrendered everything by way of compromise we give you a privy purse. And what do the two
14 judgments, My Lord, on these two say? *Madhavrao Scindia* is clear along with the other
15 judgment to say, if you want to take this compromise away, then you must amend the
16 Constitution. Therefore, any compromises that are there in the Constitution My Lord follows
17 from a very important insight My Lord of Fali Nariman, that if today we were asked to make a
18 Constitution, we would not succeed. It's in one book of mine published two years ago. But
19 that's a different matter.

20

21 Israel was never able to come to come to terms with getting Constitution through, because it
22 could not evolve by compromise anywhere. New Zealand did not initially have a Constitution
23 of its own; it couldn't come to terms. So as far as compromises are concerned, they are writ
24 large across... that is the process of Constitution making, to accommodate the largest number
25 of views, and come to a compromise. And that was borne out, My Lord, by the princely purse's
26 cases; that were a compromise. We'll give you your princely purse. And when they tried to
27 change it by definition, Madhav Rao Scindia, the first Madhav Rao Scindia said, "Sorry, by
28 definition, you cannot change it". This is, in fact, a compromise which is embedded in the
29 Constitution, 271 and 362. It is only after the amendment was made, that the compromise was
30 set aside as a part of the constituent power.

31

32 Now My Lords, I want to test this particular argument. One argument has been made. With
33 the second argument that I want to advance, is non-derogability of mandatory provisions. And
34 then, we will test this against 272 and 273. There is no doctrine of necessity in our Constitution.
35 There is a doctrine of constitutionality, but no independent doctrine of necessity. It is about
36 the most dangerous addition that one can make to any Constitutional process, where you say,
37 "Because of necessity, we could not follow your mandatory provisions". Your Lordships have

1 held, that even directory provisions must be complied with to the extent possible, but we're
2 not there, we're on the question of mandatory provisions. Now, as far as 272 and 273 are
3 concerned, one argument that I want to enlarge on the basis of what Mr. Gopal Subramaniam
4 said, My Lord. Kindly have a look at 152. This... I won't give the dates again, because these
5 dates have been given by Mr. Subramaniam. In this part, unless the context otherwise
6 requires, the expression State does not include the State of Jammu and Kashmir. Therefore,
7 as far as the entire part is concerned, this Constitution recognized the relevant provisions
8 relating to the states, legislature, and otherwise, and incorporated those provisions after 238,
9 etc. was done away with, as My Lord, the Chief Justice pointed out. Otherwise, there would
10 have been a vacuum. How was that vacuum filled? By reference to the JK Constitution and
11 those relevant parts of the JK Constitution itself. Then My Lord, if Your Lordships will kindly
12 come to 308. 308, is part 14 of the Constitution, which deals with services under the Union of
13 States. All this of course, has been done away with now, without amendment, by the
14 Reorganization Act. It says in this part, "Unless the context otherwise requires, the expression
15 state does not include the State of Jammu and Kashmir". This, My Lord, would be a vacuum,
16 but for the fact that the Constitution makers were aware that provisions relating to that these
17 two parts, parts relating to 152 and 308, were already there in the Jammu and Kashmir
18 Constitution, and in fact, as far as these are concerned, they were incorporated by implication
19 into the Indian Constitution.

20
21 Now My Lord, on the basis of this, let us just test 272 and 273. There's another aspect and a
22 small argument was made that the preamble doesn't contain socialism, secularism. It's
23 actually there in the Jammu and Kashmir Constitution. I'll just give Your Lordships, the
24 sections. First My Lord, kindly come to Section 13. This is Volume 2, PDF 20. I'll just read it
25 out, My Lord. There's no point Your Lordship... otherwise I'll dream of PDFs all my life. My
26 Lord, I don't want to do that. Now My Lord 13, says, 'State to establish a socialist order of
27 society for the promotion and welfare of the people'. Long before it came into the Indian
28 Constitution, what was the necessity of amending the preamble? Then My Lord, if Your
29 Lordships could kindly come to Section 20. Compulsory education. The J&K Constitution says
30 compulsory education in certain cases and reflects those educational provisions in the
31 directive principles. And the third, is Section 25, the States... Duty of the State to foster equality
32 and secularism. So it was no great omission as far as the J&K Constitution was concerned. As
33 has been pointed out. Now, My Lords let us come to 272 and 273. Bearing in mind that
34 mandatory provisions of the Constitution are not defeasible. My second proposition. Now, My
35 Lord, one thing that I forgot to mention when I mentioned 152 at 309 of the Constitution, that
36 says, it should not apply to Jammu and Kashmir, is it was done by this Amendment of the
37 Constitution in the 7th Amendment. Therefore, if any change had to be made it could only

1 have been done by the Constitutional Amendment and not otherwise. With this, let me read
2 C.O.273 first. None of the conditionalities of 370 and Sub-Clause 1 are met here. It says, in
3 exercise of the powers of Clause 3, of the President of India on the recommendation of
4 Parliament. Where does Parliament come in My Lord? The body in question according to the
5 original Constitution is Constituent Assembly, and according to 272, is the Legislative
6 Assembly. Where is the question of Parliament coming in as a double substitution, which is
7 there in 272 and 273? But let me just read on. All provisions of the Constitution as amended
8 from time to time without modification or exception shall apply to the Jammu and Kashmir,
9 notwithstanding anything contrary to Article 152 and 308. Those are the provisions My Lord
10 where the Constitution 7th Amendment said that these provisions will not apply to Jammu
11 and Kashmir. Is it possible My Lord in an exercise of power under 370 to amend provisions of
12 the Constitution or not? Because this was the stumbling block My Lord in their way. The
13 answer is they have not My Lord, of course, as far as the conditionalities are concerned, none
14 of them are met. There is neither concurrence nor consultation nor recommendation. It just
15 says on the recommendation of Parliament. Where does Parliament come into this? Therefore
16 My Lord, 273 is an amending provision, well beyond the scope of Article 370. And not only is
17 it amending My Lord, it also goes further to destroy any other article of the provision of the
18 Constitution or any provision of the Jammu.... Constitution of Jammu and Kashmir, any law
19 document, judgment, ordinance, order by law, rule, regulation, notification, custom usage,
20 having the force of law in the territory or any other instrument. My Lord this is an amendment,
21 and actually an abrogation of 370 itself. That power having gone. If we agree that 370(3) has
22 gone because the Constituent Assembly cannot be substituted. So the argument that Mr. Sibal
23 made and was just made by Mr. Zaffar Shah, is there are two entities here, two entities who
24 are part of Cooperative Federalism. They have to interact and the interaction is there in Article
25 370 and is entirely and totally missing from 273. If 273 falls My Lord, there will be a revival of
26 152 and 308. There has to be because they are not..., you cannot amend the Constitution, which
27 has actually been amended by the 7th Amendment.

28
29 Now let's come to 272. This begins My Lord by saying, 'in the exercise of power under Clause
30 1', bear in mind, My Lord, the exercise in 273 is under 1, 370(3), which in our view has actually
31 disappeared. Now I'm going to show its reappearance in another form. "in exercise of the
32 power under Clause 1 of 370, the President, with the concurrence of the Government of Jammu
33 and Kashmir, is pleased to admit. Now My Lord, if Your Lordship were to see the main
34 provision of 367. Subclause (c) says, references to the Government of the State shall be
35 constituted as including references to the Governor of Jammu and Kashmir acting on the
36 advice of the Council of Ministers. Therefore My Lord when they say, in concurrence with the
37 Government of the State, it has to be on the basis of the advice of the Council of Ministers.

1 Therefore, there is a contradiction here between the Interpretation Clause and the opening
2 clause of 272. This too is draconian because all the provisions My Lord which are relatable, it
3 just wipes them out completely without following any mandatory procedure. Now what is the
4 saving grace My Lord that is provided here? And that is in D in the proviso of Clause 3, Article
5 70 of the Constitution, the expression Constituent Assembly referred to in Clause 2 shall be
6 read as Legislative Assembly. Here, there is a double substitution according to them. Firstly,
7 the Constituent Assembly is replaced by the Legislative Assembly. They're not on par My Lord.
8 They're simply not on par. The Legislative Assembly, this idea that both had legislative and
9 concurrent powers, constituted powers, that is true of the Constituent Assembly of the Indian
10 Constitution. There is a whole set of debates dealing with the legislative powers, as also, My
11 Lord, of the Jammu and Kashmir Constitution. So, can such a substitution take place? Now
12 comes the double substitution, which we see in 273. Instead of the Legislative Assembly of the
13 State, we get Parliament. So, these provisions now involve a double substitution contrary to
14 370(3), contrary to 272, and we now move from the provisions of recommendation under ...
15 concurrence, which is, of course, completely missing, My Lord. Mr. Zaffar Shah, has pointed
16 this out, I don't want to elaborate it. Totally and completely missing. The arena of cooperative
17 federalism is entirely and totally missing. But can you have a double Constitution...
18 substitution in this way? And that is to say that, 367, the added clause is, that the references
19 to the Government of the State shall be construed as references, including the Governor of
20 Jammu and Kashmir acting on the advice of the Council of Ministers. This is what the new
21 interpretation is. You didn't act on the advice of anybody, you just said here that concurrence
22 of the Government of the State. Now, according to 367 itself, it means with the Council of
23 Ministers; that is a mandatory provision. So, 272 and 273 are over broad in violation of
24 mandatory provisions of the Constitution, and shift the entire concurrence or consultation
25 provisions, or recommendation provisions, from the authorities of Jammu and Kashmir to
26 Parliament. This is the double substitution argument that they have advanced. Now my Lord,
27 we come to the interesting part of Article 3. Article 3, has a mandatory provision... I put that
28 in my original submission, My Lord, from 1960 onwards, that you must circulate any bill or
29 change on the reorganization of... you must circulate it to that legislature. This is a mandatory
30 provision. It is true that Your Lordships have also held, and those references are there in my
31 original submission, that the Centre is not bound by all your recommendations, and
32 subsequent changes can take place. But, this does not take away from the fact, that Article 3 is
33 a mandatory provision. Now they say, as far as this is concerned, under Article 356, there is a
34 power to make incidental provisions that are necessary and desirable. And they say that one
35 of the provisions that was made, was that Article 3 will not apply. That has been in the
36 President's Proclamation of 19th December. Effectively, that's what it says, that these
37 provisions will not apply. It can't be done, My Lord. President 's Rule... Under President's

1 Rule, you do not have the power to do away with a mandatory provision of the Constitution.
2 Now, My Lords, I want to point out one thing to Your Lordships, if I may, about the
3 Reorganization Act. I just want to read one provision to Your Lordships and that is Section 73.
4 This is Volume 3, PDF 112, at 130. I'll read it out My Lord.

5

6 **JUSTICE SANJAY KISHAN KAUL:** Just repeat that Mr. Dhavan.

7

8 **DR. RAJEEV DHAVAN:** Volume 3, PDF 112 where it starts, My Lord.

9

10 **JUSTICE SANJIV KHANNA:** Documents 5.

11

12 **DR. RAJEEV DHAVAN:** The Reorganization Act and I'm reading Section 73 which is at
13 PDF 130. 'If the President on a receipt from the Lieutenant Governor of the Union Territory of
14 Jammu and Kashmir or otherwise is satisfied that a situation has arisen in which the
15 administration of the Union Territory cannot be carried out in accordance with the provisions
16 of the Constitution.' That is the same as 356. Now look at the next clause. 'That for the proper
17 administration of Union Territory of Jammu and Kashmir it is necessary or expedient to do
18 so. This is also there in Article 239AB. So we've added one more section to it that if you think
19 it is not expedient, the President may suspend all operations. The more important thing in,
20 say Section 73 is, it has no time clause. So today, when Your Lordship asks for a roadmap,
21 today, the Constitution that the President's Rule that survives is under Section 73. Unlimited
22 time when it is expedient and necessary to do so. Necessary or expedient to do so. This is the
23 core of the problem when Your Lordship asks for a roadmap. They are unable to give one. They
24 too are in a sense are arguing that the Reorganization Act is in fact transitional in nature. A
25 time will come when statehood will be restored. This is no roadmap at all. It is entirely and
26 totally illusory. What is not illusory is the continuance of President's rule under Section 73.
27 This goes to the core of the governance My Lord and the relationship of Cooperative
28 Federalism.

29

30 I want to make one more further point on mandatory provisions. Although there are several
31 occasions when 370 has been used under President's Rule, I'm going to make the broad
32 argument My Lord, whether it was challenged or not is irrelevant. That when there is
33 President's Rule and Cooperative Federalism under Article 370 cannot apply, then 370 cannot
34 be used at all. Because the mandatory provisions My Lords, require concurrence, consultation,
35 recommendation. If these are absent and President rule because of some suspensive order gets
36 rid of it, in no President's Rule can we apply 370. Because the very foundation of 370 would
37 disappear by an exercise of a C.O. So, these are my first two propositions. Now I go to the third

1 one. I'll have something to say in the proviso. What I've done is, I have culled out the
2 authorities that I want to rely on, which I'll hand over rather than Your Lordships My Lord be
3 troubled. And that is My Lord, relates to the basic structure doctrine. It is not the case of
4 anybody that the basic structure doctrine applies in this case as a Constitutional limitation.
5 Nobody has argued that My Lord and it cannot be so. But what the basic structure doctrine
6 has been applied as, is as a Principle of the Constitution. Now in **Nagaraj**, My Lord and I'll
7 point out those two paragraphs. This is Volume 19, pdf 164, at PDF 195. And kindly bear in
8 mind My Lord that in **Bommai**, there was no Constitutional amendment involved and there
9 are many provisions of that nature. There the principle My Lord of the basic structure was
10 applied. It is our respectful view that if democracy, federalism, reasonableness is given the go
11 by, then it would follow My Lord, the principles of these underlying, these basic structure
12 formulations will necessarily My Lord guide Your Lordships in the exercise of any
13 Constitutional power. Now My Lord I'm just going to read two passages from **Nagaraj**. I've
14 given Your Lordships My Lord the citation is **(2006) 8, SCC 212**, which Your Lordships will
15 find in Volume 19, PDF 164, at 195. Has Your Lordship got that one? Para 24. The point which
16 is important to be noted is that the principles of federalism, socialist, secularism, and kindly
17 bear one more thing in mind, reasonableness and socialism are beyond the words of any
18 particular provision. They are systematic and structural principles underlying and connecting
19 various provisions of the Constitution. They give coherence to the Constitution. They make the
20 Constitution an organic whole. They are part of the constitutional law, even if they are not
21 expressly stated in the form of rules. Now in **Nagaraj** they defended the constitutional
22 amendments but subject to certain conditionalities that were imposed. And they said the
23 identity of equality is not taken away, but you'll follow these guidelines. Now My Lord, kindly
24 come to the bottom of that page, that is para 26 next to Placitum G. 'Overarching and
25 informing of these rights and value is a principle of human dignity under German Basic Law.
26 Similarly, secularism is the principle which is an overarching principle of several rights and
27 values under the Indian Constitution. Therefore, axioms like secularism, democracy,
28 reasonableness. Reasonableness has been elevated My Lord to a part of the basic structure.
29 Apply that to 272 and 273 My Lord and the answer will become clear. 'Social justice are
30 overarching principles which provide linking factors for the principles of fundamental rights'.
31 These principles are beyond the amending power. They pervade all enacted laws and they
32 stand at the pinnacle of the hierarchy of constitutional values.' It is our case My Lord that the
33 basic structure applies not as a constitutional limitation, but, as a set of overarching principles,
34 which are part of the Constitution. Now I get back to my argument My Lord. It is ideal to say
35 that when, My Lord, the Chief Justice used the word 'asymmetric', it was used in any casual
36 sense. That is, NCT-2. I said that it is a multi-symmetrical Constitution, which I have shown
37 to Your Lordships, and there is a violation of the multi-symmetric provisions of the

1 Constitution as far as this exercise of 272, 273, and 370 is concerned. Otherwise, My Lord, the
2 whole Constitution would become meaningless. **Bommai** is a classic example, My Lord, of
3 where there is no amendment whatsoever, but you apply the principles. And of course, there
4 are a host of others. Therefore, my respectful submission to Your Lordships is, basic structure
5 as a statement of principle applies in this particular case, though not as a Constitutional
6 limitation, because I'm equally allergic to the idea of going beyond the amendment process as
7 far as Constitutional limitation is concerned. I'm allergic to that particular idea. Constitutional
8 limitations have their limitations in 368, provided there is an amendment. But there are also
9 principles that are violated, and to that they have not provided any answer.

10
11 Now, on the question of sovereignty, My Lord... Now, My Lord, I come to the question of the
12 location of sovereignty, in the Indian Constitution. Now, My Lord, sovereignty has one
13 meaning in international law, that is, you are not under any other country. To that extent,
14 there is, as My Lord Justice Khanna pointed out, across the board, nobody has argued that the
15 Indian Constitution is not sovereign, and that Article 1 does not apply across the board; that
16 is nobody's case. But I'd earlier made a distinction between external sovereignty...

17
18 **CHIEF JUSTICE DY CHANDRACHUD:** And internal sovereignty.

19
20 **DR. RAJEEV DHAVAN:** ...and internal sovereignty. Now, I think internal sovereignty, My
21 Lord, is a bit of a misnomer. It really means, the application of sovereignty in the distribution
22 of powers. I'm amending that to that extent. Therefore, My Lord, how is sovereignty to be
23 exercised, is what one means by internal sovereignty. It is the exercise of sovereignty
24 distributed throughout the Constitution. Mr. Dwivedi has made some arguments, My Lord,
25 that there are many provisions of the Constitution that says this will not be an amendment to
26 the Constitution. I've got passages from **Kesavananda**. They were aware of these provisions,
27 and they regarded this provision simply to mean, you don't have to follow the procedure of
28 368, and nothing more than that. The constitutive power, its sovereign power exists in 368,
29 and in no other provision of the Constitution. Otherwise, we'll be saying, that when the
30 Constitution is... that you can amend the Constitution for the next two years. That during that
31 interregnum, it's a constitutive power. And finally, My Lord, I come to my last point which is,
32 the substitution of 'Statehood' by 'Union Territory'. My Lord, the Constitution actually divides
33 itself into two halves. A federation of states is one part of it and the second part of it, My Lord
34 what would be called devolutionary provisions, that is Union Territories. Now England, for
35 example, Northern Island My Lord has lot to do with that, since I taught there at Queens, is a
36 devolved provision. Wales is a devolution provision, so is Scotland,. Whether they will be
37 removed or not is within the gift of the supreme power of Parliament. That is a different matter

1 altogether. What has happened is that statehood has been taken away completely. Therefore
2 as part of the federation, Union Territories are not part of the federation of states. They are
3 devolutionary units which can always be taken away and that is a fundamental distinction
4 recognised in all constitutional jurisprudence, between a federation and a devolutionary
5 power. Now, My Lord, I'll just hand over that note to Your Lordships if I may? I think it's been
6 put up as well. So that Your Lordship doesn't have to take down references, etc. The first is in
7 relation.... Has it been handed over My Lord? I think it's been uploaded as well. As a note on
8 rejoinder My Lord. On proviso, the classic description of a proviso was given by Justice Fazal
9 Ali in ***Sundaram Pillai***. We need not multiply authorities after authorities on this platform.

10
11 **CHIEF JUSTICE DY CHANDRACHUD:** It's a classical judgment.

12
13 **DR. RAJEEV DHAVAN:** That's right. But what it says, it may entirely change the very
14 intendment of the context by insisting on certain mandatory conditions. In order to make it
15 workable. Now this My Lord Mr. Gopal Sankaranarayanan tells me, has been approved in
16 ***Manohar Lal's*** case. Your Lordship may just note that. Constitution Bench (2020), 8 SCC
17 129, at para. 193.

18
19 **JUSTICE SANJAY KISHAN KAUL:** Name the citation, please.

20
21 **DR. RAJEEV DHAVAN:** Over the page. I won't take Your Lordships 2020 Constitution
22 Bench. Your Lordship is familiar with these provisions that's why I don't want to read all of it.
23 And over the page, My Lord, I've given two further examples of the proviso as a condition
24 precedent. That if Edwingson, State of Assam, where consultations are to be taken with the
25 board or ***Narayan Das***, where consultations had to be taken and this is a condition
26 precedent. Now I come to My Lord on the application of the basic structure doctrine as a
27 principle of interpretation of the Constitution. ***Bomma*** is my first example. I've given Your
28 Lordships, the paragraphs and the PDFs. In ***Coelho*** My Lords and across the board use was
29 made of basic structure as a set of principles. Once again I've given that at 3.2. As regards
30 interpreting ***301 and 304, Jindal***, the ***Government of NCT versus Union of India*** My
31 Lord, while interpreting the proviso to 239(AA)(4). And over the page I've reproduced... I've
32 reproduced from the second NCT Judgment My Lord because it's in my written submission.
33 But I've just reproduced that paragraph. I don't need to read it. These are all principles that
34 have been applied across the board in interpreting statutes as well and in certainly as far as
35 constitutional provisions are concerned. Now My Lord, the argument that was advanced was
36 that there are other provisions that by Mr. Rakesh Dwivedi, which says this will not be deemed
37 to be an amendment to the Constitution. In ***Kesavananda***, My Lord, the Lordships were

1 aware of this. For example, Justice Hegde and Mukherjee, Amendments under 4 169, seven of
2 the Fifth Schedule, Para 21 of the Sixth Schedule, need not comply in the form and manner
3 prescribed under Article 368. So My Lord, it is not that they are part of the constituent power.
4 They need not comply with the provisions of 368. The same My Lord is said for Justice Palekar,
5 who once again notes these provisions. I won't read that My Lord because the point is there.
6 Then Justice Mathew My Lord, who says enactments under 4 169 Para 7, Fifth Schedule, Para
7 21 are affected by ordinary lawmaking procedure which is different from the procedure under
8 Article 368. They are not an ancillary constituent power. They are, in fact special provisions
9 which don't require, the invocation of 368. And then My Lord, there is Justice Beg and Justice
10 Chandrachud. My Lord that's all I have to say.

11

12 Now My Lord, what is the reliefs that we are seeking? If we stay within My Lord a very narrow
13 sub, then Mr. Sibal is right. All Your Lordships have to adjudicate is the temporality of 370,
14 272, C.O. 272, 273 and whether mandatory provisions are defeasible. That is, all that is, before
15 Your Lordships. The antecedent speeches so many have been quoted My Lord in the list of
16 dates, are totally and completely irrelevant. Because as soon as 370 is born that is the provision
17 which is the incorporated provision, and there is no other. You don't even have to refer to
18 Gopaldaswami Ayyangar's provisions.

19

20 **CHIEF JUSTICE DY CHANDRACHUD:** Thank you Dr. Dhavan.

21

22 **DUSHYANT DAVE:** May I please, My Lords. My Lord whichever way Your Lordships have
23 to look at this. My Lord, democracy, federalism, rule of law, or constitutionalism, each one of
24 them is a basic structure of the Constitution as has been held by Your Lordships. Every one of
25 those principles of broad, basic structure are completely thrown out of window by exercise of
26 this power by the President. Now My Lord there are three broad arguments which have been
27 raised on behalf of the Government of India. One, that Article 370 is temporary. Two, that
28 presidential exercise under Sub-article 3 of Article 370 is a valid exercise and three, of course,
29 that the state reorganization is a valid piece of legislation. Now My Lord, let me begin by My
30 Lord pointing out that My Lord in *Coelho* Your Lordships have expressly now said, My Lord
31 para 137. Just kindly make a note. I'm not going to trouble Your Lordships taking through the
32 paragraphs. Paragraph 137, My Lord quoting *Servai* that there are two powers, which are
33 fiercely independent one is the constituent power, which is a plenary power.

34

35 The other is a power of amendment of the Constitution, which is a derivative power of the
36 plenary power. So, power of amendment is always, My Lord, conferred by the Constitutional
37 framers, and that power must be exercised within the four corners of the Constitution. We

1 have now a third situation, where there is a Constitutional power to be exercised by the
2 President of India. Now first and foremost, as Your Lordships have brilliantly put it time and
3 again, nobody is *imperium in imperio* under our Constitution. My Lord, **Digvijay Mote** is a
4 judgment where Your Lordships very brilliantly put this. **(1993) 4 Supreme Court Cases**
5 **175, (1993) 4 SCC 175**. “No one is an *imperium in imperio* in our Constitutional Order. It's
6 reasonable to hold that the Election Commissioner cannot defy the law armed by Article 324”.
7 Now, can President defy Article 370, merely because he has power under 370, which he
8 assumes to have the power? Now My Lord, the second principle that Your Lordships have
9 brilliantly put beyond pale of doubt, is that there is no unreviewable decision under our
10 Constitutional Order. Every decision is subject to judicial review, nothing is unreviewable.
11 Parliamentary laws are subject to review. Executive orders are subject to review.
12 Constitutional exercises are subject to review. And that's, My Lord, where this democracy
13 survives. Now, in fact, in **Coelho**, Your Lordships go a step further and say, that merely by
14 inserting the words ‘constituent power’ in Article 368, the Parliament has no greater power
15 than power of amendment. It's not an original constituent power. They may have used it. And
16 that's why Lord in **Minerva Mills**, Your Lordships struck down Sub-Articles 4 and 5.
17 Precisely for that reason. So, power of amendment, Your Lordships have consistently held, is
18 subject to Constitutional limitations. Now, how do we, therefore My Lord, look at this... Your
19 Lordships have always said, and this is very interesting... As Samant, puts it, “The duty of
20 judicature is to act upon true intention of the Constitutional framers, the Constituent
21 Assembly”. That means *Sententia Legis*. How do you gather that intention? Can you travel
22 outside Article 370, as the government would like Your Lordships to do? In my respectful
23 submission, no. The entire basis of the arguments are circumstances prevailing today, to
24 justify this exercise, and then, to persuade Your Lordships that this is what Article 370 means,
25 and that's why it's temporary in nature. Now My Lord, don't take anything.

26
27 Lordships have said that My Lord Your Lordships have liberty to interpret the Constitution
28 within permissible limits. Your Lordships have always upheld that principle very soundly. The
29 Government wants Your Lordships to read something which I find it very difficult to
30 understand on a plain reading and clear intention of the Constitutional framework. These were
31 men and women of extraordinary wisdom. They worked for over two years to draft the
32 Constitution. Whatever their intention was, they have put it in this Article. We don't need to
33 travel outside at all to find out what that intention is. And that intention is in 370(1)(C). Please
34 seek 370(1)(C). Don't turn to it. It says provisions of Article 1, and of this article shall apply in
35 relation to that state. So they have permanently embedded 370 into the Constitution, along
36 with Article 1. Having embedded that because it is through 1(C), that 1(a), (b), come into play
37 because they have now said 370 shall apply in relation to Jammu and Kashmir. Now they were

1 aware that they had some understanding with the state where state wasn't sure whether it
2 wanted to continue this association with us or not. So they therefore drafted Sub-Article 3, to
3 say notwithstanding anything in the foregoing provisions of this article on the
4 recommendation of the Constituent Assembly. I am paraphrasing it. On the recommendation
5 of the Constituent Assembly of the State, President may by public notification, declare that
6 this Article shall cease to be operative or shall be operative only with such exceptions. Now,
7 My Lord, can any other meaning be given to the expression Constituent Assembly? Contrary
8 to what they had said, because that also used in Sub-Article 2. Today My Lord, after 70 years,
9 you might say read Constituent Assembly to mean Legislative Assembly and Legislature to
10 mean Parliament. What I respectfully submit that this is the limiting provision. The temporary
11 nature of the article is in Sub-Article 3, because they wanted to give people of Jammu and
12 Kashmir through the Constituent Assembly the right to decide whether they wanted to
13 continue with India, whether they wanted to follow Constitution of India or not. Nothing more,
14 nothing less. Otherwise, 370 is embedded into the Constitution. And it's not temporary. It's
15 permanent. And exercise under Sub-article 1, is therefore permanent exercise to be done from
16 time to time. What principle of *contemporanea expositio*? For 70 years if Government of
17 India, My Lord, order after order after order exercises power under Article 370. My Lord can
18 it now lie in their mouth to say that Article 370 is temporary? That's how they've understood.
19 That's how they have acted. Merely because government has changed of a new party, does it
20 mean that it has suddenly become overnight temporary? This is something which I want Your
21 Lordship to kindly appreciate that 370 was never intended to be temporary in its heart and
22 soul. Only temporary nature was to give the right to the Constituent Assembly to decide, what
23 do you want. If they decided, no, we don't want it to continue. President could have issued the
24 order. Instead they said, no. We want to be part of India. We want Constitution to apply but
25 we want to... want it to be applied in the sense of Article 370(1) and (2), essentially one.
26 Consultation and concurrence. Is it not something extraordinary, that is being done. It is not
27 the case of Government of India that 370 has not worked over last 73 years?

28
29 Not one example to show that 370 has failed. Every time My Lord Government of India wanted
30 to apply anything any article which was left out or any law which had to be applied it was
31 automatically accepted by State of Jammu and Kashmir and its Assembly then and My Lord
32 subsequently, State Governments. Somehow it is very unfathomable that why is it that
33 suddenly overnight you get up and say, now, and that's something which, Your Lordships must
34 understand, I appreciate, I've said in my written submissions earlier, in their manifesto BJP
35 categorically says in 2019 we reiterate our position since the time of Jan Sangh to the
36 abrogation of Article 370. This is the only material with the President of India. Nothing else.
37 With greatest respect, in all humility at my command. They wanted to have because My Lord

1 Jammu and Kashmir and 370 has become a bone of contention in this country among some
2 sections of society. But My Lord nobody has understood what 370 is. 370 is My Lord,
3 integrating Kashmir into India, and Your Lordship say again and again in the two judgments
4 which I will now straightaway refer to. My Lord I respectfully submit, Your Lordships must
5 very carefully scrutinize My Lord, **Kaul's** case, **Prem Nath Kaul** and My Lord **Sampath**
6 **Kumar**. Both judgments support my submission on every point, was answer to what the
7 Government of India has said. And they both provide answers to the questions that Your
8 Lordships have raised from time and again, including on sovereignty, including on
9 sovereignty. I'll read My Lord just four paragraphs from each. My Lord PDF page 10 in **Prem**
10 **Nath Kaul** it's Volume 1. It starts at Page 7. Just note. Don't turn to it My Lord, unless Your
11 Lordships have time, because we are running against time. But this is what Your Lordships
12 say. PDF Page My Lord 10. Volume 1, page 7 it starts at 10. Clause 8, is very important. It says
13 that nothing in the Instrument affects the continuance of Maharaja's sovereignty in and over
14 his State or save, as provided by or under instrument, the exercise of any powers, authority,
15 and rights then enjoyed by him as the ruler of the State or validity of any law then in force in
16 the State. Then My Lord Your Lordships say. 'after the act was enacted by the Yuvraj, My Lord
17 Chief Justice rightly queried, after the Act was enacted by Yuvraj, he issued a proclamation on
18 April 2019, 51, directing that Constituent Assembly consisting of representatives of people
19 elected on the basis of adult franchise shall be constituted forthwith for the purpose of framing
20 Constitution of a State of Jammu and Kashmir. In accordance with this proclamation,
21 Constituent Assembly was elected and it framed the Constitution. Then Your Lordship says
22 something very My Lord important. 'But it is urged My Lord this is PDF, page 16, Para. 26.
23 But it is urged that sovereignty of Maharaja was considerably affected by provisions of
24 Instrument of Accession, which he signed in October 25. This argument is clearly untenable.'
25 It doesn't stop here. Even subsequent proclamation onwards, Your Lordships say, his
26 sovereignty continues to legislate. And Your Lordships My Lord when Your Lordships were
27 called upon to decide whether a matter should be referred to a larger Bench or not, Your
28 Lordship said that there is no conflict between **Prem Nath Kaul** and My Lord **Sampath**
29 **Prakash**. Therefore, Your Lordships declined to refer it. And Your Lordships said, law of
30 precedent binds us in that judgment. So My Lord these two judgments in my respectful
31 submissions are binding on every point that's been raised. Now, see further. It is true, My Lord
32 it is true thereby Clause 1 of the Instrument of Accession, His Highness conceded to the
33 authorities mentioned in the State laws the right to exercise in relation to His State such
34 functions as may be vested in them by or under Government of India Act 1935, as in force.
35 Now My Lord, this...

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37 **DINESH DWIVEDI:** [INAUDIBLE]

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CHIEF JUSTICE DY CHANDRACHUD: No Mr. Dwivedi, we made it clear that 4:00 today we are concluding. Whatever now remains, you can give us submissions in rejoinder. Because even in rejoinder, now we have heard five counsels. We have heard...we have heard Mr. Sibal, Mr. Gopal Subramaniam, Mr. Zaffar Shah, Dr. Rajeev Dhavan, and now Mr. Dave is on his leg. So, I think five counsels in rejoinder is, I think, a lot.

DUSHYANT DAVE: Your Lordships may please give 15 minutes today extra, if possible?

GOPAL SANKARANARAYANAN: [INAUDIBLE] were cutting down our submissions to argue.

CHIEF JUSTICE DY CHANDRACHUD: So, what we will do is...

JUSTICE SANJAY KISHAN KAUL: No, instead of half an hour, you were in for 2 hours. So, you can't say that you want to argue rejoinder.

CHIEF JUSTICE DY CHANDRACHUD: What we'll do is, what we will do is...

CU SINGH: Your Lordship, on the State Reorganisation, there are specific...

CHIEF JUSTICE DY CHANDRACHUD: We will continue for 15 minutes. We'll wrap up by 4:15. After that, if anybody wants to give us anything in writing, not more than one page, to just sort of highlight the bullet points, if you can...

CU SINGH: I would need about 10-15 minutes. I'm only on the State Reorganisation Act.

CHIEF JUSTICE DY CHANDRACHUD: With no difficulty, but all within 4:15. We have to wrap it up. 4:15 we'll be rising.

JUSTICE SANJAY KISHAN KAUL: The latitude is till 4:15.

CU SINGH: Because, half day on Monday was taken by the Respondents, when Your Lordships had actually apportioned Monday and Tuesday to us.

CHIEF JUSTICE DY CHANDRACHUD: But then, you also took the half day, the previous week, you know.

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JUSTICE SANJAY KISHAN KAUL: 9 days. 9 days, to be precise, for arguing and opening. One and a half days in rejoinder.

CHIEF JUSTICE DY CHANDRACHUD: So, what we'll do now is... What we'll now do is, exactly at 4:15, we will say that we have heard arguments. Judgment is reserved. Any further submissions in rejoinder, may be submitted within a period of 3 days, not exceeding one page for each of the rejoinder.

DUSHYANT DAVE: If you want me to conclude, I can. I didn't get even 10 minutes. I've been requesting all of them...

CHIEF JUSTICE DY CHANDRACHUD: We are here till 4:15. After that, this will be the order which will be recorded, that one page of rejoinder submission.

DUSHYANT DAVE: So My Lord, this is what Your Lordships say in paragraph 31, PDF page 17. "It's true that by Clause 1 of Instrument of Accession, His Highness considered to the authorities mentioned in the said clause, the right to exercise, in relation to his state, such functions as may be vested in them by Government of India Act, as in force. But, this was subject to other terms of the Agreement of Accession. And Clause 6 of the Instrument, clearly and expressly, recorded continuance of sovereignty of His Highness, in and over his state. There is no substance in this argument". They rejected the argument on behalf of the petitioner, that sovereignty had come to an end. Then My Lord, Your Lordships further said... My Lord, one paragraph...

CHIEF JUSTICE DY CHANDRACHUD: Mr. Dave, we'll look at *Kaul*. *Kaul* has been read over...

DUSHYANT DAVE: My Lord, this is little important, because this answers all questions. To my mind, My Lord, respectfully I may say so, at the cost of repetition, that every one of the arguments raised by them, stands covered by these two judgments. And they have not explained these two judgments in their arguments.

CHIEF JUSTICE DY CHANDRACHUD: *Kaul* and ...

DUSHYANT DAVE: *Kaul* and *Sampath Prakash*.

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

2

3 **DUSHYANT DAVE:** Now, please see My Lord, Article Clause 2. This clause shows... Clause
4 3, sorry. "Thus, the proviso to Clause 3 also emphasizes the importance which was attached to
5 the final decision of the Constituent Assembly of Kashmir, in regard to relevant matters
6 covered by Article 370". This is PDF page 17, para 31. Then, Your Lordships say at para 40,
7 "The Constitution makers were obviously anxious, that the said relationship should finally be
8 determined by Constituent Assembly of the State itself."

9

10 Please see this. Paragraph 40, PDF page 20. Constitution makers were obviously anxious that
11 state relationship should be finally determined by Constituent Assembly of the State itself.
12 That is the main basis for and purport of the temporary provisions made by the present Article.
13 And so the effect of its provisions must be confined to the subject matter. The temporary
14 nature, according to Your Lordships, in *Premnath Kaul* was till Constituent Assembly
15 approved it. It did. President accepted that approval and issued Presidential order.

16

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

18

19 **DUSHYANT DAVE:** So this is completely...Now My Lord, Neither subsequent proclamation
20 issued by Yuvraj Karan Singh, adopting as far as possible proposed Constitution nor
21 Constitution Order subsequently issued by President, purported to impose any limitation on
22 the legislative powers of the ruler. So My Lord, Your Lordships have held that the sovereignty
23 of the ruler continued even after the acceptance of the Constitution after Article 1 was applied.
24 After Presidential orders were issued. My Lord, in *Sampath Prakash*, Your Lordship have
25 gone a little further and said, My Lord, this is what Your Lordships say. Now My Lord
26 *Sampath Prakash*, just note this is very important. At PDF Volume 1, Page 4 at page 30.
27 Page 29- 30. My Lord these very arguments were raised by the petitioner there. The first
28 argument was that article contained temporary provisions which cease to be effective after
29 Constituent Assembly convened for the purpose of framing Constitution of Jammu and
30 Kashmir had completed his task. Then what are the grounds they give in support of that? They
31 say My Lord, these special circumstances to which reference was made by him where, 1) There
32 had been a war going on within limits of Jammu and Kashmir. There was a ceasefire. That
33 condition in State were still unusual. That part of the State was still in hands of rebel and that
34 country was entangled with United Nations in regard to so and so. Noting all these arguments
35 Your Lordships rejected the argument that it is temporary. At para 7 at PDF page 30, Your
36 Lordship says very emphatically, there are however, much stronger reasons for holding that
37 provisions of this Article continued in force and remained effective even after the Constituent

1 Assembly of the State had passed the Constitution of the State. Then, Your Lordship say, in
2 fact, no such recommendation was made by the Constituent Assembly of the State, nor was
3 any order made by President declaring that Article shall cease to be operative. On the contrary
4 it appears that Constituent Assembly of the State made a recommendation that Article should
5 be operative if one modification to be incorporated in explanation. This modification in Article
6 was notified by President by Order 44, laid down that from 17 November Article was to be
7 operative. This makes it very clear that the Constituent Assembly of the State did not desire
8 that this article should cease to be operative and in fact expressed its agreement.

9
10 Please allow me. This Article... This makes it clear PDF para 7. This makes it very clear that
11 Constituent Assembly of the State did not desire that this Article should cease to be operative,
12 and in fact expressed its agreement to the continued operation of this Article by making a
13 recommendation that it should be operative with this modification only. In view of these
14 provisions, it must be held that Article 370 of the Constitution has never ceased to be
15 operative. What are they arguing My Lord? Can Government of India, in the face of law
16 declared by this Court under Article 141, say that it has ceased to be operative or that it was
17 temporary? Never ceased to be operative, and there can be no challenge on this ground to the
18 validity of orders passed by President in exercise of powers conferred by this Article. The
19 argument was that Presidential Orders are without authority of law because Article 370 has
20 ceased to be operative. They said no. Why? Because they said Constituent Assembly agreed
21 that it should be operative and it was continued thereafter. So My Lord five learned judges of
22 this court in both these judgments have categorically held. Now My Lord so far as amendment
23 of Article 368 was concerned as My Lord applied to Jammu and Kashmir, Your Lordship said
24 only one thing that thus Article 368 is not primarily intended for amending the Constitution
25 as applicable in Jammu and Kashmir, but it is for the purpose of carrying out the amendments
26 made in Constitution for rest of India into the Constitution as applied in State of Jammu and
27 Kashmir. My Lord, PDF page 33, para. 13. So Your Lordship went to the extent of saying that
28 those provisions of amending the Constitution...

29
30 So My Lord, Your Lordships went to the extent of saying that amendment to Article 368, is so
31 far as J&K is concerned is not for the purpose of amending Constitution. It is only for the
32 purpose of ensuring that amendments in Constitution of India are affected in Jammu and
33 Kashmir. Expressly Your Lordships hold that. These two judgments therefore, now My Lord
34 the Union has relied on **Damnoo's** case. My Lord **Damnoo** does not water down this
35 position at all. **Damnoo**, in fact, Volume 1, PDF page 45, says that necessity of concurrence
36 of the State Government or consultation of State Government is a must for the purpose of
37 Article 370(1)(a) and (1)(b) and therefore they said that they place no limitation on Jammu

1 and Kashmir Constitution. So **Damnoo** was an entirely different situation. Now My Lord as
2 I said in my opening arguments, what is the situation? So My Lord, suddenly the British decide
3 to leave. There is a vacuum. By the Independence Act My Lord they said that now there will be
4 two dominions Pakistan and India. The territories will be those My Lord which were part of
5 British India, subject, of course, to the princely States agreeing to come into India or Pakistan,
6 as the case may be. So My Lord, these accession treaties were entered into. Now My Lord if
7 that is so, then My Lord as **Berubari** expressly holds, 'if a treaty has been incorporated in the
8 Constitution, 370 is a classic example of incorporation of that treaty. My Lord Clause 6 of the
9 Instrument of Accession is bodily lifted into 370 in spirit. Now, once it is treaty has been
10 constitutionally recognized you cannot My Lord pass any order to undo that. What was the
11 purpose? Why were the Constitutional framers so My Lord conscious of it? Because they
12 wanted to bring about some kind of a resolution which will be permanent in nature to solidify
13 relationship between Jammu and Kashmir and India. It was not My Lord for the purpose of
14 temporarily joining them. They wanted to solidify the relationship of J&K with India, and they
15 realized that the only way we can do it is through the means of Article 370. Because any other
16 way we would have lost My Lord Jammu and Kashmir. Somehow they were very conscious.
17 Now can we go behind what they have done or what they have expressly referred to in the
18 Article itself. So, **Berubari** My Lord expressly holds that if it is a treaty and if treaty has been
19 recognized by the Constitution, then the only way you can undo it is by amending the
20 Constitution. And **Berubari** was a case of My Lord physical territory.

21
22 Now, Reorganization Act is a classic example of physical territory of Jammu and Kashmir,
23 which came into India by a treaty, now being subjugated or divided or dismembered into union
24 territories. And you are relying, for that purpose, a legislative power of Parliament to do it,
25 without amending the Constitution under Article 368. **Berubari** says that you can only follow
26 Constitutional Amendment under 368, and the strict procedure prescribed thereunder.
27 Nothing else, nothing more. And, it defines sovereignty very beautifully. Therefore, these are
28 examples where history... Your Lordship knows, from 1921, there was a war which went on in
29 Northern Ireland. In 1998, British Parliament had to concede, and the Northern Ireland
30 Legislative Assembly was, My Lord, given away many powers which British Parliament was
31 exercising, because they wanted permanent peace. Now, My Lord, it's not that people of
32 Jammu and Kashmir will die if 370 is taken away. It's not that. Question is that, people have a
33 right to feel that what was understood constitutionally, a Constitutional promise, can it be
34 taken away in this manner that has been done? The whole... they are also citizens of India,
35 they are not some foreigners. You are taking away from a sizable section of citizens of India,
36 My Lord, a special status which was conferred upon them by Constitutional framers.
37 Parliament, merely because Parliament has majority, it does not have a right to that scrap

1 Constitution; Constitutions live for eternity. And there is nothing. Even after 2019, violence
2 has gone on unabated. Every week we find people are being killed, soldiers are dying. You have
3 almost a million troops in Kashmir. You travel from Srinagar to Pahalgam or Gulmarg, every
4 100 ft an armed policeman is standing from paramilitary forces. Hundreds of vehicles ply on
5 those roads. So, this argument that there is development and... Yes, tourism has developed,
6 because Kashmir is the most beautiful place on Earth. It's heaven. Anybody who has been to
7 Switzerland will tell us. Mr. Sibal will tell us, because he has seen it much more than I have,
8 that Kashmir is far more beautiful than what Switzerland can be. Switzerland is manicured
9 and pedicured.

10

11 **KAPIL SIBAL:** When we do go for official visits, we don't see Switzerland.

12

13 **DUSHYANT DAVE:** So My Lord, what I am respectfully submitting, is that ultimately,
14 people have a right to expect that their status, their rights are respected for longevity. It's a
15 lifetime's promise, it's not a promise for the moment.

16

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

18

19 **DUSHYANT DAVE:** So My Lord, we are seeing, as Dr. Dhavan, rightly referred to Israel,
20 what are we seeing today? For 56 weeks, today, for 56 weeks, the Constitutional Amendment
21 is taking away powers of the Supreme Court... are being resisted by thousands and thousands
22 of people from across the society - civil society, business community, labour unions, lawyers,
23 soldiers, serving soldiers, everybody is up in arms. Why? Because Constitution is so dear to us.
24 My Lord, it must remain in our heart. My Lord, if Constitutional morality is allowed to be
25 tampered with, trifled with in this fashion, then there is nothing. Mr. Court Master. Mr. Court
26 Master. Constitutional morality, as Burke says and Dr. Ambedkar quotes him, "Constitutional
27 morality must be in the heart and bosom of every citizen". Let us not allow the Union to
28 steamroll, so that people lose their love and affection.

29

30 There is one aspect on federalism that I want to cite from Dr. Ambedkar's debate, which is very
31 important. My Lord, in his closing remarks, this is what Dr. Ambedkar said. Brilliantly.

32

33 **CHIEF JUSTICE DY CHANDRACHUD:** That is read out yesterday.

34

35 **DUSHYANT DAVE:** No. This part perhaps was missed out. I was hearing it.

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

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DUSHYANT DAVE: There is only one point of Constitutional import to which I propose to make a reference. A serious complaint is made on the ground that there is too much of centralization and that the States have been reduced to municipalities...

JUSTICE B.R. GAVAI: It was read. [UNCLEAR]

DUSHYANT DAVE: Yes. This aspect is very important because he calls basic principle of Federalism is that Legislative and Executive authorities partition between Centre and States, not by law. If Constitution has conferred this special status, then My Lord, I respectfully submit.

CHIEF JUSTICE DY CHANDRACHUD: This is Volume 8, page 5, and volume 8, page 1299 Mr. Giri read out this extensively.

DUSHYANT DAVE: Mr. Giri read also the aspect of whether democracy will be lost. Dr. Ambedkar says further, which he certainly didn't read. Democratic system India lost. Will she lose it a second time? I do not know, but it's quite possible in a country like India.

JUSTICE B.R. GAVAI: Mr Dave this was read. This was also read.

DUSHYANT DAVE: This was not read. I was sitting. 'From its long disuse must be regarded as something quite new. There is danger of democracy giving place to dictatorship. It's quite possible for this newborn democracy to retain its form, but give place to dictatorship. In fact, if there is a landslide, the danger of second possibility becoming actuality is much greater' Happened in '75. It happened in 1975. We cannot... these are....Dr. Ambedkar's every word My Lord in the opening and the closing speech is... must be written in golden letters by us. It should be in our heart. We cannot overlook the fact that ultimately as Burke says and Ambedkar quotes him that you can't rule by force all the time. And if you have to rule by force, then there is no governance at all. So I respectfully submit that Your Lordship may kindly accept the interpretation that we are canvassing, that, 370 is permanent in nature and that Sub-Article 3, was temporary in nature. That power was exercised, it was exhausted and My Lord in place of Constituent Assembly it is a fraud on Constitution to say that now Legislative Assembly, Governor, President, Parliament, everybody can exercise powers in respect thereof. How do you My Lord ascribe? It is doing violence to the plain language of the Constitutional framers. And that in my respectful submission, Your Lordships' Court have never permitted.

1 Ultimately, it's Your Lordship's Court, which has always upheld rule of law. So I respectfully
2 submit that these writ petitions deserve to be allowed and the orders be deserve to be...

3

4 **CHIEF JUSTICE DY CHANDRACHUD:** All other submissions may be filed not more than
5 one page at the most two pages.

6

7 **CU SINGH:** Your Lordship told me to curtail my argument Your Lordship said I want to fall
8 on them with regard to the state reorganization, I need to put in a substantial rejoinder. 150
9 page written submissions are put in and arguments are made, My Lord, which are completely
10 contrary to the facts. Your Lordships were told by the Solicitor that, Mr. Singh has kept from
11 you the Jammu and Kashmir Reorganization Act. Had he shown Your Lordship the Act, you
12 would have seen that nothing has changed. Everything is there. I need to put in. So I will put
13 in. Please don't hold me down to one page. I appreciate that Your Lordships don't want to sit
14 tomorrow, but I must at least some latitude, about four or five pages in rejoinder. I'll put in a
15 brief note there. I will not repeat anything, but I have to deal with it. Otherwise this whole
16 aspect that I was the only one who addressed Your Lordships...

17

18 **CHIEF JUSTICE DY CHANDRACHUD:** Give that in 2 pages. Now we have heard
19 argument. You can confine it to two pages. Bullet points you can put...

20

21 **CU SINGH:** To deal with the submission. The Solicitor solemnly tells Your Lordship
22 [UNCLEAR] he told Your Lordships the act and he handed out copies of the act. He said, had
23 you been shown the Act, Mr. Singh has made a big deal about Article 246, this that. But nothing
24 has changed. Everything is given to...

25

26 **RAKESH DWIVEDI:** That will lead to multiple responses from this side in that

27

28 **CHIEF JUSTICE DY CHANDRACHUD:** Therefore, Mr. Singh, now two pages you can
29 certainly give us. I think imagine if we give you 5 pages, there will be at least 10-12 council who
30 will want to file. We will have other 60 pages to.... and then we will say We will file submissions
31 for another 60 pages.

32

33 **CU SINGH:** Your Lordships had [UNCLEAR] July, we were frozen. [UNCLEAR] stick to it.
34 They filed 250 pages of submission are filed by one person.

35

1 **CHIEF JUSTICE DY CHANDRACHUD:** But volume is not always equivalent to
2 something that you have to read every.... or respond to everything. Sometimes there are charts,
3 there are other things...

4

5 **CU SINGH:** I'm only on the State Reorganization. I mean some latitude... well, some latitude.

6

7 **PRASHANTO CHANDRA SEN:** And it's on behalf of Mr. Naphade also... on behalf of Mr.
8 Naphade also...

9

10 **TUSHAR MEHTA:** Mr. Sibal, was to share the affidavit. No, we would like to see My Lord.
11 We have not received the copy.

12

13 **PRASHANTO CHANDRA SEN:** My Lords, I had the, on behalf of Mr. Naphade also, Article
14 368 argument for amendment...

15

16 **JUSTICE SANJAY KISHAN KAUL:** Everybody has argued the same thing with respect,
17 again and again, again and again.

18

19 **PRASHANTO CHANDRA SEN:** 368 My Lords, not the amendment.

20

21 **JUSTICE SANJAY KISHAN KAUL:** [UNCLEAR] the affidavit.

22

23 **PRASHANTO CHANDRA SEN:** My Lords, there's a different view on amendment to 368,
24 so just two pages. Just two pages for my submission.

25

26 **TUSHAR MEHTA:** Only a minute... Only a minute Mr... My Lord, it says, "I am a responsible
27 and dutiful citizen. I have exercised my right to approach this court. I reiterate the oath taken
28 while being sworn in as a Member of Parliament..."

29

30 **KAPIL SIBAL:** "To preserve and uphold the provisions of the Constitution of India and to
31 protect the territorial integrity of India".

32

33 **TUSHAR MEHTA:** This is not rebuttal, this is adding incident to injury to the nation.

34

35 **CHIEF JUSTICE DY CHANDRACHUD:** We'll analyse what is there in the affidavit.

36

37 **TUSHAR MEHTA:** Kindly My Lord, say something about it. I leave it at that.

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PRASHANTO CHANDRA SEN: My Lord, the request is for three pages.

CHIEF JUSTICE DY CHANDRACHUD: We must end it. We must end it with a vote of thanks to all the members of the bar. Thank you very much.

TUSHAR MEHTA: Your Lordships may read what is not written. Your Lordships may read what is not written.

PRASHANTO CHANDRA SEN: Thank You, Your Lordships.

BIMAL ROY JAD: And thanks to Nodal Counsel also. Nodal Counsel.

END OF DAY'S PROCEEDINGS