

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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RAJEEV DHAVAN: Chief Justice, may I take one minute of your time My Lord?

CHIEF JUSTICE DY CHANDRACHUD: Yes Dr. Dhavan.

RAJEEV DHAVAN: Your Lordship wanted a list of the non-legislative functions of the State Legislature.

CHIEF JUSTICE DY CHANDRACHUD: Yes.

RAJEEV DHAVAN: Of course, the most important is democratic accountability. That's what the Freedom Movement is all about, from representative to a responsible government. I've made a note. Shall I pass it on and have it uploaded?

CHIEF JUSTICE DY CHANDRACHUD: On what are the non-legislative functions?

RAJEEV DHAVAN: Legislative functions.

CHIEF JUSTICE DY CHANDRACHUD: All right. Because that is a question of the court, you can certainly..

RAJEEV DHAVAN: Because that is a question which fell from Your Lordship. Can I hand it over?

CHIEF JUSTICE DY CHANDRACHUD: Yes. Put it as part of.... Can you ask your junior to email it Dr. Dhavan to the Court Master?

RAJEEV DHAVAN: We'll do that. I'm obliged.

ZAFFAR SHAH: [UNCLEAR] Gave it to Mr. Prasana and he will upload it.

CHIEF JUSTICE DY CHANDRACHUD: All right, no difficulties.

ZAFFAR SHAH: Along with the <UNCLEAR>

CHIEF JUSTICE DY CHANDRACHUD: Thank you. Thank you. Mr. Zaffar.

1

2 **DINESH DWIVEDI:** Proceeding on the premise that Your Lordships have gone through the
3 written submissions...

4

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

6

7 **DINESH DWIVEDI:** There is one apology I had to make My Lord. There's one serious error
8 in that written submission. Wherever I have referred to Jammu and Kashmir, please read
9 merger as accession, not merger because Lordship has seen Kashmir did not merge. So that is
10 the error which I have come to you, I want to rectify it. Wherever I have used the word in my
11 written submission, 'merger' in respect of Jammu and Kashmir has to be 'accession'. Now My
12 Lords, I'll take just two minutes to sum up the context part, which Your Lordships must have
13 seen. Kashmir acceded differently because it acceded post 19 August '47. Rest of the states
14 concluded their accession as well as standstill agreement before August '47 because standstill
15 agreement was a pre-condition for Instrumental of Accession. So they had all signed. Kashmir
16 did not do it, and therefore as per the Cabinet Mission Memorandum 25th May, as well as the
17 India Independence Act, 1947, Section 6 and 7 and 8, Kashmir acquired independence because
18 of paramountcy ceased on 15th of August '47. That is the crux of the Cabinet Mission
19 Memorandum and the India Independence Act that follows it.

20

21 **CHIEF JUSTICE CHANDRACHUD:** Yes.

22

23 **DINESH DWIVEDI:** Rest of the states barring Kashmir merged through agreements from
24 time to time with the dominion of India, ceding all their powers, ceding all their powers in
25 sovereign, barring Kashmir. And that is what Your Lordship would notice in the Instrument
26 of Accession. I would not take Your Lordships through it, but that is what Your Lordships
27 notice. All the states were unqualified sessions of sovereignty to the dominion of India. Some
28 ceded directly to dominion of India, states, the larger ones. Some ceded to the dominion of
29 India, while they merged with the provinces My Lord. Provinces, Your Lordship would know,
30 would be the provinces under the Government of India Act, and they automatically merged in
31 the dominion of India. And some ceded to the federation of states My Lord, the union of states.
32 But eventually, all these ceding rulers and states, Indian states, they accepted that their right
33 to make Constitution, which was guaranteed to them in the Cabinet Mission Memorandum,
34 and thereafter, under the India Independence Act and the negotiations. They all ceded, that
35 Constitution of India will not be the sole Constitution with their Constitution merging in the
36 Constitution of India. And, that is what is My Lord, the genesis of Article 238. Article 238 is

1 significant My Lord, and this will answer one of Your Lordship's query, My Lord, that what
2 was the status of Kashmir when it ceded to the dominion under Article 1 and the Schedule?

3

4 **CHIEF JUSTICE DY CHANDRACHUD:** Where will we get Article 238 actually? Where
5 will we get that? Because, our Constitution copy doesn't carry it. So...

6

7 **GOPAL SANKARANARAYANAN:** [UNCLEAR]

8

9 **CHIEF JUSTICE DY CHANDRACHUD:** I'll just check.

10

11 **GOPAL SANKARANARAYANAN:** Not in that, the red one.

12

13 **CHIEF JUSTICE DY CHANDRACHUD:** It doesn't have in this yes. I'll share it with Justice
14 Kaul. Is it anywhere in the compilations? In the compilations do we have it somewhere?

15

16 **GOPAL SANKARANARAYANAN:** I have copies of this. I brought copies of...

17

18 **CHIEF JUSTICE DY CHANDRACHUD:** Anyways... No, don't worry, we have it here.

19

20 **DINESH DWIVEDI:** We all rely heavily on Mr. Sankaranarayana. So very adept at these...

21

22 **JUSTICE SANJIV KHANNA:** Will the Constitution as applicable to the State of J&K have
23 that?

24

25 **DINESH DWIVEDI:** I'm sorry My Lord?

26

27 **JUSTICE SANJIV KHANNA:** Will the Constitution as applicable to the State of J&K have
28 that? No?

29

30 **DINESH DWIVEDI:** No, 238 is in the Constitution of India.

31

32 **GOPAL SANKARANARAYANAN:** It can't have it, because it's barred.

33

34 **JUSTICE SANJIV KHANNA:** Yes, that's fine.

35

36 **DINESH DWIVEDI:** I'm coming to that. I'm coming to that. There's a slight... something to
37 be said. Your Lordships would bear this in mind that Kashmir ceded and became part of Union

1 of India as Part B state. And, the rulers' states were part of Part B state. They were all Part B
2 in the Schedule, First Schedule. And therefore, 238 was made applicable to Part B states only,
3 which were Indian states. 238 only.... what 238 does was, it keeps the promise of applying the
4 State's Constitution to the Government... to the Union... I mean, to the Constitution of India.
5 Part B state... 238 says that part 6, 7 and consequently part 11 would also apply to these Part
6 B states. And, that is how all these Indian states, My Lord, merged unconditionally into the
7 Constitution of India. Initially, all the Indian states were promised that they will have their
8 Constitution. But then, through negotiations this was taken out.

9

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

11

12 **DINESH DWIVEDI:** Now the status of Jammu & Kashmir was of a Part B state in the year
13 1950, when the Constitution was enacted, and yet, Your Lordship would notice in 370, Article
14 238 was excluded. That speaks volumes about the autonomy of the state.

15

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

17

18 **DINESH DWIVEDI:** Therefore...

19

20 **GOPAL SANKARANARAYANAN:** I'll just hand these out to Your Lordships, if I may
21 please.

22

23 **CHIEF JUSTICE DY CHANDRACHUD:** Are these given on a returnable basis or on a non-
24 returnable basis?

25

26 **GOPAL SANKARANARAYANAN:** No, no. It is for the court. In fact, when we were arguing
27 Coelho's matter, we were looking for Article 31 and wasn't in the footnotes. So when we
28 conceived this Constitution, we had to put all the old provisions. So, Your Lordships may find...

29

30 **DINESH DWIVEDI:** But the very discrimination [UNCLEAR]...

31

32 **JUSTICE SANJAY KISHAN KAUL:** You want me to have a written edition of this?

33

34 **GOPAL SANKARANARAYANAN:** It's coming out in three days.

35

36 **DINESH DWIVEDI:** But if the original My Lord, the intention to gift me, was not there.

37

1 **CHIEF JUSTICE DY CHANDRACHUD:** Attorney is very upset that Attorney has been
2 discriminated against.

3

4 **JUSTICE SANJAY KISHAN KAUL:** My Lord, you have mine, I have one.

5

6 **ATTORNEY GENERAL R. VENKATARAMANI:** Probably I can answer it with my own
7 copy.

8

9 **CHIEF JUSTICE DY CHANDRACHUD:** Brother has his own copy.

10

11 **DINESH DWIVEDI:** The attorney should be penalized for gifting us all. Now coming back
12 My Lords the.... Now, My Lord this brief introduction was necessary, because the basic theme
13 of ours is that Kashmir was entirely different. And this is what Your Lordship would notice in
14 the debates which....

15

16 Kashmir was different My Lord, both in respect of accession to the Dominion of India, when
17 it ceded at a different point of time as an independent state, our nation and it was different in
18 the sense that it did not merge, unlike the other states, its sovereignty. And that is why Your
19 Lordships, would notice in the Instrument of Accession, which was negotiated by Kashmir, the
20 ruler. There are a couple of clauses, which are not there in the other Instruments of Accession.
21 Format is the same under 1936 Government, 35 Government of India Act, but the conditions
22 which were added in favour of Kashmir were not there. For instance, we are not bound by any
23 provisions of the Constitution of India, future Constitution of India. The internal sovereignty
24 vests in the ruler. My Lord, the Union of India cannot acquire land in Kashmir. Kashmir would
25 acquire for Union of India and give it. Now, My Lord, from here My Lord noticing these
26 important issues Your Lordships may just.... I would like to answer Your Lordship's query
27 which fell from My Lord the Chief Justice, the sovereignty aspect. And which eventually would
28 answer My Lord, Justice Khanna's, query also, the superior- inferior Constitution, eventually.
29 The first aspect that we have to keep in mind is, the sovereignty was retained by the Maharaja
30 in the Instrument of Accession, Lordship has seen that so I would not waste Your Lordships'
31 time. The concept of sovereignty is a variable concept, My Lord. Concept, what it was in the
32 19th century, 18th century was no longer there in the 20th or 21st century, when My Lord, the
33 written Constitution started and the democratization of autonomy, as my friend puts it, that's
34 a very phrase pregnant with meaning. Democratization of authority and power which is
35 autonomy. The sovereignty, being a variable factor, has two components My Lord, the internal
36 and the external. And there are two decisions which Your Lordship may just care to note. One
37 is, My Lord, 1953. 1953, PEPSU full bench, which deals with a similar situation where Patiala

1 as an estate, merged with British paramountcy. Then what was the position of sovereignty of
2 the Raja?

3

4 **CHIEF JUSTICE DY CHANDRACHUD:** The page, Mr. Dwivedi? You can give us the page
5 later, no problem. You can just have...

6

7 **DINESH DWIVEDI:** 739 My Lords.

8

9 **CHIEF JUSTICE DY CHANDRACHUD:** 739. What is the principle which it laid down?

10

11 **DINESH DWIVEDI:** I'm sorry My Lord, this 1953 PEPSU 1. I am sorry My Lord, this
12 conclusion arises.

13

14 **JUSTICE SANJIV KAHNNA:** It is AIR?

15

16 **DINESH DWIVEDI:** It is AIR.

17

18 **CHIEF JUSTICE DY CHANDRACHUD:** Is it in the compilation? Case Law compilation?

19

20 **DINESH DWIVEDI:** Yes, My Lord, which says the sovereignty comprises of two parts
21 mainly because you have ceded external sovereignty, defence, external affairs and
22 communication, it would not amount to ceding of internal sovereignty.

23

24 **CHIEF JUSTICE DY CHANDRACHUD:** And what is the second judgment?

25

26 **DINESH DWIVEDI:** The Second Judgment is My Lord, is a recent judgment **2000,**
27 **Volume 8, SCC 61.**

28

29 **JUSTICE SANJAY KISHAN KAUL:** Could you repeat the citation please?

30

31 **DINESH DWIVEDI:** **2000, Volume 8, SCC, page 61,** paragraph 31 and 2.

32

33 **CHIEF JUSTICE DY CHANDRACHUD:** Paragraph?

34

35 **DINESH DWIVEDI:** 31 and 2. 31 and 32.

36

1 **CHIEF JUSTICE DY CHANDRACHUD:** And where is this? In the compilation where will
2 you get it?

3

4 **DINESH DWIVEDI:** I am sorry, it's not there in the compilation because...

5

6 **CHIEF JUSTICE DY CHANDRACHUD:** No problem, it is easy to get it...

7

8 **DINESH DWIVEDI:**later research My Lord yielded all this....

9

10 **CHIEF JUSTICE DY CHANDRACHUD:** Page 61.

11

12 **DINESH DWIVEDI:** And the third Judgment in this regard, which is a clear pointer towards
13 where the sovereignty rests post Constitution, the internal sovereignty. That is, **59 Supreme**
14 **Court, P N Paul.**

15

16 **CHIEF JUSTICE DY CHANDRACHUD:** **59 Supreme Court?**

17

18 **DINESH DWIVEDI:** **P. N. Paul's** case, My Lord.

19

20 **CHIEF JUSTICE DY CHANDRACHUD:** Oh yes, that is case law compilation?

21

22 **DINESH DWIVEDI:** Volume 1, page 8. PDF page 8.

23

24 **CHIEF JUSTICE DY CHANDRACHUD:** We have seen that. Yes.

25

26 **DINESH DWIVEDI:** That's the situation with regard to sovereignty. It's not that Kashmir
27 lost out all sovereignty merely because it acceded. And neither inclusion in the Article 1 and
28 the Schedule could result in losses, My Lord, internal sovereignty. Now My Lord, the key part
29 of my argument is based on and the question which I am, the key question which I'm raising
30 is that Article 370 ceases to operate once the Constitution of Jammu and Kashmir was enacted
31 on 26 January 1957. It is somewhat different from what most of my friends have argued. They
32 want some part of 370 to survive post '57. My argument is, nothing survives. All the powers
33 conferred under Article 370 I would show, My Lord ceased to operate once the Constitution is
34 enacted. And in that context we have to keep in mind the object of 370 and the commitments
35 made by the dominion of India then and the approval of those commitment by the framers.
36 My Lord, we must bear in mind, the people governing the dominion of India were mostly the
37 same who were the framers of our Constitution. They were wise men. We always say framers

1 were most wise, dynamic and sagacious. But then when it comes to the commitment made by
2 them, My Lord, we forget their sagacity. And therefore I would pray, please permit me to place
3 the debate, My Lord of Dr. Ayyangar, that is most crucial for my arguments. And juxtapose it
4 with 370 My Lord. Then I'll show one by one, all of the provisions become otiose. So this is
5 something which is a must for my argument. And I will pray, please permit me.

6

7 **CHIEF JUSTICE DY CHANDRACHUD:** Instead of reading, us reading now, Mr.
8 Ayyangar's...

9

10 **DINESH DWIVEDI:** Debate.

11

12 **CHIEF JUSTICE DY CHANDRACHUD:** ... Debate, his address. We've read it three or four
13 times. If you can cull out and we'll take it down. If you can cull out what are the key parts of
14 what he said.

15

16 **DINESH DWIVEDI:** I understand.

17

18 **CHIEF JUSTICE DY CHANDRACHUD:** So that then we go on to 370.

19

20 **DINESH DWIVEDI:** My Lord, the debate if Lordships will see, the initial part says that
21 Article 370, Clause 1(b)(i) and (ii), these are provisions providing for consultation and
22 concurrence of the Government of Jammu and Kashmir. And, it clearly says, debates clearly
23 say, that this was an interim arrangement till the Constituent Assembly was constituted. Now,
24 what does... with due respect, I submit My Lord to ask myself, what does this 'interim
25 arrangement' mean in respect of 1(b)(i) and (ii)? If it was an interim arrangement, they said it
26 is interim vis-à-vis Clause 2, which says, as soon as the Constituent Assembly comes into being,
27 the final decision is that of the Constituent Assembly with regard to (a) The jurisdiction of
28 Union and Parliament over Kashmir, and the Union's relations with the state or state's relation
29 conversing the state's relation with the Union.

30

31 **CHIEF JUSTICE DY CHANDRACHUD:** So, the first is jurisdiction of Union of India over
32 Jammu and Kashmir. And second?

33

34 **DINESH DWIVEDI:** I'm sorry My Lord, I couldn't...

35

36 **CHIEF JUSTICE DY CHANDRACHUD:** You said once the Constitution of J&K comes
37 into being, the final decision...

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DINESH DWIVEDI: Is that of the Constituent Assembly of Jammu and Kashmir, which was formed for framing of the Constitution. Clause 2 says...

CHIEF JUSTICE DY CHANDRACHUD: On two aspects, you said. One, jurisdiction of Union of India over Jammu and Kashmir...

DINESH DWIVEDI: And the centre and the state relations. The finality would be that imparted by the Constituent Assembly of Jammu and Kashmir. I'll place only those portions, My Lord, from the debate which unerringly lead to that.

CHIEF JUSTICE DY CHANDRACHUD: All right, let's quickly see those. If you can just give us the page reference?

DINESH DWIVEDI: Kindly come to, My Lord, Volume 5, PDF page 79. I'm reading My Lord the...

CHIEF JUSTICE DY CHANDRACHUD: Volume 5, page 79.

DINESH DWIVEDI: My Lord, I'm reading the internal page 424.

CHIEF JUSTICE DY CHANDRACHUD: We'll just go to that in a second.

DINESH DWIVEDI: Have Your Lordships got it?

CHIEF JUSTICE DY CHANDRACHUD: Just one second.

JUSTICE SANJAY KISHAN KAUL: What is the page?

CHIEF JUSTICE DY CHANDRACHUD: That is Volume 5, page 79. You are on the right document, but page 79.

DINESH DWIVEDI: The first part, of course, deals with the different situation of Kashmir, which resulted in this discriminatory treatment of Kashmir, in favour of Kashmir. Then kindly come to the last paragraph. Last paragraph of that very page My Lord. Again, the passage begins like this, My Lord. "Again, the Government of India have committed themselves to the people of Kashmir in certain respects. They have committed themselves to the position that

1 an opportunity would be given to the people of the state to decide for themselves whether they
 2 will remain with the Republic, or wish to go out of it". That was the, My Lord, the extent of
 3 right given. But let's keep that aside for a moment. Then last three lines. Last three lines, My
 4 Lord, of the paragraph... last four. "We have also agreed, that the will of the people through
 5 the instrument of a Constituent Assembly, will determine the Constitution of the State, as well
 6 as the sphere of union jurisdiction over the state". That's a very clear indicator. Sphere of
 7 Union jurisdiction over the state will be determined by the Constituent Assembly. Your
 8 Lordships have gone through it, my friend skipped through it, but then the important aspects
 9 have remained uncovered. Therefore, I was... Then kindly come to the next paragraph, which
 10 is even more significant. And this represents Clause 1(b)(i) and (ii). "At present the legislature
 11 which was known as *Praja Sabha* in the state, is dead", because the situation was such in
 12 Kashmir at that point of time, nothing could be functional.

13

14 Neither that Legislature nor the Constituent Assembly can be convoked or can function until
 15 complete peace comes to prevail in that state. We have therefore to deal with the government
 16 of the State, which as a representative... which represent... as represented in its Council of
 17 Minister reflects the opinion of the largest political party in the State. Till the Constituent
 18 Assembly comes into being, only an interim arrangement is possible and not an arrangement
 19 which could be brought into line with the arrangement that exists in case of other states. Now
 20 the word interim arrangement follows their elaboration that neither the Constituent Assembly
 21 is convoked, nor the Legislative Assembly is there, under the 39 Constitution, which is *Praja*
 22 *Sabha*. Therefore, whom should we consult? We are forced to consult or get the concurrence
 23 of the government, which is the only representative body, till the Constituent Assembly comes
 24 My Lord. This leaves no room for doubt, with regard to 1(b)(i), 1(b)(ii) and even 1(d), I'll show.
 25 All those provisions which provided for consultation and concurrence with the Government of
 26 India... sorry, Government of Kashmir cease to operate till the, operate only till the Constituent
 27 Assembly is not there. No sooner it comes into being, it ceases to.

28

29 Then My Lord, the next paragraph, which is a short paragraph, further corroborates that
 30 impression and it further indicates that 306(a) is also a temporary provision. My Lord, all this
 31 argument has become permanent. We are giving meaning to the word temporary used in the
 32 constitutional provision *dehors* the context, the object, Please have this. Now, if you remember
 33 the viewpoints that I have mentioned, it is an inevitable conclusion that at the present moment
 34 we could establish only an interim system. 306(a) is an attempt to establish such a system.
 35 Now, what else does temporary provision mean? It's an interim provision, they are saying it,
 36 in so many words. And yet what we are trying to do is make it permanent, changing the entire
 37 text of the Constitution. 306 Your Lordships know is....

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For a second My Lord. The Constituent Assembly is always regarded by us as the most August assembly ever in the history of [UNCLEAR], and they evolve the Constitution. There were men who fully knew what Constitution means. When they say the Kashmir would frame its own Constitution, they could have not implied anything else except what they were doing.

CHIEF JUSTICE DY CHANDRACHUD: All right. We now take this point of yours based on those two extracts from Gopalaswami Ayyangar's speech. Now you want to refer to further something here in your speech?

DINESH DWIVEDI: Yes, yes.

CHIEF JUSTICE DY CHANDRACHUD: All right.

DINESH DWIVEDI: Kindly have My Lord, omit the next paragraph, My Lord, that is 238. So I am not..., I've already elaborated.

CHIEF JUSTICE DY CHANDRACHUD: Yes.

DINESH DWIVEDI: Then come to the next one, My Lord the paragraph. The second portion of this Article relates to the legislative authority of Parliament over the Jammu and Kashmir State. This is governed primarily by the Instrument of Accession. Broadly speaking, that legislative power is confined to three subjects of defence, foreign affairs and communication. But as a matter of fact, these broad categories include a number of items which are listed in the Instrument of Accession. I believe, they number some 20 to 25. Now these items have undergone a change in the description, in numbering in arrangements as amongst themselves in list one and list... This is the justification of putting list 3 in 370(1)(b). Now these items... No, I'm sorry. It is therefore necessary that the items mentioned in the Instrument of the Accession should be brought into line with the changed designation of the entries in List 1 and 3 of the new Constitution. So Clause 1(b) of Article 306(a) says 'that this listing of the items as per the terms of the new Constitution should be done by the President in consultation with the Government of the State.' Then can you come to Clause B(2), that is for concurrence. 'Clause B(2) refers to possible additions to the list in the Instrument of Accession, and these additions could be made according to the provisions of this Article with the concurrence of the Government of the State. The idea is that even before the Constituent Assembly meets', kindly notice this again the same thing comes, 'the idea is that even before the Constituent Assembly meets, it may be necessary in the interest of both the centre and the

1 state, that certain items which are not included in the Instrument of Accession would be
2 appropriately added to the list in that instrument, so that administration, legislation, and
3 executive action might be furthered. And as this may happen before the Constituent Assembly
4 meets, the only authority from whom we can get consent for the addition is the Government
5 of the State.

6

7 Now, if I, My Lord, read this, and if I draw an inference from this, the only inference is, that
8 even (b)(ii), for all those provisions where concurrence is required of the government or
9 consultation is required of the government, or adding anything to the Instrument of Accession,
10 whether in terms of list items, or in terms of other provisions, all the provisions of consultation
11 and concurrence worked interim, till the Constituent Assembly meets. This also...

12

13 **JUSTICE SANJIV KHANNA:** Mr. Dwivedi, just also read the next clause, the last clause
14 refers to, "And thus, the Constituent Assembly, when it is referred to in the last sentence of
15 that clause, is an indication that the Constituent Assembly may continue". It's at page 427,
16 internal page...

17

18 **DINESH DWIVEDI:** No, I'll come to that. Please bear with me, I'll explain that. I'll explain
19 that also. I have that in mind, My Lord.

20

21 **JUSTICE SANJIV KHANNA:** Whether the Constituent Assembly, when used in the last
22 sentence of that paragraph, will he [UNCLEAR] the indication that... probably the Constituent
23 Assembly over here, was meant to get prolonged also.

24

25 **DINESH DWIVEDI:** I'll answer that. Then having seen this, My Lord, that the consultation
26 and concurrence were only for a temporary period till the Constituent Assembly comes into
27 being. And, that is what Your Lordship may now fall back on the Article 370, Clause 2. 370,
28 Clause 2. My Lord, this submission of mine tends to show to Your Lordships, that both the
29 provisos, again provide for consultation and concurrence, because they govern Clause (1)(b)
30 to (1)(d). And therefore, no sooner the Constituent Assembly, as per the intent of the framers
31 comes into being, they would continue to operate, because that's the only agency left for
32 consultation and concurrence. But once it comes, then the consultation and concurrence has
33 to be with the Constituent Assembly, that is what Clause 2 says.

34

35 **CHIEF JUSTICE DY CHANDRACHUD:** Mr. Dwivedi, I don't want to rush you. We started
36 at 10:40 today. The time allotted to you is till 11:25. We are now about 11:12. So, you'll have
37 to... everybody will have to stick to time today.

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DINESH DWIVEDI: I'm obliged Your Lordship has granted me this much of time. But please bear in mind, if I'm saying something which has already been said, Your Lordships may stop me. But, if there's something which, perhaps is new or different...

CHIEF JUSTICE DY CHANDRACHUD: All that I'm saying is, we need not read now the rest of Mr. Ayyangar's...

DINESH DWIVEDI: Will not. No, no. The Ayyangar statement is relevant because it answers Your Lordship's query, as well as the inferiority and superiority of the Constitution of India, also, I'll show.

JUSTICE B.R. GAVAI: That speech you have read at least twice-thrice. That speech you have read at least twice-thrice before.

CHIEF JUSTICE DY CHANDRACHUD: But your... and your contention really is, that once the Constitution of Jammu and Kashmir was framed on 26th of January 1957, the entirety of 370 ceases to exist.

DINESH DWIVEDI: There's nothing left.

CHIEF JUSTICE DY CHANDRACHUD: And then, the only governing document is the Constitution of Jammu and Kashmir. We got the point, because... they'll have to answer that.

DINESH DWIVEDI: We cannot ignore the fact, what was the commitment made. My Lord, when we see 370, it has to be in the light of the commitment made to the people of Kashmir.

CHIEF JUSTICE DY CHANDRACHUD: Now Mr. Dwivedi, can we go to Article 370, because you like to dovetail this speech with 370.

DINESH DWIVEDI: Deeply obliged. Kindly have My Lord, 370(1).

CHIEF JUSTICE DY CHANDRACHUD: 370(1), yes.

DINESH DWIVEDI: (a). First the heading is Temporary Provision. Under the heading Temporary Provision...

1 **CHIEF JUSTICE DY CHANDRACHUD:** Which are the features of 370, which according
2 to you would indicate that it would cease to exist after the Constitution of J&K has been...?
3 Which are those, if we can just identify them?

4

5 **DINESH DWIVEDI:** If we read the debates and dovetail it over here My Lord, it will be
6 [UNCLEAR]

7

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

9

10 **DINESH DWIVEDI:** My Lord, 238.... the provisions of 238 shall not apply in relation to the
11 State of Jammu and Kashmir. This provision has ceased to exist in the Constitution of India
12 from 1957 onwards. But it has not been changed, for the reason that there is no power to
13 change it. Clause 3 requires Constituent Assembly, Clause 2 requires Constituent Assembly.
14 And therefore, what my friend was right, Mr. Dhavan, Dr. Dhavan when he said, '52 onwards
15 Clause 3 has not been used. 238 is an amendment to Article 370, My Lord, therefore, Clause 3
16 was the only provision available. And it has not been used, and it is allowed to exist because
17 there is no way you can change it.

18

19 **JUSTICE SANJIV KHANNA:** Because for 370 you have... to amend 370, you have to fall
20 back on Clause 3.

21

22 **DINESH DWIVEDI:** Yes. They have to but they can't because, the precondition for exercise
23 of power is there. Now My Lord, kindly have My Lord, b, 1 b(i) that is a one-time power My
24 Lord, there's no dispute about that. Once you determine which are the entries relating to
25 Instrument of Accession, power ceases to operate, but yet it continues. No one has deleted
26 that. Again, the same logic. Then comes 1 b(ii), such other patterns in the said list, with the
27 concurrence of the Government of India, not Government of Jammu and Kashmir. Now,
28 reading the, My Lord, the statement of Dr. Ayyangar, which I placed for, this is an interim
29 arrangement, because at that point of time there was no other authority to consult or concur,
30 until the Constituent Assembly comes into being. And that is why 2 comes in. Even I'll go to
31 the extent of saying My Lord, Lordship will see that logically Clause C also ceases to operate,
32 Article 1. It says the provisions of Article 1 of this Constitution shall apply in relation to the
33 state. Reason being My Lord, 370 My Lord, when the Constitution comes, it itself says, we
34 have inalienable part of India. And for the federation purpose, Article 1 was there, so we can
35 read both the statements together. There is really no need to go fall back on C. Your Lordship
36 has seen Section 3 of J&K Constitution, including the Preamble? Loudly pronounces.
37 inalienable and this provision, My Lord at Section 3, cannot be modified under 147 Section

1 147, which is the amendatory power of the Constituent Assembly. It's a basic feature of that
 2 Constitution therefore, which is not prone to amendment. That position is settled. Now comes
 3 My Lord, D. Such of the other provisions of this Constitution shall apply in relation to that
 4 State, subject to such exceptions and modifications, as the President may, by order specify.
 5 Now this My Lord, immediately reflects to the seven reflects to, or refers to the second proviso.
 6 First proviso, I have already shown is the same thing as 1 b(i), where the words consultation
 7 and concurrence itself is embedded in the provision. So it's more or less reiteration of that.
 8 Second proviso says, no such order which relates to matters other than those referred to in the
 9 last preceding proviso, shall be issued except with the concurrence of the government. And
 10 Your Lordship has seen the very initial part of the concurrence and consultation was brought
 11 in only because there was no other authority and therefore they said, until the Constitution,
 12 Constituent Assembly comes into being. So therefore, in my opinion My Lord, humble opinion,
 13 subject to what Your Lordships decide eventually, even 1(b) becomes otiose. That power
 14 cannot be exercised because the concurrence now has to be by the Constituent Assembly. It
 15 cannot be, and that is what 2 says. If the concurrence of the Government of the State referred
 16 to in paragraph 2, of subclause B of Clause 1, or in the second proviso to subclause D of that
 17 clause be given before the Constituent Assembly for the purposes of framing of the
 18 Constitution of the state is convened. It shall be placed before such assembly for such decision
 19 as we take.... Therefore, even the concurrences and My Lord, the consultations that have
 20 resulted into something the finality of decision is vested in the Constituent Assembly. It can
 21 overturn the concurrence.

22

23 And that is what the framers say in respect to Clause 2, that the finality for determining the
 24 status of Union and the state relations as well as the jurisdiction of Parliament vests in the
 25 Constituent Assembly, who will finally determine these things. Constituent Assembly would
 26 finally determine through the shape of Constitution of Jammu Kashmir. It can't finally
 27 determine otherwise. Final determination has to be the enactment of Constitution, which was
 28 done. That is why I wanted to place the other paragraphs, My Lord, where they have said this
 29 in so many words. 'The final determination would be that of Constituent Assembly in respect
 30 of Parliamentary jurisdiction over the State and the Union's relations with the state.

31

32 **CHIEF JUSTICE DY CHANDRACHUD:** Clause 2 does not give finality to the decision of
 33 the...

34

35 **DINESH DWIVEDI:** No, no, I'm not saying that. That is why I said, please juxtapose the
 36 provision with the debate. And the debate says that.

37

1 **CHIEF JUSTICE DY CHANDRACHUD:** So in other words, we'll be reading an ingredient
2 of finality from the Constituent Assembly debate?

3

4 **DINESH DWIVEDI:** My Lord, I will ask myself...

5

6 **CHIEF JUSTICE DY CHANDRACHUD:** How can that be?

7

8 **DINESH DWIVEDI:** If the debate says as a commitment, because Jammu and Kashmir
9 Constituent Assembly will determine the Constitution. What is the use of the commitment
10 made? And what is the use of the Constitution when it cannot finally lay down anything? Just
11 look at it this way, unless we see 370 in the light of the commitment made and the commitment
12 was to framing of the Constitution. My Lord I...

13

14 **CHIEF JUSTICE DY CHANDRACHUD:** Can we say that a speech or an address made by
15 an individual member of the Constituent Assembly, however weighty, represents a
16 commitment by the nation or the dominion of India to the State of Jammu and Kashmir? This
17 would have a bearing on the interpretation of the constitutional provision.

18

19 **DINESH DWIVEDI:** My answer to this is My Lord, when we try to see...

20

21 **CHIEF JUSTICE DY CHANDRACHUD:** But for us to raise it to the point where it's a
22 binding commitment, a speech by a very distinguished member of the Constituent Assembly
23 represents a binding commitment of a nation.

24

25 **DINESH DWIVEDI:** But that statement is not by any member. That was a statement on
26 behalf of the person who answers all the queries on the amendments made. That's the
27 difference.

28

29 **JUSTICE SANJIV KHANNA:** Mr. Dwivedi, what you're asking us to read into it is
30 something which is not there in the Article. But if the Article was that this Article will speak,
31 get frozen in point in time after the Constituent Assembly of J&K frames a Constitution, that
32 doesn't appear to be following, because that is why I said, come to page 427, and that makes it
33 very clear.

34

35 **DINESH DWIVEDI:** Let's see...

36

1 **JUSTICE SANJIV KHANNA:** Because you are reading.... we can't read a portion of the
2 debate without going through the entire, what has been...

3

4 **DINESH DWIVEDI:** Your Lordship is reading the last paragraph and I'll explain.

5

6 **JUSTICE SANJIV KHANNA:** Not the last, yes the, the last claim, the last clause, just read
7 that.

8

9 **DINESH DWIVEDI:** This Article.

10

11 **JUSTICE SANJIV KHANNA:** Yes, just read that. You can't read, because you can't read
12 portions *dehors* the other. Because when debate is going on, there can be statements and then
13 the explanation to those statements.

14

15 **DINESH DWIVEDI:** Now My Lord, may I answer it in this way?

16

17 **JUSTICE SANJIV KHANNA:** And the other part is, you see, once you become part of the
18 nation, you become part of the.. It's the entire nation then you are part of.

19

20 **DINESH DWIVEDI:** This is what is creating a problem My Lord. Our perhaps thinking in
21 the manner which we have been tuned to think for last 70 years is that one nation, one
22 constitution. But where is that prescribed, My Lord, I ask myself. Excepting it could be
23 prescribed in the Constitution of India. But Constitution does not say so.

24

25 **JUSTICE SANJIV KHANNA:** Anyway, just read that paragraph.

26

27 **DINESH DWIVEDI:** 'The effect of this Article is that Jammu and Kashmir State, which is
28 now part of India, will continue to be part of India.'

29

30 **JUSTICE SANJIV KHANNA:** No, the one before that. 'The last clause refers to what may
31 happen later on..'

32

33 **DINESH DWIVEDI:** 'The last clause refers to what may happen later on. We have said
34 Article 211(a) will not apply to Jammu and Kashmir...' This is Article 238. '... but that cannot
35 be a permanent feature of the Constitution of the State and hope it will not be. So the provision
36 is made that when the Constituent Assembly of the state has met and taken its decision, both
37 on the Constitution of the State, and on the range of federal jurisdiction over State..' kindly

1 you notice that? 'State. The President may, on recommendation of the Constituent Assembly,
 2 issue an order that the Article 306(a) shall, either cease to be operative, or shall be operative
 3 only subject to such exceptions and modifications, as may be specified by him.' Now My Lord,
 4 I ask myself this question....

5

6 **JUSTICE SANJIV KHANNA:** Just read further in the last paragraph.

7

8 **DINESH DWIVEDI:** But before he issues any order of this kind, the recommendation of the
 9 Constituent Assembly will be a condition preceding....

10

11 **JUSTICE SANJIV KHANNA:** Correct. Now read the next paragraph also.

12

13 **DINESH DWIVEDI:** "The effect of this article is, that the Jammu and Kashmir State, which
 14 is now part of India, will continue to be part of India, will be a unit of the future Federal
 15 Republic of India and the Union Legislature will get jurisdiction to enact laws on matters
 16 specified either in the Instrument of Accession, or by later editions with the concurrence of
 17 the Government of the State, and steps have to be taken for the purposes of convening the
 18 Constitution". Your Lordship may detach one line before the succeeding line. It says
 19 concurrence to the government, and then effort should be made to establish the Constitution
 20 of India. So, this is what...and Jammu and Kashmir... Constituent Assembly. Now, if Your
 21 Lordships would read it with the first part, and this part... After all, they are elaborating. So,
 22 we can't detach the first part from the last part. So, we are, My Lord, with due respect, but we
 23 cannot snatch away this part My Lords. Steps have to be taken for the purposes of convening
 24 the Constituent Assembly in due course, which will go into matters I have already referred to.
 25 In other words, My Lord, all this is talking again of that interim period the concurrence and...
 26 Otherwise My Lord, the first part says, concurrence ceases till the Constitution comes into...
 27 the Constituent Assembly comes into being. And if we read later part as saying that no, it will
 28 still continue. There's a contradiction to that. And therefore My Lord, my cohesive reading
 29 shows, that perhaps when they gave this power of consultation and concurrence to the
 30 government, it was in a peculiar situation, not beyond that. And that is the key. As I said My
 31 Lord, that was the key to indicate what was the scope of (1)(b)(i) and (1)(b)(ii), including (1)(d),
 32 the two provisos. And, it's nobody's case, Clause 2 and Clause 3 survive beyond 1970... My
 33 Lord, '57.

34

35 **CHIEF JUSTICE DY CHANDRACHUD:** After the Constituent Assembly took its decision
 36 on 26th of January 1957, the dominion of India would have no power to apply any other
 37 provisions of the Constitution to Jammu and Kashmir.

1

2 **DINESH DWIVEDI:** They have all the powers. As I said, if Your Lordships would see the
 3 44th Amendment, which is the basis for Constitution of Jammu and Kashmir, that gives Union
 4 of India all the entries My Lord, which it has under the Constitution of India, 1 to 96, excepting
 5 97 is not there because residuary power is there with the state, Section 5. That was My Lord...
 6 I'm not here to judge whether they were right or wrong. I am here only indicating to Your
 7 Lordships, that this is one of the intents clearly falling from the interpretation which they had
 8 given to 370 only. And we have always argued, we have always said, look into the debates to
 9 cull out the intent of the provision. So, all that I am saying is, kindly look into the debates to
 10 cull out the intents of 370. And when we see the debates, along with 370, it clearly emerges
 11 that this power is not available thereafter. And, that is where I submit with respect, My Lord,
 12 **Sampat Kumar** is wrong. I have indicated in my written... **Sampat Prakash**. And the
 13 biggest mistake committed by **Sampat Prakash**, Your Lordships would see is, they relied
 14 upon 1952 Presidential Order, which incorporates My Lord, that the explanation.... If Your
 15 Lordship would see 370 explanation, that was what was incorporated by **Sampat Prakash**,
 16 modified. Initially, it was the dynastic rule, that the President will recognize the Raja as *Sadr-*
 17 *e-Riyasat*. But, '52 My Lord, the Constituent Assembly moved a motion and abolished this
 18 dynastic rule and said, now *Sadr-e-Riyasat* would be elected, elected by the Assembly on the
 19 advice of the Government of Jammu and Kashmir.

20

21 Now My Lord, this was sent to the Government of India with the concurrence of the
 22 Constituent Assembly under Clause 3, 370, and it was incorporated in the form of an
 23 explanation to one, that *Sadr-e-Riyasat* would be. Now My Lord the **Sampat Prakash**
 24 assumes, that this '52 order, My Lord, continues the *Sadr-e-Riyasat*, and therefore it shows
 25 that they wanted permanence to 370. But they earned in one respect, something which was
 26 not pointed out to them. Kindly have Section 27 of the Jammu and Kashmir Act.

27

28 **JUSTICE SANJAY KISHAN KAUL:** Mr. Dwivedi your submission is, that defunct
 29 provision of the Constitution, 370 was a defunct provision of the Constitution. No purpose in
 30 having it there. Yet it continued to be there. Everything would be determined by J&K
 31 Constitution.

32

33 **DINESH DWIVEDI:** I'll, I'll answer that question.

34

35 **JUSTICE SANJAY KISHAN KAUL:** C. O.s have been issued from time to time, pre '57 and
 36 post '57 and yet nobody thought about it. Yet the so-called affiliation with 370 as a section of
 37 the people [UNCLEAR] was also negatory because nothing fell out of that.

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DINESH DWIVEDI: My Lord, may I... please permit me to answer this...

JUSTICE SANJAY KISHAN KAUL: It is difficult to go that far.

DINESH DWIVEDI: [UNCLEAR] for the Lordships know that the past practice is going to justify the invalidity...

CHIEF JUSTICE DY CHANDRACHUD: Past practice...

DINESH DWIVEDI: That's not the law. Law, as I understand, is howsoever long the past practice may be, if it is constitutionally illegal, then it cannot be justified. And I'll show, My Lord here kindly have Section 27 of the Jammu and Kashmir Constitution. It is Volume 20. My Lord, howsoever much we may not like it, we may not approve it, but the fact remains, all that time trying to show is the intent. And should we read Article 370 *dehors* the intent My Lord? That's my question

JUSTICE SANJAY KISHAN KAUL: We read an intent based on the Constitutional law debates. But how it transpired after that, how it has worked out is, you say is irrelevant...

DINESH DWIVEDI: That's why I said My Lord any amount of illegality or action that may have been taken subsequently cannot justify the invalidity once it is, I will show...acquiescence can never be...

JUSTICE SANJAY KISHAN KAUL: Which volume do you want us to see now?

DINESH DWIVEDI: Yes, kindly have My Lord, Volume 20.

CHIEF JUSTICE DY CHANDRACHUD: Page? What page would that be?

DINESH DWIVEDI: PDF page 310.

JUSTICE SANJAY KAUL: Page?

CHIEF JUSTICE DY CHANDRACHUD: 310.

1 **DINESH DWIVEDI:** PDF page 310. I know My Lord I am advocating a cause which may not
2 sound very... in fact which way not sound please.

3

4 **JUSTICE SANJIV KHANNA:** No, no, it's not that. It's not that please.

5

6 **DINESH DWIVEDI:** I was conscious of it.

7

8 **JUSTICE SANJIV KHANNA:** I know. You see the explanation, which was added in 1952,
9 refers to the Council of Ministers.

10

11 **DINESH DWIEDI:** I'll answer that My Lord. It is 27.

12

13 **JUSTICE SANJIV KHANNA:** But it doesn't refer to the Constituent Assembly.

14

15 **DINESH DWIVEDI:** It does.

16

17 **JUSTICE SANJIV KHANNA:** It doesn't. It doesn't refer to the Constitutional Assembly.
18 Expression. And it defines the expression Government of the State for the purpose of that
19 article.

20

21 **DINESH DWIVEDI:** Yes.

22

23 **JUSTICE SANJIV KHANNA:** It defines the expression Government of the State for the
24 purpose of the article.

25

26 **DINESH DWIVEDI:** And that is with the concurrence of ...

27

28 **JUSTICE SANJIV KHANNA:** And there lies the distinction between the Constituent
29 Assembly debates because Constituent Assembly debates was not relevant, as far as the
30 explanation is concerned.

31

32 **DINESH DWIVEDI:** That's not correct. That's what I'm saying. Kindly have Section 27.
33 *Sadr-e-Riyasat* in that form, continued under Constitution of Jammu and Kashmir.

34

35 **JUSTICE SANJAY KISHAN KAUL:** One thing I find it difficult to accept...

36

37 **DINESH DWIVEDI:** I know My Lord, it is difficult.

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JUSTICE SANJAY KISHAN KAUL: No, I'm saying so that the Constituent Assembly debates amounted to an assurance that 306(a) or 370 would dissolve itself. I am not saying, whether after that it did or not, it has dissolved itself.

DINESH DWIVEDI: No that's not right way of putting my question My Lord.

JUSTICE SANJAY KISHAN KAUL: If you say 370 is put in the statute, then it is dissolved automatic...

DINESH DWIVEDI: No, what I'm saying is My Lord, debates indicate the intention behind 370 and the scope of 370 because it's very common law. Every time when we see this we want to investigate and go into the question of intentions of the framework.

JUSTICE SANJAY KISHAN KAUL: I thought you said 370 doesn't exist. According to you it is only on paper.

DINESH DWIVEDI: Yes post '57.

JUSTICE SANJIV KHANNA: Yes, yes. I am saying what you say is the Constitution's debate should be read in a manner that 370 will intend to dissolve itself on the Constituent Assembly completing its... the J&K Constituent Assembly, completing the process. It had inadvertently remained on the statute over which some people seem to be very.... let me say better words, feel very strongly.

DINESH DWIVEDI: Fair enough. My Lordships...[UNCLEAR]

JUSTICE SANJIV KHANNA: I am putting to you the consequence what would happen were we to accept what you are saying. This is only what I am consequence....

DINESH DWIVEDI: But I ask myself My Lord, I don't feel that there would be any adverse consequence. Once we accept... please keep this in mind for a moment, that yes, two constitutions could have separately existed cohesively. But what will be the consequence I ask myself, My Lord. And that was the intent of the framers and they felt eventually Kashmiris may agree to something which is like other states, but then they didn't enforce that. They still permitted Constitution to be framed. But Constitutions are not made for a day, Your Lordships have held in 2018. They are made till the lifetime of the state or the nation. They are not made

1 for a day or two. They can't be held to be an interim measure, to be chipped off, off and on My
2 Lord. Now please have 27 My Lord, what the Supreme Court in **Sampat Kumar** overlook
3 was that explanation did not continue. What continued thereafter was 27 Section.

4

5 **CHIEF JUSTICE DY CHANDRACHUD:** Dwivedi, the net consequence would be that the
6 Constitution of India, in its application to the State of Jammu and Kashmir would stand frozen
7 as of January, 1957. Therefore, no further development in Indian Constitutional Law can at all
8 apply according to you to the J&K... to the state of Jammu and Kashmir, after 1957.

9

10 **DINESH DWIVEDI:** Because Constitution of Jammu and Kashmir itself...

11

12 **CHIEF JUSTICE DY CHANDRACHUD:** How can that be acceptable?

13

14 **DINESH DWIVEDI:** I'll... My Lord, we may ask this question how. But the question is which
15 provision of the Constitution permits that except 370? Now, if I am right in my submission,
16 that 370 ceases to operate, then which [UNCLEAR], other provisions would...

17

18 **CHIEF JUSTICE DY CHANDRACHUD:** But if Article 370 ceases to operate, and Article 1
19 continues to operate. And then Jammu and Kashmir is an integral part of India, surely the
20 jurisdiction of every democratically elected institution in India is not excluded in its
21 application.

22

23 **DINESH DWIVEDI:** What I'm saying here again, My Lord, let me reiterate.

24

25 **CHIEF JUSTICE DY CHANDRACHUD:** There has to be then a provision in the Indian
26 Constitution which excludes its application to Jammu and Kashmir. Then there is none then,
27 according to your argument.

28

29 **DINESH DWIVEDI:** This may be our wish, but the point is, let us look at the provisions of
30 the Constitution. This is what I'm saying.

31

32 **JUSTICE SANJIV KHANNA:** Mr. Dwivedi in fact...

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34 **DINESH DWIVEDI:** In 370...

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36 **JUSTICE SANJIV KHANNA:** In fact, your argument now cuts across the other side
37 argument.

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DINESH DWIVEDI: That's right.

JUSTICE SANJIV KHANNA: Your side argument itself. You are cutting it...

DINESH DWIVEDI: No, there is a difference.

JUSTICE SANJIV KHANNA: And just look at the second proviso. Just turn to the second proviso.

DINESH DWIVEDI: Yes.

JUSTICE SANJIV KHANNA: 'Except with the concurrence of that government..' Now the government has been defined and the argument of your side, some of your colleagues on your side, is government and the Government of the day Council of Ministers is different from the Constituent Assembly and the Legislative Assembly.

DINESH DWIVEDI: My Lord, this is where....

JUSTICE SANJIV KHANNA: And here the second proviso does not use the expression Constituent Assembly. It says, except with the concurrence of that government. And government has been defined by pursuant to the Amendment in 1982, and therefore your challenge or to the dictum in *Sampat Kumar* is slightly gets into difficulty because that's the intent behind it.

DINESH DWIVEDI: May I answer that My Lord? When it says that 'government', what it means is the government which was preceding the Constituent Assembly.

JUSTICE SANJIV KHANNA: That's contrary to the explanation.

DINESH DWIVEDI: I will answer that. My Lord, kindly bear with me. Why do I say so? After second proviso, there is Clause 2 and what does Clause 2 say? 'Whatever concurrence has been given prior to Constituent Assembly has to be placed before Constituent Assembly, for enabling it to take a final decision.'

1 **JUSTICE SANJIV KHANNA:** What it means is this, that if there is concurrence, because
 2 initially, when the Article 370 was there, it was *Sadr-e-Riyasat* and the other Council. After
 3 that, at that time if any decision is taken, it will be...

4

5 **DINESH DWIVEDI:** *Sadr-e-Riyasat* continued.

6

7 **JUSTICE SANJIV KHANNA:** I know, I'm aware. But the explanation, which is added is,
 8 with regard to then the Council of Ministers. The explanation in 1952, which was added by the
 9 concurrence of the Constituent Assembly, was with regard to the Council of Ministers.

10

11 **DINESH DWIVEDI:** There's no difficulty My Lord. We are reading little, with due respect
 12 My Lord, we are reading little too much on that because have Section 27 to 32. It is the *Sadr-*
 13 *e-Riyasat* elected by the Legislative Assembly who will be the *Sadr-e-Riyasat*. And obviously
 14 the recommendation goes through the Council of Ministers, not otherwise. So the Council of
 15 Ministers and *Sadr-e-Riyasat* as well as Legislative Assembly are all there, elected. And then
 16 My Lord by explanation, relying on the explanation to 1952 order, we cannot say in '57,
 17 Constitution does not cease 370. That doesn't follow. Because Constitution includes *Sadr-e-*
 18 *Riyasat*. The continuance of *Sadr-e-Riyasat* had to be as per Section 27, and couldn't be... and
 19 that was the fact. So, this assertion in **Sampat Kumar**, My Lord, relying upon the '52
 20 Presidential Order, adding the explanation of elected *Sadr-e-Riyasat*, is not correct. My Lord,
 21 there are lots of misconception points in **Damnoo's** case, which I think, one of my friends
 22 may have cited that.

23

24 My Lord, please read Clause 2 in the debates My Lord. Please read Clause 2 in the debates.
 25 May I pay here... Lots of clarification would be there if Your Lordships would need the
 26 explanation to Clause 2 in the debates, page 427, the same. Page 82. Then we come to Clause
 27 2. The passage is My Lord, paragraph... Then we come to Clause 2. "You will remember that
 28 several of these clauses provide for concurrence of the Government of Jammu and Kashmir...
 29 Jammu and Kashmir State. Now, these relate particularly to matters which are not mentioned
 30 in the Instrument of Accession, and it is one of our commitment to the people of... and the
 31 Government of Kashmir, that no such addition should be made, except with the consent of the
 32 Constituent Assembly, which may be called in the state for framing of the Constitution. In
 33 other words, what we are committed to is, that these additions are matters for the
 34 determination of the Constituent Assembly". That explains Your Lordship's question. It may
 35 be one to second explanation, but it comes before Clause 2. After reading the explanation in
 36 Clause 1(b)(ii)... 1(d), they come to Clause 2. My Lord, otherwise the whole reasonable... My
 37 Lord, the sequence denoted in the Article 370, has no meaning then. And, this, My Lord,

1 paragraph includes the second proviso clearly. So, inferring something different from that
2 word 'that government', to me as I see it, it doesn't follow. And, then also the next paragraph
3 is equally... so far as the other thing is... Yes. My Lord, Just one paragraph. "Now you will
4 recall, that in some of.." Now, My Lord, as I said, **Sampat Kumar** was not... **Sampat**
5 **Prakash** was not rightly decided. And, if Your Lordships would just have a look at **Sampat**
6 **Prakash**, that perhaps may eventually conclude my argument. **Sampat Prakash** is...

7

8 **CHIEF JUSTICE DY CHANDRACHUD:** Which is a provision of the J&K Constitution
9 equivalent to Article 245 or 246?

10

11 **DINESH DWIVEDI:** They have their own Section 5, which defines the powers of both state,
12 and indirectly, the Parliament. Section 5, Your Lordships have? And this is what continued for
13 a long period of time, My Lord. Practices relevant My Lord... then this is continued for a long
14 period of time, till this order comes. Kindly have Section 5. That is, for Your Lordship's
15 convenience, Volume 2, PDF page... I will first refer to the preamble.

16

17 **CHIEF JUSTICE DY CHANDRACHUD:** Now see the problem with your argument,
18 because Article 5 says, that the legislative and executive power of the state would extend to all
19 matters, except those with respect to which Parliament has power to make laws for the state....

20

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

22

23 **CHIEF JUSTICE DY CHANDRACHUD:** ... under the provisions of the Constitution of
24 India. Therefore, that takes us to the Constitution of India. That therefore postulates with the
25 Constitution of India does apply to the state of Jammu and Kashmir.

26

27 **DINESH DWIVEDI:** That overlooks one important factor. And that is, the 44th Amendment
28 immediately preceded to the concurrence of Constituent Assembly, where they had elaborately
29 defined, what are the provisions of the Constitution of India would be applicable to Jammu
30 and Kashmir, and this Constitution is elaborately based on that, 44 Order. And therefore it
31 presumes, whatever power has been given to the Parliament, under My Lord, the scheme of
32 things, 44, there My Lord, what they have indicated is, entries 1 to 96 of List 1.

33

34 **CHIEF JUSTICE DY CHANDRACHUD:** But unless we... unless for the purpose of the
35 argument of this side, unless we accept that Article 370 did continue until 2019, there would
36 be absolutely no trammel on the jurisdiction of Parliament and the Section 5,

37

1 **DINESH DWIVEDI:** My Lord, as i said...

2

3 **CHIEF JUSTICE DY CHANDRACHUD:** Because 5 says, except those with respect to
4 which Parliament has power to make laws for the State under the provisions of the
5 Constitution.

6

7 **DINESH DWIVEDI:** But there is no difference.

8

9 **CHIEF JUSTICE DY CHANDRACHUD:** Now under Constitution but for 370...

10

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

12

13 **CHIEF JUSTICE DY CHANDRACHUD:** ...Parliament would have the power to make laws
14 with respect to all aspects in List 1 and List 3. Now, if your arguments is that 370 goes...

15

16 **DINESH DWIVEDI:** My Lord the moment we come to...

17

18 **CHIEF JUSTICE DY CHANDRACHUD:** ...then where is the limit on the power of
19 Parliament?

20

21 **DINESH DWIVEDI:** I will answer My Lord. It has.... Parliament has power to make laws.
22 Now let us fall back to that stage. What was the power given to Parliament at that point of time
23 to make laws? The 44th Presidential Order, 48 Presidential Order, which is 1954. It elaborately
24 determines what is the scope of parliamentary jurisdiction, that is, entry 1 to 96. Now if we
25 add entry 97 to that again, because that is Parliament's power, then what will be the fate of
26 Section 5?

27

28 **CHIEF JUSTICE DY CHANDRACHUD:** But then you've been arguing all this while, that
29 these Constitutional Orders are matter of constitutional practice. They are contrary to the
30 provisions of the, they are contrary to the Constitutional provisions. If we accept your
31 argument and therefore, don't look at the Constitutional Orders, then this is the consequence
32 that follows as sequitur of your argument, that there would be no restraint in the power of
33 Parliament, then.

34

35 **DINESH DWIVEDI:** The sequitur is this My Lord, that after the 1954 order there couldn't
36 have been any other order. And that is why they say in respect to which Parliament has power
37 to make law. Otherwise, My Lord, again. I fall back on the same theory, interim sovereignty

1 continued with the State. The Constitution ensures that interim sovereignty.... there is a My
2 Lord whole legislative provision, the executive provision, and the judicial provision. What is
3 the utility of that My Lord, if 370 continues to infiltrate. As I said My Lord add entry 97. That
4 is the residuary power. Then what remains of this? And yet the commitment was there. My
5 Lord, all that I am suggesting time and again is, see it in the light of the object to 370 the intent.
6 The object of 370 was only to ensure that no one from outside interferes with the Constitution
7 making. That was the object of 370 as the framers have delineated. So therefore not otherwise
8 Your Lordships may see, 254 doesn't apply.

9

10 **CHIEF JUSTICE DY CHANDRACHUD:** Mr Dwivedi, now I think we've really understood
11 your perspective. Can we now wrap up?

12

13 **DINESH DWIVEDI:** Yes, yes. *Sampat Kumar* I've already indicated.

14

15 **CHIEF JUSTICE DY CHANDRACHUD:** You've already argued *Sampat Kumar*, so we
16 will now, there are some people who have to follow now.

17

18 **DINESH DWIVEDI:** [UNCLEAR]

19

20 **CHIEF JUSTICE DY CHANDRACHUD:** Thank you so much, Mr. Dwivedi. Thank you
21 very much.

22

23 **DINESH DWIVEDI:** My Lord there's one aspect there is one aspect which I want to throw
24 light on, which fell from Justice Kaul. But since there has been repeated exercise of power
25 since 1957 onwards, under 370 therefore, that speaks of the validity, too. We have to take that
26 into consideration, if I have understood rightly. It can't be that the power was not there yet it
27 was being exercised. Now the two authorities My Lord, which I cite here, one is My Lord which
28 we could cull out because the argument fell from Your Lordships. Your Lordships would
29 permit me?[UNCLEAR]

30

31 **JUSTICE SANJAY KISHAN KAUL:** What is the proposition you are seeking?

32

33 **DINESH DWIVEDI:** The proposition is that, howsoever long the practice may have been,
34 acquiescence, howsoever long it may have been, that will never confer validity on the provision
35 if the power is not there.

36

1 **JUSTICE SANJIV KHANNA:** That may... what is being put is not in that fashion. What has
2 been said is if there are two interpretations which are possible...

3

4 **DINESH DWIVEDI:** No, no, not that, I am not..

5

6 **JUSTICE SANJIV KHANNA:** That's what was put to you.

7

8 **JUSTICE SANJAY KISHAN KAUL:** What is being put is the way it has been understood
9 by everybody.

10

11 **DINESH DWIVEDI:** As I said My Lord if two interpretations, let's...

12

13 **JUSTICE SANJAY KISHAN KAUL:** At this stage you say no, no, all that has happened
14 over the last so many decades...

15

16 **DINESH DWIVEDI:** That's what Your Lordship,

17

18 **JUSTICE SANJAY KISHAN KAUL:** Nobody understood the Constitution of J&K. Nobody
19 understood the Constitution of India?

20

21 **DINESH DWIVEDI:** That's what Your Lordships did in Golaknath. That's what Your
22 Lordships did in Indira Sahni. My Lord in Indira Sahni.... My Lord, please recall what
23 happened in Indira Sahni.

24

25 **CHIEF JUSTICE DY CHANDRACHUD:** All right. We've taken the point that the
26 constitutional practice will not legitimize a Constitution.

27

28 **DINESH DWIVEDI:** That will not legitimize.

29

30 **CHIEF JUSTICE DY CHANDRACHUD:** Fair enough. Thank you, Mr. Dwivedi. Thank you
31 very much. We'll now go on to the next Mr. Singh. Yes, Mr. C. U. Singh now.

32

33 **DINESH DWIVEDI:** My Lord, there is one decision that, My Lords may please make a note
34 of it.

35

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

37

1 **DINESH DWIVEDI:** *1961 Supreme Court, AIR 1961 Supreme Court, 964.*

2

3 **JUSTICE B.R. GAVAI:** 964?

4

5 **DINESH DWIVEDI:** Para 1 and 2.

6

7 **CHIEF JUSTICE DY CHANDRACHUD:** 964. What is the name of the case?

8

9 **DINESH DWIVEDI:** This is *Amalgamated Coal Fields Limited*, so para, just two
10 paragraphs.

11

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

13

14 **DINESH DWIVEDI:** 1 and 2. It's a Constitution Bench. Again, they said, these acquiescence,
15 you cannot convey it [UNCLEAR].

16

17 **CHIEF JUSTICE DY CHANDRACHUD:** Thank you, Mr. Dwivedi. Yes, Mr. Singh.

18

19 **DINESH DWIVEDI:** And all that I am saying, if two views are possible, let's take the view
20 in favour of the Constitution of Jammu and Kashmir, the autonomy which we had promised,
21 the commitments made.

22

23 **CHIEF JUSTICE DY CHANDRACHUD:** Thank you. Yes, Mr. Singh. Thank you, Mr.
24 Dwivedi.

25

26 **DINESH DWIVEDI:** I am obliged. I hope I have not ruffled too many feathers.

27

28 **CHIEF JUSTICE DY CHANDRACHUD:** No, no, not at all. It's an intellectual exercise, it's
29 a debate.

30

31 **JUSTICE SANJAY KISHAN KAUL:** It's a debate, therefore, we will give our perspective
32 of what, if we see where the debate may be going, so that you have a chance to clarify to us
33 that's all. Otherwise, as I always say, simplest thing is to keep silent. But that's not good for
34 the lawyers.

35

36 **JUSTICE SANJIV KHANNA:** Questions are put to get an answer, it's not the conclusion.
37 Questions can never be conclusions.

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DINESH DWIVEDI: [UNCLEAR].

CHIEF JUSTICE DY CHANDRACHUD: Thank you. Yes, Mr. Singh.

DUSHYANT DAVE: I must say it has been one of the earnest intellectual debate that we have seen for a long time. We are all grateful to Your Lordships for that.

CHIEF JUSTICE DY CHANDRACHUD: Thank you Mr. Dave.

DUSHYANT DAVE: [UNCLEAR].

CHIEF JUSTICE DY CHANDRACHUD: Thank you Mr. Dave. Likewise for us also it's a....

JUSTICE SANJAY KISHAN KAUL: We have got some experienced references and various nuances of the Constitution from all of you.

CHIEF JUSTICE DY CHANDRACHUD: It's really, the Bar has taken the jurisprudential analysis to a different level. I'm sure we'll be getting more of it from the other side now, after we conclude today. Let's see. Thank you very much. Yes, Mr. Singh.

C.U. SINGH: I took Your Lordships' suggestion which fell from the court at the case management hearing, which took place on 3rd July. I took that very seriously. I consulted my colleagues and I am concentrating only on the State Reorganization Act because Article 370, I'm adopting the argument. My written submissions also I've noted, I've adopted the arguments of Mr. Raju Ramachandran because they were available at that time and of Mr. Gopal Sankaranarayanan, the written submissions on 370 and abrogation and all those aspects.

CHIEF JUSTICE DY CHANDRACHUD: Mr. Singh, can you just formulate it, what your submissions on the Reorganization Act are going to be? If you can just... we will take it down.

C.U. SINGH: They are broadly in my written submission, but there are some nuances and finer points which I have to, which I will place before Your Lordships. Broadly it is this My Lord. First of all, the proclamation, the Presidential Proclamation of 19th of December 2018, paragraph C(ii), C Roman ii, is void and that is the one by which the two provisos to Article 3 was suspended. The two provisos which applied to Jammu and Kashmir in Article 3 was

1 suspended without even My Lords concomitantly applying the proviso, which exists for the
2 rest of India. That's number one. I'm just formulating the proposition.

3

4 **CHIEF JUSTICE DY CHANDRACHUD:** Just one sec.

5

6 **C.U. SINGH:** That being void, on the 5 August and 6 August 2019, it is my submission that
7 the two provisos applicable to Jammu and Kashmir were very much, have to be treated as
8 being in force. Two is that, I'll hand over... hand across a one page timeline. The timeline of
9 how the resolutions and amendments were executed on the 5th and 6th of August 2019, shows
10 My Lords, that there is absolute legislative legerdemain... something which is, it boggles the
11 imagination. I'll show Your Lordships that, neither the Constitution of India, nor the
12 Constitution of Jammu and Kashmir are applied, and what is done is just, by sort of sleight of
13 hand... It will become... I don't want to...

14

15 **CHIEF JUSTICE DY CHANDRACHUD:** How would you formulate the second point? The
16 first we got, that the proclamation...

17

18 **C.U. SINGH:** I'll just place that before Your Lordship. But what I'm [UNCLEAR] is...

19

20 **CHIEF JUSTICE DY CHANDRACHUD:** Sort of formulate it, just conceptualize it so that
21 we can just then...

22

23 **C.U. SINGH:** The point is that, the C.O. 273, which comes to be issued on 6th August, is in a
24 sense, applied in anticipation. A bill is presented by... a bill for... I'm only on the
25 Reorganization Act now. The bill for reorganization is presented by the President, tabled in
26 the Rajya Sabha, passed by Rajya Sabha on the 5th of August. Then tabled in Lok Sabha on
27 6th of August, and simultaneously, with the recommendation of Lok Sabha to the President,
28 to issue C.O. 273. But simultaneously, even before 273 has been issued, Lok Sabha passes a
29 bill which is purportedly passed by the Rajya Sabha the previous day. I'll just make good the
30 proposition; I'm just outlining it. So, what happens ultimately...

31

32 **JUSTICE SANJAY KISHAN KAUL:** Like the Chief Justice said, what is the proposition?
33 That they tailored and managed the time in a manner, everything occurred in this two days'
34 time. But, we wanted to know, what is that you're [UNCLEAR] time?

35

36 **C.U. SINGH:** The point is, that the provisos which are in place, and the explanations, the two
37 explanations, which are in Article 3, the two explanations were not applicable in Jammu and

1 Kashmir, because the 18th Amendment was never extended to Jammu and Kashmir. So, the
2 explanation which said that a union territory... the argument is, that we can interchange states
3 and union territories under Article 3, because of the two explanations which were introduced
4 by the 18th Amendment. That was not applicable to Jammu and Kashmir on the 5th of August.
5 So, as far as Jammu and Kashmir is concerned, on the 5th of August, it was only a state. That
6 any changes under Article 3, could only be state-to-state. But... I'll come to a close, I'm just
7 formulating the points. I'll hand across this. Now, *dehors* this aspect, my submission is, that
8 part 1, that is Articles 1, 2, 3 and 4, have to be read conjointly. And when you read them
9 conjointly, no power can be found in Article 3 to convert a state into a union territory,
10 notwithstanding the two explanations, which are added by the 18th Amendment. 4...

11

12 **CHIEF JUSTICE DY CHANDRACHUD:** One second. Yes.

13

14 **C.U. SINGH:** 4 or 5, because I might lose track, because it's all oral.

15

16 **CHIEF JUSTICE DY CHANDRACHUD:** It's 4.

17

18 **C.U. SINGH:** If two interpretations were possible as far as Article 3 is concerned, then that
19 reading should be preferred, which would be in keeping with the principles of federalism, the
20 principles of democracy, the principles of the representation of the people of a state, and which
21 would be... which would keep Article 3 out of conflict with Article 368. That reading should be
22 preferred, and not a reading where Article 3 is allowed to ride roughshod, coach and horses,
23 through Article 368, without any of the safeguards introduced in 368. And this My Lord, I'll
24 show Your Lordships, not just from the Constitutional reading, but from the history of the
25 Article 3 and Article 3, 4... that is 1 to 4, and Article 368, and the view taken by Your Lordships
26 in certain judgments, as well as Dr. Ambedkar's speech on Article 304, which was 368. That
27 there has to be a harmonious construction between these articles, where one, those articles,
28 Article, that Article 3 and 4, which allow an amendment to the Constitution, but by a simple
29 majority in Parliament, can't impinge on those amendments which have the effect of either
30 which attract the proviso to 368, or which in any case require a special majority, by their very
31 nature.

32

33 **CHIEF JUSTICE DY CHANDRACHUD:** Will you be referring to the text of the
34 Constitution for developing your argument? How should we now go about it? You made your
35 four points. We've made a note of the four points.

36

1 **CU SINGH:** No, there is a little more here. So, these are the broad issues. There might be
2 some finer points. So let me just start straight away with, My Lords, and I'm going to try to be
3 brief, but I just want to preface it by saying that since I had confined myself to this subject,
4 several of Mr. Kapil Sibal, Dr. Dhavan, etc., all touched on Article 3, but they made it clear that
5 they're leaving it to me to argue this...

6

7 **CHIEF JUSTICE DY CHANDRACHUD:** So let's see Article 3 first.

8

9 **CU SINGH:** So I'll ask for some latitude from Your Lordship on time because of this... and I
10 believe that the Reorganization Act, apart from 370, is very, very important for the people of
11 Jammu and Kashmir. And also that if this interpretation of Article 3 were to be upheld by Your
12 Lordships, then this is the thin end of the wedge for democracy and federalism in the country
13 as a whole, because any party in power at the Centre, if it also happens to be the party in power
14 in a given state, can just convert that state by a simple majority in the State Legislature, and a
15 simple majority in Parliament can convert the state into a Union Territory. It's a, this is a
16 proposition of, of a cause of action.

17

18 **CHIEF JUSTICE DY CHANDRACHUD:** Let's see Article 3 now.

19

20 **CU SINGH:** Which is [UNCLEAR]. I'll come back to Article 3 in a moment. First My Lords,
21 I'll go in the same sequence.

22

23 **CHIEF JUSTICE DY CHANDRACHUD:** Yes, yes, certainly.

24

25 **CU SINGH:** So, first, para C(ii) of the Presidential Proclamation.

26

27 **CHIEF JUSTICE DY CHANDRACHUD:** Where did you get that?

28

29 **CU SINGH:** In Volume 3, page 92 of the document, Volume 3 of the documents. Page 92.
30 Lordships have that? This is expressly under challenge in at least four of the petitions and Mr.
31 Ramachandran, Raju Ramachandran's written submissions open with this. So My Lords if we
32 come to C straightaway "now, therefore, I hereby proclaim, I make the following incidental
33 and consequential provisions, which appear to me to be necessary or desirable, for giving effect
34 to the objects of this proclamation, namely" I'll come straight to 2, "the operation of the
35 following provisions of the Constitution and of the State Constitution is hereby suspended,
36 namely, so much of the first proviso to Article 3 of the Constitution, as relates to the reference
37 by the President to the Legislature of the state, and the second proviso to that article," and

1 then "so much of Clause 2 of Article 151," etc. But I'm concerned with this part in particular
2 "so much of the first provision to Article 3 of the Constitution relates to the reference by the
3 President of the Legislature of the state and the second proviso to the article." This is now
4 referring to the Constitution as extended to Jammu and Kashmir because there are two
5 provisos in Article 3, which were introduced by the 1954 Presidential Order.

6

7 **JUSTICE SANJIV KHANNA:** Just one thing, Mr. C U Singh, the word used over here is
8 "suspended."

9

10 **CU SINGH:** I'm sorry?

11

12 **JUSTICE SANJIV KHANNA:** The word used over here is "suspended."

13

14 **CU SINGH:** Suspended. That's right.

15

16 **JUSTICE SANJIV KHANNA:** It's not [UNCLEAR].

17

18 **CU SINGH:** No, no. Suspended. Now this, we are talking about a Presidential Proclamation
19 where the Constitution has not been able to be worked on the report that the President has
20 presumably got from the Governor, etc. And therefore, there's a Presidential Proclamation
21 under 356.

22

23 **JUSTICE SANJIV KHANNA:** I specifically drew your attention to this because you said
24 that if we..., last while referring to the fourth argument of yours, the fourth contention of yours,
25 you used the phrase that, in case we, in case this, there is possibility of misuse.

26

27 **CU SINGH:** Yes, sir. By suspending and then changing the nature of the state.

28

29 **JUSTICE SANJIV KHANNA:** Please continue with the argument.

30

31 **CU SINGH:** The suspension becomes like an obliteration. If you suspend a requirement to
32 consult the people of the state and then change that state into a union territory, that
33 suspension is, it's an obliteration, virtually. It might not make any difference whether we call
34 it a suspension or a....

35

1 **CHIEF JUSTICE DY CHANDRACHUD:** Are you approaching it from the perspective of
2 Article 356? That the power under Article 356 cannot be used to achieve these ends, such as
3 the suspension. I mean how are you further exploring the point?

4

5 **C.U. SINGH:** Unless this was in furtherance of the object of 356 and it pertained to a body
6 or authority of the state. Here, the suspension is of a constitutional provision which deals with
7 consultation with the representative body of the state, which is the Legislature of the state, the
8 Legislative Assembly of the state. Now this can't have any, even the remotest nexus with an
9 Article 356 object, to suspend consultation with the Legislature of a state or even I'm now
10 arguing against myself, or even the substitute for that Legislature, which is Parliament, to
11 suspend that consultation altogether, can't have any of any nexus with the object of 356. 356
12 is for the purpose of, because the Constitution has been working in that state, or the state isn't
13 able to be governed as per the Constitution, and therefore, there's a temporary suspension.

14

15 **CHIEF JUSTICE DY CHANDRACHUD:** [UNCLEAR].

16

17 **C.U. SINGH:** I don't want to go into repeat arguments on 356.

18

19 **CHIEF JUSTICE DY CHANDRACHUD:** The argument on your side has been that 356 is
20 for the purpose of restoring democracy, not for abrogating. That is the argument.

21

22 **C.U. SINGH:** That's right. That's right. And this unless, unless the Union were to tell Your
23 Lordships, when they start their arguments, whenever they do, unless the Union is to tell Your
24 Lordships that, "Yes, it was an object of Article 356 to change Jammu and Kashmir in former
25 state to a union territory", they can never justify this as having any of any nexus with the object
26 of 356...

27

28 **CHIEF JUSTICE DY CHANDRACHUD:** Therefore Mr. Singh, there are two distinct
29 arguments therefore. One, whether the power under Article 3 can at all be utilized to convert
30 a state into a union territory.

31

32 **C.U. SINGH:** That I will come to subsequently.

33

34 **CHIEF JUSTICE DY CHANDRACHUD:** And the second, whether this power was
35 correctly utilized or constitutionally exercised at a time when Article 356 was in operation.
36 Does Article 356 empower the Union to do that?

37

1 **C.U. SINGH:** Yes, that is right. But I am...

2

3 **CHIEF JUSTICE DY CHANDRACHUD:** But they are two different areas, which we'd like
4 to hear from you very briefly.

5

6 **C.U. SINGH:** I am very grateful to My Lord Chief Justice but this is just one step before that.
7 I'm saying that if you read, it says, 'make such incidental and consequential provisions as
8 appear to the President to be necessary or desirable, for giving effect to the objects of the
9 proclamation, including provisions for suspending in whole or in part, the operation of any
10 provisions of this Constitution relating to anybody or authority of the State. So my argument
11 here is, one such para C(ii) can never, even remotely be for giving effect to the objects of the
12 proclamation, on 18th of December or 19th of December 2018. The object of the proclamation
13 was not for changing the status of Jammu and Kashmir. And if it were, then it's a fraud on the
14 Constitution. It's an absolute fraud on the Constitution, if you admit that this had a nexus with
15 your object on 18th of December.

16

17 **CHIEF JUSTICE DY CHANDRACHUD:** In fact, to stretch your argument, your argument
18 could be that the object of any proclamation under Article 356, can only be to ensure that the
19 Government of the State is carried on in accordance with the provisions of the Constitution.

20

21 **C.U. SINGH:** As a stepping stone to restore full democracy in that state. I bow to Your
22 Lordships, I couldn't have put that better, very neatly and I am very happy to adopt that line
23 as my own. Now, in this behalf, My Lords, if Your Lordships would straightaway... Rather than
24 take Your Lordship into *Bommai*, My Lords, the Honourable Chief Justice's judgment in...
25 opinion in *Krishna Kumar Singh*, if My Lords are kind enough just to see that, what is the
26 judicial scrutiny required on a proclamation, Presidential Proclamation. My Lords, Volume 21
27 of The Case Law Compilation...

28

29 **CHIEF JUSTICE DY CHANDRACHUD:** Page?

30

31 **C.U. SINGH:** At PDF 61... PDF 60, I'm sorry, because Your Lordships have...

32

33 **JUSTICE SANJAY KISHAN KAUL:** Which volume Mr. Singh?

34

35 **C.U. SINGH:** My Lords, Volume 21, PDF 60, paras 55 and 56. Your Lordships have set out...

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37 **CHIEF JUSTICE DY CHANDRACHUD:** This is seven judges, right?

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C.U. SINGH: Yes. My Lord’s judgment was seven judges, and Your Lordship have just extracted a very apposite portion from *Bomma*.

CHIEF JUSTICE DY CHANDRACHUD: 53, page 60. Which page?

C.U. SINGH: My Lord, PDF 60, in Volume 21 of the Case Law Compilation. Do Your Lordships have it?

CHIEF JUSTICE DY CHANDRACHUD: Just one second.

C.U. SINGH: My Lords, at the foot of that page, placitum G. Just one line above placitum G, “Elucidating the approach of the court, when a proclamation under 356 is questioned, Justice Jeevan Reddy held in *Bomma* case, para 373... Whenever a proclamation under 356 is questioned, the Court will, no doubt, start with the presumption that it was validly issued. But it will not, and it should not hesitate to interfere, if the invalidity or unconstitutionality of the proclamation is clearly made out. Refusal to interfere in such a case, would amount to abdication of the duty cast upon the court, Supreme Court and High Court by the Constitution. The standard of judicial review was formulated in the following observations *Bomma* case, para 374, and the truth or correctness of materials cannot be questioned by the court, nor will it go into the adequacy of the material. It will also not substitute its opinion for that of the President. Even if some of the material on which the action is taken is found to be irrelevant, the court would still not interfere, so long as there is some relevant material sustaining the action. The ground of mala fides takes an *inter alia* situation, where the proclamation is found to be a clear case of abuse of power, or what is sometimes called fraud and power, cases where this power is invoked for achieving oblique ends”. I’m confining myself to C(ii), I’m not... others before me have argued on the larger issue, but since I’m on the State Reorganization Act alone, I’m just narrow... keeping it as narrow as possible, My Lord. C(ii), I submit, is clearly beyond the purview of the of 356, and except for revealing the underlying intention of that proclamation, it does nothing more, C(ii). Now My Lords, in *Rameshwar Prasad*, My Lords, a Constitutional... Chief Justice Sabharwal, then speaking for the bench in *Rameshwar Prasad*, at Volume 3, PDF 96, if My Lords are kind enough to come to that. Actually PDF 95.

CHIEF JUSTICE DY CHANDRACHUD: Mr. Singh, is the conversion of the state into a union territory, is it severable from the abrogation of 370 itself?

1 **C.U. SINGH:** Yes, yes. It is... the two are completely separate. Here what has happened is,
2 that relying on Article 3, by passing a simple law, simple Parliamentary Law under Article 3, a
3 State Reorganization Act was passed, and...

4

5 **CHIEF JUSTICE DY CHANDRACHUD:** So, your argument on the conversion of J&K into
6 the two UTs, that would really survive irrespective of the decision of the abrogation of 370.

7

8 **C.U. SINGH:** My written submission starts with that, that this is completely independent of
9 the abrogation. Whether J&K was, from day one, completely under the Constitution of India,
10 with no commas and full stops taken out of it, whether it was under 370 as applied to J&K,
11 with any permutation and combination...

12

13 **CHIEF JUSTICE DY CHANDRACHUD:** Even if you were to exercise this power according
14 to you in relation to any Indian state.

15

16 **CU SINGH:** That's right.

17

18 **CHIEF JUSTICE DY CHANDRACHUD:** This would be unconstitutional. Irrespective of
19 special consideration, which applied to J&K in relation to 370.

20

21 **CU SINGH:** Yes, and irrespective of the proviso also. The scheme of part 1 and read with
22 Article 368, and I'll show Your Lordship, it completely precludes such an exercise. Also when
23 I come to the history, Your Lordship will find, that all, right from the 1919 Government of India
24 Act, 1935, Government of India Act, the precursors to Articles 3, 4 and 368, and then the
25 Constituent Assembly debates, and then what came about, this was never, the powers given to
26 the Crown, initially, to the Governor General in 1919, to the Crown in 1935, and to the
27 Parliament in 1950, were powers meant to mediate when a minority, perhaps in a state, made
28 out a justifiable case for greater self-representation. Suppose there's a linguistic minority in a
29 state, but they have a distinct, distinct area like Haryana was in Punjab or Himachal was, as a,
30 with merger of princely states. The idea, or let us say there's certain other reasons where there
31 are people who can't get a majority in that State Assembly to accept, but they make out a case
32 for greater autonomy, greater representation, for full statehood. Parliament under Article 3
33 and 4 acts as a mediator because...

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35 **CHIEF JUSTICE DY CHANDRACHUD:** How the UT is born in, in the Republic?

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37 **CU SINGH:** I'll come to that.

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CHIEF JUSTICE DY CHANDRACHUD: I think in my judgement in NCT, too, I've dealt with the whole history of how the UTs were created.

CU SINGH: You have. But...

CHIEF JUSTICE DY CHANDRACHUD: And, were the UTs, in other words was there a peculiar constitutional history attached to the creation of UTs?

CU SINGH: Yes.

CHIEF JUSTICE DY CHANDRACHUD: And does that category remain frozen now?

CU SINGH: In fact, in fact, that category has moved consistently towards full statehood. By the 4th of August 2019...

CHIEF JUSTICE DY CHANDRACHUD: What is the origin of the creation of UTs?

CU SINGH: Yes. My Lord, may I...

CHIEF JUSTICE DY CHANDRACHUD: We'll have to then, because that, your argument we will have to explain this way. What is the history surrounding the creation of Union Territories under the Indian Constitution? Two- does that category then remain a sort of frozen category in the sense that you can convert a UT into a state, but you can't do the reverse process? That's the second point.

CU SINGH: And that is historically, that is what has happened. So by 4 August 2019, there were seven UTs left in India, and they were Delhi, Chandigarh, Delhi, Chandigarh, Daman & Diu, Dadra & Nagar Haveli, Puducherry, Lakshadweep, and Andaman. All other UTs were gradually, once they became, could, become viable units, the moment an area could become a viable unit as a state, it was converted into a state.

CHIEF JUSTICE DY CHANDRACHUD: But, what do we find? And how were the UTs created?

CU SINGH: Yes. So My Lord, can I just then give Your Lordships the pages for this first argument? Just so that...

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CHIEF JUSTICE DY CHANDRACHUD: Yes certainly. And then we can move to the next. You are on *Rameshwar Prasad* until I...

CU SINGH: Rameshwar Prasad, My Lords the Volume 3, page 95, PDF 95, para 96. Here, my Lord, Justice Sabharwal spoke for the bench, it was a unanimous verdict of the Constitution Bench.

CHIEF JUSTICE DY CHANDRACHUD: And what is the principle which Justice Sabharwal has laid down there in para 96?

CU SINGH: On the nature of the power of the 356 and the nature of the scrutiny, he goes a step further, beyond *Bommai*. I'll only take Your Lordships very pointedly to the short, three or four important paras. 96, Justice Sabharwal said "the power under Article 356(1) is an emergency power, but it is not an absolute power. Emergency means the situation which is not normal, a situation which calls for urgent remedial action. Article 356 confers a power to be exercised by the President in exceptional circumstances, to discharge the obligation cast upon him by Article 355," which Mr. Naphade pointed to. 'It is a measure to protect and preserve the Constitution. The governor takes the oath prescribed by 159 to preserve, protect, and defend the Constitution and the laws to the best of its ability. The power under 356 is conditional, the condition being the formation of satisfaction of the President as contemplated by 356(1).' My submission is that this applies equally to 356(2) and when the President is satisfied that certain measures need to be taken to fulfil the object of the proclamation, that also must meet the same test. Then para 97, there's an extract from *Bommai* in para 97 in the foot of that page. 'When the proclamation is challenged by making out a prima facie case with regards to its invalidity, the burden would be on the Union Government to satisfy that there exists material which showed that the Government could not be carried on in accordance with the provisions of the Constitution. Since such material would be exclusively within the knowledge of the Union Government, in view of the provisions of 106 of the Evidence Act, the burden of proving the existence of such materials would be on the Union Government' And then next Para overleaf, PDF 96 in para 98, just Placitum C may be seen, 'if and when...', this is Justice Jeevan Reddy's opinion in *Bommai*, 'If and when any action taken by the President in exercise of its functions is questioned in a court of law, it is for the Council of Ministers to justify the same, since the action or order of the President is presumed to have been taken in accordance with Article 74(1)'. And then 324, para 324, at the foot of that page of *Bommai*, 'In our respectful opinion, the above obligation cannot be evaded by seeking refuge under 74(2). The argument that the advice tender to the President comprises material as well, and

1 therefore calling upon the Union of India to disclose the material would amount to compelling
2 the disclosure of the advice is if we can say so respectfully, respectfully to indulge in sophistry.
3 The material placed before the President by the Minister or Council of Ministers does not
4 thereby become part of advice. Advice is what is based upon the said material, material is not
5 advice...' And I won't trouble Your Lordships. And then para 100 is very important, overleaf at
6 page 97. 'The above approach shows objectivity even in subjectivity. Constitutionalism or
7 constitutional system of government abhors absolutism. It is premised on the rule of law in
8 which subjective satisfaction is substituted by objectivity provided by the provisions of the
9 Constitution itself.' This line is clear also from Maru Ram. And then if Your Lordship would
10 just come to PDF 120, PDF 120, paras 138 and 140, they are very short paras. PDF page 120 of
11 the same volume, volume 3, paras 138 and 140. 138, 'clearly **Bommai** case expanded the
12 scope of judicial review through the observations of Justice Reddy were made in the context
13 of a situation, where the incumbent chief minister alleged to have lost the majority support or
14 the confidence of the House, and not in the context of a situation arisen, after a general election
15 in respect whereof no opinion was expressed. But in our view, the principles of the scope of
16 judicial review in such matters cannot be any different.' And then para 140. 'Thus it is open to
17 the Court in exercise of judicial review to examine the question, whether the Governor's report
18 is based upon relevant material or not, whether it is made bona fide or not, and whether the
19 facts have been duly verified or not. The absence of these factors resulted in the majority
20 declaring the dissolution of the State Legislatures of Karnataka and Nagaland as invalid.' And
21 lastly, Madhavrao Scindia in Volume 6. Volume 6, PDF 457, para 111, I think has been shown
22 to Your Lordships by Mr Naphade, perhaps. But para 113, at page 457 is very important.
23 Volume 6, PDF 457.

24

25 **JUSTICE SANJAY KISHAN KAUL:** Para?

26

27 **C.U. SINGH:** Para 113. 'By express injunction in Article 53(1) of the Constitution, the
28 executive power vested in the President is directed to be exercised in accordance with the
29 Constitution. That power is intended to be exercised in aid of and not to destroy constitutional
30 institutions. Granting that power to recognize a ruler carries with it the power to withdraw the
31 recognition of the ruler, the power must be exercised bona fide and in the larger interest of the
32 people, consistently with the provisions of the Constitution, to maintain the institution of
33 rulership. Power may therefore be exercised in the course of and for recognizing another
34 person as a successor to the ruler having regard to the laws and customs governing the State.
35 The President is not competent to recognize a person as a ruler who is not by the custom and
36 law, qualified to be a ruler. The President cannot obviously withdraw recognition of a ruler

1 and recognize another, nor can he lawfully depart from laws and customs of the state to
2 introduce a person as a ruler who is not by ties of blood, etc., etc.

3

4 Now, the next page, My Lords, overleaf, 458, the fourth line, "But unquestionably, the
5 President is not invested with arbitrary authority to recognize a stranger as successor to the
6 *gaddi*, or not to recognize any person at all as a successor. The power of the President is plainly
7 coupled with a duty: a duty to maintain the Constitutional institution, the Constitutional
8 provisions, the Constitutional scheme and the sanctity of solemn agreements entered into by
9 the predecessor of the Union Government, which are accepted, recognized, and incorporated
10 in the Constitution. An order merely 'de-recognizing' a ruler without providing for the
11 continuation of the institution, which is an integral part of the Constitutional scheme, is
12 therefore plainly illegal". My Lord, **Madhav Rao** was a judgment of a bench of eleven learned
13 judges, and Justice J.C. Shah, His Lordship Justice J.C. Shah was speaking for seven of
14 himself, and six other learned judges, for seven the majority of seven. I think, there were some
15 concurring and some dissenting opinions. But, I'm just placing this that, these powers have to
16 be exercised bona fide, and I don't see anything, certainly not in their counter, but there's no
17 justification whatsoever for why these two provisos had to be suspended, and what nexus that
18 would have with the proclamation under 356. That's the first point My Lords. Now, may I just
19 skip over the second point, that timeline. I'll come back to that. I've made just a one-pager
20 where I've set out that timeline. I can come back to that. Since the question fell from My Lords
21 about the background to union territories and how they came about and so on, and what is
22 their status in the Constitutional scheme. So, this is... If Your Lordships are kind enough to
23 see, what happened... I'll just summarize it, and I'll take Your Lordships straight to the relevant
24 provisions. 1905, Lord Curzon split the province of Bengal. This was done unilaterally as a
25 Governor General. That led to... the partition or bifurcation of Bengal led to tremendous
26 backlash against the British Raj, and there were huge protests, a lot of killings, etc., etc. And
27 ultimately, in 1911, Lord Harding was compelled to rescind that move and restore Bengal as
28 one province. Now, this experience led to a declaration by the British Parliament on 20th of
29 August 1917, to devolve greater power on India, and on... particularly on the provinces of India,
30 and the representatives of the people in those provinces. And this, Your Lordships will find,
31 the declaration by Parliament led to the 1919 Act, the Government of India Act, 1919, which
32 specifically provided for the original precursor to Article 3. So, the 1919 Act, along with that
33 declaration, Your Lordship will find, Volume 18 of the documents, and that declaration is very
34 important, My Lords, and as also the preamble to the 1919 Act. Volume 18, page 14, PDF 14 is
35 the Declaration of 20th August 1917.

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37 **CHIEF JUSTICE DY CHANDRACHUD:** Volume 18, page?

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C.U. SINGH: Volume 18, PDF 14 is the Declaration of 1917, 20th August 1917. It's very short. May I read it My Lords? "The policy of His Majesty's Government, with which the Government of India..."

CHIEF JUSTICE DY CHANDRACHUD: No, we can't get it.

C.U. SINGH: Page 14. I'm so sorry, Volume 18.

CHIEF JUSTICE DY CHANDRACHUD: The Government of India Act, 1919, right? We have Section 3 there, 3(1).

C.U. SINGH: Yes, but the declaration is at PDF 14. The Declaration of 20th August 1917.

CHIEF JUSTICE DY CHANDRACHUD: No. That's not at page 14.

JUSTICE SANJAY KISHAN KAUL: Page 14 is the Government of India Act.

CU SINGH: Volume 18, PDF 14.

CHIEF JUSTICE DY CHANDRACHUD: No.

JUSTICE SANJIV KHANNA: That's 18, 10849. Which is the page you are getting?

CU SINGH: 10835.

CHIEF JUSTICE DY CHANDRACHUD: 10835?

CU SINGH: I don't know why my PDF, there must have been an earlier version, I'm so sorry. 10835. Does anybody have the correct page?

JUSTICE SANJAY KISHAN KAUL: What page Is it?

CU SINGH: I had it at PDF 14, because that was what was given to us.

JUSTICE B.R. GAVAI: 10835.

1 **CU SINGH:** Declaration of 20 Aug 1917. It starts with "the policy of His Majesty's
2 Government, with which the Government of India are in complete accord."

3

4 **CHIEF JUSTICE DY CHANDRACHUD:** PDF page 14. Yes, it's there.

5

6 **CU SINGH:** We all have it as PDF 14. I think that...

7

8 **CHIEF JUSTICE DY CHANDRACHUD:** 10835 right?

9

10 **CU SINGH:** 10835. And on this side we all seem to have it at PDF 14. I don't know, there's
11 some mismatch. My Lords find it now?

12

13 **CHIEF JUSTICE DY CHANDRACHUD:** Yes. Just one second.

14

15 **CU SINGH:** This is from, extracted, all this, this entire book is here, in this volume which is
16 "The Working Constitution in India" by Sm Bose. The 1921 publication.

17

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

19

20 **CU SINGH:** The policy of the Government...

21

22 **CHIEF JUSTICE DY CHANDRACHUD:** Just one second.

23

24 **CU SINGH:** My Lord Honourable Justice Surya Kant finds it? I could hand up an iPad for
25 My Lord. Your Lordships have 10835, the running page? There's a Declaration of 20th August.
26 "The policy of His Majesty's Government, with which the Government of India are in complete
27 accord, is that the increasing association of Indians in every branch of the administration, and
28 the gradual development of self-governing institutions with a view to the progressive
29 realization of responsible government in India as an integral part of the British Empire. They
30 have decided that substantial steps in this direction should be taken as soon as possible and
31 that it is of the highest importance as a preliminary to considering what these steps should be,
32 that there should be a free and informal exchange of opinion between those in authority at
33 home and in India. His Majesty's Government have accordingly decided that His Majesty's
34 approval that I should accept the Viceroy's invitation to proceed to India, to discuss these
35 matters with the Viceroy and the Government of India, to consider the Viceroy's views and the
36 views of local Governments, and to receive with him the suggestions of represented bodies. I
37 would add that progress in this policy can only be achieved by successive stages. The British

1 Government, and the Government of India, on whom the responsibility lies for the welfare and
2 advancement of the Indian peoples, must be judges of the time and measure of each advance,
3 and they must be guided by the cooperation received, from those upon whom...."

4

5 **CHIEF JUSTICE DY CHANDRACHUD:** Mr. Singh, what is the relevance of this actually?

6

7 **CU SINGH:** Then Your Lordships, just see the Preamble. The progress, when Your Lordship
8 sees the particular section, the preamble, then was based on this of the Act in 1919 was, five
9 pages down, if Your Lordships just scrolls down five pages to the Government of India Act.
10 Now the Preamble to the Act specifically said the 1919 Act, whereas it is a declared policy of
11 Parliament to provide for the increasing association. So based on this same declaration, then
12 the...

13

14 **CHIEF JUSTICE DY CHANDRACHUD:** Were the UTs all a part of the 'Part C territories'?

15

16 **C.U. SINGH:** So I'm just coming to that provision, then straight away, if Your Lordships, I
17 have it at PDF page 58.

18

19 **CHIEF JUSTICE DY CHANDRACHUD:** And before the Constitution came into force,
20 where were these 'Part C territories' comprised?

21

22 **C.U. SINGH:** So there were...

23

24 **CHIEF JUSTICE DY CHANDRACHUD:** They were the Chief Commissioner's province?

25

26 **C.U. SINGH:** Yes, that's right. So there were the, the Governor's provinces became 'Part A'
27 states, the Governor General, and then later the governor. So Bombay province, Madras
28 province, Calcutta Fort William etc., etc. became the 'Part A' states. The Indian states with...

29

30 **CHIEF JUSTICE DY CHANDRACHUD:** Became 'Part B'?

31

32 **C.U. SINGH:** Not all of them, there were 562 states, those which could be merged and made
33 into viable states, because viability was the main crux here.

34

35 **CHIEF JUSTICE DY CHANDRACHUD:** But J&K was also a 'Part B' state.

36

1 **C.U. SINGH:** That's right. So those which were viable as states, all Indian states, which were
2 viable, either by either standing as they stood, or by merger, became 'Part B' states. Those
3 which were...

4

5 **CHIEF JUSTICE DY CHANDRACHUD:** Then the Government of India Act, what was the
6 classification of the territories in the Government of India Act?

7

8 **C.U. SINGH:** In the Government of India Act, there were Governor's provinces, there were
9 Chief Commissioner's provinces. And I'll just show them to you.

10

11 **CHIEF JUSTICE DY CHANDRACHUD:** So we must look at, what was the position in the
12 Government of India Act?

13

14 **C.U. SINGH:** That's right.

15

16 **CHIEF JUSTICE DY CHANDRACHUD:** How that transformed into the Constitution?

17

18 **C.U. SINGH:** Yes.

19

20 **CHIEF JUSTICE DY CHANDRACHUD:** So that will give us an idea of how the union
21 territories were created.

22

23 **C.U. SINGH:** Yes. In fact in the Constitution...

24

25 **CHIEF JUSTICE DY CHANDRACHUD:** The union territories came into being. One thing
26 is very clear. The union territories came into being with the 7th Amendment in 1956.

27

28 **C.U. SINGH:** So in the 7th..

29

30 **CHIEF JUSTICE DY CHANDRACHUD:** And abrogated the distinction between Part A,
31 Part B, and Part C states, and the Part B territories..

32

33 **C.U. SINGH:** Yes.

34

35 **CHIEF JUSTICE DY CHANDRACHUD:** and then brought the entirety of India into
36 the states and the union territories.

37

1 **C.U. SINGH:** Union Territories. Now so I'll just show Your Lordship the progression. So if
2 Your Lordship sees here, please come straight away to PDF 58, which would be in the same
3 volume, it's 10879 running page.

4

5 **CHIEF JUSTICE DY CHANDRACHUD:** Page 58?

6

7 **C.U. SINGH:** But your 58 won't match because 14 wasn't matching. Could Your Lordships
8 tell me what was your equivalent PDF for 14?

9

10 **CHIEF JUSTICE DY CHANDRACHUD:** The difference is 14 pages, actually.

11

12 **C.U. SINGH:** 14 pages, 14 more. So this 58 would be 72, perhaps around 72. 10879.

13

14 **JUSTICE SANJIV KHANNA:** 10?

15

16 **C.U. SINGH:** 10879, it should be a PDF 72, if there's a difference of 14 pages.

17

18 **JUSTICE SANJIV KHANNA:** How does it start?

19

20 **C.U. SINGH:** Section 14 is on the top. Government of India, 10879 is the running page. The
21 printed page number is 44 and it's PDF. we have PDF 58, all of us here.

22

23 **JUSTICE SANJAY KISHAN KAUL:** PDF 72 is 10907.

24

25 **C.U. SINGH:** 1090? Oh it's 14 less then So it should be 44. PDF 44. PDF 44 should....

26

27 **JUSTICE SANJIV KHANNA:** You're referring to Internal page 44. PDF is 58. Section 14
28 you're referring to.

29

30 **C.U. SINGH:** We are getting PDF 58. It...

31

32 **JUSTICE SANJIV KHANNA:** That is 10879.

33

34 **C.U. SINGH:** Yes My Lords.

35

36 **CHIEF JUSTICE DY CHANDRACHUD:** That is page 44, I think.

37

1 **C.U. SINGH:** So Your Lordships' PDF is matching the internal page number, I think. So now
2 15(1)... Actually, what I'm taking Your Lordships to, is the precursors to Article 3. But to
3 answer the union territory aspect, in my written submission, Your Lordship will find that...

4

5 **CHIEF JUSTICE DY CHANDRACHUD:** Now we are at 10879 with a great effort. So, let's
6 focus on that. We don't want to lost this precious page.

7

8 **C.U. SINGH:** So this is the precursor to Article 3 in the 1919 Act, Section 15.

9

10 **CHIEF JUSTICE DY CHANDRACHUD:** Section 15, alright, let's see that.

11

12 **C.U. SINGH:** Yeah. And, the marginal note is Constitution of New Provinces, etc., and the
13 provisions as to backward track. The Governor General and Council may, now please note,
14 after obtaining an expression of opinion from the local government and the local legislature
15 affected... this is why I was reading that preamble and the declaration of the King, His Majesty.
16 The Governor General, may, after obtaining an expression of opinion from the local
17 government and the local legislature affected by notification with the sanction of His Majesty,
18 previously signified by the Secretary of State in Council, constitute a new Governor's province,
19 or place part of a Governor's province under the administration of a Deputy-Governor to be
20 appointed by the Governor General, and may in any such case apply, with such modifications
21 as appear necessary and desirable, all or any of the provisions of the Principal Act or this act
22 relating to Governor's provinces or provinces under Lieutenant Governor or Chief
23 Commissioner through any such new province of part of a province.

24

25 **CHIEF JUSTICE DY CHANDRACHUD:** Therefore, that was a power to constitute a new
26 Governor's province. Yes.

27

28 **C.U. SINGH:** And then Sub-Section 2 deals with backward tracks, we are not concerned with
29 that. This was then carried forward in Section 290 of the 1935 Act.

30

31 **CHIEF JUSTICE DY CHANDRACHUD:** Where is that?

32

33 **C.U. SINGH:** That Your Lordships will find... I'm sorry in this, could Your Lordships just
34 read the footnote to this? Section 15, there's a footnote of the committee, the committee report,
35 which is very important. This is in the whole thing of self-governance, the footnote is on the
36 next page. For Constitution... The committee have two observations to make on the working
37 of this clause. On the one hand, they do not think that any change in the boundaries of a

1 province should be made without due consideration of the views of the Legislative Council of
2 the province. On the other hand, they are of opinion, that any clear request made by a majority
3 of the members of a Legislative Council representing a distinctive racial or linguistic territorial
4 unit for its Constitution under this clause as a sub-province or a separate province, should be
5 taken as a *prima facie* case, on the strength of which a Commission of Inquiry might be
6 appointed by the Secretary of State, and that it should not be a bar to the appointment of such
7 a Commission of Inquiry, that the majority of the Legislative Council of the province in
8 question, is opposed to the request of the minority representing such a distinctive territorial...

9

10 **CHIEF JUSTICE DY CHANDRACHUD:** Now, where is that...

11

12 **C.U. SINGH:** This is that, what I was saying about the arbiter. Parliament being an arbiter,
13 when there is within a state...

14

15 **CHIEF JUSTICE DY CHANDRACHUD:** Now, where is the Government of India Act,
16 Section 290?

17

18 **C.U. SINGH:** 290, Your Lordships will find in Volume 6, My Lords, of the documents, PDF
19 113. And I trust, My Lord this time, we'll all be on the same page. Volume 6.

20

21 **CHIEF JUSTICE DY CHANDRACHUD:** Page?

22

23 **C.U. SINGH:** Page 113, My Lords. 290 is almost in the same form in which Article 3 came to
24 be enacted by the Constituent Assembly. Your Lordships have page 113? PDF 113? Volume 6.
25 Document Volume 6.

26

27 **JUSTICE SANJAY KISHAN KAUL:** 290.

28

29 **C.U. SINGH:** Creation of new provinces and alteration of boundaries of provinces...

30

31 **CHIEF JUSTICE DY CHANDRACHUD:** Which is the... how are the provinces distributed
32 under the Government of India Act, actually?

33

34 **C.U. SINGH:** Section 5 of this...

35

36 **CHIEF JUSTICE DY CHANDRACHUD:** 5 refer to? What is the PDF page for page...

37

1 **C.U. SINGH:** PDF page 18. I'm very grateful to Mr. Sankaranarayanan.

2

3 **CHIEF JUSTICE DY CHANDRACHUD:** 18?

4

5 **CU SINGH:** Yes. Proclamation of the Federation of India. PDF 18 of the same Volume 6 My
6 Lords. Establishment of Federation and Accession of Indian States. Proclamation of
7 Federation. "It shall be lawful for His Majesty, that if an address in that behalf has been
8 presented to him by each House of Parliament, and if the condition hereinafter mentioned, is
9 satisfied to declare, by Proclamation that as per [UNCLEAR] therein appointed, there shall be
10 united in a Federation under the Crown...

11

12 **CHIEF JUSTICE DY CHANDRACHUD:** But it's kind of important because it says "it shall
13 comprise of the provinces, hereinafter called the Governor's provinces, and the Indian states,
14 which have acceded or may thereafter accede to the federation. And in the federation so
15 established, there shall be included the provinces hereinafter called the Chief Commissioner's
16 provinces."

17

18 **CU SINGH:** That's right. Then the conditions referred to is that states, the rulers, whereof,
19 will, in accordance with the provision contained in part 2 of the first schedule, be entitled to
20 choose not less than 52 members of Council of State and the aggregate population, whereof,
21 as ascertained in accordance with the set provisions, amounts to at least one half of the total
22 population of the state, so ascertained have acceded to the federation. Then the manner of
23 accession is in Section 6, and the footnotes My Lords, to Section 5, it says Section 5 was
24 substituted as follows. This is, after 15th August 1947, I think this was in 1948.

25

26 **CHIEF JUSTICE DY CHANDRACHUD:** This is important. So, with the Indian
27 Independence Act, we got the Governor's provinces, the Chief Commissioner's provinces, the
28 Indian States in the manner hereinafter provided and any other areas that may be with the
29 consent of the dominion included in that dominion.

30

31 **CU SINGH:** Yes. And this was not on, this was not under the Indian Independence Act. This
32 was an amendment to the Government of India Act 1935.

33

34 **CHIEF JUSTICE DY CHANDRACHUD:** Right. Following the Indian Independence Act.

35

1 **CU SINGH:** Following the Indian Independence Act. Absolutely. Because till then, it was only
2 the British Parliament, which could enact the law. After 15 Aug 1947 the amendments were
3 made by the... in the dominion, by the dominion.

4

5 **CHIEF JUSTICE DY CHANDRACHUD:** Now, what is Chief Commissioner's provinces, is
6 it referred to, in any schedule to the Government of India Act or no?

7

8 **CU SINGH:** Chief Commissioner's provinces, I think it's in the 1919 Act. But...

9

10 **GOPAL SANKARANARAYANAN:** PDF page 49.

11

12 **CHIEF JUSTICE DY CHANDRACHUD:** Of this very thing?

13

14 **CU SINGH:** I'm very grateful.

15

16 **GOPAL SANKARANARAYANAN:** Part 4.

17

18 **CU SINGH:** Part 4, the Chief Commissioner's provinces. Correct. At PDF 49, My Lords have
19 that? Section 94 onwards. My Lords will find this. My Lord Honourable Justice Surya Kant
20 will find it. PDF 49.

21

22 **JUSTICE SURYA KANT:** Yes, yes.

23

24 **CU SINGH:** Part 4, the Chief Commissioner provinces. The following shall be the Chief
25 Commissioner's provinces. That is to say, the heretofore existing Chief Commissioner's
26 provinces of British Baluchistan, Delhi, Ajmer- Merwar, Coorg and the Andaman and Nicobar
27 Islands, the area known as Panth-Piploda, and such other Chief Commissioner's provinces
28 that may be created under this act. Aden shall cease to be a part of India. A Chief
29 Commissioner's province shall be administered by the Governor-General acting, to such
30 extent as he thinks fit, through a Chief Commissioner to be appointed by him in his discretion.
31 Then, British Baluchistan as set out in '95.

32

33 **CHIEF JUSTICE DY CHANDRACHUD:** Now, from here we go to the Constitution. Would
34 it be correct to say that when the Constitution was adopted on 26 January 1950, the territories
35 were comprised into Part A states, which comprised of the Governor's provinces, the erstwhile
36 Governor's provinces? Part B states, which were the Indian States, which had acceded to the
37 dominion of India, Part C states...

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CU SINGH: Only such of those which were viable.

CHIEF JUSTICE DY CHANDRACHUD: We are not under the Jammu & Kashmir thing at all. We are now looking at the broad... this argument is independent of the J&K issue.

CU SINGH: Yes.

CHIEF JUSTICE DY CHANDRACHUD: Part C states were the erstwhile Chief Commissioner's provinces.

CU SINGH: Yes. And...

CHIEF JUSTICE DY CHANDRACHUD: Part B states were the other territories.

CU SINGH: No. And Part C states also have one more category.

CHIEF JUSTICE DY CHANDRACHUD: Let's look at the constitution as of 26th of January, 1950, because that schedule will give us the distribution between what was Part A, what was Part B, Part C and Part D.

C.U. SINGH: Just one qualification

CHIEF JUSTICE DY CHANDRACHUD: That however... Part C states had the Rajpramukh.

C.U. SINGH: That's right.

CHIEF JUSTICE DY CHANDRACHUD: I think Part B also had the Rajpramukh, Part C had the Rajpramukh, Part A had the governors...

C.U. SINGH: That's right.

CHIEF JUSTICE DY CHANDRACHUD: And that continued from 1950 to 1956.

C.U. SINGH: That's right.

1 **CHIEF JUSTICE DY CHANDRACHUD:** '56 following the Fazal Ali Commission,
2 everything was abrogated and we just have states and union territories.

3

4 **C.U. SINGH:** That's right. But just one small qualification. Part C states also included Indian
5 States, which were not able to be merged into a viable unit. So, for instance, Himachal Pradesh
6 was consisting of 30 Indian States, 30 small Indian States. But because the province of Punjab,
7 the Governor State of Punjab, came almost to the edge of Shimla, at that time there were hill
8 areas of Punjab and they automatically went as a 'Part A' state. So, Himachal Pradesh with its
9 30 States, acceding and merging into it, still was not viable. So it was a 'Part C' state. Though
10 it was Indian state but 'Part C'. So there were several such cases of those which were not viable
11 as independent state for independent statehood, at that point in time. It became a 'Part C'
12 state, it became a union territory in 1956. Then in 1966, when Punjab demanded a *Punjabi*
13 *suba*, and there was a huge movement and agitation etc., as a negotiation to give Punjab a
14 linguistic state, Haryana was carved out and the hill areas of Punjab were carved out and given
15 to Himachal. It still continued temporarily as a UT, and in 1971 it was made into a full state.

16

17 **CHIEF JUSTICE DY CHANDRACHUD:** Now, do we have the Constitution? Just to
18 complete the whole exercise. The Constitution as of 26 January 1950, where is that?

19

20 **GOPAL SANKARANARAYANAN:** Here, they can put it on the screen.

21

22 **CHIEF JUSTICE DY CHANDRACHUD:** All right, they will put it on the screen, actually.

23

24 **C.U. SINGH:** If your Lordships in the meantime, may I just very quickly take Your Lordships
25 to my written submission? Very brief thing on how this transition took place. Page 468 of my
26 written submissions.

27

28 **JUSTICE SANJIV KHANNA:** So Mr C.U. Singh at the time when Punjab, the Division of
29 Punjab took place, there were two union territories, Himachal Pradesh was carved out as a
30 union territory.

31

32 **C.U. SINGH:** And Chandigarh.

33

34 **JUSTICE SANJIV KHANNA:** And Chandigarh was carved out.

35

36 **C.U. SINGH:** Because of common....

37

1 **JUSTICE SANJIV KHANNA:** Correct. There were two union territories which were carved
2 out.

3

4 **C.U. SINGH:** That's right, that's right. Absolutely Your Lordships are right. In fact, this is all
5 in my note, and even in the written submission. But the point here is, right from the 1919 Act,
6 the progression has been consistently and continuously towards greater self-governance and
7 greater self-governance in the form of full statehood.

8

9 **JUSTICE SANJIV KHANNA:** We are only on today, for that the question is legality of that
10 order in terms of Article 3.

11

12 **C.U. SINGH:** That's right, that's right. So, but the context in which the reading that I would
13 seek to persuade Your Lordship to adopt is one which would be consistent with our objective
14 of greater self-governance, when we read Article 3, as opposed to Article 368. That greater self-
15 governance and the move that.... because keep in mind, that barring these small unviable or
16 Special Status Union Territories like Delhi, Chandigarh, Andaman and Nicobar, Dadra and
17 Nagar Haveli, etc. by 4th of August 2019, there were only seven union territories left in India,
18 and the seven were Delhi, Chandigarh, Andaman and Nicobar, Dadra and Nagar Haveli,
19 Daman, and Diu and Puducherry. These are the seven union territories left. All others were
20 merged or amalgamated.

21

22 **CHIEF JUSTICE DY CHANDRACHUD:** Now see what they have put up on... It's very
23 interesting. Part A. This is on the date of the Constitution. Part A states are basically nine
24 states. Assam, Bihar, Bombay, Madhya Pradesh, Madras, Orissa, Punjab, United Provinces,
25 and West Bengal.

26

27 **C.U. SINGH:** That's right.

28

29 **CHIEF JUSTICE DY CHANDRACHUD:** Now, let's see Part B.

30

31 **C.U. SINGH:** Part B states My Lords...

32

33 **CHIEF JUSTICE DY CHANDRACHUD:** Part B are Hyderabad,

34

35 **C.U. SINGH:** Jammu and Kashmir, Madhya Bharat, Mysore, Patiala, and the East Punjab
36 states that the PEPSU, Patiala East Punjab State Union, Rajasthan, Saurashtra, Travancore,
37 Cochin, and Vindhya Pradesh.

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CHIEF JUSTICE DY CHANDRACHUD: Right.

C.U. SINGH: Then My Lord, Your Lordship sees the territories of the state? The territory of each of the states in this part shall comprise of the territory which immediately [UNCLEAR] of the Constitution in the corresponding Indian State, and in the case of each of the States of Rajasthan and Saurashtra shall also compare...

CHIEF JUSTICE DY CHANDRACHUD: Jammu and Kashmir *ka territory dekh letey hain kya hai.*

C.U. SINGH: Now, Your Lordships will see that some of those Commissioners' provinces were merged into Part B states, because they became viable. [UNCLEAR]...

CHIEF JUSTICE DY CHANDRACHUD: Ajmer, Bhopal, Bilaspur, Cooch Behar, Coorg, Delhi, Himachal Pradesh, Kutch, Manipur and Tripura.

JUSTICE SANJIV KHANNA: Himachal Pradesh was at that time also...?

CHIEF JUSTICE DY CHANDRACHUD: Part C *mein tha.*

JUSTICE SANJIV KHANNA: Was it not included in Punjab? It was later on included in Punjab.

C.U. SINGH: If Your Lordships come to Part C states...

GOPAL SANKARANARAYANAN: The second paragraph of each of these parts in the schedule, describes what they were earlier. If Your Lordship sees Part A, Part B, Part C, they have explanations below the list. No, it's there, it's part of this.

C.U. SINGH: Yes. If Your Lordships just go below part B - territories of states...

GOPAL SANKARANARAYANAN: It's below the list. These territories they have for each of the parts. Now, the second explanation there, describes where they came from.

C.U. SINGH: Beneath each of the lists, My Lords, the territories are given, and that shows how different units were merged into them, even at [UNCLEAR] of Constitution.

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CHIEF JUSTICE DY CHANDRACHUD: Right.

C.U. SINGH: I have also got a table in my...

CHIEF JUSTICE DY CHANDRACHUD: And, Part D only comprised of Andaman and Nicobar?

C.U. SINGH: Andaman and Nicobar, which was which was a Chief Commissioner's province in the 1935 Act. But, that was carved out separately.

JUSTICE SANJAY KISHAN KAUL: So, if Ladakh is a UT, and the change of status from a state to a UT of Jammu and Kashmir.

C.U. SINGH: Yes, My Lord.

JUSTICE SANJAY KISHAN KAUL: Both aspects.

C.U. SINGH: Both. First of all, just the conversion of a state into a union territory, I submit, is only... if at all it could be done, I submit it violates the basic structure and it can't even be done under Article 368. But, if at all it could be done, it could be done only under Article 368, because it clearly impinges on at least six or seven provisions in the proviso. So it would require both the special majority and ratification by more than... the legislatures of more than 50% of the states to convert a state into a union territory, and I'll make good that submission.

JUSTICE SANJAY KISHAN KAUL: Therefore, I refer to two different things. Carving... change of status is one. Suppose, Jammu and Kashmir Assembly status was maintained, and only UT was carved, out, then what could be argued?

C.U. SINGH: Even so, My Lords, the submission really is, that for both for Ladakh and for Jammu and Kashmir, the exercise which has been done, is one which is clearly beyond the purview of Article 3. It was not permissible under Article 3 at all, even if it had been rightly done, I'll show from the timeline that it's actually not even done as per Article 3. But, assuming it were rightly done under Article 3, this is not the scope of the power of Article 3. When I take Your Lordships through the provisions of the Constitution, Your Lordship will see, Article 295, Article 294, etc., a 'state' comes with property or lands, property, consolidated funds, rights,

1 contracts, right to raise money. It has absolutely sacrosanct powers under Article 73 read with
2 Article 162, the executive powers, the legislative powers.

3

4 **CHIEF JUSTICE DY CHANDRACHUD:** We have given you your one hour. How long
5 would you now take?

6

7 **C.U. SINGH:** My Lords, I'll try to be as brief as possible. I think it will take about an hour or
8 so.

9

10 **CHIEF JUSTICE DY CHANDRACHUD:** No, no. One hour, no. It can't be... one hour it
11 can't be.

12

13 **C.U. SINGH:** I'll tell Your Lordships, this is... what I am arguing is something nobody else
14 has argued. But the main thing here is, we are saying...

15

16 **JUSTICE SANJAY KISHAN KAUL:** What is the point...

17

18 **C.U. SINGH:** ...regardless of what...

19

20 **JUSTICE SANJAY KISHAN KAUL:** What is the point to this chart then?

21

22 **C.U. SINGH:** Independent...

23

24 **JUSTICE SANJAY KISHAN KAUL:** ...you're supposed to have a kind of argument council
25 or session. If for one hour you take two hours, then this schedule means nothing.

26

27 **C.U. SINGH:** My Lords, I acceded to Your Lordships' wishes and I confined myself from day
28 one. I adopted other people's arguments. I'm not touching on 370 at all. I am saying that... and
29 if at any stage Your Lordships feel that I am going beyond the purview of the... there are certain
30 four or five points which I outlined at the beginning.

31

32 **CHIEF JUSTICE DY CHANDRACHUD:** But, you have made your four points now, and
33 your argument really is this, that look insofar as... they are twofold. You cannot convert an
34 area which is comprised in a state into a union territory. Now we have seen the history of the
35 creation of union territory. Because when you create a union territory, people who have
36 preceded you, they said "look, the whole essence of a state is democracy. You have a
37 Legislature, you have elections. You have converted it into a union territory, which has no

1 Legislature, which has no elections over the past four years." Therefore, that's one aspect. The
2 second aspect of your submission...

3

4 **CHIEF JUSTICE DY CHANDRACHUD, CU SINGH:** [UNCLEAR]

5

6 **CHIEF JUSTICE DY CHANDRACHUD:** The second aspect of your submission is that
7 you can't use the Article 356 power to suspend the two provisos to Article 3, and then use that
8 to complete the process of conversion of these states. So these are the two key areas really. I
9 think another, we can give you another ten minutes.

10

11 **CU SINGH:** I won't be able to do it in 10 minutes. I think Your Lordships will perhaps accept
12 my submission.

13

14 **CHIEF JUSTICE DY CHANDRACHUD:** Actually Mr. Singh, everybody has argued this
15 point also before. It's just that...

16

17 **CU SINGH:** My Lords, I will not repeat a single argument that anybody made. I'll take Your
18 Lordships very...

19

20 **CHIEF JUSTICE DY CHANDRACHUD:** 3:00 to 3:15. We'll give you 15 minutes. I think.

21

22 **CU SINGH:** I'll go as quickly as I can.

23

24 **CHIEF JUSTICE DY CHANDRACHUD:** Mr. Singh, that's it now.

25

26 **CU SINGH:** I don't think I'll be able to do that My Lord.

27

28 **CHIEF JUSTICE DY CHANDRACHUD:** Mr. Singh...

29

30 **CU SINGH:** I'll go very quickly My Lords. I will not take extra time on anything. I'll just go
31 point wise and place the...

32

33 **CHIEF JUSTICE DY CHANDRACHUD:** Because tomorrow they have to start arguing.
34 Between all of you, you decide now. We'll give you a little more time, but it'll cut into somebody
35 else's time. So who that person is, you please decide for yourself.

36

37 **CU SINGH:** My Lord I think that may not be proper in this case.

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CHIEF JUSTICE DY CHANDRACHUD: Delimitation, for instance, we are not concerned with delimitation here. Delimitation is not an issue in these petitions. So we have to now... the delimitation argument...

CU SINGH: No, I'm not arguing on delimitation.

CHIEF JUSTICE DY CHANDRACHUD: That's, what we are trying to say is that, at lunch, you reorganize the time between yourselves, because the delimitation will not arise at all in this.

CU SINGH: I think Your Lordships may need to give us a little bit of time tomorrow. A little bit of time.

CHIEF JUSTICE DY CHANDRACHUD: No. No. We'll conclude today on this side. Yes. Mr. Singh, one request. I'll tell you why we were trying to put a little time limit. Now, with all the hard work which has been done by your side, I think we have reached a point of mental saturation, not fatigue. The mental saturation that we are now, that questions to be posed to the other side and answers to be required from the other side. So in that sense, conscious as we are, that if we are putting an end to your argument a little earlier on the reorganization, we'll bear that in mind so that, when they respond and it comes to the rejoinder, we'll give you a little more time on the rejoinder, because then you'll have to really deal with what their defence is. Because broadly, reorganization was argued before you also, though you put it in a different way, we have seen the provisions now. We would now like to be in a situation where we conclude this part and we sort of, we have questions to be posed to the other side. We have to demand answers from them. And we are now at a point of the matter where we want now you know to move on. That's the only thing. I mean, it shouldn't be misconstrued why we sort of curbing arguments.

C.U. SINGH: My Lord, I am conscious of the anxiety of the court.

KAPIL SIBAL: Only six, seven answers [UNCLEAR] lifetime. It is such a matter which has such ramifications, just some kindness from Your Lordships part. I am deeply obliged.

CHIEF JUSTICE DY CHANDRACHUD: Yes Mr. Singh,

1 **C.U. SINGH:** I'll just summarize the point on the union territory aspect. I have in fact in my
 2 written submissions, I've got a detailed note on it. I'll just flag that to Your Lordships. Let me
 3 just summarize it in three or four sentences, that's all. So basically the point is this that, the
 4 history of Articles 3 and 4, emanating from the 1919 and 1935, Government of India Acts.

5

6 **CHIEF JUSTICE DY CHANDRACHUD:** Just one second Mr. Singh. The history of
 7 Articles 3 and 4 emanating from the?

8

9 **C. U. SINGH:** 1919 and 1935 Government of India Acts, shows that the powers to alter
 10 boundaries, change names, etc., was always used to increase self-representation and
 11 democratic self-government

12

13 **CHIEF JUSTICE DY CHANDRACHUD:** Under Article?

14

15 **C. U. SINGH:** And there was no. case of retrogression.

16

17 **CHIEF JUSTICE DY CHANDRACHUD:** Was used to...?

18

19 **C. U. SINGH:** Increase democratic self-government and self-representation and there was
 20 no case of retrogression. Secondly My Lords...

21

22 **CHIEF JUSTICE DY CHANDRACHUD:** Just one second. Yes.

23

24 **C. U. SINGH:** These powers were always exercised after due democratic consultation with
 25 the people of the concerned region, state or territory. And this Your Lordships will find in my
 26 written submissions. My written submissions, are at PDF 445 of the...

27

28 **CHIEF JUSTICE DY CHANDRACHUD:** We won't say with the people of the territory,
 29 we'll say with the legislative representatives of the territory.

30

31 **C.U. SINGH:** People of the territory through their representatives, which is why I showed
 32 Your Lordships the Section 15 which is why I showed Your Lordships the footnote to Section
 33 15, the Committee Report, which led to Section 15 of the 1990 Act. 1919 Act, Lordships recall
 34 that the Committee report and what they said about the consultation. Similarly, the 1935 Act
 35 and then My Lords, and in my written submission, which is at... these points are made out.
 36 I'm just summarizing it, at page 445 of the combined written submissions, is my written
 37 submission. PDF 445, from pages 464 to 472, I deal with this history and progression of union

1 territories. 464 to 472. I'm not even taking Your Lordships through it. I'm just identifying it
2 for Your Lordships.

3

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

5

6 **C.U. SINGH:** In particularly My Lords, paras. 41 to 43, a note may be made of this. I have set
7 out a chart of how various territories changed from Part C state to union territory, part C state
8 to Union Territory to full statehood, etc., etc. And that's why the way I would sum it up is that,
9 when Your Lordships see Schedule 1 to the Constitution and the section on union territories,
10 My Lords will find, that today there are only six, I mean, take away Jammu and Kashmir,
11 because even Dadra & Nagar Haveli and Daman & Diu have been merged into one, in 2020.
12 They've been merged into...they've been made into one union territory. Even though, they're
13 four...because they are four small parts...800 km this side... 400 km that side, etc., because
14 between Damon & Diu, it's an 800 kilometre driving distance. I mean, not flying, but if you
15 drive down the Rann of Kutch etc. So these small, non-viable territories have remained, which
16 are not viable estates have remained as union territories. None. None other. All have gone in
17 one direction. So this Your Lordship will find in my note, I'll say no more about this. That's
18 done. Now coming to the next point My Lords, is that 3 and 4 have to be read. First of all, I
19 said that 3 and 4 have to be read as part of Part 1. Now, Part 1 is very important because Your
20 Lordships have been shown Article 1 & 2. Article 1 says India shall be a Union of States. Article
21 1 was amended by the Seventh Amendment when union territories came to be introduced. But
22 Article 1(1) and 1(2) were not amended. Union territories were added in 1(3) sorry in 1(3)(b).
23 So, even while amending, in the 7th Amendment, 'India that is Bharat shall be a Union of
24 States. The States and the Territories thereof shall be as specified in the First Schedule.' These
25 were not amended, when Union Territories came into being in the Seventh Amendment. What
26 is added is 3. 'The Territory of India shall comprise:

27 A) The territories of the State

28 B) The Union territory specified in the First Schedule, and

29 C) Such other territories.

30

31 But the basic concept of 'India that is Bharat shall be a Union of States', was maintained.
32 Article 2 was maintained as it is. Admission or establishment of New States. Parliament may,
33 by law, admit into the Union, or establish new states on such terms and conditions that it
34 thinks fit. Article 3, was not amended till the 18th Amendment when those two explanations
35 were inserted. Now the explanation has become the tail, which is wagging the dog and from
36 that it is sought to be contended by the Union, that because the explanation says, for certain

1 portions, the state shall include union territory, therefore, any permutation and combination
2 is now available to Parliament under Article 3. Now.....

3

4 Keeping aside the fact that the two explanations were never extended to Jammu and Kashmir,
5 the two explanations which were introduced by the 18th Amendment, were never applied to
6 Jammu and Kashmir. I will come back to that, I am keeping that aside for the moment. So this
7 fiction that you can convert a state into a union territory, was by the Constitution of India
8 never applied to Jammu and Kashmir. But keeping that aside for a moment because I'll come
9 to that on that timeline issue. Now, please see the enormity of it, if you accept this argument
10 for a moment of converting states into union territories as a whole, for the whole of the
11 country, including Jammu and Kashmir, because we are saying that it's an integral part of
12 India. Please see Article 294 and 295 may just be seen My Lords. These particular articles I
13 want to show because My Lords, the Honourable Chief Justice wanted to know, how do these,
14 how are these provinces dealt with by the Constitution of India. So, under 294, those
15 properties of His Majesty's Government, which were used for the dominion, became part of
16 the Union Properties. Please see 294(a). All property and assets, which immediately before
17 such commencement, were vested in His Majesty for the purposes of the Government of the
18 dominion of India, and all property and assets which immediately before such commencement
19 were vested in His Majesty for the purposes of the Government of each Governor's Province
20 shall vest respectively, in the Union and the corresponding State. So, properties which were
21 for the dominion vested in the Union of India, properties which were for a Governor's State,
22 which will be used for a Governor's State, vested in the corresponding state, Punjab, Bombay
23 State, Madras State etc., etc. The properties pertaining to that State vested in the State by
24 Constitution. Similarly, all rights and liabilities, etc., again, respectively, in B. Then 295,
25 Succession to properties, assets and in other cases. Now please see 2.

26 Sub (2) I'm just taking Your Lords, this is now dealing with the Indian State. Subject to the
27 aforesaid, the government of each state specified in Part B, of the First Schedule shall, as from
28 the commencement of this Constitution, be the successor of the Government of the
29 corresponding Indian State, as regards all property and assets and all rights and liabilities and
30 obligations that are arising out of any contract or otherwise other than those referred to in
31 Clause 1. So those properties became the Part B States' properties. Part C and Part D were not
32 defined here because the Union had control of them. The Union had control of Part C and Part
33 D so they remained in a sort of a silo because what really happened is Part C and Part D and
34 union territories are really a stepping stone. It's a silo kept, sort of a holding pen so to speak,
35 till you can get full statehood. The holding pen, the silo in which you are kept, you are kept
36 safe and secure under the benign umbrella of the Union of India. It's really for that. It was
37 never intended....

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CHIEF JUSTICE DY CHANDRACHUD: And Mr. Singh anyway, Mr Naphade,

C. U. SINGH: I can put this point.

CHIEF JUSTICE DY CHANDRACHUD: Mr. Naphade, in the concluding part of his submissions has given us a whole list of what the impact in the Constitutional structure is and we have made note of that. (1) he said, Ladakh has no representation in the Rajya Sabha. (2) Rajya Sabha, all of the four seats go to J&K. (3) Lok Sabha, Article 81(c), all UTs can have a maximum of 20 seats. Article 81(2), other states seats depend on population. J&K has no proportional representation in the Lok Sabha. Presidential election, Article 54 and 55, J&K, no MLA for Presidential election. The reorganization of Act of 2019 gives the same rights as Puducherry. 279(a), no representation of the GST Council and High Court judges no views of the CMRT....

C.U. SINGH: I'll just add a few more. Now, I won't take Your Lordships to the sections. I wanted to show this section, just to show how property devolved, property and rights devolved. Now I'll just mention a few My Lords. Under Article 266 provides for the Consolidated Fund of the Union and a separate Consolidated Fund of the States, 266(1) & (2). 283(2) provides for the 'custody of the Consolidated Fund of the State and the manner of withdrawals from that custody'. 289 'exempts the property and income of a State from Union Taxation'. Once My Lords, 283, My Lords... 162 now, this is very important, 162 says 'Subject to the provisions of this Constitution, the executive powers of the state shall rest in the state in respect of List 2 and List 3.' List 3, 'only if Parliament makes a specific provision by a law to exercise executive powers in respect of some particular provision of List 3...' 'Executive Power', now I'm talking about, 'only then, to that extent the state will yield Executive Powers to the to the Union.' Otherwise, all executive powers in the State, on subjects of List 2 and List 3 are exercised by the state. And this is not subject to a law made by Parliament. This is subject to the provisions of this Constitution. The reason it is subject is like 256, 257 are a qualifier on 162. 256, 257 is where the Union, for purposes of defence, etc., etc., can My Lords encroach to some extent on the Powers of the State 73, is the concomitant executive powers of the Union. 73 has a... please just see that 73 has a specific provision, which says 'the Union shall not exercise any of the powers of the state.' 73, subject to the provision of this Constitution, again, not by law. 'The executive power of the Union shall extend to matters with respect with which Parliament, has the power to make laws, and to the exercise of such rights, authority, and jurisdiction.

CHIEF JUSTICE DY CHANDRACHUD: The proviso.

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C.U. SINGH: Now proviso. 'Provided that the executive power referred to in sub-clause A, shall not, save as expressly provided in this Constitution, or in any law made by Parliament, extend in any state to matters with respect to which the Legislature of the state has also powers to make law.'

CHIEF JUSTICE DY CHANDRACHUD: The proviso to 73 and the proviso to 162 are mirror images..

C.U. SINGH: Mirror images, mirror images..

CHIEF JUSTICE DY CHANDRACHUD: Because the executive power of the State also extends to laws to concurrent field subjects.

C.U. SINGH: That's right.

CHIEF JUSTICE DY CHANDRACHUD: And including any law made by Parliament in the concurrent list, unless Parliament expressly reserves the power to the Union Government.

C.U. SINGH: That's right. Absolutely right. Then My Lords 293, further clarifies, that the executive of power of the state extends to domestic borrowings against the Consolidated Fund of the state. So, there's a specific Constitutional Power of that. 298 extends the executive power of the state to carry on trade or business, acquiring properties, etc., and then 246 and the list. Now by a simple expedient of a simple ordinary majority under Article 3, all these Constitutional rights, all these Constitutions rights, many of which are directly part of the basic structure of the Constitution are wiped out. So the theory is...

CHIEF JUSTICE DY CHANDRACHUD: Point is taken. Mr. Singh. We've understood.

C.U. SINGH: No, this has been dealt with by Your Lordships fortunately and I want to just place that. Following My Lords, if Your Lordships are kind enough to see the judgment of a Constitution Bench in *Shankari Prasad*. So if My Lordships are kind enough to take up *Shankari Prasad*, I'd asked the learned Court Master to keep it ready. It's on the screen. My Lords, this is *AIR 1951 SC 458* and His Lordship, Justice Patanjali Sastri, speaking for the bench, spoke of harmonious interpretation of the different modes of amendment under the Constitution.

CHIEF JUSTICE DY CHANDRACHUD: Para?

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C.U. SINGH: If Your Lordships may come to para 6... on the first point it was submitted and then overleaf notes, come to the last about eight lines of para 6, 'Various methods of Constitutional Amendment...' Did Your Lordships find that? 'Various methods of Constitutional Amendment have been adopted in written Constitution, such as by referendum, by a special convention, by legislation, under a special procedure and so on. But which of these methods the framers of the Indian Constitution have adopted, must be ascertained from the relevant provisions of the Constitution itself, without any leaning based on [UNCLEAR] grounds, or the analogy of other constitutions in favour of one method in reference to another. We accordingly turn to the provisions dealing with Constitutional Amendments. Now the Constitution provides for three classes of amendments of its provisions. First, those that can be affected by a bare majority, such as that required for the passing of any ordinary law. The amendments contemplated in Articles 4, 169 and 240, fall within this class, and they are specifically excluded from the purview of Article 368.

Secondly, those that can be affected by a special majority are laid down in Article 368. All constitutional amendments other than those referred to above, come within this category and must be affected by a majority of the total membership of each House, as well as by a majority of not less than two thirds of the members of that House present and voting. And thirdly, those that require in addition to the special majority above mentioned, ratification by resolutions passed by not less than one half of the State specified in Part A and Part B of the First Schedule. This class comprises amendments that seek to make any change in the provision referred to in the proviso of Article 368. This is what my learned friend Mr. Naphade, highlighted some of those provisions which directly fall within A to E of the provision. 'It will be seen that the power of affecting the first class of amendments is explicitly conferred on Parliament, that is to say, the two houses of Parliament and the President. This would lead one to suppose, in the absence of a clear indication to the contrary that the power of affecting the other two classes of amendments has also been conferred on the same body of Parliament, for the requirement of a different majority, which is merely procedural, can itself be no reason of entrusting the power to a different body and examine it.' Because the argument here was being made that a Constitutional Amendment can't be made by Parliament. It has to go back to a Constituent Assembly. So that was negative.

Now this was followed in *Sajjan Singh*, this *Shankari* dealt with the First Amendment, and *Sajjan Singh* dealt with the 17th Amendment, that is, *AIR 1965 SC 845* and para 7, 8. Please just see the first four lines of paragraph 7 My Lord in *Sajjan Singh*, 'in our opinion'...My Lords have that? 'In our opinion, the two parts of Article 368 must, on a

1 reasonable construction, be harmonized with each other in the sense that the scope and effect
2 of either of them should not be allowed to be unduly, reduced, or enlarged.' Then, in para. 8
3 My Lords, about line 7 from the top. 'In other words in construing both the parts of Article
4 368, the rule of harmonious construction requires that if the direct effect of the Amendment
5 of Fundamental Rights is to make a substantial inroad on the High Court's powers under
6 Article 226, it would become necessary to consider whether the proviso would cover such a
7 case or not. If the effect of the amendment made in the Fundamental Rights on the power of
8 the High Courts prescribed by 226 is indirect, incidental or is otherwise of an insignificant
9 order, it may be that the proviso will not apply.' In other words, you have to harmonize these
10 two provisions, and if it is substantially falling within impinging on those A to E of the proviso,
11 then you have to follow the greater.... Then come to para 30 My Lords of the...

12

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14 **CHIEF JUSTICE DY CHANDRACHUD:** We'll see that Mr. Singh. Well settled. We'll have
15 a look at it.

16

17 **C.U. SINGH:** Very well. I only want to point out para 30 My Lords, because para 30 deals
18 with Article 4 directly, so I would request Your Lordships. Para 30. Incidentally, we may also
19 refer to the fact that the Constitution makers had taken the precaution to indicate that some
20 amendment should not be treated as amendments of the Constitution for the purpose of
21 Article 368. Take for instance, Article 4(2), which deals with law made by virtue of Article 4(1).
22 Article 4(2), provides that no such law shall be deemed to be an amendment of the
23 Constitution for the purpose of Article 368. Similarly, Article 169(3) provides that any law in
24 respect to the amendment of the existing legislative apparatus by the abolition of creation of
25 Legislative Councils and States shall not be deemed to be an amendment of the Constitution
26 for the purposes of 368. In other words, laws falling within the purview of Articles 4(2) and
27 169(3) need not be passed subject to the restrictions imposed by Article 368, even though in
28 effect they may amount to the amendment of the relevant provisions of the Constitution. So
29 they say that these provisions have to be read harmoniously, as in *Shankari* and they are
30 exempted, but the exemption can't mean that you completely efface the... if you're falling
31 within 368 to efface My Lord, the provision is there. Now as it happens My Lords this is, if
32 Your Lordships go very quickly to the Constituent Assembly debates for a moment, I just want
33 to show Your Lordships Dr. Ambedkar on his feet on this very same provision. and why this
34 ascending power of amendment and how it has to each one has to apply only in their limited
35 sphere. So if Your Lordship sees Volume 8 of the documents and at page 881...This is Dr.
36 Ambedkar's speech, it begins at the previous page 880.

37

1 Dealing with Article 304, the draft Article 304, which is 368. Now para 4, My Lords on page
2 881. Now, let me turn to the provision of our Constitution. What is it that we propose to do
3 with regard to the amendment of our Constitution? We propose to divide the various articles
4 of the Constitution into three categories. In one category, we have placed certain articles which
5 would be open to amendment by Parliament by a simple majority. That fact unfortunately, has
6 not been noticed by reason of the fact that mention of this matter has not been made in Article
7 304, but in different other articles of the Constitution. Let me refer to some of them. Take, for
8 instance, Articles 2 and 3 which deal with the states. So far as the creation of new states is
9 concerned, for the reconstitution of existing states is concerned, this is a matter which can be
10 done by Parliament by a simple majority. Similarly, take for example, Article 148(a), which
11 deals with Upper Chambers in the provinces. Parliament has been given perfect freedom to
12 either abolish the Upper Chambers or to create new second Chambers and provinces which do
13 not now have them by a simple majority. Now take Article 2(1)(3), which deals with the states
14 in Part 2. With regard to the Constitution of the States, the draft Constitution also leaves the
15 making of the Constitution of the States in Part 2 and their modification in the Parliament.

16

17 **CHIEF JUSTICE DY CHANDRACHUD:** Nothing much turns on this really.

18

19 **C. U. SINGH:** No the harmonious reading, if Your Lordship...

20

21 **CHIEF JUSTICE DY CHANDRACHUD:** No that's well settled, why do we have to read the
22 speech for that?

23

24 **C. U. SINGH:** I am sorry My Lords?

25

26 **CHIEF JUSTICE DY CHANDRACHUD:** We don't have to read the speech to have
27 harmonious construction.

28

29 **C. U. SINGH:** No I'm only on this, what Justice Patanjali Sastri, the formulation that he made
30 in *Shankari*...

31

32 **CHIEF JUSTICE DY CHANDRACHUD:** The three provisions, the bare majority, two
33 thirds majority and two third majority with gratification. Those are three separate provisions.

34

35 **C. U. SINGH:** Please just see page 882 for a moment, just flag it, Your Lordship may just flag
36 it. The third para in 882. Now what is it we do? And the next para My Lords, below that after
37 the interjection by the President. Yes. now, we have no doubt put certain articles in a third

1 category where for the purposes of amendment, the mechanism is somewhat different or
2 double. It requires two third majority plus....

3

4 **CHIEF JUSTICE DY CHANDRACHUD:** Two thirds plus gratification.

5

6 **C. U. SINGH:** I shall explain why we think that in case of certain articles, it is desirable to
7 adopt this procedure. If members of the House who are interested in this matter are to
8 examine the articles that have been put under the proviso, they will find that they refer not
9 really to the centre, but to the relations between the centre and the provinces. We cannot forget
10 the fact that while we have in a large number of cases, invaded provincial autonomy, we still
11 intend and have, as a matter of fact seen into it that the federal structure of the Constitution
12 remains fundamentally unaltered. We have by our laws given certain rights to provinces and
13 reserved certain rights to the centre. We have distributed Legislative Authority. We have
14 distributed Executive Authority, and we have distributed Administrative Authority. Obviously,
15 to say that even those articles of it to be pertained to the Administrative, Legislative and other
16 powers.

17

18 Page 2 of 883. It's very important because it specifically deals with 73 and 162, the articles
19 which were 60 and 142. And it says, that these cannot be changed. This ratio, this balance
20 cannot be changed except by a special majority coupled with gratification by more than half
21 the states. So that may be just noted. Now in *Mangal Singh*, this is reiterated and I'll just
22 give Your Lordships, the pages now. *Mangal Singh*, Your Lordships will find at volume 6,
23 PDF 386 para 6.

24

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

26

27 **C. U. SINGH:** And in state of Himachal Pradesh versus Union of India, Volume 14 PDF 776...

28

29 **JUSTICE SANJAY KISHAN KAUL:** Volume number?

30

31 **C. U. SINGH:** Volume 14 PDF 776, para. 93 and this is very important. If I can just draw Your
32 Lordships' attention to it. Specifically, the Supreme Court held My Lords in this judgment,
33 what is not permissible under, My Lords Article 3 and 4. If Your Lordships are kind enough
34 just to turn to Volume 14, page 776, para 93.

35

36 'We find...' My Lords, have that? Volume 14 page 776, para 93. 'We find that under the
37 provisions of Article 3 of the Constitution, Parliament has the power to form a new state, by

1 separation of territory from any state, or by uniting 2 or more states or parts of states, or by
 2 uniting any territory to a part of any state, increase the area of any state, diminish the area of
 3 any state, alter the boundaries of any state, and alter the name of any state.' But under Article
 4 3, Parliament cannot take away the powers of the State Executive or the State Legislature in
 5 respect of matters enumerated in List 2 of the Seventh Schedule to the Constitution. This has
 6 been made clear in the speech of Dr. Ambedkar in the Constituent Assembly, quoted in
 7 paragraph 52 of the decision of this Court in **Kuldip Nayar V. Union of India**. Relevant
 8 portion from the speech is quoted, 'The basic principle of Federalism is that Legislative and
 9 Executive authority is partitioned between the centre and the states, not by any law, to be made
 10 by the centre, but by the Constitution itself. This is what the Constitution does. The states
 11 under our Constitution are in no way dependent upon the centre for their Legislative or
 12 Executive authority. The centre and the states are co-equal in this matter.' And then, Your
 13 Lordships have been shown **Berubari**, in Volume 13, page 492, various paras, but My Lords,
 14 may just note the paras in **Berubari** Volume 13, it starts at page 492, paras 36, 38, 44, and
 15 especially 46 are very important. Then My Lords, the **R.C. Poudyal** etc., Your Lordships have
 16 been shown those. I won't...

17

18 **CHIEF JUSTICE DY CHANDRACHUD:** This reeling of the Judgements and giving para
 19 numbers, doesn't it form a part of your synopsis? If it forms a part of a synopsis, we will give a
 20 consideration to it. Otherwise, what's happening is you're depriving your other colleagues of
 21 the right to...

22

23 **C. U. SINGH:** Because of...in the context of...that this could only have been done under
 24 368(2). That is my... that is the essence. Now the last point was and I will close, is, what I...the
 25 second point I had raised. But My Lord, the Honourable Chief Justice wanted me to address,
 26 on union territories to start with. My Lords, this is with regard to the timeline and how there
 27 was no power at all to table or enact this law at all, in the manner in which it had been done.
 28 The reorganization... and please just take this timeline

29

30 **JUSTICE SANJAY KISHAN KAUL:** Parliament...how Parliament passes it? Does it fall
 31 within..

32

33 **C. U. SINGH:** No, if there was...the point here is not... the point here is if C.O. 273 was not
 34 there, and the Constitution of Jammu and Kashmir and the Constitution of India as applicable
 35 in Jammu and Kashmir was enforced, this could not have been tabled at all.

36

1 **JUSTICE SANJAY KISHAN KAUL:** So you are trying to say that there was not adequate
2 debate on how the Parliament was conducted. This would be a difficult area to get. We
3 understood the other proposition, but now to say they did it in this much time not this much
4 time, but this much time,

5

6 **C. U. SINGH:** No I'm sorry. It's my fault, My Lord, I have not made the point clear. If Article
7 3 says, for instance, that it will not be introduced unless the President has done ABC and it is
8 apparent that the President has not done ABC. ABC gets done on a subsequent date. It's not
9 there on that date. Rajya Sabha passes a bill, which it has which it is not competent to pass at
10 all, not competent to even table or consider under the terms of the Constitution. Then that's
11 all I'm trying to point out. Please, just take a look at this, it's a very short, just a timeline of five
12 entries of what happened on 5th and 6th. This is all from available in the... and I've given the
13 PDF pages of each of the documents, My Lords.

14

15 **CHIEF JUSTICE DY CHANDRACHUD:** Just give us what is the dates? You can tell us the
16 dates. Just give us the dates. We will not be able to handle these sheets now. Now we've got
17 everything in the soft form. I mean, these sheets will just fly around the place.

18

19 **C. U. SINGH:** It is just a [UNCLEAR] pages. Very well.

20

21 **CHIEF JUSTICE DY CHANDRACHUD:** This will be a part of our record.

22

23 **C. U. SINGH:** Now My Lords, on 5th August 2019, C.O. 272 is issued, by the President, which
24 adds sub-clause D to Clause 4 of Article 370, substituting The Legislative Assembly...

25

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

27

28 **C. U. SINGH:** It might save Your Lordships a little time if I can just...

29

30 **JUSTICE SANJAY KISHAN KAUL:** Is it not a part of your synopsis, that is what I am
31 asking?

32

33 **CHIEF JUSTICE DY CHANDRACHUD:** It may be part of your submissions, right? Your
34 written submissions.

35

36 **C. U. SINGH:** No. This timeline is not set out... this is all, it's in the C.O.s and what is in
37 Volume 3.

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JUSTICE SANJAY KISHAN KAUL: It is like a supplementary submission now being sorted..

C. U. SINGH: It is not a submission. I can take Your Lordships directly to the documents. It is not....

CHIEF JUSTICE DY CHANDRACHUD: You just tell us now, quickly the dates so that we can wrap up now.

C. U. SINGH: So when C.O. 272, is issued by the President this merely adds a Sub-Clause D which substitutes the Legislative Assembly for the Constituent Assembly of the State. On the same day this is at Volume 3 page 101...

JUSTICE SANJAY KISHAN KAUL: We will go through it.

C.U. SINGH: Now on the same day the second entry, the Lok Sabha on a reference from the President, this is the phraseology, passes a resolution to accept the J&K Reorganization Bill presented to it by the President for its views. Now this is at volume 3, page 104. I'll tell Your Lordships the importance of this.

CHIEF JUSTICE DY CHANDRACHUD: We'll have a look at this.

C. U. SINGH: Let me just make the point My Lords.

JUSTICE SANJAY KISHAN KAUL: What's the point to doing this? See you please tell us... We will not go beyond 04:00. You ask your colleagues whether it is fair to them or not. That's all I'm saying.

C. U. SINGH: May I just summarize the point in a few sentences?

JUSTICE SANJAY KISHAN KAUL: One hour was taken, we've given you 1 hour 45 minutes. Still, you feel something...It's not fair, honestly.

C.U. SINGH: If Your Lordships have felt that I have repeated myself in any way or not...

1 **CHIEF JUSTICE DY CHANDRACHUD:** Everybody has to ration time. Everybody has to
2 ration time.

3

4 **JUSTICE SANJAY KISHAN KAUL:** We have given you time. You have summarized it. At
5 some stage all good things must come to an end. The arguments must come to an end. Let us
6 have the next counsel now to address us.

7

8 **C. U. SINGH:** Let me just make the point in two sentences My Lords. The point here is that,
9 the two explanations did not apply to Jammu and Kashmir until C. O 273 got passed on the
10 following day and it was only recommended simultaneously, along with the Rajya Sabha
11 passing the... Lok Sabha, passing the J&K Reorganization Act. This is not permissible because
12 until then the Constitution of India as applicable to Jammu and Kashmir applied. The
13 explanations were not there. Union Territories were not in Article 3 as it applied to Jammu
14 and Kashmir. So I'm saying that what was tabled and what was passed by the Rajya Sabha,
15 purportedly on 5 August was something clearly contrary to Article 3 itself. So if they are
16 founding their case on Article 3, I submit that that is *ultra vires*. That's the point.

17

18 **CHIEF JUSTICE DY CHANDRACHUD:** Thank you, Mr. Singh. Mr. Parikh?

19

20 **C. U. SINGH:** My Lord, I'm very grateful.

21

22 **SANJAY PARIKH:** I am conscious of My Lord the time constraint. I must indicate My Lord,
23 what I am going to argue. I am going to argue My Lord one point with regard to the historical
24 details which has not come in so far the list of dates which was given which is manifesto from
25 1944. I am going to say something about 370. And then My Lord about the Governor's
26 Proclamation, and the Presidential Order. That's how My Lord, and I know I am not going to
27 repeat. And I'm conscious My Lord because in Bhopal case when I appeared before Justice
28 Kaul, he said, you have to summarize. So I am trained My Lord...

29

30 **CHIEF JUSTICE DY CHANDRACHUD:** Mr. Parikh, in about ten minutes, please
31 summarize the points.

32

33 **SANJAY PARIKH:** My Lords in 10 minutes I can't but I...

34

35 **CHIEF JUSTICE DY CHANDRACHUD:** We have to wrap up by 4 o' clock. We have time
36 up till 4 o' clock.

37

1 **SANJAY PARIKH:** This is what happens somebody who is sensible then he is put into this
2 difficulty.

3

4 **CHIEF JUSTICE DY CHANDRACHUD:** No, everybody is Mr. Parikh. We will now wrap
5 up. Just formulate it.

6

7 **SANJAY PARIKH:** I'll do my best.

8

9 **CHIEF JUSTICE DY CHANDRACHUD:** Just formulate it. We'll take it down.

10

11 **SANJAY PARIKH:** Yes, I'm going My Lord. Now the first point is the historical details,
12 which is the Manifesto of 1944, which is important.

13

14 **CHIEF JUSTICE DY CHANDRACHUD:** Why don't you copy it?

15

16 **SANJAY PARIKH:** I'm appearing in Writ Petition number Lordships may just note 1368 of
17 2019. And my written submissions are from page 504 in Volume 1 of the submissions. Now
18 My Lord, the formulation is like this, that My Lord, the people of Kashmir in on 29, 30 of
19 September 1944 came together and gave themselves a manifesto. In manifesto they said, two
20 things we want, we want a Constitution for our, for Kashmir and then also economic plan for
21 Kashmir. Now these two things were there. Then they went into the question of, what rights
22 should be given to the children? What rights should be given to the women? What kind of land
23 reform should be there? All that was part of manifesto. Now they gave it to the Raja, at the
24 time and then Maharaja and Maharaja for consideration that this is what we demand, and this
25 is the democratic setup we want in Kashmir. Now, this particular manifesto, which is taken as
26 a magna carta virtually. That's what Justice Anand says in his book on Constitution, was then
27 accepted in the Constitution and whatever people said, ultimately in the manifesto, most of it
28 My Lord, was included in the Constitution. This is known as the New Kashmir, they called this
29 manifesto. Now, the importance is this My Lord, that the sovereignty rests with the people and
30 they express their sovereignty in a particular way. This is what they want. This is kind of
31 democratic setup they want. Now, this sovereignty was accepted when the Constituent
32 Assembly was sitting and was translated ultimately into the Constitution of Jammu and
33 Kashmir. So, there are two things My Lords which emanate from it. Number one is, that the
34 sovereignty which vests with the people, and they My Lord expressed it and that expression
35 was translated ultimately My Lord, into the Constitution which they gave unto themselves,
36 that's number 1. Second is My Lord, when there is a written Constitution, then that written
37 Constitution is supreme. Now Lordships have noted the judgment in Article 143, that

1 privileged case My Lord. I'll just give the citation and the para number which says, that
2 ultimately in a democratic country having written Constitution, it is the Constitution, which is
3 supreme and sovereign. That is My Lord, **1965, 1 SCR, 414**, and it is in Volume 17, PDF, it
4 starts at 337, at 357, para 40. My Lord, please note that in my submissions because it has not
5 come...[NO AUDIO]

6 Now My Lord the second judgment, which I just wanted to bring to your attentions, is My
7 Lord, **Bommai's** case, which has been cited before Your Lordships. It is para ...

8

9 **CHIEF JUSTICE DY CHANDRACHUD:** What is the... if you can conceptualise the...

10

11 **SANJAY PARIKH:** My Lords, that's what I'm saying. I'm saying that this My Lord, the entire
12 idea the people said they want to have a democratic setup and therefore they came together,
13 gave themselves a manifesto. Manifesto was translation of their wishes or desires that it should
14 be in a particular way. That My Lord, was given to Maharaja at that particular point of time,
15 that, "please accept it because we want this monarchy to end, we want a democracy to come."
16 So, this expression, My Lord which was given in the manifesto, was translated ultimately
17 because, as I said, it was a magna carta and in the discussion also, we find...

18

19 **CHIEF JUSTICE DY CHANDRACHUD:** That is [UNCLEAR] in your written submissions.
20 Mr. Parikh we will look at your submissions.

21

22 **SANJAY PARIKH:** ...Your Lordships had formulated, so it's My Lord ultimately the
23 sovereignty, which vests in the people ultimately transferred My Lord in the Constitution. As
24 I said, the Constitution is supreme and sovereign. My Lord, that's the idea and I, My Lord,
25 refer to the two paragraphs. One is My Lord, in the 1965 Judgment, which is para 40. And para
26 102 and 103, Justice Sawant's My Lord view in **Bommai**, and if Your Lordships permit me,
27 I'll read only para 103, and this particular part will end. 'In this connection... May I give Your
28 Lordships the PDF?

29

30 **CHIEF JUSTICE DY CHANDRACHUD:** No, no, we got it. Yes.

31

32 **SANJAY PARIKH:** Yes, this will be PDF 171, 172 of Case Law Volume 2. 271, 272. Now 102,
33 now 102 My Lord, at 271.

34

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

36

1 **SANJAY PARIKH:** Now Your Lordships, may I skip My Lord, the earlier para...just like last
2 3 or 4 lines. 'It is true to say that democracy people are sovereign. All powers belong primarily
3 to people. The retention of such power by the...'

4

5 **CHIEF JUSTICE DY CHANDRACHUD:** Yes, we've read that.

6

7 **SANJAY PARIKH:** Now My Lord 103, is how the States are formed on the basis of linguistic,
8 ethnic, and other things and that cannot be disturbed. My Lordships have noted...that's
9 enough, My Lord for me. Now the only thing is My Lord, that in the book, Justice Anand My
10 Lord, says that, as far as the sovereignty is concerned, in autonomy, they are My Lord,
11 interchangeable terms. That what you call sovereignty's autonomy. Now, that is not something
12 which is important when we say whether there is autonomy. Autonomy in the form of
13 sovereignty. Sovereignty with the people and ultimately in the Constitution of Jammu and
14 Kashmir. Now My Lord, with regard to the interpretation of 370, Your Lordships have read it
15 number of times. I just wish to point out My Lord...two things; one is My Lord when we look
16 at 370(1)(b) and My Lord, 370(d), first proviso. These are two provisions, they talk about the
17 consultation, rest is concurrence. So my argument is My Lords, as far as the concurrence is
18 concerned.... Concurrence is concerned because the Constituent Assembly doesn't exist. And
19 I must point out My Lords, how the Constituent Assembly of Jammu and Kashmir, because
20 that has not been pointed out, how it was dissolved. There was a resolution, and pursuant to
21 the resolution, it was dissolved. So therefore My Lord, those parts are concerned the provisions
22 My Lords, in terms of the 1954 Presidential Order, which has been issued. My Lords, I know
23 Your Lordships are probably...if I'm repeating something, then....1954 Presidential Order,
24 which is there, if you look at these 6 presidential orders which have been issued, the first one
25 is My Lord consultation....there are other three consultation. One is C. O. 44, which is My Lord
26 under 373 where My Lord the Constituent Assembly's prior recommendation was taken
27 because they changed the explanation there from My Lord Maharaja to *Sadr-e-Riyasat*. So
28 that is My Lord one thing which shows that ultimately you require prior recommendation of
29 the Constituent Assembly. The only provision is 1954, which talks about the concurrence. My
30 submission is My Lord, that the concurrence ultimately comes to an end because the
31 Constituent Assembly is not there. But the question arises My Lord, which Your Lordships
32 may put to me, what about the Presidential Orders, which have been issued subsequently. The
33 only answer My Lord which I think can be given is, that all the subsequent Presidential Orders
34 which have been issued, are either some changes, some amendments in the 1954 Presidential
35 Order. They are not My Lord, because the areas were carved where the Union will legislate and
36 the areas My Lord, where the Kashmir...Jammu and Kashmir Constitution will prevail.
37 Therefore, My Lord, all those things which have been issued can be justified only on this basis

1 that these Presidential Orders, because 1954 Presidential Order was issued after My Lord the,
 2 the concurrence of the Constituent Assembly or approval of the Constituent Assembly of
 3 Jammu and Kashmir. Therefore, the subsequent Presidential Orders which are issued were
 4 under the presumption that the Constituent Assembly is approval already exist as far as the
 5 Presidential Order. This is one way to look at it because when I try to find out I couldn't get
 6 without any answer because if the Constituent Assembly comes to an end naturally the entire...
 7 My Lords there is no Constituent Assembly therefore there can't be any concurrence in that
 8 sense which is provided My Lords under 370. I have formulated 370, I'll just read two
 9 formulations. 370, I am reading that My Lord, provided the constitutional mechanism by
 10 which the Instrument of Accession was integrated into the Constitution of India. Recognized;
 11 areas where the Constitution of India will operate and by respecting will of the people, carved
 12 all the areas where the Constitution they wish to give onto themselves will prevail. Second is
 13 370 is temporary in the sense that it contained the principles which would govern the
 14 formation of Indian Constitution as applicable to J&K, as well as the Constitution of J&K. Once
 15 that was achieved., the aim and object of 370 was fulfilled. Seeing each other, meeting each
 16 other was converted into a relationship on mutually decided terms. It is this relationship which
 17 is permanent. This relationship could not be unilaterally altered. It is like a constitutional
 18 promise embedded in will of the people. With the dissolution of Constituent Assembly of J&K
 19 achieving its purpose of giving back to the Constitution the temporary provision achieved the
 20 permanent result. The other significant permanent feature being that people of J&K accepted
 21 J&K with all its territorial limits to be an integral part of India for all times to come.

22

23 [NO AUDIO]

24

25 Now My Lords there are two, three documents My Lords on the basis of which the
 26 interpretation of 370 is possible. One is, the Constituent Assembly debates in India, the
 27 Constituent Assembly debates of J&K, and the judgment in **Premnath Kaul**. Now, from all
 28 these three documents, two situations emerge. One is that the Constituent Assembly will have
 29 a final say. All My Lords, the debates as well as debate in Jammu and Kashmir and My Lord
 30 **Premnath Kaul** judgment says so that number one, Constituent Assembly will have a final
 31 say and number 2 is relationship will be finally determined by J&K Constituent Assembly.
 32 These are the two factors which are common My Lord in the entire thing. I just wish My Lord
 33 because Mr. Gopal Subramaniam had read the debates in Jammu and Kashmir Constituent
 34 Assembly, but I just wish to draw Your Lordship's attention to my submissions. 504. Just may
 35 not look at 512.

36

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

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SANJAY PARIKH: These are my submissions My Lords, which is in Volume 1 of the submissions starts from 504. Just kindly come to 512.

CHIEF JUSTICE DY CHANDRACHUD: Yes.

SANJAY PARIKH: And then Your Lordship may skip. This is My Lord, what Sheikh Mohammad Abdullah makes a statement on 370. The entire paragraph is that. Your Lordships may skip that and come to My Lord 514. Just above para 26. "The Constitution of Indian Union, therefore clearly envisaged the convening of a Constituent Assembly for Jammu and Kashmir State, which would be finally competent to determine ultimate position of the State, in respect of the sphere of its succession, which would be incorporated as in the shape of permanent provisions in the Constitution. This briefly, is the position of Constitution of India according to us." Now, this was My Lord, the same thing which we find, in the debates of Gopalswami Ayyangar. He says the same thing. Same thing we find in the judgment of [UNCLEAR] and this is what. So, there was My Lord, *ad idem* as to what should be the shape and what should govern the relationship between My Lord, Jammu and Kashmir, and India. Now, 26 is, which has not been shown to Your Lordships, how the ultimately it was dissolved the Constituent Assembly of Jammu and Kashmir. Now, this is the statement which was made by Mir Qasim. He said, he said My Lord whereas the Constituent Assembly came into being, for framing the Constitution for the state whereas the Constituent Assembly has enacted and adopted the Constitution for the State. Now, therefore, this Assembly resolves, shall stand resolved on 26 day of January, 1957, which is the date of commencement of the Constitution. Sir, I would like to make a brief submission with regard to this resolution. The resolution aims at dissolving the Constituent Assembly by passing and adopting the Constitution, which will come into force on 26th January. The Assembly has done its primary and main function and it is but natural that it would stand dissolved. Legally it could not have been dissolved by any authority because people elected this assembly for a specific object. Now, the object having been achieved, it is reasonable to dissolve it by way of a resolution. Hence the resolution. This Assembly is not capable of protecting the Constitution. It had only the mandate of framing and enacting the Constitution for the State and nothing more.

Now we can skip the entire thing and finally on the next page. The last four or five lines. 'Mr. President, the question is whether the Constituent Assembly came into being for framing the Constitution of the State, whereas the Constituent Assembly is enacted and adopted the Constitution. Now, therefore, this Assembly resolves. It should stand dissolved on 26th

1 January, which is the date of commencement of the Constitution and we close the business.
 2 And then My Lord after this cross Clause is My Lords the proceedings on 26 of January 1957.
 3 Mr. President, today, this historic session ends, with this the Constituent Assembly is dissolved
 4 according to the resolution passed on 17th November 1956. Clock struck 12:00pm and the
 5 Constituent Assembly was dissolved by the President according to the resolution adopted on
 6 17th November.' I thought I must draw Your Lordship's attention to this important part, how
 7 it was dissolved.

8

9 Now, as I have read My Lord on 370. I am not going into the **Sampath Prakash** and other
 10 arguments which I'm skipping because all that has been argued. Now, Lordships may only
 11 look at one part, two parts actually. The Presidential Order which was passed in 1954, had
 12 expressly My Lord, excluded Articles 356, 357 and 360. Kindly look at My Lord, Lordships
 13 have seen that, aware of that. That is Volume 3, page 18. Now, these were expressly excluded.
 14 And because they were excluded, it was with the understanding that as far as there is a
 15 breakdown of Constitution machinery in Jammu and Kashmir, then ultimately it will be taken
 16 care of under the Constitution of Jammu and Kashmir, and they brought in Section 92 for that
 17 particular purpose. Now thereafter, My Lord, and this was with the concurrence, which My
 18 Lord my argument, if it is accepted, then after that no change was possible because 92 had
 19 already come into operation, which took care of the entire situation. Now 356 was brought in
 20 by virtue of C.O. 71 in 1965. Now Your Lordships will mark it, this is page 37, if Your Lordships
 21 want to see Volume 3. Now. 357 was not adopted. 357 was not brought into. It is only 356. So,
 22 one question which arises is, you have to My Lord, question that, what is the implication
 23 ultimately of 357 not being there? I hope I am clear My Lord. If Your Lordships want to note
 24 down the pages I can..

25

26 **CHIEF JUSTICE DY CHANDRACHUD:** Yes

27

28 **SANJAY PARIKH:** My Lord, that 54 Presidential Order... What I'm trying to My Lord point
 29 out is this, that the Constituent Assembly of Jammu and Kashmir...

30

31 **JUSTICE SANJIV KHANNA:** At that time 356 was not there. Subsequently, 356 has been
 32 made applicable.

33

34 **SANJYA PARIKH:** No My Lords, what I'm trying to say is, I can show the debates when 92
 35 was inserted...Section 92....what were the debates My Lords, in the Constituent Assembly of
 36 Jammu and Kashmir. What I'm trying to show is the Constituent Assembly of Jammu and
 37 Kashmir ultimately approved that 356, 357, 360 will not be there and therefore My Lords, 92

1 came into being. So 92 provided for the situation, because 92 equivalent of 92 doesn't exist for
 2 as far as other states are concerned. Thereafter, My Lord, the changes were made and in 1965,
 3 356 was inserted, brought in...said wherever Constitution is mentioned, you read it as
 4 Constitution of Jammu and Kashmir. 357 was not brought in. Now if you look My Lord, read
 5 356, it says that you give Parliament ultimately or to the President. Under 357 alone that the
 6 orders can be passed or law can be made. Kindly look at 357, My Lord. This will also have a
 7 bearing on Section 3, but I am not going to those parts. Now 357 says, 'Whereby a proclamation
 8 issued under Clause 1 of Article 356, it has been declared, that power of the Legislature of the
 9 state shall be exercisable by or under the authority of Parliament. It shall be competent for the
 10 Parliament to confirm on President the power of Legislature to make laws, authorize the
 11 President to delegate, subject to such conditions as he may think fit or Parliament or the
 12 President, in whom such powers are vested, to make laws conferring powers for imposing
 13 duties.' I'll take Your Lordships, through the Governor's Proclamation... 92.

14

15 **CHIEF JUSTICE DY CHANDRACHUD:** Article 357 has not been made applicable?

16

17 **SANJAY PARIKH:** It has not been made applicable..

18

19 **CHIEF JUSTICE DY CHANDRACHUD:** And therefore, though Parliament can assume to
 20 itself the power of the State Legislature to enact laws, you cannot further delegate it to the
 21 President..

22

23 **SANJAY PARIKH:** Correct? You cannot do that. That My Lord is my argument. And kindly
 24 see the proclamation, which was issued on 20th of June 2018. Just look at that My Lord. That
 25 proclamation My Lord, is at page...Volume 3, page 85. I am saying My Lord, that there is a
 26 machinery which existed to take care of the constitutional background and I am quoting again
 27 Justice Anand's book, because he says, relying upon number of judgments which are given by
 28 My Lord, the Jammu and Kashmir High Court, whether we can reconcile both and the
 29 argument is, yes we can reconcile. But the question is ultimately 92 acts in a particular sphere,
 30 and 356 acts in a different sphere altogether. You can reconcile...it can exist. But the question
 31 is they operate in different fields. And once you exercise power under 92 and you say we are
 32 dissolving and look at this particular proclamation, which is at page 85. Just look at it My Lord
 33 in 92. And I'm asking myself why 356 was not issued initially? It could have been done. Why
 34 they resorted to 92? And answer will also come. Answer is because after the proclamation on
 35 the next date, it dissolves the Assembly by resorting to Section 53(2)(b) which could not have
 36 been done without the aid and advice of the Council of Ministers. Why it was done because it
 37 is dissolved, and then we take over ultimately. Now proclamation says powers conferred by 92

1 enabling me on that behalf. The concurrence of the...Now one important factor I must
2 mention. I am so sorry I have to hurry up otherwise necessary for me to show, but because
3 Lordships are aware I'm going on that basis. Section 92, says concurrence of the President. So
4 naturally, when this proclamation was issued, there was proclamation, it says so, there is a
5 proclamation of President of India. Now he gives My Lord the concurrence to the proclamation
6 which was issued 'the President' and after that certain provisions are suspended. He says, 'any
7 reference to... any reference to State, Constitution or Acts or made by the Legislature shall be
8 construed as including reference or act made by me.' That is on page...para 5, in exercise of
9 powers of Legislature of the State under the proclamation made under such and such. So
10 assumes My Lords on that date itself the powers to make the laws. Now My Lords look at this
11 one and 357, how you reconcile both the things. And next day My Lord he says, 'power vested
12 upon me under 92(1) exercise of powers under 53(2)(b) of the Constitution Jammu and
13 Kashmir, I hereby dissolve the Legislative Assembly.' Now 350 Section 53(2)(b) if we read My
14 Lord section, I think 35 that this can be done. 92 you can exercise without the aid and advice
15 of the Council of Ministers. But 53 you cannot do which is necessary. So he does My Lord a
16 thing which is absolutely unconstitutional act. It was impermissible to do it. My argument here
17 is if Your Lordships, I can give certain... there's a discussion by Justice Anand in his book about
18 how these two provisions can work in Kashmir. That is Volume 17, PDF at 143, 144.

19
20 My Lord, my submission is, in this situation it was not permissible for the President, to invoke
21 the powers under 356 because under 92, and 92 is something which was approved ultimately
22 by the Constitution of India, and also the Constitution of Jammu and Kashmir. It is a malafide
23 exercise of power and a fraud, which My Lord I don't want to go into the judgments. Now My
24 Lords my probably last, I must say argument is with regard to C.O. 272 and 273. Just kindly
25 have a look at and the argument will be very brief. Kindly look at 272 at page, I think PDF 101.
26 Lordships had put a question to Mr. Sibal, this is 5th of August 2019 and 6th My Lord is the
27 final order which has been issued C.O. 273. I must say My Lord before I go to 272 is that 273
28 assumes My Lord the fact that the prior recommendation of Constituent Assembly is
29 necessary. If we understand that way My Lord then kindly look at it. It means if you want to
30 make any change in 370 as such, which we draw My Lord from C.O. 44, which I pointed out
31 when you changed the explanation, that's the only thing which the Constituent Assembly
32 approved. Now, here, what they do is that through the Interpretation Clause provision they
33 My Lord, indirectly change 370 itself. Kindly look at My Lord, this one. 367 shall be added the
34 following clauses. Lordships may skip A. A is construed as references of such and such, B is
35 references to person for the time being recognized by President's recommendation of
36 Assembly. *Sadr-e-Riyasat* acting on advice of Council of Minister of State for the time he is in
37 office, shall be constituted as reference to Jammu and Kashmir. Now, exactly the same words

1 which are used in the explanation. So they are changing My Lords, the explanation without
 2 the prior recommendation of Constituent Assembly. And look at My Lord below that, in
 3 proviso D (3) of 370, expression Constituent Assembly of State. (2) shall be read as the
 4 Legislative Assembly of the state. Now, I ask myself that, how this is possible, that you can
 5 change 370 as such, by virtue of the interpretation, when you recognize in the very next order
 6 which was issued, that Constituent Assembly's prior recommendation is necessary. So this
 7 interpretation My Lordships had asked, why this interpretation? Without this interpretation
 8 also something was possible. This interpretation was resorted to because they wanted to show
 9 the exercise ultimately done by them, by C.O. 273 is something which is constitutional in
 10 nature. That is to say that they have done this thing after prior recommendation of the
 11 Constituent Assembly. So, how they My Lord achieved it, they changed 370 through the
 12 Interpretation Clause. Absolutely My Lords, Unconstitutional Act. And after doing this, I hope
 13 I am clear My Lord? After doing this, then the final order is given. What it says. C.O. 273, in
 14 exercise of powers conferred by Clause 3 of 370, read with Clause 1 of 370 of the Constitution,
 15 the President, on recommendation of Parliament. So My Lord, the recommendation of the
 16 Constituent Assembly after that was substituted by recommendation of Parliament, is pleased
 17 to declare as from the, such and such all clauses of the 370 shall cease to operate. So what they
 18 do is they know without Constituent Assembly, they cannot do. Constituent Assembly is not
 19 there. They bring in through the interpretation indirectly. And my submission is what you
 20 cannot do directly you cannot do indirectly. That's again a fraud [UNCLEAR] Your Lordships
 21 have followed My Lord?

22

23 **JUSTICE SANJIV KHANNA:** Mr. Parikh, this argument has been raised.

24

25 **SANJAY PARIKH:** It was, I'm so sorry. Because I think I was attending all the, in this
 26 because Your Lordships were putting questions to Mr. Sibal, what's the meaning of this
 27 Interpretation Clause? Why they resorted to interpretation? They resorted to interpretation
 28 because they could not have done directly with 370. Therefore they resorted to and after
 29 making change came out with this one on the recommendation of Parliament. Now other
 30 question, which is a prior recommendation. According to 373, which is prior recommendation
 31 of Constituent Assembly, it has to be prior recommendation. Now kindly look at, on 5th of
 32 August this notification is issued. How My Lord next day, a prior recommendation of
 33 Parliament was sought. On the face of it, it looks obvious that this is something My Lord, which
 34 is not permissible. The entire exercise shows, that it is malafide in nature. So therefore, this
 35 goes, 272 goes, the other proclamations which are issued, they also go.

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37 **CHIEF JUSTICE DY CHANDRACHUD:** Thank you, Mr. Parikh Thank you

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SANJAY PARIKH: It becomes very difficult sometimes because I know, because you read a lot, chip by chip things are removed. Few chips remain then you have to sustain yourself on those chips. So, probably I do not [UNCLEAR] whatever

CHIEF JUSTICE DY CHANDRACHUD: Thank you Mr. Parikh. Mr Sen?

PRASHANTO CHANDRA SEN: Not more than 7 or 8 minutes. Just as fast as possible.

CHIEF JUSTICE DY CHANDRACHUD: Yes.

PRASHANTO CHANDRA SEN: My Lords, just three points I want to highlight. Proposition being a more restrictive and strict approach in interpreting Article 370. For three reasons, I'm taking the broader view because the nuts and bolts have been gone into. The first reason is historical, the second is jurisprudential, and the third is in terms of the Constitutional ethos. The historical part My Lord, which I'd like to emphasize, for a more restricted and strict interpretation is that the region consisted of a Muslim majority and the population My Lords, had a choice between either going into Pakistan or into India. Either being a majority in Pakistan, or choosing to take a minority status in India. My Lords, they chose the latter. And My Lords although the historical part has been dealt with, about the signing of the Instrument of Accession, just a few pages I'll highlight, to show how it was Sheikh Abdullah, who represented and who had a hold over the population at that time, who was responsible for this transition to India. And therefore, My Lords, one of the important points which I'd like to make is that if there is a choice, a conscious choice made to remain a minority in a region, in the backdrop of the horrific violence of partition, My Lords, when there's a constitutional promise in the nature of Article 370, it should be strictly construed, that's my first point. And My Lords, in regard to that, may I just point out, two, three pages, VP Menon's book on the Integration of the Nation State, I'll just point out the pages, so that I don't take time. My Lords, page...at volume 15, fifteen...one five, PDF page 1258, where it just mentions that Sheikh Abdullah rose to power to fight for the rights of the Muslim community. By 1939, the body had shed its communal complexion and changed its name to National Conference, yet a considerable hold over the people of the state. That is VP Menon's book, at page 1258. Then My Lords may see, page 1259, PDF, the Maharaja was assured by Lord Mountbatten, that if he acceded to Pakistan, India would not take it amiss and that it had a firm assurance of this from Sardar Patel himself. Lord Mountbatten went on to say that in view of the composition of the population, it was important to ascertain the wishes of the people. This is PDF page 1259, Volume 15. The situation for the Maharaja was not easy. This is again, Menon, pointing out...if

1 he acceded to Pakistan, the non-Muslims of Jammu and Ladakh as well as considerable
2 section of Muslims led by National Conference would have resented such an action. That is
3 page 1259, PDF page 1259, Volume 15. The Government of India had no territorial ambition
4 in Kashmir. If the raid by the tribes had not taken place, Government of India would have left
5 Kashmir alone. That is at page 1271 PDF, Volume 15. The tribal invasion was not a spontaneous
6 affair engineered by Pakistan. That is at page 1271, Volume 15. The accession was legally made
7 by the Maharaja of Kashmir, and this is important and the step was taken with the advice of
8 Sheikh Abdullah, that is PDF page 61, Volume 20. This is A. G. Noorani's book *My Lords*, this
9 is not... up to now I was speaking about Mr. Menon's book. This is A. G. Noorani. And then *My*
10 *Lords* may see, on 27-10-1947, in reply to the request for accession by the Maharaja, the
11 Governor General of India, Mountbatten clearly stated, that the issue of accession should be
12 decided in accordance with the wishes of the people as soon as law and order had been restored
13 in Kashmir. This is PDF page 59, Volume 20. In the context of these historical facts, both
14 Nehru and Sardar Patel were of the clear view that Jammu and Kashmir should decide their
15 own consequences. See letter of Jawaharlal Nehru, dated 18th of March 1949, PDF page 67,
16 Volume 20. This is again A. G. Noorani's book.

17

18 It is in this context, My Lord, that 370 emerges. So my first submission is this, in this context,
19 that when there is a conscious choice made in this manner, My Lords, it's all the more reason
20 why it should be taken strictly and in this context may I just point out, ***S R Bommai*** at page
21 218, PDF page 218, Volume 2, which says that federalism is not seen merely as a matter of
22 administrative convenience, but one of the principal outcomes of our own historical process
23 and a recognition of ground reality. And this leads to what is called 'Asymmetric Federalism',
24 My Lords, which has been extensively dealt with by My Lords in the NCT Judgment 2. It is
25 also My Lords, in fact one of the persons, first persons who coined the term 'Asymmetric
26 Federalism' in the Indian context, was Professor Balveer Arora from Sorbonne, and he was
27 also the 'Professor for Political Science' in JNU and his book *My Lords*, which is at page 242
28 to 243, PDF page, Volume 17, of the document compilation, where he talks about the nature
29 of asymmetric federalism which was there, which is to take into account different regional
30 aspirations and it has a remarkable degree of flexibility and pragmatism. It is a collaborated
31 institutional response to the diversity of constitutional unit permeating both *de facto* and *de*
32 *jure* variation. My Lords, thereafter My Lords, may I just point out the above fact that it is an
33 anti-majoritarian or a protection against majoritarian that Asymmetric Federalism provides.
34 And in that context, My Lords, our Constitution is also, an anti-majoritarian in many ways My
35 Lords, there are lots of judgments which I have dealt with it. I put it at point E.3 of my written
36 statement at page 500, that is E.3 of my written statement.

37

1 Then My Lords, ***Kesavananda Bharati*** case, at paragraph 208, PDF page 151, Volume 15,
 2 where I point out that when it is emphasized that in case there is a promi... it quotes the case.
 3 and I'll just quote it. I may mention that the Judicial Committee, while interpreting British
 4 North America Act 1867, had also kept in mind the preservation of the rights of minorities.
 5 For they say, in the regulations and control of Aeronautics in Canada, the British North
 6 America Act embodies the compromise under which the original provinces agreed to federate.
 7 It is important to keep in mind that the preservation of the rights of minorities were the
 8 conditions on which such minorities entered into the Federation and the foundation upon
 9 which the whole structure was subsequently erected. The process of interpretation as the years
 10 go on, ought not to be allowed to dim or whittle down the provisions of the original contract
 11 upon which the federation was founded, nor is it legitimate that any judicial construction
 12 should impose a new and different contract.' This is echoed in ***Jindal Steel Case*** at (2017)
 13 **12 SCC 1** that is PDF page 219, 220. Where it is very clearly pointed out again, it reiterates
 14 ***Kesavananda Bharati*** that the original terms should not be whittled down. So My Lords
 15 the argument that so called hollowing out of the Article 370 through various orders which have
 16 taken place. Already, Mr. Naphade has argued that there was no hollowing out. The core
 17 remained. But assume that there was a hollowing out which takes place. It is a political act.
 18 And My Lords have been very clear in this entire proceedings that we are interpreting the
 19 Constitution. So if because of a political act, there is a so called hollowing out, which is without
 20 prejudice to that argument, I do not accept that it is. But if there is, such is the case even then,
 21 that should not affect the interpretation of the provisions of Article 370. Then My Lords, may
 22 ***Poudyal*** case again highlights the aspect of Asymmetric Federalism, which I will not go into.

23
 24 My Lords the second point briefly. What are the limits if you're looking at the broad approach.
 25 What are the limits by which we will determine what are the limits of a constitutionally vested
 26 power? And My Lords the answer is the analogy of Mill's famous thing on liberty that your
 27 Liberty ends where the other man's nose begins. So the moment there is a Constitutional...
 28 fundamental constitutional principle, which is there, which is getting affected, the limit must
 29 be there. And My Lords in that context the ***NCT*** judgment case. There are two pages, I'll just
 30 point out. PDF page 92 at para 108, Volume 5, and PDF page 35 at para 40 Volume 14. Also,
 31 there is a ***Miller Case*** that is at PDF page 324 of Volume 5. Recent ***Miller Case*** in the UK
 32 in the context of proroguing of the House, where again this concept is put forward. So it's an
 33 international constitutional concept, which is also equally applicable here. It has been
 34 reiterated by various judgments in India. My Lords I would also urge that if we are talking
 35 about minority rights, if you're talking about anti-majoritarian or protection against
 36 majoritarian. My Lords then there is an LGBTQ+ judgments etc. which are coming. There is
 37 an evolution which is taking place. With respect My Lords this kind... If one were to do away

1 with this thing which involves historically a religious minority, not that they are necessarily
2 expecting. If that is there My Lords it will be a regressive step. And My Lords in line with what
3 is happening in line with in which the evolution is taking place more and more inclusiveness
4 is there, it should not be there. I'd like to finally end My Lords, I won't take more time. I'd like
5 to end by pointing out one or two quick points. One is in my rejoinder at page 88, the Niti Ayog
6 report is there. Now, My Lords there is no material which has been brought on on why 356
7 was imposed? My Lords that has all been argued. But the material of the government which is
8 already there on record it says, in peace, security, effective governance based on rule of law
9 and upholding principles of equality Jammu and Kashmir rises above a number of States. And
10 My Lords that I've put at page 88 at Volume 13 of the Niti Ayog Report page 282 of Volume
11 13, at page 286 and page 285. This is prior to abrogation. Now My Lords this further kind of
12 deepens the mystery and of course there are statements made by X constitutional authorities,
13 not of much relevance now that he's not holding a constitutional post, but how it was exercised.
14 But when this was the case, if Kashmir was a leader, it's used as a leader in these areas, where
15 was the need for a 356?

16

17 Finally one last anomaly, which my learned friend had also pointed out, and that is I'll just
18 point out that is Volume 3. Just a minute, just on the reorganization. I am sorry. My Lords
19 may come to Section 57. It's a botched up kind of situation which is arising now. Of course, the
20 Reorganization Act is consequential. I understand, but still My Lords, I may just point this out,
21 57 at PDF, page 126 Volume 3. It says, notwithstanding anything to the contrary contained in
22 any law document, judgment, ordinance, rule, regulation, or notification on and from the
23 appointed date, the Legislative Council of the existing State of Jammu and Kashmir shall stand
24 abolished. On abolition of Legislative Council, every member shall cease to be, etc. So it
25 abolishes the Legislative Council. Now, what is peculiar is, yes, before this, the C.O. 272 is
26 passed. C.O. 272, applies all the provisions of the Constitution. When you are talking about
27 abolishing the Legislative Council, then it has to be as per Section 169 of the Constitution of
28 India, which is already stands applied on pursuant to C.O. 272. Once that is applied, then My
29 Lords, what have to be done? It can't be done away by this, by way of this Act. So we've already
30 challenged the validity of this Act. But My Lords, this is like a Trishanku, a Legislative Council,
31 which has not been abolished by any proper procedure, which is prescribed by law. So, that
32 was the point and there was one more. 73 My Lords is that clause, which has come even by
33 way of amendments in the context of the Delhi Government also. That, if the President on
34 receipt of a Lieutenant Governor My Lords, the same powers as 356, but no time limit
35 provided. I'm very grateful, My Lord, and I'm extremely grateful that My Lords had this, the
36 technology which enabled us even many times, even while we were not present in court we
37 could keep in touch with.

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CHIEF JUSTICE DY CHANDRACHUD: Thank You Mr. Sen.

PRASHANTO CHANDRA SEN: Deeply obliged.

CHIEF JUSTICE DY CHANDRACHUD: Yes Ms. Ramakrishnan?

NITYA RAMAKRISHNAN: [UNCLEAR] one of the major political parties and was heading the government at the time of Governor's Rule and I have held office. I've formed the government twice before. I was a single major party. And I am therefore, I would venture to suggest much more representative of legislative will than that sadly duplicitous reference in C.O. 272, with the Legislative Assembly. I also represent writ petitioners in Writ Petition 1099, where Mr. Ramachandran was appearing. Petitioners 3, 4 and 5.

PETITIONER'S COUNSEL: My Lord, may I make a submission

NITYA RAMAKRISHNAN: As far as I'm concerned, I appear for PDP, I do not know what this is?

CHIEF JUSTICE DY CHANDRACHUD: Who are you?

NITYA RAMAKRISHNAN: Who are you?

PETITIONER'S COUNSEL: My Lord, this writ petition 1011, mine was initially filed by 6 people. Then two of them withdrew. [UNCLEAR]

NITYA RAMAKRISHNAN: I don't know what he's talking about.

PETITIONER'S COUNSEL: Then the writ petitioner number 1, who is Mr. Javid Bhat, Javid Bhat when he engaged my learned friend then [UNCLEAR] Senior Counsel Raja Ramachandran would be arguing the matter. When he came to know that he has been drawn from the matter then he contacted a senior lawyer from Kashmir, Mr. Muzaffar Hussain Baig who in fact...

NITYA RAMAKRISHNAN: I didn't know anything of the sort. I am sorry. Let me represent PDP the Impleadment application My Lords will hear him whenever they have time.

1 **PETITIONER'S COUNSEL:** We are from PDP

2

3 **NITYA RAMAKRISHNAN:** Yes, I'm arguing for PDP now, My Lords will hear me first.

4

5 **PETITIONER'S COUNSEL:** That's an intervener application for the [UNCLEAR] writ
6 petition. In my writ petition followed by the petitioner number 1 where he gave them, then the
7 understanding was that Mr. Raja Ramachandran would be arguing the matter. When he
8 withdrew from the case then Javid got petitioner number 1. He approved Mr. Muzaffar
9 Hussain Baig. So we have filed to come, that perhaps have been cleared from the board because
10 of some timeline issues.

11

12 **S PRASANNA:** May I clarify?

13

14 **PETITIONER'S COUNSEL:** [UNCLEAR] Petitioner number 1 in Writ Petition Number
15 1099, Mr. Muzaffar Hussain Baig would be arguing, of course, with the permission of My
16 Lords.

17

18 **CHIEF JUSTICE DY CHANDRACHUD:** See, ordinarily there's no difficulty, but normally
19 for all, the entire group of petitioners, in a petition, you presume that they are sailing together.
20 Therefore one lawyer would appear for all the petitioners. For different respondents, different
21 lawyers can appear, but for people who join together in a petition... if there is some conflict
22 within the petitioners, somebody has to get transposed or file another proceeding.

23

24 **PETITIONER'S COUNSEL:** That conflict arose because of Mr. Ramachandran only.

25

26 **S PRASANNA:** May I make a clarification Your Lordship? This....

27

28 **CHIEF JUSTICE DY CHANDRACHUD:** Just for factual clarity. Writ Petition 1099 was
29 filed by how many people?

30

31 **PETITIONER'S COUNSEL 1:** By admission...

32

33 **S. PRASANNA:** May I? I am the counsel...

34

35 **CHIEF JUSTICE DY CHANDRACHUD:** Just one second, he is in charge

36

1 **S PRASANNA:** I instructed in the matter Your Lordship. There were initially seven people
2 of which Dr. Shah Faesal and Miss Shehla Rashid had subsequently withdrawn. Mr.
3 Ramachandran, in fact argued that applications for withdrawal and this was allowed by this
4 court,

5

6 **CHIEF JUSTICE DY CHANDRACHUD:** So they are left with five.

7

8 **S PRASANNA:** They are left with five. There was one Mr Javid Ahmed Bhat. His was
9 petitioner number 1, who became the petitioner number 1 after Dr. Shah Faesal's withdrawal.
10 So last evening I received a request saying that there has to be a way in which we had another
11 arguing counsel in the team. And this was, because this was contrary to the express orders of
12 the court, where it had said that all the petitioners' arguments had to be wrapped up today,
13 and that a certain list was held. So despite...and therefore I deemed it unreasonable to have
14 to...have to accede to that request at that time. And I had indicated that they are free to pursue
15 their remedies whatever they have, and they had therefore requested no objection on which I
16 had a separate, very detailed release covenants that I had in fact received from the petitioner,
17 where in the detailed release covenants, he had covenanted that these hearings would not be
18 interrupted, and after the hearing plan is over, if anything, with the permission of the Court,
19 he may take... because, as also the Nodal Counsel, we owe a duty to the court...

20

21 **CHIEF JUSTICE DY CHANDRACHUD:** Just one second, one second....

22

23 [NO AUDIO]

24

25 **NITYA RAMAKRISHNAN:** I don't want to appear for anybody in this writ petition. I will
26 just appear for PDP. Yes, I don't want to appear for anyone.

27

28 **CHIEF JUSTICE DY CHANDRACHUD:** In the petition which your argument it is 1099,
29 you are the first counsel to argue right?

30

31 **NITYA RAMAKRISHNAN:** Yes. Because Mr. Ramachandran requested me.

32

33 **CHIEF JUSTICE DY CHANDRACHUD:** Fair, fair. In the last three weeks, you are the first
34 person who is arguing this matter?

35

1 **NITYA RAMAKRISHNAN:** Correct. Until yesterday I thought I was arguing for all the
2 petitioners, but I'm happy to just...I'm arguing for PDP definitely, and let me argue for them.
3 If my friend who he represents in that writ petition. I don't know.

4

5 **CHIEF JUSTICE DY CHANDRACHUD:** Now, Mr. Counsel, what you are suggesting is
6 that, Mr. Muzaffar Hussain Baig will appear for Mr. Javid Bhat...

7

8 **PETITIONER'S COUNSEL:** Yes My Lord.

9

10 **CHIEF JUSTICE DY CHANDRACHUD:** Now, you see, there's only one difficulty. See, we
11 want to be fair. We don't want to shut out any voice. It's our duty to give a fair hearing to all
12 perspectives. At the same time, you're also conscious as a member of the bar, that in a petition,
13 when a group of petitioners have come together, one lawyer appears for all the petitioners.
14 There may be a little conflict or diverging interest between respondents and therefore
15 respondents are entitled to have separate representation. But at the same time we are more
16 than willing to hear Mr. Baig's perspective. The way to do it is that Mr. Bhat...Mr. Javid Bhat,
17 will perhaps has to withdraw from that petition 1099, and we'll permit Mr. Baig to make a brief
18 representation as an intervener. We can do that. Ultimately, it's a question of being heard by
19 the Supreme Court, isn't it?

20

21 **PETITIONER'S COUNSEL:** And she has very graciously, she has very graciously said that
22 she would be representing PDP only.

23

24 **CHIEF JUSTICE DY CHANDRACHUD:** So, Ms. Ramakrishnan, now the remaining five
25 petitioners in 1099... who are those five petitioners? Is PDP party in that? Just one second.

26

27 **NITYA RAMAKRISHANAN:** PDP is an impleadment application. She's an impleader
28 because she was in jail. She was an imprisonment when all these petitions were...

29

30 **CHIEF JUSTICE DY CHANDRACHUD:** Her application is for impleadment?

31

32 **NITYA RAMAKRISHNAN:** Yes.

33

34 **CHIEF JUSTICE DY CHANDRACHUD:** As a petitioner?

35

36 **NITYA RAMAKRISHNAN:** Yes.

37

1 **CHIEF JUSTICE DY CHANDRACHUD:** But others have to agree to her impleadment.

2

3 **NITYA RAMAKRISHNAN:** They have agreed. They have no objection.

4

5 **TUSHAR MEHTA:** Not impleadment. Not for petition...as petitioner My Lord. She wants to
6 be impleaded.

7

8 **NITYA RAMAKRISHNAN:** Correct.

9

10 **JUSTICE SANJAY KISHAN KAUL:** Who represents the other four? One of them...This is
11 a new development, but...

12

13 **CHIEF JUSTICE DY CHANDRACHUD:** Just one second, who's for the other four now or
14 the other five? Because actually there are five now left.

15

16 **NITYA RAMAKRISHNAN:** Shah Faesal withdrew.

17

18 **CHIEF JUSTICE DY CHANDRACHUD:** and likewise, Ms. Shaila Afridi...now who's
19 appearing for the remaining five?

20

21 **S. PRASANNA:** Ms. Ramakrishnan was [UNCLEAR]

22

23 **CHIEF JUSTICE DY CHANDRACHUD:** Ms. Ramakrishnan, are you appearing? Forget
24 Javid Bhat's case for a moment. We'll say the remaining four. Apart from appearing for the
25 PDP, are you representing the four as well?

26

27 **NITYA RAMAKRISHNAN:** Yes. I was given to understand that until this minute.

28

29 **CHIEF JUSTICE DY CHANDRACHUD:** But even at this minute, he's representing.... So
30 we take it apart from the impleader...intervener which is the PDP. You are appearing for the
31 remaining four?

32

33 **NITYA RAMAKRISHNAN:** Correct.

34

35 **CHIEF JUSTICE DY CHANDRACHUD:** And you have instructions to appear for them by
36 the Advocate on Record? All right. Now, insofar as Mr. Javid Bhat is concerned...what we'll do

1 is we'll complete the submissions of Ms. Nitya Ramakrishnan. Rest assured that we will give....
2 Let's see how things progress. All right, we got the point. Yes, Ms. Ramakrishnan.

3

4 **NITYA RAMAKRISHNAN:** I'll try and speak in bullet points.

5

6 **CHIEF JUSTICE DY CHANDRACHUD:** But then only one thing do we take it that you,
7 Mr. Javid Bhat seeks to withdraw from this petition so as to allow him a separate intervention?

8

9 **PETITIONER'S COUNSEL:** No My Lords he is not withdrawing as a petitioner,

10

11 **CHIEF JUSTICE DY CHANDRACHUD:** But then if he is not withdrawing as petitioner
12 we are trying to create some space for you. If he is not withdrawing as a petitioner then the
13 advocate on record will appear for him. How can you have a different counsel appearing?

14

15 **PETITIONER'S COUNSEL:** Because he obtained a NOC. That is the reason...

16

17 **JUSTICE SANJAY KISHAN KAUL:** When did he obtain the NOC?

18

19 **CHIEF JUSTICE DY CHANDRACHUD:** When did he obtain the NOC?

20

21 **PETITIONER'S COUNSEL:** [UNCLEAR]

22

23 **JUSTICE SANJAY KISHAN KAUL:** When did he obtain the NOC please tell us?

24

25 **CHIEF JUSTICE DY CHANDRACHUD:** You can't do that.

26

27 **PETITIONER'S COUNSEL:** [UNCLEAR]

28

29 **JUSTICE SANJAY KISHAN KAUL:** [UNCLEAR] last date of hearing you obtain a NOC.
30 Didn't you say now I want to appear for that one individual petitioner. He will continue to be
31 the petitioner while 4 others or 5 others are represented by another counsel because I...
32 background or no background we are not...[UNCLEAR] much earlier.

33

34 **CHIEF JUSTICE DY CHANDRACHUD:** In any case one thing is very clear even in a
35 normal civil appeal, we will not allow people to withdraw in the course of a submission and
36 not when the matter has gone on for three weeks. This we will not permit.

37

1 **PETITIONER'S COUNSEL:** My submissions is....

2

3 **CHIEF JUSTICE DY CHANDRACHUD:** Please understand the position in law. We will
4 go strictly by the position in law. We will give you an opportunity should Javid Bhat not wish
5 to continue any further with Ms. Ramakrishnan's petition, no difficulty we will permit him to
6 delink himself and we will give him a separate hearing. But he cannot be a part of that petition
7 and say that there will be two lawyers arguing for them because there may be a conflict of
8 arguments on that which is not permissible in a petition. We saw that for instance Mr. Dwivedi
9 adopted a different line but he could do it because he was in a different petition.

10

11 **PETITIONER'S COUNSEL:** I beg to be clear My Lord the situation arose only when Mr.
12 Javid Bhat came to know that Mr. Raja Ramachandran is not arguing the matter.

13

14 **CHIEF JUSTICE DY CHANDRACHUD:** That is so for the last three weeks. Everybody
15 knew that he is not going to be appearing for the last three weeks. He didn't appear.

16

17 **PETITIONER'S COUNSEL:** [UNCLEAR]

18

19 **JUSTICE SANJAY KISHAN KAUL:** First hearing two years ago he opened the argument.
20 Three of us were party to the bench. He is the one who had opened the argument. Now it was
21 said thereafter that whatever the reason Sibal now started it. He was not available. Now
22 suddenly in the last date of hearing and the last nth minute you say. Not only at the nth minute
23 you interrupt and say well I want to sail in some other boat.

24

25 **S PRASANNA:** [UNCLEAR]

26

27 **CHIEF JUSTICE DY CHANDRACHUD:** All right, we will cut through all this. Above all
28 we are all absolutely sure in our mind that we want to give opportunity to different perspectives
29 because we have to be duly apprised on all side, different perspectives, different points of view.
30 As we said even within the petitioner to a different trades of constitutional argument we will
31 not sat anybody out. We will hear but let's follow the correct procedure in law. Let's not set
32 down procedures which are wrong. Mr. Attorney General we would like your assistance on
33 this. Will that be a proper procedure of Mr. Attorney? Yes, Ms. Ramakrishnan.

34

35 **NITYA RAMAKRISHNAN:** Should all this happen to me... If I may just...

36

37 **MUZZAFFAR HUSSAIN BAIG:** [UNCLEAR]

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CHIEF JUSTICE DY CHANDRACHUD: Mr. Baig, please rest assured we'll hear you, no difficulty at all. Please be in the court Mr. Baig. Mr. Baig, you can be in the court, you don't have to leave. You can be in the court now. We'll hear you after. You can be in the court. Please give, ask one of the juniors to give a chair to Mr. Baig, so that he can sit down. Yes, Ms. Ramakrishnan.

NITYA RAMAKRISHNAN: I'll try to make my arguments in bullet points, so I'm quick. The first point I wish to make is that integration is neither a linear concept nor a quantitative concept. There's a spoken and unspoken assumption that Article 370 is temporary in anticipation of some greater antici....

CHIEF JUSTICE DY CHANDRACHUD: It is neither a linear concept...?

NITYA. RAMAKRISHNAN: Nor a quantitative one. My friends on the other side?

[NO AUDIO]

CHIEF JUSTICE DY CHANDRACHUD: Yes. Since we are six or seven minutes short of 04:00 and there is an event at the Bar in the evening otherwise we could have continued till 05:00, 5:30. You are going to argue on Article 356?

NITYA RAMAKRISHNAN: No, I was going to argue on integration, shared sovereignty in the political context in which this happened, because it's directly relevant to adjudging it.

CHIEF JUSTICE DY CHANDRACHUD: Let me suggest one thing. Can you put down what you really have, to just so that brings clarity to us. We are also at the end of the argument, so there's a tendency to be just jaded by the length of submissions. If you can put everything down on one page. Just formulate exactly what you're.... And then for every submission, you can cover yourself in about few minutes so that we have some clarity on what you are arguing.

NITYA RAMAKRISHNAN: That's what I have in mind but My Lords want that in writing?

CHIEF JUSTICE DY CHANDRACHUD: Just a page or so. Just give us a page. No give it to us tomorrow morning. A page.

NITYA RAMAKRISHNAN: Tomorrow morning.

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CHIEF JUSTICE DY CHANDRACHUD: Now, Dr. Guruswamy on delimitation we are not going to hear this. Because delimitation is not an issue at all which arises here.

TUSHAR MEHTA: It was challenged and it is confirmed by this Honourable Court.

CHIEF JUSTICE DY CHANDRACHUD: Justice Kaul's judgement, yes.

TUSHAR MEHTA: My Lord Justice Kaul's judgement.

CHIEF JUSTICE DY CHANDRACHUD: On internal sovereignty...

MENAKA GURUSWAMY: Internal sovereignty not repeating any argument

CHIEF JUSTICE DY CHANDRACHUD: And not on delimitation.. Likewise. So what we'll do is we'll likewise request you to formulate your points on just a page on internal sovereignty, right? Then Mr. Manish Tiwari, what would you be arguing? You are going to North-East... how can we hear it in this matter?

MANISH TIWARI: [UNCLEAR] 370, and bring about the reorganization of Jammu and Kashmir and its implications qua the North-East because 370 is succeeded by 370(1) and there are asymmetric guarantees which were given and those guarantees have implications of national security because the Constitution, while being a legal, legal political document, also performs a very important national security function in terms of integrating the periphery and the rest.

CHIEF JUSTICE DY CHANDRACHUD: Let us formulate it like this. What you want to really argue is that the impact of the argument which should be propounded by the other side on other similar provisions of the Constitution...

MANISH TIWARI: What Your Lordships, respectfully what I want to submit is, that there is already a process which has been adopted by Parliament in terms of abrogating 370. So therefore, there's a precedent in place and that precedent has implications qua the other guarantees in the Constitution, especially with regard to the North- Eastern state. So those are the implication which I would like to point out, and I would not take more than 15 minutes of your time. And I assure you it would not be a waste of your time.

1 **CHIEF JUSTICE DY CHANDRACHUD:** Likewise what we would suggest is, if you can
2 put it down on this evening on one page then we'll have clarity on exactly what the focus is.
3 Then what about Miss Farasat....you have?

4

5 **WARISHA FARASAT:** It's a point that has not been argued by anyone. And one. In fact, one
6 proposition is in answer to what My Lordship's has been asking. Clarifying 2 and 3 and a quick
7 point on federalism.

8

9 **CHIEF JUSTICE DY CHANDRACHUD:** All right, Ms. Farasat you can also reduce what
10 you have to say on a piece of...on a page.

11

12 **WARISHA FARASAT:** Yes My Lords, I will do that.

13

14 **CHIEF JUSTICE DY CHANDRACHUD:** And who's...where's the Nodal Counsel? By the
15 evening please put it...put together all this and give soft copies to the Court Master, what we
16 are now proposing to do. Then what about Mr. Irfan Lone..

17

18 **IRFAN LONE:** Yes Your Lordship.. very briefly. I will...,

19

20 **CHIEF JUSTICE DY CHANDRACHUD:** You are on Federalism..

21

22 **IRFAN LONE:** Federalism, Rule of Law and Democracy.

23

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

25

26 **IRFAN LONE:** Because it is the soul of Democracy..

27

28 **CHIEF JUSTICE DY CHANDRACHUD:** Absolutely, no difficulty. Just the modalities. Put
29 it down on a sheet of paper so that we'll have clarity on what you are arguing, because now we
30 have had arguments before you. So we'll know exactly what is it that is different that you are
31 arguing.

32

33 **IRFAN LONE:** We are arguing only ten minutes, so.....

34

35 **CHIEF JUSTICE DY CHANDRACHUD:** Dr. Z A Bhat? Now malice-in-law is being argued
36 by Ms. Warisha Farasat also.

37

1 **DR. Z. A. BHAT:** There is something very important which have been left out.

2

3 **CHIEF JUSTICE DY CHANDRACHUD:** All right, one page. You can please put it down
4 on paper on the page this evening and give it to the Nodal Counsel. We'll hear you for five
5 minutes or so. And finally, Mr. Gopal Sankaranarayanan..

6

7 **GOPAL SANKARANARAYANAN:** To tell Your Lordships candidly...

8

9 **CHIEF JUSTICE DY CHANDRACHUD:** Now what we will do.... What we'll do is this. We
10 can come back to you. Ms. Ramakrishnan, we will give you ten minutes tomorrow to formulate.
11 Dr. Guruswamy we will give you exactly ten minutes to formulate tomorrow. Mr. Tiwari we'll
12 give you 10 minutes too, once you have put it down on paper. If you can all circulate it to the
13 Court Master by 08:00 this evening, we'll all have the opportunity to read what you have
14 written by early morning tomorrow, and then everybody else after Mr. Tiwari, Warisha
15 Farasat, Irfan Lone and Z A Bhat, we will give you five minutes each to conclude your
16 submissions once you have put it down on paper.

17

18 **IRFAN LONE:** Ten minutes, Your Lordship.

19

20 **CHIEF JUSTICE DY CHANDRACHUD:** Mr. Sankaranarayanan, after they've all
21 concluded, we'll give you the wrap up word on the....

22

23 **IRFAN LONE:** The earlier list indicates the ten minutes, so..

24

25 **CHIEF JUSTICE DY CHANDRACHUD:** Time is over already this evening. We have
26 already permitted. So Gopal, be ready tomorrow. We will hear you... Mr. Baig, if you can give
27 us likewise, say by 08:00 today a note not exceeding two pages on what your line of
28 submissions is. Please have the notes circulated to the Nodal Counsel, who is just right here,
29 next to Ms. Ramakrishnan so that that note will be circulated to all the members of the bench
30 by tonight. But do put down what you have to say on a note, in two pages and we will hear you
31 right before Mr. Gopal Sankaranarayanan. So now, the order will be Ms. Ramakrishnan is in
32 [UNCLEAR] of the proceedings now. Thereafter, Dr. Guruswamy, Mr. Manish Tewari, Ms.
33 Farasat, Mr. Lone, Mr. Z A Bhat, then Mr. Muzaffar Hussain Baig and then Mr.
34 Sankaranarayanan. So much before we rise for the first session. I think we'll be through with
35 this side tomorrow morning.

36

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END OF DAY'S PROCEEDINGS