

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

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SUPREME COURT OF INDIA
RECORD OF PROCEEDINGS

Writ Petition (Civil) No.1099/2019

In re: Article 370 of the Constitution

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GOPAL SANKARANARAYANAN: I've been requested by Mr. Sanjay Parikh to clarify something. Yesterday regarding that Article 357 issue, I had said that...

CHIEF JUSTICE DY CHANDRACHUD: Wish to clarify that...

GOPAL SANKARANARAYANAN: ...for his arguments I had given a clarification. He felt that I shouldn't convey the impression that he tried to mislead the Court...

CHIEF JUSTICE DY CHANDRACHUD: No, not at all. I mean you appear before us every day. We've never meant, this is hardly this, that...[UNCLEAR]

GOPAL SANKARANARAYANAN: I said of course, I would clarify that.

CHIEF JUSTICE DY CHANDRACHUD: It is probably just a... I mean, all that fine print sometimes just happens. That's all...[UNCLEAR].

SANJAY PARIKH: No I want to say My Lord, I want to say something....

CHIEF JUSTICE DY CHANDRACHUD: [UNCLEAR] Thats all.

SANJAY PARIKH: I want to say, I looked into and sent it to Mr. Gopal Sankaranarayanan.

CHIEF JUSTICE DY CHANDRACHUD: Don't worry, we'll never make that assumption about the...[UNCLEAR]

SANJAY PARIKH: No, not that My Lord. I say so, it is a question of interpretation. And I still feel that 357 doesn't exist. That's my impression, but I don't want to interfere now. I'll say so My Lord....

CHIEF JUSTICE DY CHANDRACHUD: I think you and Mr. Gopal Sankaranarayanan have to resolve this over coffee or better.

SANJAY PARIKH: It's a question of interpretation by Gopal Sankaranarayanan, interpretation by me. All that I wanted to say. I'll make it good when my time comes in the rejoinder, I'll take two minutes.

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CHIEF JUSTICE DY CHANDRACHUD: Look at the broader, whether 357 is there, it doesn't change the arguments on your side or the response on the other side.

SANJAY PARIKH: Yeah, that's correct. That's all.

KAPIL SIBAL: We seem to be at odds with each other.

ATTORNEY GENERAL R. VENKATRAMANI: I seek your Lordships' indulgence.

CHIEF JUSTICE DY CHANDRACHUD: Yes Mr. Attorney.

ATTORNEY GENERAL R. VENKATRAMANI: For a small internal arrangement between us. Since the need for a historical narrative as a part of documentation is to be read through which I don't propose to do and placing certain propositions in the context of historical narrative we have divided jobs between Solicitor and myself. What I propose to do is just to flag Your Lordships' consideration a summary of my written submission. I have my written submissions, but I want to play the summary just to take the court to what....

CHIEF JUSTICE DY CHANDRACHUD: Is the summary available?

ATTORNEY GENERAL R. VENKATRAMANI: Yes, it's available in my....

CHIEF JUSTICE DY CHANDRACHUD: So who you're appearing likewise, for the Solicitor? But as a matter of bifurcation both of you would be appearing for the Union of India, right?

TUSHAR MEHTA: And Jammu & Kashmir.

CHIEF JUSTICE DY CHANDRACHUD: Alright. So between the two of you, you'll be appearing for the Union and the state. The rest are all for interveners? Mr. Dwivedi, Mr. Giri, Mr. Salve, Mr. Jethmalani, then Guru. And Mr. Nataraj you will be appearing for the Union?

TUSHAR MEHTA: Because [UNCLEAR]

CHIEF JUSTICE DY CHANDRACHUD: Okay. But then if something is... all right.

1 **TUSHAR MEHTA:** [UNCLEAR] Subjects are My Lord bifurcated, there won't be any
2 repetition.

3

4 **JUSTICE SANJAY KISHAN KAUL:** Like Mr. Banerjee also appears for whom? Vikramjit
5 Banerjee as ASC appears for whom?

6

7 **TUSHAR MEHTA:** Vikramjit also would be My Lord is for the Union.

8

9 **CHIEF JUSTICE DY CHANDRACHUD:** Can we then suggest one thing? If something
10 remains, then that can be covered because we need not then....

11

12 **TUSHAR MEHTA:** Whatever timeline is given, they are our timelines. And it is always
13 subject to Your Lordships' final call.

14

15 **CHIEF JUSTICE DY CHANDRACHUD:** After we complete with the first two arguments,
16 we'll realize what canvas remains then I think. Then consider.

17

18 **JUSTICE SANJAY KISHAN KAUL:** I think after you have taken and the Attorney has
19 taken two, three days whether Mr. Banerjee will require one day to argue for what, would be
20

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22 **TUSHAR MEHTA:** No, he didn't say one day.

23

24 **CHIEF JUSTICE DY CHANDRACHUD:** No, he says one day. That's why we were....

25

26 **JUSTICE SANJAY KISHAN KAUL:** One day. That's why...One day, one day.

27

28 **TUSHAR MEHTA:** It's a mistake on the part of my colleague. No, no, I'm sorry, it's a mistake
29 on the part of my colleague.

30

31 **JUSTICE SANJAY KISHAN KAUL:** So Nataraj is one hour and he is one day. So I was
32 wondering...

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34 **TUSHAR MEHTA:** That is also one hour. But that is outer hour. Kindly correct it My Lord,
35 that's a mistake on our part.

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37 **CHIEF JUSTICE DY CHANDRACHUD:** All right. Yes Mr. Attorney.

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ATTORNEY GENERAL R. VENKATARAMANI: Because we travel long days it can become hours.

TUSHAR MEHTA: I'm sorry My Lord. Your Lordship [UNCLEAR]

JUSTICE SANJAY KISHAN KAUL: Because we broadly know. I'm sure after you people have finished, they will see whether they want to add something or not.

ATTORNEY GENERAL R. VENKATARAMANI: Your Lordship pleases. Before I begin reading my main summary... Your Lordships could locate? It's in the Written Submissions' folder. It is titled "Summary of Written Submissions". Just a two page document. Before I do that I must at least thank all my esteemed colleagues on the petition, who brought in a lot of very insightful understanding of emotion, passion ridden issue and complicated from all the aspects and we tried to bring our own, if possible keeping in mind the objectivity as well as the neutrality which is to be involved in understanding this. And some American historian said objectivity is not neutrality. Of course, sometimes these things can become problematic. So keeping in mind, I'm also reminded of a really famous statement made by Abraham Lincoln in 1864, in response to a border territories conflict issue. He talked about balancing the nation, losing the nation and preserving the Constitution. And he said, while general law, life and limb must be protected. But, it's often a limb must be amputated to save a life, but a life is never wisely given to save a limb. I'll place that very full extract a little later on the floor, for balancing between losing the nation and preserving the Constitution, which will be my running theme in trying to say, we want to say that Constitution will be preserved in the context of the processes, due processes, the fairness of the processes, and how these procedures are important for the integration of the Constitution on the one hand, and losing the nation on the other hand.

CHIEF JUSTICE DY CHANDRACHUD: But, equally, Mr. Attorney General, we can't postulate a situation where the ends justify the means also, right?

ATTORNEY GENERAL R. VENKATARAMANI: I know about that...

CHIEF JUSTICE DY CHANDRACHUD: The means have to also be consistent with the ends.

1 **ATTORNEY GENERAL R. VENKATARAMANI:** All of us understand that. So, very often
2 this question confronts all of us, both, in personal life, public life, the politics of the nation, the
3 dynamics of the political process and so on. But then, that is a question which definitely
4 contrasts. How do you find answers which will produce... probably produce the most
5 [UNCLEAR] solutions? So, let me try to read this summary. No factual or legal foundation...
6 Your Lordship gets it?

7

8 **JUSTICE SANJAY KISHAN KAUL:** Is that what you're reading? Or...

9

10 **ATTORNEY GENERAL R. VENKATARAMANI:** If Your Lordships do not have it, can I
11 handover a...? My Lord, Justice Kaul has got that page? May I proceed to read?

12

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

14

15 **ATTORNEY GENERAL R. VENKATARAMANI:** No factual or legal foundation for any
16 sovereignty argument. On a combined reading of the Instrument of Accession and the
17 Proclamation, followed by adoption of Article 370, all traits of sovereignty, if any, were
18 surrendered and disappeared. The Constitutional integration process of the State of Jammu
19 and Kashmir with the Union of India, howsoever sought to be brought about, was the only
20 object of Article 370. All principle and procedures [UNCLEAR] the service for the above
21 purpose, will always be considered subservient to this purpose. The power and deliberation
22 authority of the President under Article 370 to deal with it in any manner, is neither lost nor
23 removed by reason of his exercise over a period of time, nor it can be said that the provision
24 erased itself without intervention by any positive lawmaking power. Article 370 was conceived
25 and designed to aid the Constitutional integration process, on the same line as it happens in
26 other states. Its continued exercise over a period, cannot be seen as a cloud over, or a distortion
27 of its original purpose. Any discretion exercised beyond its original purpose seen as
28 introducing room for whittling the constitutional integration or otherwise, can always be
29 deliberated upon to bring about any changes in its contents or its abrogation. All judicial
30 pronouncements in regard to Article 370 will be seen in that context of the challenges and
31 claims clear before the Court and their total view to be kaleidoscopically seen. Border States
32 are a special clan of territories of India, and their reorganization in Article 3 will deserve
33 distinct consideration. The Court will refer to the wisdom of Parliament in their choices of
34 action relating to border states. The justiciability of decisions taken, to deal with matters
35 letting the border states may not be as in the case of general rung [UNCLEAR] of
36 reorganization of States or imposition of President's Rule. The scheme and architecture of
37 Article 356, which provides in regard to the sustenance of the fabric of the Nation, will not be

1 narrowed or compressed. The interim argument demanding course correction or linearly
2 tailored and need not be touchstone for its anti-tinkering in the undefinable state necessity
3 potential of Part 18 of the Constitution. All instruments in aid of discharge of duty under
4 Article 355, including the preamble to the Constitution will be comprehended in the plenary
5 power, Parliament to engage in the reorganization scheme under Article 3. The plenary power,
6 the Acts under Article 3, is available even during rule under Article 356. Long standing or
7 similar measures in regard to reorganization are not precluded.

8
9 The availability of power existing from any due process:

10 a). Neither asymmetrical federalism, nor any other federal features have been intrinsic. We'll
11 try to make it all the arguments. [UNCLEAR]. No rights in relation to representative
12 democracy of integral [UNCLEAR]. Reorganization of States Includes temporary or other
13 rearrangement of rights to serve the integrity of federalism and the unity and integrity of the
14 country. All rights are available for exercise only [UNCLEAR] and integrity are intact. The
15 doctrine of necessity is flexible. The long history of internal disturbance, lack of availability of
16 real measure of rights and justice or matters that can be legitimately taken into account for
17 paving the paths for due course rearrangement. No person can have a lesser right in favour of
18 a perennial state of unrest and all the instruments of law which have not subserved peace and
19 justice have no inherent justice right to continue to exist... to right to exist, or to continue.
20 However, it is submitted that all measures taken are within the due processes granted and to
21 be pressed into service to act in exceptional circumstances. All such taken under so and so or
22 within the standard set or provision issued during President's rule and nothing arbitrarily
23 designed has been provided for. All arguments and fraud and power of [UNCLEAR] is
24 conceived.

25
26 That's the broad summary of my submission. Just before the learned Solicitor takes over, as
27 part of the paragraph 7B the last few sentences. I looked into all the presidential proclamations
28 running into 120 of them, and particularly in regard to Jammu and Kashmir. The suspension
29 of provisions of Article 3, the two provisos, and various other provisions of the Constitution
30 of India, or in terms of a convention representing the Proclamation, follows. So no deviation
31 has taken place as far as this particular Presidential Proclamation is concerned. So suggest
32 that for either a fraud in the Constitution is completely misconceived. I'll try to make with the
33 arguments [UNCLEAR] referring to the arguments. I

34 just want to place the summary to show that the due process have been followed. There is no
35 deviation from due processes, all within falls within the legitimate aims and objects of what,
36 we took orders for to achieve and the reorganization act also falls within them.

1 **CHIEF JUSTICE DY CHANDRACHUD:** Thank you very much, Mr. Attorney General. Yes
2 Mr. Solicitor.

3

4 **TUSHAR MEHTA:** May I please Your Lordships. As indicated by the petitioners, Your
5 Lordships would be taking a historical decision in more than one ways. But first, this is for the
6 first time My Lords, after 75 years that Your Lordships would be considering that the privileges
7 with which the residents of Jammu and Kashmir have been deprived of till then, till date have
8 been conferred and I'll make this submission good, that so far, Article 370 My Lord functions
9 as a detriment between the welfare scheme flowing from the centre, the constitutional rights
10 flowing from the centre and the residence of Jammu and Kashmir. The second thing, because
11 of this confusion, whether it is temporary or permanent, there was a kind of a psychological
12 duality, which was in the minds of one particular region of our country, though since inception
13 of the Constitution, it became part and parcel of inalienable and integral part of India. But
14 there remained a psychological duality whether induced or otherwise. That My Lord, Your
15 Lordships would end, judgment going either way, My Lord that position would end. And third
16 My Lords...

17

18 **CHIEF JUSTICE DY CHANDRACHUD:** Mr. Solicitor the first one, can you just in a
19 sentence again formulate it? I somehow missed the first point.

20

21 **TUSHAR MEHTA:** Yes, My Lords. Your Lordships would find.....

22

23 **KAPIL SIBAL:** I don't want to interrupt my Learned Friend My Lords, but this new volume,
24 as it is added, two new volumes have been added which were not there before two days ago. I
25 don't know My Lords, I may be wrong. I have no objection My Lords, but I just want to point
26 that out.

27

28 **TUSHAR MEHTA:** It was added with the permission of the court after, before six days.

29

30 **KAPIL SIBAL:** It was added. That's all I'm saying My Lordships. The written submissions
31 are new. I don't mind, I will not object to any of that because I don't believe in objecting to
32 materials which are relevant for the court. But since the court told me.

33

34 **TUSHAR MEHTA:** No, no, that's permitted My Lord. We mentioned Your Lordships.

35

36 **KAPIL SIBAL:** I'm not disputing. I'm not. You may have mentioned, I'm just saying My
37 Lords. I have still no objection My Lords.

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CHIEF JUSTICE DY CHANDRACHUD: Volume 3 are your submissions. Mr. Solicitor?

TUSHAR MEHTA: My Lord, the Chief Justice would recall, My Lord what we have done is, my submission, the submissions of the Learned Attorney and My Lord all other submissions are placed in one volume. Our submissions My Lord, where new and detailed after My Lord hearing them and thereafter My Lord in a chronological order and with continuing pagination, they form part of Volume Number....

CHIEF JUSTICE DY CHANDRACHUD: On Monday, when the Solicitor mentioned in the morning, you informed us that the list of dates which have been filed by Mr. Sibal....

TUSHAR MEHTA: Yes, that is incorporated.

CHIEF JUSTICE DY CHANDRACHUD: You're making, you are adopting the same list of dates, but where you are adding something, you're putting it all together so we don't have to flip between list of dates.

KAPIL SIBAL: Written submissions are all new here. Are all new. I'm not disputing.

TUSHAR MEHTA: But this has been updated on that day.

KAPIL SIBAL: I still am not disputing. I still will not dispute. I'm just saying My Lords...

TUSHAR MEHTA: Then let's start My Lord because....

KAPIL SIBAL: I'm only saying My Lords I was not allowed, that's all. All these are all new, but I don't mind.

CHIEF JUSTICE DY CHANDRACHUD: What we had, when he mentioned on Monday morning I think we asked him whether notice has been given to everybody and Solicitor said yes. At that stage I told the Solicitor instead of having five different list of dates, work on a list of dates which Mr. Sibal has submitted. I'd also mentioned it in the course of the hearing.

KAPIL SIBAL: That's right.

1 **CHIEF JUSTICE DY CHANDRACHUD:** And in that list of dates, add what you are adding
2 separately so that we know what will be in addition by the Union of India.

3

4 **KAPIL SIBAL:** Not only that.

5

6 **CHIEF JUSTICE DY CHANDRACHUD:** All of us have one master list of dates that
7 becomes much easier.

8

9 **TUSHAR MEHTA:** It would have been better if this objection would have been raised
10 because this.....

11

12 **KAPIL SIBAL:** [UNCLEAR]

13

14 **TUSHAR MEHTA:** Let's not My Lord, people are watching. Let's not be My Lord school
15 children like objections. It was given on that very date at night.

16

17 **KAPIL SIBAL:** No, no, it's because the court had objections....

18

19 **GOPAL SATYANARAYANAN:** The document is created on 24th August, which is today.
20 The PDF says it's created 24 August. So I don't know how it could have been.

21

22 **TUSHAR MEHTA:** Mr. Prasanna....

23

24 **KAPIL SIBAL:** Anyways My Lord, I think we should go on with the hearing. I'm not
25 objecting.

26

27 **TUSHAR MEHTA:** You object and thereafter you are saying I'm not objecting.

28

29 **KAPIL SIBAL:** No, because I was told, I was told that I should not be able to add anything. I
30 had only put some [UNCLEAR] cases.

31

32 **TUSHAR MEHTA:** No, no whatever reason.

33

34 **JUSTICE SANJAY KISHAN KAUL:** Mr. Sibal, your submission also it would have resulted
35 in many more people.....

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37 **KAPIL SIBAL:** That's why My Lords, I didn't press it.

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JUSTICE SANJAY KISHAN KAUL: But even that has been taken note of.

KAPIL SIBAL: That's all I'm saying.

TUSHAR MEHTA: Gopal Sankaranarayanan was here from day one. He could have told us. But, My Lord, I must make a positive statement before we mention before Your Lordships the previous night, this was placed on record with a service to all. They were aware, and My Lord, they knew that this is the master list of dates which all of us on this side will rely upon.

S PRASANNA: Your Lordships, may I clarify?

CHIEF JUSTICE DY CHANDRACHUD: One second, one second. Mr. Solicitor, on your master list of dates, I hope you have maintained the integrity of the original list of dates...

TUSHAR MEHTA: Yes.

CHIEF JUSTICE DY CHANDRACHUD: ...where you want to add something that you have indicated to us in a separate note or separate colour or track changes.

TUSHAR MEHTA: What I've done is, what I have done is....My Lord, I believe, at the outset, that it seems my list of date contains something, because this first objection appears to be the best point, now, after the list of dates. But, leave it at that.

CHIEF JUSTICE DY CHANDRACHUD: Mr. Solicitor, the reason why we're asking you is, when one sits down to dictate the judgment, I hope in the list of dates we will know what is Mr. Sibal's part, and what is your part. So as long as that is there, it's no difficulty for us.

TUSHAR MEHTA: So, kindly come to page 1 of my list of dates.

CHIEF JUSTICE DY CHANDRACHUD: So long as it is there... we accept your word for it. But, so long as your juniors have prepared it in that way, there's no difficulty.

TUSHAR MEHTA: Mr. Sibal's submission are incorporated in that general common list of dates in *italic*, in blue colour, saying AS, means, that's the list of dates of Mr. Sibal.

1 **CHIEF JUSTICE DY CHANDRACHUD:** Alright. And whatever you wanted to add, you've
2 added in a separate font or whatever? Then there is no difficulty.

3

4 **CHANDER UDAY SINGH:** Nobody has any issue with the list of dates. It's just that, if they
5 are filing something, they should tell everybody. What has been done today is, there's a 107
6 page list of dates which is filed...

7

8 **TUSHAR MEHTA:** Mr. Prasanna knows, everything was served. Please tell him. This is what
9 a nodal counsel is supposed to do.

10

11 **S PRASANNA:** Yes, yes.

12

13 **CHANDER UDAY SINGH:** Please give me a moment. The learned Solicitor's written
14 submission, apart from the list of dates, has somehow ballooned from 18 pages to 139 pages,
15 and a lot of it in very fine print. Now I mean...

16

17 **TUSHAR MEHTA:** I've put it in a para.

18

19 **CHANDER UDAY SINGH:** ... Airdropped 3 minutes ago or 5 minutes ago I've got it on
20 Airdrop.

21

22 **TUSHAR MEHTA:** Huh? From Mr. Prasanna, not by me.

23

24 **CHANDER UDAY SINGH:** If you're... nobody... When Mr. Sibal says he has no objection,
25 we have [UNCLEAR].

26

27 **TUSHAR MEHTA:** But, from your nodal counsel. He gives the date, My Lord.

28

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

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31 **JUSTICE B.R. GAVAI:** Mr. Prasanna is trying to say something for the last 5 minutes.

32

33 **CHIEF JUSTICE DY CHANDRACHUD:** Yeah, Mr. Prasanna. Just one second. Let's have
34 a word from the young junior here.

35

1 **S PRASANNA:** We were certainly served last week, Your Lordship, I had not... I had not... I
2 had not been informed that it had been allowed by the court, which is why I could not circulate
3 it forward. So that was the issue.

4

5 **TUSHAR MEHTA:** It was uploaded on Sunday night. Your Lordships can check up. Now
6 everything My Lord is possible to be ascertained and verified.

7

8 **CHIEF JUSTICE DY CHANDRACHUD:** You say that it was emailed to him on Sunday
9 night, with a copy to Mr. Prasanna, is it?

10

11 **TUSHAR MEHTA:** Yes, My Lord.

12

13 **S PRASANNA:** That's correct, that's correct. It was not circulated because it had not been
14 allowed by the court. That is not something that I had been informed, that it had been allowed
15 by the court. That was where the gap is.

16

17 **TUSHAR MEHTA:** My Lord, my first point, why Your Lordship's judgment is going to be a
18 historical judgement, is this. a) After going through the facts which we will point out on this
19 side, Your Lordships would be satisfied, that large number of fundamental rights and other
20 rights will be now conferred upon the residents of Jammu and Kashmir, and they would be
21 fully at par with rest of their brothers and sisters of this country.

22

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

24

25 **TUSHAR MEHTA:** Number two, because of... I'm sorry ... because of the ongoing confusion
26 which, according to us, there was none. But, because of the ongoing confusion as whether this
27 provision is temporary or it has become permanent, etc., there was a psychological duality
28 amongst the minds of the residents of Jammu and Kashmir, and that was being taken
29 disadvantage of by, I would say, interests not inimical to India. That would be settled once and
30 for all, whichever way Your Lordship decides.

31

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

33

34 **TUSHAR MEHTA:** I'll take Your Lordships, I must assure Your Lordships that, yesterday
35 we undertook an exercise, that Your Lordships have been appraised with almost everything on
36 facts. But Your Lordships are specifically not appraised with many things. So, in my list of

1 dates also, we have marked, which portions we would not trouble Your Lordships by reading.
2 So kindly directly come to, in that common compilation, page 6. PDF page 6.

3

4 This is only for one reason, My Lord, I am reading this part. My Lord Justice Gavai was pleased
5 to put a question. There was a Praja Sabha constituted, Your Lordships would recall and My
6 Lord's, question was, "what was, what is the composition of the, what was the composition of
7 the Praja Sabha?" So that is what is mentioned. Your Lordships would find the first, second
8 date on this page, is 20....

9

10 **CHIEF JUSTICE DY CHANDRACHUD:** Just one, only one thing, Mr. Agrawal, Mr. Kanu
11 Agarwal, I'm not asking the Solicitor this. In the list of dates there is some dates which are
12 marked by the light brown, one by green, one by blue, and...

13

14 **TUSHAR MEHTA:** Please come to page 4.

15

16 **CHIEF JUSTICE DY CHANDRACHUD:** Is there a distinction for our <UNCLEAR> Is
17 there a green, blue <UNCLEAR>?

18

19 **TUSHAR MEHTA:** Page 4. Page 4 will be the answer.

20

21 **CHIEF JUSTICE DY CHANDRACHUD:** We just want to see.

22

23 **TUSHAR MEHTA:** Page 4.

24

25 **CHIEF JUSTICE DY CHANDRACHUD:** Then we have clarity, you know.

26

27 **TUSHAR MEHTA:** This is, My Lord, the colour scheme which we have used. History of
28 Kashmir is this colour.

29

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

31

32 **TUSHAR MEHTA:** Then British events, law and statements.

33

34 **CHIEF JUSTICE DY CHANDRACHUD:** Are green.

35

36 **TUSHAR MEHTA:** And blue will be Indian Constitutional history. Red will be process of
37 integration, etc. This is the relevance of the colour. But Your Lordships need not bother about

1 that. Once, the flow I have kept chronologically. So therefore colours might keep on changing
2 depending upon the legend, but the flow will continue.

3

4 **CHIEF JUSTICE DY CHANDRACHUD:** And where you say "KS" in italics, that is Mr.
5 Sibal's original...

6

7 **TUSHAR MEHTA:** That is my learned friend Mr. Sibal's submission.

8

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

10

11 **TUSHAR MEHTA:** Therefore Your Lordships may not.... may consider not keeping Mr.
12 Sibal's submission side by side. It contains everything, verbatim.

13

14 **CHIEF JUSTICE DY CHANDRACHUD:** Much easier.

15

16 **TUSHAR MEHTA:** As produced before Your Lordships. That's all I wanted to show.

17 Date 20th April 1927. I'm not reading it, but this is Mr. Sibal's submission, in his list of dates.

18 And I have not missed any date from his submission. It is in blue colour and in italics. The

19 next date is 22nd April '34. Maharaja Hari Singh enacted 1934 Constitution of Jammu and

20 Kashmir. This law established a Legislative Assembly called Praja Sabha, which was to

21 function under the supremacy of the Maharaja. Answering My Lord Justice Gawai's question,

22 the Praja Sabha was to have 75 members, of which, 12 would be officials, 33 elected members

23 and 30 nominated members. Then My Lord, rest Your Lordships can consider skipping. And

24 kindly come to 7. Just taking Your Lordships chronologically, Your Lordships have seen this

25 provision as well. I'm just refreshing Your Lordships' memory without reading the provision.

26 This is a part of Government of India Act 1935. My Lord why it has become long? The relevant

27 parts are quoted for Your Lordship's immediate reference. My Lords may not have to go

28 through Volume 1 PDF page so and so, but page numbers are also mentioned if Your Lordships

29 would like to go through. But please see, at page 8, Section 6 of Government of India Act 1935.

30 "Accession of Indian states. A state shall be deemed to have acceded to the federation if His

31 Majesty has signified his acceptance of an Instrument of Accession executed by the ruler

32 thereof, whereby, the ruler, for himself, his heirs and successors declare" so and so, so and so,

33 so and so. My Lord, the purpose of showing this is to My Lord point out to Your Lordships and

34 ultimately I'll assist Your Lordship with that proposition and one or two judgments on this.

35 The moment the accession is complete, the sovereignty gets lost. The sovereignty is subsumed

36 with the bigger sovereign.

37

1 **CHIEF JUSTICE DY CHANDRACHUD:** Just a minute.

2

3 **TUSHAR MEHTA:** There is a Privy Council judgment and few other judgments also My Lord
4 which we'll take a little later on. There is one trivia, My Lord I have just added. It doesn't make
5 any difference for either of us. But as My Lord we attribute the Indian Penal Code to Lord
6 Macaulay, My Lord, this entire exercise of 1935 Act was conduct, work done. My Lord he was
7 the author virtually of this My Lord. Sir Samuel Hoare, one of the unsung heroes My Lord in
8 the history of Indian partition. But he who, it was he who drafted this. It has no bearing on the
9 main question. Then My Lord, I have reproduced the.....

10

11 **CHIEF JUSTICE DY CHANDRACHUD:** Actually Mr. Solicitor, you may also read Section
12 5.

13

14 **TUSHAR MEHTA:** Yes.

15

16 **CHIEF JUSTICE DY CHANDRACHUD:** Because what is the importance of, what is the
17 importance of accession? That Section 5(1) gives us.

18

19 **TUSHAR MEHTA:** Yes My Lord. I wanted to read, but I thought Your Lordships may have
20 read. My Lord kindly come to Section 5, PDF Page 7.

21

22 **CHIEF JUSTICE DY CHANDRACHUD:** But we need to highlight that because it shall be
23 lawful. Just read that, only that.

24

25 **TUSHAR MEHTA:** 'It shall be lawful for His Majesty, if an address in that behalf has been
26 presented to him by each of Parliament, each House of Parliament and if the condition
27 hereinafter mentioned is satisfied, to declare by proclamation that as from the date therein
28 appointed there shall be united in a Federation under the Crown by the name of the Federation
29 of India.

30 A) The provinces hereinafter called Governor's Provinces, which were under the direct British
31 sovereignty or suzerainty My Lord, as the case may be, were functioning through the Governor
32 General, then

33 B). The Indian States, which have acceded or may thereafter accede to the Federation and in
34 the Federation so established, there shall be included the provinces hereinafter called Chief
35 Commissioner's Provinces. My Lord the smaller regions, which eventually

36

1 **CHIEF JUSTICE DY CHANDRACHUD:** Consequence of an accession under the
2 Government of India Act was. that then the acceding would be United in a Federation. The key
3 words in 5, united in a Federation
4

5 **TUSHAR MEHTA:** In a Federation. So My Lord, that is the first stage of losing sovereignty,
6 the moment you sign accession and it is accepted.
7

8 **CHIEF JUSTICE DY CHANDRACHUD:** But you'll have to at some stage deal with the
9 argument which they have urged that sovereignty itself has an external component and an
10 internal component. External component was lost. Internal sovereignty still remained. That's
11 the...
12

13 **TUSHAR MEHTA:** That's the argument My Lord. We are conscious of that. And My Lord
14 I'll also bear in mind Your Lordships' very, very pertinent observation that ends may not justify
15 the means. I'll also show to Your Lordships the means adopted strictly within the
16 constitutional parameters and as per various judgments of your Lordship. But that followed
17 after My Lord the factual chronology. My Lord, thereafter Your Lordships may kindly come to
18 page 9, 1939. My Lords, this is also crucial. The Indian National Congress' formal stance was
19 that the princely state must join independent India on the same terms and with the same
20 autonomy as the provinces of British India and with their people granted responsible
21 government. As a result it attempted to insist on the incorporation of the princely states, also
22 into India in its negotiations with the British. So we were as My Lord, British India, also our
23 leaders were already negotiating that princely states should also come at par with the
24 provinces, British provinces, which were already under the suzerainty or sovereignty as the
25 case may be of the British. Then My Lord 7th September 1939, Jammu and Kashmir
26 Constitution Act 1939 was issued by Raja Hari Singh; it established a Council with a Prime
27 Minister. My Lord, why My Lord I'm reading this? I'll just paraphrase this argument. My Lord,
28 why I say this.
29

30 My Lord, substantial arguments were made, that there were no Constitutions. Jammu and
31 Kashmir had a special place in the geographical British India, because that was the only part
32 which had its own Constitution in '39. My Lord, that is factually incorrect. There were 62 states
33 which had their own Constitutions, whether they are named as Constitution or any instrument
34 of governance, internal governance. I'm just trying to show, that the argument shows that
35 Jammu and Kashmir had a special status from the beginning which continued till date, is
36 factually wrong; the foundation is wrong. And, 286 states were in the process of framing that
37 Constitution during this period of late 40s... late 30s My Lord, 39 onwards. As a matter of fact,

1 eminent counsels of the day, those days, were engaged to help the princely states to draw their
2 Constitutions. I'm not going into that detail, that's not relevant. But, one of the... when we
3 researched this, Alladi Krishnaswamy Iyer, was considered to be one of the top ranking
4 counsels, was engaged. His fees were not found to be... the problem was there at that time
5 also... by one state called Reva in present Uttar Pradesh. I'm sorry...

6

7 **JUSTICE SANJAY KISHAN KAUL:** Madhya Pradesh, Madhya Pradesh.

8

9 **TUSHAR MEHTA:** And therefore, My Lord, he was requested not to continue, because it
10 was found to be too exorbitant. Please see from where do I get this. PDF Volume 16...
11 Document Volume 16, I'm sorry. Document Volume 16, PDF page 574.

12

13 **CHIEF JUSTICE DY CHANDRACHUD:** Document Volume?

14

15 **JUSTICE B.R. GAVAI:** 16.

16

17 **TUSHAR MEHTA:** My Lord, this is a research paper by a very eminent professor of Yale. He
18 has done...

19

20 **JUSTICE SANJAY KISHAN KAUL:** PDF is?

21

22 **TUSHAR MEHTA:** ... at 584 directly, because this is history. I may not trouble Your
23 Lordships beyond a point, but 584. Running page would be 10514. My Lord, as a matter of
24 fact, some of them made their Constitution, and thereafter immediately signed the accession
25 also. And, I'll also show to Your Lordships from this chronology, that the Draft Accession
26 Agreement was common to all; everybody had signed the same draft. I'll come to that. Please
27 My Lord, see the second line, "However", at page 584. My Lord Justice Khanna and other
28 Justices... has it?

29

30 **JUSTICE SANJIV KHANNA:** Yes, I got it.

31

32 **TUSHAR MEHTA:** My Lord Justice Kaul has that? "However, the inauguration of Shahpura
33 Constitution did not prevent the Prince from signing, the next day, the Instrument of
34 Accession to the Dominion of India in three areas of defence, external affairs, and
35 communications, as many other princely states did at the same time. My Lord, next para,
36 kindly come some 5th or 6th line from the top of the unnumbered second para, Manipur. Your
37 Lordships would find Manipur. Does Your Lordships get it? "Manipur in the Northeast,

1 adopted a Constitution, which on 26th of July 1947, provided for fundamental rights and
2 separation of powers, and recognized the Maharaja as its Constitutional head. Maharaja of
3 Patna, declared the setting up of a representative Constitution, making body on 24th October,
4 1947. Just at the moment when the first draft of Indian Constitution was ready, that same
5 month, M.R. Jayakar, until the previous May, a member of the Constituent Assembly, advised
6 Gwalior State Constitutional Reforms Committee, not to depart in their proposed Constitution
7 from the model now invoked, for instance, at Mysore. This pattern of general steps towards
8 Constitutions based on principle of representative Government was repeated in numerous
9 other princely states. These included Aundh, Banswara, Baoni, Baria, Baroda, Barwani,
10 Banaras, etc., etc. My Lord. The list goes on and on and on. I'm not reading it because the
11 names are not relevant. And this is whole length and breadth of the country. They were
12 making, either having their Constitution or making their Constitution. My Lord, why? I just,
13 My Lord, we were just examining, why these three subjects are kept, even by them, to
14 themselves, namely defence, communication and foreign affairs. The reason was, there is a
15 small princely state. It can't have its own army. Communication means, the British had laid
16 postal services, and Britishers have also laid railway lines, so that communication was crucial.
17 And every state can't have their own communication system for intra princely state
18 communication. And foreign affairs obviously, they would like the greater power, to control.
19 That was basically the idea. Thereafter My Lord, as I go on, the Lordships would be satisfied,
20 that ultimately everything started getting subsumed and there are discussions. Once Article 1
21 comes into force with First Schedule, all states which became part of the First Schedule, came
22 to be governed by the Constitution of India and the only sovereign which remained was "we,
23 the people of India."

24 Now kindly come back to my, I'm sorry, last line, my last line, I'm so sorry My Lord. In that
25 page 585, 1st para, last line.

26 So far as we have raised... Your Lordship gets it My Lord? It's somewhere, fifth line from the
27 bottom of the first unnumbered para. So far, Your Lordship gets it?

28 "So far, so far, we have raised 62 states that framed their own Constitution and 286 others that
29 were involved in making Constitutions for Union of States, which shaped the new
30 constitutional landscape. This fact has gone largely unnoticed in the study of India's
31 constitutionalism." So, first, why I am pointing out, the basic argument that Jammu and
32 Kashmir was the only princely state having its Constitution and therefore was getting a
33 separate treatment is factually not, found well-founded.

34

35 Now Your Lordships kindly come to my... kindly come to page 10. Your Lordships page 10 has
36 the list of dates. Page 10 starts with Mr. Sibal's note, which I have quoted verbatim. Then 12th
37 May and 22nd May. Your Lordships may not invest time in that. Kindly come to the next date,

1 16th May 1946. 'The Cabinet Mission, planned by the Britishers issued a statement regarding
2 its report. Under paragraph 15(1) and 4 of this statement, the Cabinet Mission Plan
3 recommended that Union of India, which should necessarily deal with defence, foreign affairs
4 and communication of princely states.' They only recommended. In the note of my learned
5 senior, it is differently mentioned that it was 'decided.' They only recommended. Thereafter,
6 page 11. Just a few weeks before becoming the Vice President of the interim Government,
7 Jawaharlal Nehru clearly stated, that no princely state could prevail militarily against the army
8 of independent India. This is, My Lord, the first step for unification of the Federation of India,
9 which eventually became Union of India. This is July '46. Then My Lord, 9th December 1946,
10 Constituent Assembly of India was formed. But there is no dispute on this date. My Lord,
11 Jammu and Kashmir had four representatives, including late Sheikh Abdullah ji.

12

13 But the relevant parties when more and more princely states started acceding and accepting
14 the Constitution of India their representatives also kept on being added. And they started
15 participating in framing of our Constitution. And My Lord I will come to that My Lord, at....

16

17 **JUSTICE SANJIV KHANNA:** Just one clarification. The four representatives of Jammu
18 and Kashmir were there from the beginning or only in October?

19

20 **TUSHAR MEHTA:** No My Lord, not from the beginning. They came My Lord subsequently.

21

22 **CHIEF JUSTICE DY CHANDRACHUD:** '49, I think they came.

23

24 **TUSHAR MEHTA:** Yes '49. '49, My Lord. '49, it comes, that date will come.

25

26 **KAPIL SIBAL:** June 1949.

27

28 **TUSHAR MEHTA:** Yes, that date will also come. And I may My Lord at the outset just flag
29 it. It would come in the chronological order. All these states, who eventually became part of
30 the Union of India had their differently worded instruments of Accession. Some of them have
31 said that taxation would be within our domain only, but thereafter My Lord as the Legislative
32 and the constitutional history progresses, this is how countries are formed. When My Lord,
33 we have more than one federal unit, and it's unlike American Federalism, where they entered
34 into a contract to form the Union. We didn't adopt My Lord that model. In a very wise, My
35 Lord foresight of our forefathers that they did not choose that option. They voluntarily started
36 joining and participating in the process of Constitution making. Then My Lord January 1947,
37 Nehru, in his capacity as the Vice President of the Interim Government, which included both

1 present day India and Pakistan, clearly say that Independent India would not accept the divine
2 right of kings. My Lord, this is January, 1947. The stand of India and the party which led the
3 freedom struggle was, we will not accept divine right of kings. We are going for a democratic
4 setup. And that stand remained consistent as I'll point out. Then My Lord 22nd January 1947,
5 My Lord the Constituent Assembly of India adopted objective resolution. My learned senior
6 My Lord read only one part My Lord, which is, para 3. My Lord let me read para 3 and then
7 rest of them. These were the broad My Lord kind of objects and reasons based upon which the
8 Constitution was to be framed. Para 3- "Declared that princely states that had joined the Union
9 of India, whether with their present boundaries or with such others, as may be determined by
10 the Constituent Assembly and thereafter, according to the law of the Constitution, shall
11 possess and retain the status of autonomous units, together with residuary powers and
12 exercise all powers and functions of Government and Administration, save and accept such
13 powers and functions as are vested in or assigned to the Union." My Lord, the interpretation
14 given by the petitioner was that the autonomy was the foundational stone of the Constitution
15 making. This autonomy will have to be understood from the subsequent paragraphs. States
16 are still autonomous in case of My Lord List 2, Schedule 7 etc. My Lord there are several
17 provisions giving them an internal autonomy while being a part of the larger Union of India.
18 Paragraph 4, My Lord this according to me, should be read.

19 "Declared that all power and authority of the Sovereign Independent India, its constituent
20 parts and organs of the Government are derived from the people."

21 My Lord, the seeds of democracy born for the first time, that the sovereignty would vest in we
22 the people of India. Then 5, declared that there shall be guaranteed and secured to all the
23 people of India, justice, social, economic and political equality of status. Kindly mark this
24 'equality of status' was the above goal, while framing the Constitution. One Union or one
25 segment of the Union of India, cannot be deprived of the rights which are enjoyed by rest of
26 the countrymen. Then 7, declared that there shall be maintained the integrity of the territory
27 of the Republic and its sovereign rights on land, sea, and air according to justice and law of
28 civilized nations. And 8, declared that this ancient land attains its rightful and honoured place
29 in the world, and makes it full willing, so and so, so and so, so and so. Now Your Lordships
30 may kindly see the next date, 25th January '47. The resolution for the establishment of the
31 Union Powers Committee in the Constitution Assembly was passed. Your Lordships can skip
32 the next date, the statement by Clement Attlee, the then Prime Minister of Britain. Then, My
33 Lord, 17-4-1947, the first report of Union Power Committee was... that is of the Constituent
34 Assembly... was published widely, expanding the scope of phrases, defence, foreign affairs,
35 communications, and powers necessary to raise the finances required. Further, the said
36 committee further recommended, in para 3, powers and subject which were inherent or
37 implied or resultant from the express powers of the Union, that is, judiciary, services, RBI, etc.

1 It was also hoped, that certain other subjects would be included in the union list, like
2 insurance, planning, banking, patents, etc. This is the first report. My Lord, the note of the
3 Petitioner, which I have quoted, does not mention about this first report. They have directly
4 gone to the second report. Therefore, My Lord, this has its relevance in the chronology, I have
5 placed it, My Lord. Second date can be skipped, nothing turns on that, Constituent Assembly
6 resolution appointing Union Constitution Committee, etc. My Lord, 3rd June is an important
7 date. 3rd June, 1947. The legislative representatives of the Indian National Congress, the
8 Muslim League, and the Sikh community came to an agreement with Lord Mountbatten on
9 what has come to be known as 3rd June Plan, or Mountbatten Plan. This plan was the last plan
10 for....

11

12 [NO AUDIO]

13

14 All these facts, would be necessary as a process of connecting the dots for me, to persuade Your
15 Lordships to reach a particular conclusion. Even otherwise, whichever way Your Lordships
16 would like to ultimately decide, these facts would be relevant. Therefore, I'm placing only those
17 facts which are relevant to the issue. Now, Mountbatten Plan comes. This is the only plan for
18 independent India, last plan. The British Government proposed a plan announced on 3rd
19 June... I'm sorry, my learned senior Mr. Dwivedi points out, that this resolution, which I say,
20 objective, was thereafter passed, framed, and placed before the Constituent Assembly in '46,
21 which was approved by the Constituent Assembly. And, the preamble draws inspiration from
22 that plan. Your Lordships may have seen the words.

23

24 **JUSTICE B.R. GAVAI:** There were lot of discussions also on that.

25

26 **TUSHAR MEHTA:** Yes.

27

28 **JUSTICE B.R. GAVAI:** ... of this resolution. It was proposed by Pandit Jawaharlal Nehru.

29

30 **TUSHAR MEHTA:** On 13th December '46.

31

32 **JUSTICE B.R. GAVAI:** Dr. Ambedkar criticized a lot about that. He said that there are many
33 things which are missing in what we are promised.

34

35 **TUSHAR MEHTA:** As a matter of fact, the first letter of Dr. Ambedkar, while introducing
36 the draft Constitution, makes a very interesting reading.

37

1 **JUSTICE B.R. GAVAI:** No, his speech of 4th of December 1948.

2

3 **TUSHAR MEHTA:** Yes, yes, yes. My Lord, when we go through the Constituent Assembly
4 debates of India, My Lord, we really feel as citizens, that we were in safest of the hands. Now
5 this proposal contained these principles. Principle of partition of British India was accepted
6 by the British Government. Then second, successor Governments would be given dominion
7 status. Autonomy and sovereignty to both countries, that is, India and Pakistan. Then third....
8 fourth and fifth is relevant. Both can make their own Constitution. And fifth, princely states
9 were given the right to join either India or Pakistan. Princely states had no option to remain
10 independent under this plan. It comes thereafter in 1947. But Lord Mountbatten advises the
11 Crown of, the Chamber of Princes that it's not viable for most of you. You can't survive as
12 independent units. But in this plan they could join either Pakistan or India, depending upon
13 several factors, but mainly, the factor of geographical proximity. For example, hypothetical
14 example, Delhi can't join Pakistan because of the land route not being available, etc. Now My
15 Lords, next date, 27 June, Your Lordships may skip. June 47. After the announcement of June
16 3rd plan, Lord Mountbatten spent four days discussing the situation of Jammu and Kashmir
17 with the Maharaja of Jammu and Kashmir and clearly explained that independence of Jammu
18 and Kashmir was not a feasible option. Then Viceroy, 13 of June '47, Viceroy Mountbatten
19 invited Nehru, Sardar Patel, Acharya Kriplani, Jinnah, Liaquat Ali Khan and Sardar Abdul
20 Nishtar and Sardar Baldev Singh to attend an informal meeting to discuss the problem of the
21 states. My Lord, I may not read the whole. The purpose was, that you create one separate
22 department, which would deal with integration of states. That was, My Lord, the state's
23 department and the First Secretary was Mr. V P Menon. This functioned under Sardar Patel,
24 V P Menon was the First Secretary and he has written two books, as Your Lordships were told,
25 on a request from Sardar Patel, that you document it. You are the first person. You also have
26 the first-hand information. And he has written both the books without being judgmental or
27 without giving his value judgement. He has narrated the facts as he witnessed. Most of the
28 documents are also signed by him. Letters are also signed by him. He had taken part in several
29 negotiations also with princely states. Then, Your Lordships can skip 15th June 1947, Congress
30 Working Committee. The same continued that "we'll not accept divine rights of princely states.
31 We are going for democracy." And My Lord they rejected specifically, the concept of
32 paramountcy. The Congress was dealing with this issue and negotiating with the Britishers
33 and with princely states. Then 17 June '47, Nehru wrote to Mountbatten, stating that Kashmir
34 was of first importance to India as a whole, and specifically, as a great strategic importance of
35 that Frontier State. We were conscious from that day. Then, 18th June, Mountbatten urged on
36 the Maharaja and the then Prime Minister of Jammu and Kashmir, Shri Kak, not to make any
37 declaration of independence. He also pressed them to make, take measures to ascertain the

1 will of the people and to announce their intention to send representatives, to send
2 representatives to one Constituent Assembly or the other, that is Pakistan or India. The State
3 Department, he told them, were prepared to give an assurance that if Kashmir joined Pakistan,
4 this would not be regarded as unfriendly by the Government of India. The Maharaja allegedly
5 replied to the same by stating that he would never accede to Pakistan, as they were setting up
6 a theocratic state. Mountbatten pointed out the dangerous situation in which Kashmir would
7 find itself if it did not have the support of one of the two dominions after 15th August. This is
8 by Narayani Basu and VP Menon's book My Lord. They have reproduced My Lord, we have...
9 Narayani Basu was, I think granddaughter of V. P. Menon. And a very seasoned bureaucrat.
10 Subject to correction, the second part is subject, to subject to correction.

11

12 Then My Lord, the State Department is formed. That date My Lord Your Lordships can
13 consider skipping. Then 3rd July '47, Sardar Patel wrote to Hari Singh, stating that interest of
14 Kashmir lie in joining the Indian Union and its Constituent Assembly without any delay. And
15 also say that its past history and tradition demands it, and all India looks up to you and expects
16 you to take this decision. At this juncture India was not contiguous whole and princely states
17 were scattered across the length and breadth of the territory of the country. Then 5th July '47.
18 Department as the State Department was a part of the Ministry of Home Affairs headed by Sri
19 Sardar Patel, came into being and Sardar Patel issued a statement as under. Please see My
20 Lord page 16. Your lordships can directly come to and only the highlighted part My Lord, so
21 that I'm not My Lord investing Your Lordships' time more. I have few words to say, My Lord.
22 See, My Lord, we have dealt with every princely state in a democratic manner and everyone
23 has voluntarily come, including Jammu and Kashmir, as I will show My Lord further.

24

25 "I have a few words to say to the rulers of Indian States amongst whom I am happy to count
26 many as my personal friends. It is the lesson of history that it was owing to her political
27 fragmented condition and our inability to make a united strength that India succumbed to
28 successive waves of invaders. Our mutual conflicts and inherence, quarrels and jealousies have
29 in past been the cause of our downfall and our falling victims of foreign domination a number
30 of times. We cannot afford to fall into those errors or traps again; we are on the threshold of
31 independence." Then My Lord, again, the highlighted part. "But there can be no question that
32 despite this separation of fundamental, homogeneous culture and sentiment reinforced by
33 compulsive logic of mutual interest, would continue to govern us. Much more would this be
34 the case with the vast majority of states which owing to their geographical contiguity and
35 indissoluble ties, economic, cultural and political must continue to maintain relations of
36 mutual friendship and cooperation with the rest of India."

37

1 My Lord, please come to next page My Lord, 17 highlighted in bold part. I'm skipping
2 something which is in the same breath, My Lord. Same line, My Lord, Sardar Patel says, "nor
3 would it be a policy"... My Lord I'm reading the highlighted part only. "Nor would it be my
4 policy to conduct the relations of the new department with the states in any manner which
5 severs of the domination of one over the other. If there would be any domination, it would be
6 that of our mutual interest and welfare." My Lord this is where My Lord Sardar Patel sowed
7 the seeds of My Lord, federalism and balance of power. Said nobody would be dominant,
8 nobody would be subservient. The only thing dominant would be our mutual interest and
9 unification and unity of the nation. Then My Lord 5th July '47. The Union Powers Committee
10 submitted its second report My Lord which was placed by My Learned Senior Mr. Sibal. Kindly
11 My Lord, first was not placed and I want to read fully, My Lord only a part was read. And it
12 may have My Lord potential to assist Your Lordships. My Lord only highlighted part or I may
13 read My Lord the full.

14

15 "Momentous changes have since occurred. Some parts of the country are seceding to form a
16 separate state. And the plan put forward in the statement of 16th May on the basis of which
17 the Committee was working is in many a sense no longer operating. In particular, we are not
18 now bound by the limitations on the scope of Union powers. The first point accordingly, that
19 we considered was whether in the changed circumstances the scope of these powers should be
20 widened. We had no difficulty in coming to a conclusion on this point. The severe limitation
21 on the scope of Central Authority in the Cabinet Mission's Plan was a compromise accepted by
22 the Assembly much we think against its judgment of the administrative needs of the country
23 in order to accommodate the Muslim League. Now that partition is a settled fact, we are
24 unanimously of the view that it would be injurious to the interest of the country to provide for
25 a weak Central Authority, which would be incapable of ensuring peace, of coordinating vital
26 matters of common concern and speaking effectively for the whole country in the international
27 sphere. At the same time, we are quite clear in our minds that there are many matters in which
28 authority must lie solely with the units." My Lords stronger centre, but federal structure.
29 Therefore, we say it's more unitary than federal, or more federal than unitary, My Lords, that
30 is the first rule. Units... "and that to frame a Constitution on the basis of a unitary state, would
31 be a retrograde step, both politically and administratively. We have accordingly come to the
32 conclusion, a conclusion which was also reached by the Union Constitution Committee, that
33 soundest framework for our Constitution, is a federation with a strong centre. In the matter of
34 distributing powers between the centre and the units, we think that most satisfactory
35 arrangement is to draw three exhaustive lists on the lines followed in the Government of India
36 Act, 1935, that is, federal, provincial, and concurrent." Appendix to this report, please see the

1 note. "The appendix to this report has a union list with a wide array of subjects, that is 87 in
2 total. Now we have 97.

3

4 Now My Lord, kindly come to the next date, 10th July 1947. This is a very important statement
5 made on the floor of British Parliament by Clement Attlee, the then Prime Minister of India.
6 This is not available otherwise, but in one of the recent judgments of the British Court where
7 there was a dispute regarding properties of Hyderabad's Nizam, this is quoted. He had
8 transferred some \$1 million to... and there was some dispute between High Commission and
9 Nizam; that's not relevant. From there, this quotation. At the foot, I have underlined. I'll read
10 only that part. "A feature running through all our relations with the states, has been that the
11 Crown has conducted their foreign relations. They have received no international recognition
12 independent of India, as a whole. With the ending of the treaties and agreements, the states
13 regained their independence." They had treaties with British Government with regard to
14 communication, in terms of coastal, railways, etc. "Everything was to come to an end. But they
15 are part of geographical India, and their rulers and peoples are imbued with a patriotism, no
16 less grit than that of their fellow Indians in British India. It would, I think, be unfortunate if,
17 owing to the formal severance of their paramountcy relations with the Crown, they were to
18 become islands cut off from the rest of India. The termination of their existing relationship
19 with the Crown need have no such consequences." Then underlined, "It is hope of His
20 Majesty's Government, that all states will, in due course and their appropriate place, within
21 one or other of the new dominions within the British Commonwealth, but until the
22 Constitution, etc...'" My Lord, I can skip that. The position was clear, that princely states
23 became independent technically, but not viable independent units. My Lord, may I start at
24 2:00?

25

26 **CHIEF JUSTICE DY CHANDRACHUD:** I'm so sorry. I was with the advocates on record.
27 They have some practical issues about filing, office.. so I just... with them I took time. Our own
28 members of the bar who have some you know, they are responsible to the clients.

29

30 **TUSHAR MEHTA:** I was on page 21. I can My Lord, again reiterate my assurance. Whatever
31 may not be necessary for Your Lordship's perusal, I'm skipping it while keeping it there. Page
32 21, 1947. This would be another landmark. Therefore, I must bring to Your Lordships' notice.
33 Under Section 9 of the Indian Independence Act, the Governor General of India issued India
34 (Provincial Constitution) Order 1947. What I have quoted is Section 6. Section 5, I have not
35 quoted. I'll just paraphrase it. It merely defined the territories and included within it the
36 acceding states also. Acceding States. Your Lordships can have a note.

37

1 **JUSTICE SANJAY KISHAN KAUL:** Which page?

2

3 **TUSHAR MEHTA:** Volume 12. Document Volume 12, PDF page 103.

4

5 **JUSTICE SANJAY KISHAN KAUL:** PDF page 21, I think.

6

7 **TUSHAR MEHTA:** I'm sorry. Your Lordships are asking about the page of the note?

8

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

10

11 **JUSTICE B.R. GAVAI:** Page of the note... Page 20 or 21?

12

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

14

15 **TUSHAR MEHTA:** 21. I am sorry. Page 21. My apologies. I thought Your Lordships are.....

16

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

18

19 **TUSHAR MEHTA:** Section 5. My Lord I am on 1947. That is the date. Your Lordships Justice
20 Kaul and Justice Gavai has.

21

22 **JUSTICE B.R. GAVAI:** Yes.

23

24 **TUSHAR MEHTA:** Under Section 9 of the Indian Independence Act 1947, the Governor
25 General of India is....

26

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

28

29 **TUSHAR MEHTA:** No, I'm sorry My Lord, my note. My apologies, My Lord. I should have
30 been clear. My note which Your Lordships would find Respondent's conjoined written
31 submissions, Volume 3, My Lord. There were two sections incorporated. Section 5, I have not
32 quoted. I will just paraphrase it. It defined territories and included within the term territories
33 acceding states also. That's all. Your Lordships would like to note the page number and... it's
34 volume... document Volume 12, page 103. Now My Lord, the system of accession of Indian
35 States that was Section 6 of this Order of 1947. Please see My Lord (1). May I My Lords?

36 "An Indian State shall be deemed to have acceded to the dominion, if the Governor General
37 has signified his acceptance of an Instrument of Accession executed by the ruler thereof,

1 whereby the ruler on behalf of the State, declares that he accedes to the dominion with the
2 intent that the Governor General, the dominion Legislature, the Federal Court, and any other
3 dominion authority established for the purposes of dominion shall, by virtue of his Instrument
4 of Accession, but subject always to the terms thereof."

5 Please mark this My Lord, that's the case of the other side, therefore I must bring it to Your
6 Lordships' notice.

7 'And for the purposes only of the dominion, exercise in relation to the state such functions as
8 may be vested in them by order under this Act and assume the obligation of ensuring that
9 effect is given within the State to the provisions of this act, so far as they are applicable therein
10 by virtue of the Instrument of Accession.

11

12 Now two. This is important and this was common My Lord. Obviously, for all who wanted to
13 accede or have acceded. An Instrument of Accession , shall specify the matters with the rulers
14 accept as matters with respect to which the Dominion Legislature may make laws for the state
15 and the limitation. It should be delimitation and delimitations, if any. So which the power of
16 the Dominion Legislature to make laws for the states an exercise of the executive authority of
17 the dominion in the state are respectively to be subject. This is my submission and my reading,
18 My Lord, an attempt to ensure that unification becomes as difficult as possible. Because
19 everyone were permitted to put their own terms and conditions. That if you are a princely
20 state, you can accede but subject to the terms and conditions. And see how beautifully the
21 Founding Fathers of our Constitution dealt with that situation, unified the nation, and the
22 ultimate result was Article 1.

23

24 **CHIEF JUSTICE DY CHANDRACHUD:** Actually, this was intended to create a sense of
25 confidence in the princely states.

26

27 **TUSHAR MEHTA:** You are not losing everywhere...

28

29 **CHIEF JUSTICE DY CHANDRACHUD:** You are acceding to the Union, but we are giving
30 you the ability to have reservations in your Instrument of Accession, by virtue of which you
31 will retain certain subjects to yourself, or you will accept the jurisdiction of the Federal
32 Legislature, the Dominion Legislature, subject to some restrictions which you can yourself
33 impose. So that...

34

35 **TUSHAR MEHTA:** You have that option.

36

1 **CHIEF JUSTICE DY CHANDRACHUD:** We must also put ourselves at that point of time.
2 The Union of India wanted these princely states to come into the fold. But at the same time we
3 gave them that assurance that you can today decide that you will give only certain subjects to
4 the Dominion Legislation.

5
6 **TUSHAR MEHTA:** So that can be My Lord, I think a better way of reading it. And that's
7 why Sardar Patel said that "the basic theme, the underlining theme would be mutual interest
8 and welfare."

9
10 **CHIEF JUSTICE DY CHANDRACHUD:** Just.. again aside, these Instruments of
11 Accession, the draft... was there a model draft?

12
13 **TUSHAR MEHTA:** Yes, that is coming My Lords next...

14
15 **CHIEF JUSTICE DY CHANDRACHUD:** That was prepared by the Department of States?
16 Or who prepared that draft?

17
18 **TUSHAR MEHTA:** Yes. That is next deal. That is next deal.

19
20 **CHIEF JUSTICE DY CHANDRACHUD:** Alright.

21
22 **TUSHAR MEHTA:** ...and that was common for all. Lord.... I'm sorry. The Subsection 3.
23 Learned AG My Lord, is guiding me to My Lords....

24
25 **CHIEF JUSTICE DY CHANDRACHUD:** So variation of the Instrument of... by
26 supplementary...

27
28 **TUSHAR MEHTA:** By a supplementary Instrument executed by him and accepted by the
29 Governor wherein the Instrument of Accession of his state by extending the functions which,
30 by virtue of that Instrument are exercisable by any dominion. So, he can forego, he can kind
31 of waive, or he can permit the dominion to do that. Lord Mountbatten, speaking to the
32 Chamber of Princes as Crown Representative on 25th July, negotiating Committee constituted
33 of ten rulers and twelve ministers of princely states. This apparatus had in fact been decided
34 upon after heated political debate. Full statement at so and so... My Lords I'm not reading it,
35 but note in this process, a model draft of Instrument of Accession was made. This draft is
36 signed by all princely states and Jammu and Kashmir, has not signed any Instrument of

1 Accession, either special or having any different version at this stage. Now My Lord, India
2 attained independence. Your Lordships would like to see the draft that would be....

3

4 **CHIEF JUSTICE DY CHANDRACHUD:** No. That's okay. That's alright. You need not
5 break the flow.

6

7 **TUSHAR MEHTA:** My Lord, page 23. After 15th August 1947, after Independence, Lord
8 Ismay on the recommendation of Lord Mountbatten went to Maharaja of Kashmir to persuade
9 him to choose one of the dominions. Then 27th September '47, Nehru wrote to Sardar Patel
10 claiming that the Pakistani strategy is to infiltrate Kashmir now and to take some big action as
11 soon as Kashmir is more or less isolated because of coming.... and these words proved to be
12 prophetic. This in fact happened, and as My Lord, it is pointed out subsequently. Then
13 Pakistan continued hit and run border raids in Kashmir. Then 2nd October '47, Sardar Patel
14 writes to Hari Singh, stating that Sheikh Abdullah will be coming to Delhi shortly and we shall
15 endeavour to reach a sensible solution to the difficulties you have from that quarter. That is
16 the quarter means the Sheikh, that you have some problem which are flagged by Sheikh
17 Abdullah ji so we will sort it out. Then Your Lordships would find 15-10-1947, Mehr Chand
18 Mahajan. My Lord, he was the Prime Minister of the then Kashmir, and incidentally he became
19 a judge of Federal Court, and My Lord, eventually got set in this court as Chief Justice of India.
20 Complained to the British Prime Minister that Government of Pakistan had doctored the
21 Standstill Agreement, which was between Kashmir and Pakistan, and the whole of state border
22 from Gurdaspur to Gilgit, was threatened with invasion which had already begun in Punjab. Then
23 Government of Jammu and Kashmir sent a protest letter to the Governor General and the
24 Prime Minister of Pakistan against breaches of the Standstill Agreement and the continuous
25 raids. Then Your Lordships can skip this. In the autobiography of Justice Mahajan this
26 incident is narrated that when he was traveling along with Maharaja of Kashmir, how his life
27 and the life of the King was saved My Lord, by a sheer coincidence of an intuition of the King,
28 that instead of this guest house, we may better stay in some other guest house. That's all My
29 Lord.

30

31 Then Your Lordships may kindly see 22nd October 1947. All out invasion of Jammu and
32 Kashmir started consisting allegedly of local tribesmen. The other side also repeatedly said
33 that there were tribe leaders who were conducting raids. I'll point out the contemporaneous
34 letter written by the King to the Government of India and My Lords Shri V. P. Menon. The
35 raiders destroyed the Uri Bridge and captured Mahura Powerhouse, which supplied electricity
36 to Srinagar, which plunged Srinagar into darkness. It was announced that they would reach
37 Srinagar within two days. Then 24th October '47, Government of India received a request for

1 help from Maharaja. Then 25th of October '47, the meeting of Defence Committee was held
2 presided over by Lord Mountbatten, wherein it was decided that the Home Secretary, Mr. V.
3 P. Menon, should fly to Srinagar immediately to study the situation on ground and report the
4 same to the Government of India. V. P. Menon landed in Srinagar and found the entire city
5 into, I quote, "oppressed by the stillness as the graveyard all around." Shri Menon met the PM
6 of Jammu and Kashmir, Sri Mehr Chand Mahajan, who appraised Shri Menon to the perilous
7 situation and pleaded the Government of India to come to the rescue of the State. Then 26
8 October '47. The next morning, Shri Mahajan called Shri Menon that there were rumours that
9 raiders had reached Srinagar. Shri Menon and Shri Mahajan flew back to Delhi. Shri Menon
10 went straight to the meeting of the Defence Committee and reported the impressions of the
11 situation and pointed out the supreme necessity of saving Jammu and Kashmir. It was pointed
12 out by Lord Mountbatten, that till the time Jammu and Kashmir does not accede to India, it
13 would be improper to move Indian troops. An accession would be the only basis which would
14 rightfully give the right to Indian forces to retaliate against the invasion of Kashmir. After the
15 meeting of the Defence Committee, Shri Menon and Shri Mahajan flew to Jammu and woke
16 up the Maharaja and informed him of the developments that had taken place in the Defence
17 Committee meeting. Maharaja desired to accede, reiterated his request for military help and
18 further informed his intention to set up an interim, responsible government. Then Your
19 Lordships may kindly come to this letter, sent by contemporaneous letters sent by the King to
20 Shri Menon, My Lord, that is Volume 1, Document Volume 1, page 7. This would be My Lord
21 relevant for Your Lordships' assistance. What were.... My Lord I am sorry. Document Volume
22 1, PDF 7.

23

24 **CHIEF JUSTICE DY CHANDRACHUD:** You have actually read this letter, where the
25 Maharaja says that he had not decided whether to be independent or join the dominion.

26

27 **TUSHAR MEHTA:** Only part, which was read My Lord, I would like Your Lordships to read
28 My Lords, at page 8. Two paragraphs which were...

29

30 **CHIEF JUSTICE DY CHANDRACHUD:** Yeah. He refers to the mass infiltration and other
31 things.

32

33 **TUSHAR MEHTA:** Kindly see the first. "The mass infiltration of tribesmen drawn from the
34 distant areas of North West Frontier coming regularly in motor trucks using Mansehra-
35 Muzaffarabad Road and fully armed with up to date weapons cannot possibly be done without
36 the knowing of the Provincial Government of North West Frontier Province and the
37 Government of Pakistan. In spite of repeated requests made by my Government, no attempts

1 have been made to check these raiders or stop them from coming to my state. The Pakistan
2 Radio even put out a story that the Provisional Government has been set up in Kashmir. The
3 people of my state, both the Muslims generally, have taken no part at all. With the conditions
4 obtaining at present in my state and to great emergency of the situation as it exists, I have no
5 option but to ask for help from the Indian Dominion. Naturally, they cannot send the help
6 asked for by me without my State acceding to the Dominion of India. I have accordingly
7 decided to do so and I attach the Instrument of Accession for acceptance by your Government.
8 The other alternative is to leave my State and my people to free looters. On this basis, no
9 civilized Government can exist or be maintained. The alternative I will never allow to happen
10 as long as I am the ruler of the State and I have life to defend my country.'

11

12 **CHIEF JUSTICE DY CHANDRACHUD:** So this letter is taken by Mr. Menon to Sardar
13 Patel, and the Maharaja said that he has instructed his ADC that if Menon comes back... if
14 Menon comes back, well and good. That means, then everything is according to plan.
15 Otherwise he said, "Shoot me when.." He told his ADC to shoot him dead when he was asleep,
16 he said. And he said if he comes back, don't wake him up.

17

18 **TUSHAR MEHTA:** Don't wake me up. Otherwise if he doesn't then shoot me because I
19 would not like to be shot by the enemy forces. That was the... That's how My Lord, the
20 beautifully sent letter. 'So long as there is a life in me, I'll defend my people.' Now My Lord, I
21 am coming back to page 26. Second... My Lords, that is accepted. The Instrument of Accession
22 is accepted. Then 22nd... 27th October 1947. Your Lordships have page 27.

23

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

25

26 **TUSHAR MEHTA:** Secondly, 27 October '47. 'A herculean airlift operation of Indian troops
27 was carried out in order to carry out the rescue operations in Jammu and Kashmir' - which we
28 continued till 2019. Now it has stopped. Possibly the only provision which is not only
29 mentioned to be temporary, but has been understood by all subsequent Parliament to be
30 temporary, has managed to continue for 75 years. 'The moment Jinnah heard that India has
31 accepted Jammu and Kashmir accession and Indian troops had been airdropped into
32 Kashmir, he gave orders to General Gracey, Acting Commander-in-Chief in Pakistan Army.
33 General Gracey represented his inability to issue any instructions without approval of the
34 Supreme Commander. Field Marshall so and so informed Jinnah that considering the fact that
35 Jammu and Kashmir had signed an Instrument of Accession, it would not be possible for
36 British officers serving in Pakistani Army to enter Jammu and Kashmir. Thereafter, Jinnah
37 invited Nehru to Lahore to discuss the Kashmir problem.' Now, how this is averted, the

1 diplomacy at its best. Mountbatten was eager to accept the invitation, and Nehru was inclined
2 to agree with Mountbatten. However, Sardar Patel was strongly opposed to the proposition on
3 the ground that Pakistan was the aggressor in this case and India ought not to follow the policy
4 of appeasing the aggressor. As there was a difference of opinion between Nehru and Patel, the
5 matter was referred to Gandhiji. Gandhiji called Nehru, Sardar Patel and Shri Menon to Birla
6 House. During the discussion it was found that Nehru was running a high fever and his going
7 to Lahore was out of question. It was decided that Lord Mountbatten should go alone.' My
8 Lord, V. P. Menon writes this. Without any value judgment, without giving his personal views
9 or comments, as a fact as it happened.

10
11 **KAPIL SIBAL:** Sometimes running high fever is also an act of diplomacy.

12
13 **TUSHAR MEHTA:** Yes, it is. And it was in this case. It was a diplomatic illness. And it was
14 required in the interest of the country. Absolutely right. That you should not go. They are
15 aggressors. And we shouldn't be.

16
17 **CHIEF JUSTICE DY CHANDRACHUD:** Sorry.

18
19 **RESPONDENT'S COUNSEL:** [UNCLEAR AUDIO]

20
21 **TUSHAR MEHTA:** It was a wrong [UNCLEAR] filed as that's what my learned friend is
22 trying to say.

23
24 **RESPONDENT'S COUNSEL:** He was ready to go to Pakistan. The cabinets were
25 [UNCLEAR] that it can't be that they are aggressor and our Prime Minister goes crawling to
26 Lahore to meet Jinnah.

27
28 **TUSHAR MEHTA:** Now please see, 16-12-1947 Sardar Patel.... I'm at page 27, My Lords.
29 Last date on that page, Sardar Patel issued a statement. 'Public has already received through
30 the press and over the radio and fairly clear and detailed picture of the settlement'... Your
31 Lordships can come to only the....

32
33 **CHIEF JUSTICE DY CHANDRACHUD:** Highlighted portion actually.

34
35 **TUSHAR MEHTA:** Underlined portion. 'Democratization of the Administration, which has
36 long been the keynote of Congress Policy towards the State, has become addressing problem
37 since August 15. The princes themselves have in many cases begun to realize the spirit of times

1 and have been gradually introducing measures in accordance in accord with that spirit. The
2 progress has been in some States, low in other it has been swift, but everywhere it has been
3 sure'. Your Lordships can thereafter, skip the rest. Then last lines on this My Lord, provincial
4 administration in this process of unification and amelioration so that they may derive the full
5 benefit of this great achievement. Then My Lord, white paper, I have just given the summary.
6 Before the Constitution of India came into force, a herculean task of unionization and
7 democratization ensuring local popular government in place of hereditary princes was going
8 on. For the same process Instrument of Accession and Standstill Agreement were signed.
9 Thereafter the policy was followed, which involved merging the smaller states that were not
10 seen by the Government of India to be viable administrative units, either into neighbouring
11 provinces or with other princely states, to create a Princely Union. It was felt that smaller states
12 lacked resources to sustain their economies and support their growing populations, imposed
13 tax rules and other restrictions, impeding free trade. And without integration, the economies
14 of the states would collapse, and anarchy would arise if the Princess were enabled... unable to
15 provide democracy and govern properly. Note: This was done despite the Instrument of
16 Accession and despite assurances given by the State Department and Lord Mountbatten
17 during the accession process.

18

19 There were, My Lord, provinces held up, as in one of the judgments referred to My Lord, but
20 that judgment is thereafter reconsidered, and I'll come to that. That these promises, after the
21 Constitution of India comes into force, have no meaning. It is is the Constitution which is
22 supreme and the only sovereign is "we the people of India." There is a judgment on this. In
23 December, '47 princes from the East India Agency and Chhattisgarh Agency, were summoned
24 to an all-night meeting with Menon, where they were persuaded to sign Merger Agreements,
25 integrating their States into Odisha, the Central Provinces, and Bihar. Thereafter, 66 States in
26 Gujarat and Deccan were merged into Bombay, including large states of Kolhapur and Baroda.
27 Other small states were merged into Madras, East Punjab, West Bengal, and United Provinces,
28 and Assam. 30 States of former Punjab Hill States Agency which lay near the international
29 border... My Lord.. similarly this continued to happen depending upon the geographical
30 situation but...

31

32 I'm not reading the examples, but there is one example My Lord, which is very, very striking
33 example. But there were many of this kind. Out of 506 plus princely states, about 200 plus
34 were only in one region of Gujarat, that is Saurashtra region. They formed United States of
35 Kathiawar. There was a separate country which functioned for some time and thereafter
36 merged. But they signed a Treaty of Accession. Kindly have a look at the Treaty of Accession,
37 page 30. The Revised Treaty of Accession. Sorry, sorry. Revised Instrument of Accession. The

1 purpose of my showing is this. Like Jammy and Kashmir, every princely state had put their
2 own conditions. But eventually, the theory of Act of State and Article 363 that all treaties etc.
3 gets subsumed in one document, namely the Constitution of India. Please see page 30, the
4 highlighted part. 'That all subjects except matters relating to taxation.' That those princely
5 states said that taxation will be our subject, you will not touch... the Union of India...the
6 Dominion of India will not touch taxation. Please come to page 31. After 3, the proviso... does
7 My Lord get it? Page 31. It is a part of the Revised Instrument of Accession, Clause 3 proviso.
8 My Lord, Justice Surya Kant has it?

9

10 **JUSTICE SURYA KANT:** Yes.

11

12 **TUSHAR MEHTA:** 'Provided that nothing contained in the said list or in any other provision
13 of the act shall be deemed to empower the Dominion Legislature to impose any tax or duty in
14 the territories of the United States.' United States means United States of Kathiawar.

15

16 **JUSTICE SURYA KANT:** Kathiawar.

17

18 **TUSHAR MEHTA:** 'Or to prohibit the imposition of any duty or tax by the Legislature of
19 the United States in the said territories.' Please come to page 32. There are two clauses. This
20 is to show every state had put their conditions. 7, My Lords, Clause 7. This is again part of the
21 Revised Instrument of Accession. 'Nothing in this Instrument shall empower the Dominion
22 Legislature to make any law for the United States, authorising the compulsory acquisition of
23 land for any purpose, but subject the dominion for the purpose of a Dominion Law, which
24 applies in the United States, deem it necessary to acquire any length. The Rajpramukh of the
25 United States shall, at the request and at the expense of Dominion Government, acquire the
26 land, or if the land belongs to the United States, transfer it to them on such terms as may be
27 agreed or in default of agreement determined by an arbitrator so and so, so and so.' The
28 princely state remain even after independence they were called Rajpramukhs, even after the
29 federal units, namely the states, the Governor...

30

31 **CHIEF JUSTICE DY CHANDRACHUD:** Until 1956 Amendment

32

33 **TUSHAR MEHTA:** '56.

34

35 **CHIEF JUSTICE DY CHANDRACHUD:** Then the Rajpramukhs were abolished and we
36 had the Governor.

37

1 **TUSHAR MEHTA:** <UNCLEAR> became the governance, not princely state. But 8 -
2 'Nothing in this Instrument shall be deemed to commit the United States in any way to
3 acceptance of any future Constitution of India.' This is not in Jammu and Kashmir. It is
4 reverse, I'll show. But they say - I am not admitting that I'll accept the future Constitution of
5 India in any way to acceptance of India, or to fetter the discretion of the Government of United
6 States to enter into agreements with the Government of India under any such future
7 Constitution.

8

9 **CHIEF JUSTICE DY CHANDRACHUD:** The only difference was that this Constitutional
10 history led to the ultimate integration in every sense of the other States, like Kathiawar,
11 Saurashtra, Baroda since they didn't follow the 370 route. Because for J&K the Constitution
12 decided to go to 370. The other states, there is no provision like 370. They merged and they
13 were integrated completely. They accepted list one. They accepted list three. They accept...
14 they accepted the ultimate dominion powers, Executive and Legislature of the Dominion of
15 India.

16

17 **TUSHAR MEHTA:** I'm just showing this with a view to make one point that stand, which is
18 now being taken and which has been taken, that we had a special feature, and therefore we
19 were given a special treatment. And therefore, this provision is kind of a privilege given to us,
20 which can never be taken away. My Lord, I'm just trying to show that there were many
21 similarly situated princely states. They had also put their conditions, but eventually they
22 subsumed themselves with the Union of India because of the act of State Doctrine and because
23 of Article 363 and Article 1. But I'll, I'll My Lord, one more thing...

24

25 **CHIEF JUSTICE DY CHANDRACHUD:** They came into the Indian Union as a volition.
26 They joined voluntarily. I mean, we will take it as voluntarily. There may have been a little bit
27 of persuasion, may have been whatever.

28

29 **TUSHAR MEHTA:** Persuasion. [UNCLEAR]

30

31 **CHIEF JUSTICE DY CHANDRACHUD:** Obviously, no difficulties. And that is probably
32 the genius of Sardar Patel. There is no doubt about it. But the fact however, remains that in so
33 far as J&K is concerned, J&K bucked that trend. J&K went to the 370 route. So...

34

35 **TUSHAR MEHTA:** But why, how and till what time? That will come My Lord subsequently.
36 And that's why My Lord, for me, as I stated at the outset, connecting the dots would be
37 necessary.

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CHIEF JUSTICE DY CHANDRACHUD: So the limited point which you are making at this stage is that the Instruments of Accession of various princely states contains certain reservations. Now we have seen in regard to taxation, in regard to land acquisition...

TUSHAR MEHTA: Binding Constitution.

CHIEF JUSTICE DY CHANDRACHUD: Not binding themselves to accepting a future Constitution. So the IoAs at that point of these states were hedged with various conditions.

TUSHAR MEHTA: This is also...

CHIEF JUSTICE DY CHANDRACHUD: But that is consistent with Section 6 of the Government of India Act which was adopted by Section 9 of the Indian independence Act. We gave this SOP to the princely rulers, that look, you come here on your terms. we are not telling you today to come on our terms. You agree to the Indian Union. You make reservations. And we hope that by and by, you will accept full integration into the Union. Which they did.

TUSHAR MEHTA: Another point why I wish Your Lordships to be made aware of this development is, there was an argument that Instrument of Merger was a necessary attribute for a complete integration. Otherwise, we had kind of an internal sovereignty. Your Lordships would recall that Jammu and Kashmir never signed Instrument of Merger. Many States did not sign Instrument of Merger. From the date on which Constitution of India came into force, and Article 1 came into force as an Act of the state, they became an integral part of Union of India. And how Jammu and Kashmir were separated, My Lord, and how it was only for a temporary period would succinctly come My Lord in subsequently.

CHIEF JUSTICE DY CHANDRACHUD: Interestingly, Mr. Solicitor, this department of states, which existed in the Ministry of Home Affairs post 1950, after the 7th Amendment. The 7th Amendment right? 1956.

TUSHAR MEHTA: 238 was the..

CHIEF JUSTICE DY CHANDRACHUD: So, the department of states must have been abolished post 1956. You will be still having records in the Ministry of Home Affairs?

1 **TUSHAR MEHTA:** I'm sorry. My instructions are not there. The officer sitting My Lord was
2 the Additional Secretary In Charge of Jammu Kashmir in NHA. He said that department
3 technically still continues.

4

5 **CHIEF JUSTICE DY CHANDRACHUD:** The Department of State still continues. Now do
6 we have, I'm not sure about this, can exercise can be done? Just for, I mean you don't have to
7 do it by very detailed document, but just a tabulation. If you can have a list of the states and
8 we can have say, Kathiawar, Instrument of Accession, supplementary Instrument of Accession
9 and Merger Agreement. Which of the states came into the union with a Merger Agreement,
10 which of the states had no Merger Agreement at all and yet joined the union? I don't know
11 whether, that now at this point of time that record would be there. If you can, if you can try, if
12 you can...

13

14 **TUSHAR MEHTA:** To a large extent white paper indicates My Lord what happened.

15

16 **CHIEF JUSTICE DY CHANDRACHUD:** I don't know if you have that record. I mean, how
17 many out of these 562 who actually joined the Indian Union, the Union of India, actually
18 executed Merger Agreements. What I meant was how many of these states, which joined the
19 Union of India, did not execute Merger Agreements? That would be a smaller group probably.

20

21 **TUSHAR MEHTA:** Possibly, possibly.

22

23 **CHIEF JUSTICE DY CHANDRACHUD:** So, which will then perhaps give some support
24 to your argument that the execution of a Merger Agreement was not quintessential to
25 acceptance of ultimate sovereignty by India and second, many states, many princely states
26 were subsumed with the Union of India, even without a Merger Agreement. And various states,
27 therefore, were subsumed in the Union of India only with an Instrument of Accession.

28

29 **TUSHAR MEHTA:** We'll do that exercise. Substantially everything is there in the white
30 paper. But if there is something else also My Lords...

31

32 [NO AUDIO]

33 **KAPIL SIBAL:** All 562 states were not independent. What happened was there were small
34 little principalities, small nawabs. They got into larger...

35

36 **CHIEF JUSTICE DY CHANDRACHUD:** They were just in fact, Brother Surya Kant was
37 giving us a little backdrop about Punjab and Himachal...

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KAPIL SIBAL: Integration with the larger state and the larger one is finally the instrument of the merger.

CHIEF JUSTICE DY CHANDRACHUD: Right, but we were wondering, was it possible because Mr. Sibal what we want is a little bit of factual...

TUSHAR MEHTA: I have understood My Lords.

CHIEF JUSTICE DY CHANDRACHUD: Factual clarity, factual clarity that may have, were there Indian States, we shouldn't call them Princely States because as Mr. Sibal says some of the small Nawabs from the princely...

TUSHAR MEHTA: We will have to say Princely States because Indian State would mean those with...

CHIEF JUSTICE DY CHANDRACHUD: Governor's Provinces

TUSHAR MEHTA: Sovereignty or suzerainty of British India. That's how it has....

CHIEF JUSTICE DY CHANDRACHUD: They were the Governor's provinces.

KAPIL SIBAL: That's right, that's right.

CHIEF JUSTICE DY CHANDRACHUD: No, we just want to know this.

TUSHAR MEHTA: We will undertake this.

CHIEF JUSTICE DY CHANDRACHUD: Again to sort of repeat two things, which were the states which accepted completely to be subsumed within the Union India, without merger agreements and followed only the IoA course and straight came into the Union of India.

DINESH DWIVEDI: There was no such instrument with due respect. It was just the white paper which is part of the record. White paper was issued by Sardar Patel [UNCLEAR]

TUSHAR MEHTA: I will formulate that. I have understood the question.

1 **CHIEF JUSTICE DY CHANDRACHUD:** You know Mr. Sankaranarayanan I just thought,
2 since the department of state, since the department of states exists even today, there's
3 something this would be, they might take a day or two days, but they'll be able to give it.

4

5 **TUSHAR MEHTA:** It would be My Lord, it would be done that exercise.

6

7 **GOPAL SANKARANARAYANAN:** A table layout of the states which have not entered into
8 a merger, it is helping your point, factually if you want a list of states, which have not....

9

10 **CHIEF JUSTICE DY CHANDRACHUD:** What is the source, what is the source of your
11 table?

12

13 **GOPAL SANKARANARAYANAN:** It's from the white paper.

14

15 **TUSHAR MEHTA:** White paper, there are inadequacies I will put it that way...

16

17 **CHIEF JUSTICE DY CHANDRACHUD:** So there are states which did not accept the
18 merger, and yet became a part of the Indian Union.

19

20 **GOPAL SANKARANARAYANAN:** State of Mysore, State of Mysore, State of Saurashtra,
21 pre-independence, Madhya Bharat, Patiala, and East Punjab.

22

23 **TUSHAR MEHTA:** This is?

24

25 **GOPAL SANKARANARAYANAN:** This is not from the white paper. There is a chart.

26

27 **TUSHAR MEHTA:** We will My Lord, let's not deviate from this. I have taken the point.

28

29 **JUSTICE SANJAY KISHAN KAUL:** The point is that there were other states, basically
30 whether it was 2,3,4,5, whatever, there were other states which did not sign the Merger
31 Agreement.

32

33 **TUSHAR MEHTA:** Yes, there was nothing special which is being claimed.

34

35 **JUSTICE SANJAY KISHAN KAUL:** That's your point.

36

1 **TUSHAR MEHTA:** And second, that merger was such a *sine qua non* without which you can
2 never be an integral part of India, either under Article 1 or otherwise, or your special status
3 must continue. But please My Lords....

4

5 **CHIEF JUSTICE DY CHANDRACHUD:** So in other words Mr. Solicitor, to sort of
6 paraphrase your submission, it's twofold. First the expression of reservations in the
7 instrument of accession was not unique to the instrument of accession which were executed
8 by Maharaja Hari Singh.

9

10 **TUSHAR MEHTA:** I couldn't put it.... that's right.

11

12 **CHIEF JUSTICE DY CHANDRACHUD:** To the execution of a merger agreement was not
13 a *sine qua non* to be absorbed or become a part of the Indian Union. It's a twofold submission.
14 We got the point.

15

16 **TUSHAR MEHTA:** So, please come to para 30, page 32 bottom, my notes. Note 1. The
17 assertion of the petitioners that all others signed the Instrument of Merger except State of
18 Jammu and Kashmir is false. Several states signed revised Instruments of Accession, including
19 therein different conditions, etc. I have seen. Neither this process of integration, unionization
20 linear in its legal application nor assurances or negotiations remained sacrosanct while
21 framing the Constitution of India and making of this great nation as Union of India. There
22 were States which did not sign revised Instrument of Accession or Merger Agreement, also
23 joined as part of Union of India. The same thing My Lords were indicating as, as and when
24 such inclusion of the state took. Their representative kept on being included in the Constituent
25 Assembly and Schedule 1 kept on being amended adding each state. Once the Constitution of
26 India came into being on 26th January '50, all states mentioned in Schedule 1 being part of
27 Union of India losing their sovereignty, if any, which was an Act of State and this is how
28 countries are formed. With coming into force of the Constitution of India, only the
29 Constitution remained the supreme document vesting sovereignty in the people of India, and
30 all other documents got subsumed in one sacred document, that is, the Constitution of India.
31 Thereafter, no princely state has successfully asserted its claim based upon any previous
32 document, be it Instrument of Accession, revised Instrument of Accession or merger
33 agreements. The princely states also retained their right to not commit to the future
34 Constitution. However, the application of Indian Constitution through Article 1 was not
35 dependent upon the same.'

36

1 Then 2 My Lords, Your Lordships can skip. Kindly come to page 34. My learned friend want
2 me to read. 'The Instrument of Accession had its source in Section 5 and 6 of the Government
3 of India Act.' I'm sorry. My learned friend is right. I should have. 'There is no statutory source
4 of merger agreement and they were only signed in some cases as a result of negotiations
5 between some states and Dominion of India.' It seems it's more because of binding the princely
6 state not to go back from its word that they were signed. It doesn't have any statutory source
7 like Instrument of Accession.

8

9 Then My Lord, 34. 4-11-48. The draft Constitution was introduced in the Constituent
10 Assembly. Upon its introduction, Dr. Ambedkar gave a speech outlining how...'- My Lord
11 Justice Gvai was referring to the - 'outlining how the Constitution was meant to function, and
12 how governance under the Constitution was to be conducted. Notably, Dr. Ambedkar made
13 clear..' - Please come to Volume CCD8, I'll read only two paragraphs, not the entire speech,
14 because a part was read. Part which was not read, I would wish Your Lordship's attention is
15 invited. CCD Volume 8, PDF page 63 at 75.

16

17 **JUSTICE SANJAY KISHAN KAUL:** Documents volume?

18

19 **TUSHAR MEHTA:** Document Volume 8, PDF page at 75. It starts at 64, at 75. Only one para
20 My Lord, which was not read, therefore I'm reading it. Because according to me this is the
21 heart of what Dr. Ambedkar felt.

22

23 **CHIEF JUSTICE DY CHANDRACHUD:** 2936

24

25 **TUSHAR MEHTA:** 2936. Yes, My Lord. Running page 2963. Unnumbered second Para.
26 'Some critics..' Your Lordships have it?

27 'Some critics have taken objection to the description of India in Article 1 of the draft
28 Constitution as a Union of States. It is said that the correct phraseology should be a Federation
29 of States. It is true that South Africa, which is a unitary state, is described as a Union, but
30 Canada, which is a Federation is also called a Union. Thus, the description of India as Union,
31 though its Constitution is federal does no violence to usage. But what is important is that the
32 use of the word Union is deliberate. I do not want to... I do not know why the word Union was
33 used in the Canadian Constitution. But I can tell you why the drafting committee has used it.
34 The drafting committee wanted to make it clear that though India was a Federation,
35 Federation was not the result of an agreement by the states to join in a Federation and that the
36 Federation not being the result of an agreement, no state has the right to secede from it. The
37 Federation is a Union because it is indestructible. Though the country and the people may be

1 divided into different States for convenience of administration, the country is one integral
2 whole. It's people, a single people living under a single imperium, derived from a single
3 source.' This is the heart and soul of Article 1.

4

5 **JUSTICE B.R. GAVAI:** It is also referred in his speech of 25th November 1949.

6

7 **TUSHAR MEHTA:** Yes. Last closing.

8

9 **JUSTICE B.R. GAVAI:** Last speech. He said that our Constitution is unique. It's Federal at
10 the same time Unitary.

11

12 **TUSHAR MEHTA:** It is. It will come in the chronology.

13

14 **CHIEF JUSTICE DY CHANDRACHUD:** This speech of Dr. Ambedkar also lays that the
15 distinction between a Constituent Assembly and Parliament. The bottom of that page....

16

17 **TUSHAR MEHTA:** Yes. That was read by Mr. Sibal. Therefore, I missed. I can go to that.

18

19 **CHIEF JUSTICE DY CHANDRACHUD:** No. No. That's right.

20

21 **TUSHAR MEHTA:** But this was not read. I'm not repeating what was read.

22

23 **CHIEF JUSTICE DY CHANDRACHUD:** Yes, absolutely.

24

25 **TUSHAR MEHTA:** Then Your Lordships may come to the date 16th June 1949. Sheikh
26 Abdullah joins the Constituent Assembly alongside three other representatives from the State
27 of Kashmir, namely Mirza Mohammed Afzal Baig, Maulana Muhammad Syed Masoodi and
28 Motiram Bagda. Now My Lords may kindly see the territorial integration. My Lord, this is the
29 part of the white paper. Mr. Sibal, My Lord read up to a particular point. I would like Your
30 Lordships to read further. Therefore, I have quoted in full. 'Territorial integration. One of the
31 important consequences of the adoption of the new Consti...' Does Your Lordships get?

32

33 **CHIEF JUSTICE DY CHANDRACHUD:** Yes, yes.

34

35 **TUSHAR MEHTA:** 35 My Lord. I am reading.' One of the important consequences of the
36 adoption of the new Constitution is completion of the process of territorial integration of the
37 states. The states, geographically contiguous to the Dominion of India as they existed before

1 the Constitution of India became operative, could be divided into two main categories. One,
2 the acceding states and two, the non-acceding states. There were only two non-acceding states,
3 namely Hyderabad and Junagarh. The acceding states could be subdivided into the following
4 groups:

5 A) states which were not affected by the process of integration and continued as separate units,
6 i.e. Mysore and Jammu & Kashmir.' This was read by the learned counsel.

7 B) Union of States.

8 C) Centrally merged states.

9 D) Provincially merged states and

10 E) Khasi Estate Federation.

11 Please read My Lord further. This My Lord, I think required to be read. 'Under the new
12 Constitution, all the constituent units...' My Lord, this is new Constitution Article 1, Schedule
13 1. Under the new Constitution, all constituent units, both provinces and states, the latter term
14 includes non-exceeding states have to be classified into three classes, that is Part A states
15 which correspond to the former governance provinces directly under sovereignty or
16 suzerainty. Part B states, which comprises the unions of state and the states of Hyderabad,
17 Mysore, and Jammu and Kashmir and Part C states, which correspond to the former Chief
18 Commissioner's Provinces, which became UT thereafter. The new Constitution affects the
19 territorial integration of states by means of twofold process. Firstly, Article 1 of the
20 Constitution defines the territories of India to include the territories of all the states specified
21 in the First Schedule, including Part B states. This is an important departure from the scheme
22 embodied in the Act of 1935, in that while Section 311(1) of that Act defined India to include
23 British India, together with all territories of Indian rulers. The Act did not define territories of
24 Indian Federation. Secondly, with the, please note this My Lord. Secondly, with the
25 inauguration of the new Constitution the merged states have lost all vestige of existence as
26 separate entities. That is My Lord, First Schedule to the Constitution. Thereafter Your
27 Lordships can skip.

28
29 Your Lordships may come to 08-08-49. This is how My Lord, you retain your sovereignty. I
30 have given an example, that internal and external sovereignty. For example, we have a... I'm
31 sorry My Lord. I missed one. July '49, My Lord, kindly see July '49. Note by the Ministry of
32 States regarding the Indian states, it was specifically noted that Jammu and Kashmir would
33 be treated as a part of Indian territory. Please read only first para. This note was before the
34 Constituent Assembly. We have checked that. The Government of India have considered the
35 matter in its various aspects and are of the opinion that in view of the present peculiar situation
36 in respect of Jammu and Kashmir state, it is desirable that the accession of the state should be
37 continued on the existing basis till the state could be brought to the level of other states. Idea

1 was prevailing situation then not Instrument of Accession or lack of merger, etc. The prevailing
2 situation then, idea was to bring it at par with other states. And the important part, a special
3 provision has therefore to be made, in respect of this state on the basis suggested above, as a
4 Transitional Agreement, Arrangement. This was the promise My Lord, by the Constitutional
5 Assembly to the Nation, that as a Transitional Arrangement we are making a provision, a
6 departure from other states. Second My Lord, is 08-08-49. Your Lordships can skip.

7

8 **JUSTICE B.R. GAVAI:** Mr. Solicitor?

9

10 **TUSHAR MEHTA:** Yes, My Lord.

11

12 **JUSTICE B.R. GAVAI:** You may read little below that also. The Ministry of States....

13

14 **TUSHAR MEHTA:** Yes, the Ministry of State suggests for consideration of the drafting
15 Committee the following approach to this question (1) Jammu and Kashmir State may be
16 treated as part of Indian territory and shown in States specified in part 3 of Schedule 1. I am
17 obliged My Lord, I am going a little fast.

18

19 **JUSTICE B.R. GAVAI:** Go further on.

20

21 **TUSHAR MEHTA:** A special provision may be made in the Constitution to the effect that,
22 until Parliament provides by law that all provisions of the Constitution applicable to the state
23 specified in Part 3 will apply to this State, the power of Parliament to make laws for the state
24 will be limited to the item specified in the Schedule, to the Instrument of Accession till
25 Parliament makes the law, governing the accession of the State to the Dominion of India, or
26 to corresponding entries in List 1. This is very important. I missed it, I'm really grateful My
27 Lord. Then My Lord 08-08-49 is just an example of how to retain your sovereignty, that is
28 Bhutan. Bhutan has a treaty with us, contemporaneously signed in '47, 50s'. That is '49, 08-
29 08-49, where My Lord, in external affairs, India has suzerainty we don't have sovereignty.
30 They are sovereign. But we have the.... 12-10-49 in a speech to the Constituent Assembly,
31 Sardar Patel stated that although the initial policy of the government was to permit States to
32 have a separate Constitution, this idea had now been dropped as a legacy from the rulers and
33 the polity and that in a people's polity there was no scope for variegated constitutional
34 patterns. We therefore discussed this matter with the premiers of various unions, unions
35 means the princely states, My Lords, association kind of thing and decided with their
36 concurrence that the Constitution of the State should also form an integral part of the
37 Constitution of India. The natural implication of this statement is twofold that Article 370 was

1 a temporary nature, was of a temporary nature and that it was meant to last only until the
2 disturbed situation in Jammu and Kashmir was normalized. Now My Lord is interesting. Draft
3 Article 306(5) Gopaldaswami Ayyangar had discussed the position of Draft Article 370 in detail
4 with Pandit Nehru before his departure to United States. Generally speaking when we go
5 through, Gopaldaswami takes the line which Pandit Nehru wants him to take, and there is some
6 difference of views between Sardar Patel and Nehru on this issue. Principled differences.
7 However, there was strong opposition in the Indian National Congress for giving any special
8 provision. The same has been noted as under, in my reminiscences of Sardar Patel by Vishnu
9 Shankar. My Lord, Vishnu Shankar was the Principal Secretary to Sardar. He was Secretary
10 (Kashmir) in those days and rose to become the Cabinet Secretary. His version is considered
11 to be one of the authentic versions of what transpired during that period. Please read My Lord,
12 what he says. 'In the party, there was a strong body of opinion which looked askance at any
13 suggestion of discrimination between Jammu and Kashmir State and other states as members
14 of the future Indian Union, and was not prepared to go beyond certain limits in providing for
15 the special position of Jammu and Kashmir. Sardar was himself fully in accord with this
16 opinion, but due to his usual policy of not standing in the way of Pandit Nehru and
17 Gopaldaswami Ayyangar, who sorted out problems in their own line, he had kept his own views
18 in the background. In fact, he had not taken any part in framing the draft proposals with the
19 results that he heard the proposals only when Gopaldaswami Ayyangar announced them to the
20 Congress Party. The announcement was followed by a storm of angry protest from all sides,
21 and Gopaldaswami Ayyangar, found himself a lone defender, with Maulana Abul Kalam Azad,
22 an ineffective supporter. Metaphorically the situation may be succinctly described by saying
23 that both Gopaldaswami Ayyangar and his proposal were torn to pieces by the party.'

24

25 Now 'J&K was included in Part 3 States under Article 1, and its territories were defined as the
26 territory which comprised of the corresponding Indian State immediately before the
27 commencement of the Constitution.' Then, My Lords, I have given the list Your Lordships can
28 skip. Please come to 15-10-49. Four seats were allocated in the Constituent Assembly to
29 Kashmir. The debate is quoted as under. Please come to page 39 somewhere in the... after the
30 figures, 'The foregoing paragraphs have dealt with changes in the numerical strength of the
31 Constituent Assembly and in its representative character. That was, however, a series of
32 changes of a different kind in the representation accorded to the Indian States, which deserves
33 separate mentions. While the Constituent Assembly was in session holding its deliberations
34 between December '46 and November '49, many of the smaller states were merged in
35 provinces. Many others were United to form United Union of States, and some were directly
36 administered by the Centre as Chief Commissioner's Provinces. These changes necessarily
37 called for a readjustment of representation of states from time to time. The general plan

1 adopted was as follows. The states were merged in provinces. The Speaker of the Legislative
2 Assembly of the province was authorized to hold elections and by elections wherever
3 necessary, and notify the person or persons elected or nominated.'

4 (2) 'Where the States were United to form United Union of States' - like United States of My
5 Lord, Kathiawar - 'and in case of Hyderabad, Mysore and Jammu and Kashmir, the
6 Rajpramukh, or the Ruler of the State, was entrusted with this function.' Function of selecting,
7 not obviously electing.

8 And (3) 'In case of states constituted into Chief Commissioner's Provinces, this function was
9 entrusted to the Chief Commissioner, so far as allocation is concerned.'

10 Kindly come to the next, My Lord this is a very, very important letter in my respectful
11 submission and from my perspective. 16-10-1949. 'On the evening of introduction of draft
12 Article 306-A, that is erstwhile 370. After Gopaldaswami Ayyangar shared the draft of the
13 Article, Sardar Patel wrote a scathing letter to him, making his position clear as under. 'My
14 dear Gopaldaswami, thank you for your letter dated so and so, which I received only this
15 afternoon on my return from Constituent Assembly. I find there are some substantial changes
16 over the original draft, particularly in regard to applicability of fundamental rights and
17 directive principles of state policy. You can yourself realize the anomaly of the state becoming
18 a part of India, and at the same time...'

19

20 'You can yourself realize the anomaly of the state becoming part of India, and at the same time
21 not recognizing any of these provisions.' And I'll show till 7'6, Article 21 was applicable in a
22 truncated way. Article 19. There was a Sub-Article added as it applied to Jammu & Kashmir
23 that the reasonable restrictions would be those which will be prescribed by the Legislature.
24 Meaning thereby, the persons against whom citizens invoke Article 19 would decide what
25 would be the reasonable restrictions. I'll come to that.

26 'I do not at all like any change after our party has approved of the whole arrangement in
27 presence of Sheikh Sahib himself. Whenever Sheikh Sahib wishes to back out, he always
28 confronts us with his duty to the people. Of course, he owes no duty to India or to the Indian
29 Government, or even on a personal basis to you and the Prime Minister who have gone all out
30 to accommodate him. In these circumstances, any question of my approval does not arise. If
31 you feel it is the right thing to do, you can go ahead.'

32 Clear. No ambiguity, no...

33

34 Then My Lord next date. Then My Lord, Jammu & Kashmir was... received four
35 representatives. Then My Lord, seven... I am on page 40. Yes My Lord, 17-10-1949, Draft
36 Article 306(A) which is a present Article 370 was debated in the Constituent Assembly.
37 Gopaldaswami Ayyangar who was chiefly involved in the drafting of Article 370, gave a speech

1 in which he stated that regard to the accession of the state that, kindly see My Lord only the
 2 highlighted part. As the House is also aware, at page 40... "As the House is also aware,
 3 Instrument of Accession will be a thing of the past in the new Constitution. The states have
 4 been integrated with the Federal Republic in such a manner that they do not have to accede or
 5 execute a document of accession for the purpose of becoming units of the republic." Please
 6 mark this My Lords. "But they are mentioned in the Constitution itself, and in case of
 7 practically all states other than the State of Jammu and Kashmir, their Constitutions also have
 8 been embodied in the Constitution for the whole of India. All those other states have agreed
 9 to integrate themselves in that way and accept the Constitution provided." Maulana Hasrat
 10 Mohani. 'Why this discrimination please?'

11
 12 Now just pausing here for a minute, so that My Lords, the debate doesn't get boring. Maulana
 13 Hasrat Mohani was an eminent Urdu lyricist of his time. And all of us, most of us have heard
 14 *chupke chupke raat din aansoon bahana yaad hai*. That is by Maulana Hasrat Mohani. I don't
 15 want to sing it. I know my limitations and I'll spare all of you. On the lighter side. Then My
 16 Lord, there are several good lyrics, good Urdu ghazals and *nazms* written by Maulana Hasrat
 17 Mohani. Yes, yes. The question is very important, that why are we discriminating from people
 18 of one state and people of other. Your Lordships would be shocked when I show the
 19 discrimination. We have analysed My Lords, how the provisions were selectively picked up,
 20 modified and applied to one state. And I am not saying that my power is taken away or state's
 21 power is taken away. So far the residents of Jammu and Kashmir were being deprived of what
 22 I will show to Your Lordships, till '19, till 5th of August 2019. The Honourable Shri N
 23 Gopaldaswami Ayyangar, he replies. 'The discrimination is due to special conditions of
 24 Kashmir. That particular state is not yet ripe for this kind of integration. It is the hope of
 25 everyone here that in due course even Jammu and Kashmir will become ripe for the same sort
 26 of integration as has taken place in case of other states. Cheers. At present it is not possible to
 27 achieve that integration. There are various reasons why this is not possible.' Now I shall refer
 28 again to this letter. Please note My Lord, that after acceptance of 370, B. Shankar expressed
 29 his disappointment at the passing of the special provision. Sardar Patel summoned him to
 30 lunch. The description of the same meeting In My Reminiscences of Sardar by Vishnu
 31 Shankar... his Principal Secretary, who was Secretary Jammu and Kashmir, and became the
 32 Cabinet Secretary. Please note My Lord, read one by one, beautiful words. 'As soon as I was
 33 seated, Sardar spoke. So you are annoyed with me for having accepted Gopaldaswami's formula.
 34 I queried, that if he felt that way, why did he not indicate his mind earlier? He said, I was...'
 35 See the My Lords, maturity of the man and the statesmanship. 'I was deeply concerned at the
 36 situation. Gopaldaswami had acted under Panditji's advice. If Jawaharlal were here, we could
 37 have had it out of him. But how could I do so with Gopaldaswami, who was only acting under

1 orders? If I did, people would have said that I was taking revenge on his confidence when he
2 was away. Gopaldaswami had appealed to me for help. How could I have let him down in
3 absence of his chief? Since my Prime Minister is not present, I'll not let him down, since my
4 Prime Minister is outside, out of the country. I then asked why he had let down the country
5 and other States whose Constituent Assemblies had been scrapped in accordance with his
6 advice and policy. He conceded the validity of the criticism, but pointed out that delicate
7 international position of the state and the issue of his relationship with India. We felt that the
8 present situation had to be tide over without giving up the eventuality. And this had been done
9 under the formula.' Please note this My Lord. This only Sardar could have spoken and now it
10 has proved to be prophetic. He said that after all neither Sheikh Abdullah nor Gopaldaswami
11 was permanent. The future would depend on the strength and guts of the Indian government.

12

13 **KAPIL SIBAL:** This is not a political...

14

15 **TUSHAR MEHTA:** And if we cannot have confidence in our strength, we do not deserve to
16 exist as a nation.

17

18 **CHANDER UDAY SINGH:** If I may just seek the permission of the Learned Solicitor
19 General, we were all told on 3rd of July to file all documents [UNCLEAR]

20

21 **TUSHAR MEHTA:** Again My Lords these...[UNCLEAR].

22

23 **JUSTICE B.R. GAVAI:** Mr. CU Singh....

24

25 **CHIEF JUSTICE DY CHANDRACHUD:** Mr. Singh, let him continue, I mean what's the....

26

27 **JUSTICE B.R. GAVAI:** When your side argued there was no interruption from either the
28 Attorney or the Solicitor..

29

30 **TUSHAR MEHTA:** Many of them provided additional documents, additional judgements,
31 we never objected

32

33 **CHIEF JUSTICE DY CHANDRACHUD:** But... these are well established, well known....

34

35 **JUSTICE SANJAY KISHAN KAUL:** Why such sensitivity over some statements which
36 comes, which should not be palatable.

37

1 **CHANDER UDAY SINGH:** [UNCLEAR]

2

3 **CHIEF JUSTICE DY CHANDRACHUD:** Mr. Singh, equally we know that when we decide
4 the matter we have to give primary importance to primary sources such as the statutes, the
5 Instruments of Accession. These are other documents which he is relying on to the extent of...

6

7 **TUSHAR MEHTA:** [UNCLEAR] was not even born when all this happened.

8

9 **CHANDER UDAY SINGH:** [UNCLEAR] It's extract put in a list of dates.

10

11 **TUSHAR MEHTA:** I didn't object to Noorani. It's a one sided thing.

12

13 **JUSTICE B.R. GAVAI:** Your Nodal Counsel argued that he received it Sunday evening?

14

15 **CHANDER UDAY SINGH:** I am sorry.

16

17 **JUSTICE B. R. GAVAI:** Your Nodal Counsel agreed in the morning that he received it long
18 back but he did not circulate it amongst you all.

19

20 **TUSHAR MEHTA:** On Sunday, last Sunday My Lords.

21

22 **CHANDER UDAY SINGH:** I am just saying there are extracts from a book in a list of dates.
23 The book is not on record. It's not a document before Your Lordships.

24

25 **TUSHAR MEHTA:** We will give copies of that.

26

27 **CHANDER UDAY SINGH:** That's not the point. I mean it just keeps getting enlarged. I'm
28 only saying that let's stick to the record.

29

30 **TUSHAR MEHTA:** If A. G. Noorani can be read even a newspaper can be read. I'm sorry.
31 I'm saying this with seriousness. I have read A G Noorani, it is a one sided. but we did not
32 object.

33

34 **CHIEF JUSTICE DY CHANDRACHUD:** That's all right Mr. Solicitor, you don't have to
35 go that far.

36

37 **TUSHAR MEHTA:** Now My Lord, I am on page...

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CHIEF JUSTICE DY CHANDRACHUD: Mr. Singh, all that this really indicates. It's not like conclusive evidentiary material. This is used to demonstrate that there were different points of view, different perspectives, which were flowing in at that time.

CHANDER UDAY SINGH: [UNCLEAR]

KAPIL SIBAL: The historical perspective of what people felt at that particular...

TUSHAR MEHTA: There are several things mentioned....

KAPIL SIBAL: The dialogue that was taking place, where one side was expressing one view the other side was strongly opposed to it. Ultimately, we have to interpret the provision of the Constitution how this all came about. That's all that we are....

JUSTICE B.R. GAVAI: Mr. Sibal you also referred to certain documents

KAPIL SIBAL: I am fine My Lords, this going on but I mean...

CHIEF JUSTICE DY CHANDRACHUD: That's all right, these documents give us some background, of different perspectives to the background.

TUSHAR MEHTA: Several new facts were stated. I didn't object because I didn't want to trivialize the dialogue. This is the Constitution Bench, we are....

JUSTICE SANJAY KISHAN KAUL: Mr. Solicitor please proceed.

TUSHAR MEHTA: Kindly come to page 44. My Lord 43 bottom. In the course of discussions regarding federalism in India during the Constituent Assembly, Jaspal Roy Kapoor, representing United Provinces commented, 'I wish, I only wish that Kashmir should also....

JUSTICE B.R. GAVAI: You are reading page?

TUSHAR MEHTA: Page 43 last date My Lord. This is Constituent Assembly debates, CCD Document Volume 8 PDF. I've quoted for Your Lordships easy reference. 'In the course of discussion regarding federalism in India, during the Constituent Assembly, Jaspal Roy Kapoor, representing United Provinces, commented, I only wish that Kashmir should also

1 have been brought in on the same level as other States, but unfortunately much to our
2 dissatisfaction and chagrin if I may say so, this would not be done. This is a delicate subject
3 and I'll not say anything more on this.'

4 Please read this now. This is very, very important. And in my respectful submission, the
5 answer lies here. What happened to Jammu and Kashmir, its sovereignty, external, internal.
6 My Lord, the difficulty is the Petitioners are confusing, in my understanding, internal
7 sovereignty with autonomy. External sovereignty My Lord, nobody can dispute that it is with
8 the Union of India. Internal sovereignty, in the facts of our case and in the Constitutional
9 structure which we have accepted, would mean autonomy of the federating units, and which
10 autonomy is there with every state.

11

12 **CHIEF JUSTICE DY CHANDRACHUD:** It's actually there with every institution.

13

14 **TUSHAR MEHTA:** Every institution is autonomous, so that's not internal...

15

16 **CHIEF JUSTICE DY CHANDRACHUD:** We have the autonomous authority to decide the
17 Constitutional issue. So, we can't say that internal sovereignty vests with us.

18

19 **TUSHAR MEHTA:** Yes

20

21 **CHIEF JUSTICE DY CHANDRACHUD:** We are an independent, autonomous institution
22 on the Constitution.

23

24 **TUSHAR MEHTA:** They are confusing the word autonomy with internal sovereignty. There
25 is no internal sovereignty,

26

27 **CHIEF JUSTICE DY CHANDRACHUD:** Except that Mr. Solicitor I mean to paraphrase
28 their argument fairly, what they are saying that - look, we gave up external sovereignty. There
29 was no doubt about it. They said that we have acceded to the Indian Union that's irrevocable.
30 But they said that the course of events, the adoption of 370 would indicate that while they were
31 giving up of external sovereignty, a modicum of internal sovereignty which was exercised by
32 the then Maharaja, that was not ceded to the Indian Union. That seems to be the line of...

33

34 **TUSHAR MEHTA:** That's the submission My Lord, and my respectful submission.....

35

36 **CHIEF JUSTICE DY CHANDRACHUD:** And therefore, they are relying on various
37 judgments of our Court to indicate Indira Gandhi....*Indira Nehru Gandhi versus Raj*

1 *Narain* to indicate that sovereignty has an external component. It has an internal component
2 also.

3

4 **TUSHAR MEHTA:** Different context, but I'll assist Your Lordships on that.

5

6 **CHIEF JUSTICE DY CHANDRACHUD:** And then in your turn, you can explain that line
7 of... we are only on the list of dates. You can go ahead.

8

9 **TUSHAR MEHTA:** 25-11-1949. Yuvraj Karan Singh issued a proclamation for the State of
10 Jammu and Kashmir. I have given the pagination. By which he declared and directed the
11 Constitution of India shortly to be adopted by the Constituent Assembly of India, govern the
12 Constitutional relationship between the State and the contemplated Union of India, and shall
13 be enforced in the state by him, his heirs and successors, in accordance with the tenure of its
14 provisions. The said proclamation is worth quoting in full. 'Whereas with the inauguration of
15 the new Constitution for the whole of India, now being framed by the Constituent Assembly of
16 India, the Government of India Act 1935, which now governs the Constitutional relationship
17 between this State and the Dominion of India will stand repealed.'

18 Your Lordship may kindly recall the Instrument of Accession was under Government of India
19 Act and subsequently Independence Act.

20 'And whereas in the best interest of this State, which is closely linked with the rest of India by
21 a community of interest in the economic, political, and other fields, it is desirable that the
22 Constitutional relationship established between this State and the Dominion of India should
23 be continued as between this State and the contemplated Union of India, and the Constitution
24 of India, as drafted by the Constituent Assembly of India, which includes duly appointed
25 representatives of this State, provides a suitable basis for doing so. I now hereby declare and
26 direct that Constitution of India, shortly to be adopted by the Constituent Assembly of India
27 shall' - My Lord please mark this. This is where My Lord, they are highlighting and I'll have to
28 meet with - 'insofar as it is applicable to the State of Jammu and Kashmir govern the
29 Constitutional relationship between this State and the contemplated Union of India. And shall
30 be enforced in this State by me, my heirs and successors, in accordance with the tenure of its
31 provisions, that the provisions of the said Constitution shall, as from the date of its
32 commencement, supersede and abrogate all other constitutional provisions inconsistent
33 therewith, which are at present in force.'

34

35 This is beyond any Instrument of Accession or merger. This is accepting supremacy of our
36 Constitution and surrendering the sovereignty to the Constitution, where the sovereign is we,
37 the people of India.

1

2 **CHIEF JUSTICE DY CHANDRACHUD:** Of course, when he made this proclamation on
3 25th of November 1949. This is on the same day as Dr. Ambedkar's last address to the
4 Constituent Assembly. The famous address to the Constituent Assembly. So by this point of
5 time the entirety of the Constitution had been formulated.

6

7 **TUSHAR MEHTA:** Including 370.

8

9 **CHIEF JUSTICE DY CHANDRACHUD:** Right? Including 370.

10

11 **TUSHAR MEHTA:** And Article 1.

12

13 **CHIEF JUSTICE DY CHANDRACHUD:** Therefore, when he makes this proclamation, he
14 makes this proclamation in the light of 370, which also is before him. There can't be any doubt
15 about that.

16

17 **TUSHAR MEHTA:** There can't be any doubt. I bow down. And he is also very clear that what
18 he is doing, at what stage and under what constitutional mechanism, which is temporarily
19 provided. The said proclamation is not only beyond the Instrument of Accession. Your
20 Lordships can skip that. I've orally said My Lord. Two, the preamble to this proclamation
21 shows that it was based on the conviction that the best interest of the state required that the
22 constitutional relationship established between the state and to Dominion of India should be
23 continued as between the state and the contemplated Union of India. And it refers to the fact
24 that the Constituent Assembly, which had formed the Constitution of India, included the duly
25 appointed representatives of the states, and that the State Constitution provided a suitable
26 basis to continue the constitutional relationship between the state and the contemplated
27 Union of India. At this juncture, the Constituent Assembly of Jammu and Kashmir was not
28 formed. However, it is important to note that the princely state, through its ruler, who had the
29 authority to surrender the sovereignty of Jammu and Kashmir to the Union of India and made
30 it specifically enforceable in the state, including Article 1 thereof, could never have thereafter
31 formed a Constituent Assembly for his state, which would be a plenary Constituent Assembly,
32 which can create a document having the sanctity and sovereignty of the Constitution of a
33 nation in which the state merged. It was merely an Act providing for internal governance of
34 the state, which was an integral part of the sovereign, that is Indian Dominion. My Lord, my
35 respectful submission is that Constituent Assembly of Jammu and Kashmir, which formed
36 subsequently, was not a plenary Constituent Assembly the way we had our Constituent
37 Assembly, because by that time the sovereignty had already merged. There cannot be two

1 Constitutions. There cannot be, and therefore, My Lords, I am saying that the sanctity of that
2 document, which we call Constitution, is nothing more than an act of legislation. And I'll
3 substantiate that. My Lord, note four. This further points, furthers the point that the words
4 Constituent Assembly in Article 370, Sub Article 3 can be read only as legislative assembly,
5 even without the aid of Article 367. Apart from this...

6

7 **JUSTICE SANJIV KHANNA:** Mr. Solicitor, this will require a little clarification. This will
8 require a little clarification. At this stage we are not saying anything because when we talk
9 about Article 370, including the explanation which is added with...

10

11 **TUSHAR MEHTA:** Separate submissions, My Lord.

12

13 **JUSTICE SANJIV KHANNA:** That will require clarification.

14

15 **TUSHAR MEHTA:** My Lord, I'm conscious. This is not the best point where I can justify the
16 substi...

17

18 **JUSTICE SANJIV KHANNA:** We are not stopping you at this stage because you're going
19 on facts.

20

21 **TUSHAR MEHTA:** This is not the best point on which My Lord, I would be able to justify
22 substitution of a defunct Constituent Assembly with Legislation. I'm not joining issue with it.
23 I have other set of submissions on that. At this stage My Lord, this is the perception My Lord,
24 which I'm presenting for Your Lordships' consideration. Now, My Lord, kindly come to 26-11-
25 49. the Constitution of India is adopted, but the rest I can...

26

27 **CHIEF JUSTICE DY CHANDRACHUD:** So, Mr. Solicitor what we, apropos what fell from
28 brother Sanjiv Khanna, we are not engaging in a dialogue with you on any of these notes right
29 now because we take it you'll be arguing these aspects independently later on. So right now,
30 we'll run through the list of dates with you, so we have a broad drift of your analysis.

31

32 **TUSHAR MEHTA:** Correct. I will just My Lord, point out broadly...

33

34 **CHIEF JUSTICE DY CHANDRACHUD:** But we take it that you're going to take up each
35 one of these stance later and argue them independently. Then we can, instead of asking you
36 any of our doubts right now, we can reserve it when you go in to the themes themselves. Right
37 now we can just run through the list of dates.

1

2 **TUSHAR MEHTA:** What I intend, assisting Your Lordships, the way is this My Lords. After
3 this My Lord, I'll show how the Constitution, how 370 worked till 2018. And some of the things
4 are really shocking and I want Your Lordships to know about it because practically, practically
5 two Constitutional organs, State Government, and the President in consultation with each
6 other can amend any part of the Constitution the way they want and apply it to Jammu and
7 Kashmir. For example, I'll elaborate on this. Please mark this. The preamble of Indian
8 Constitution was made applicable to Jammu and Kashmir by way of a Constitution Order
9 under Article 371(b) in 1954. Thereafter, in 42nd and 44th Amendment, the word socialist and
10 secular came to be added. That was not made applicable till 5th of August 2019 Jammu and
11 Kashmir Constitution was not having either the term socialist or secular. And I will show My
12 Lord the devastating effect it would have if this Constitution, which, according to me, is
13 nothing more than a legislature, would not have been repealed, the way My Lord, we have
14 done. I'll explain the procedure which we have followed. I must satisfy Your Lordships'
15 conscience. Your Lordships have very rightly flagged that ends may not justify the means, but
16 I will justify the mean also. They are constitutionally permissible.

17

18 **CHIEF JUSTICE DY CHANDRACHUD:** Eventually, when you argued that this is really
19 not a Constituent Assembly but a Legislative Assembly in its original form, you'll have to
20 answer how this squares up with Clause 2 of Article 370, which specifically says the
21 Constituent Assembly formed for the purpose of framing the Constitution of that state.

22

23 **TUSHAR MEHTA:** Correct, I have to answer.

24

25 **CHIEF JUSTICE DY CHANDRACHUD:** That is because there was a textual answer which
26 may militate against your line of approach on that. Anyway, we'll discuss that later on
27 because....

28

29 **TUSHAR MEHTA:** Kindly come to page 47. My Lord this is a new point. Now, first the
30 Constitution Order comes, My Lord, I can...

31

32 **CHIEF JUSTICE DY CHANDRACHUD:** We can continue on Monday morning.

33

34 **TUSHAR MEHTA:** Monday morning

35

36 **KAPIL SIBAL:** Since Your Lordships is hearing this matter on Monday, we had some
37 commitments. If Your Lordships will pardon me for some time.

1

2 **CHIEF JUSTICE DY CHANDRACHUD:** Certainly, yes, of course, Mr. Sibal.

3

4 **KAPIL SIBAL:** I didn't know about this.

5

6 **CHIEF JUSTICE DY CHANDRACHUD:** Monday running around in...

7

8 **TUSHAR MEHTA:** No, never, never.

9

10 **KAPIL SIBAL:** He can't. He can't.

11

12 **TUSHAR MEHTA:** Never, My Lord. I'm before the Constitution.

13

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

15

16 **KAPIL SIBAL:** No way in the world.

17

18 **TUSHAR MEHTA:** Out of question. I will not make any. Obligated, Your Lordships.

19

20

21

22

END OF DAY'S PROCEEDINGS