

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

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

**Writ Petition (Civil) No.1099/2019**

**In re: Article 370 of the Constitution**

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TRANSCRIPT OF HEARING

09-August-2023  
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**GOPAL SUBRAMANIUM:** My Lords am I clearly visible and audible?

**CHIEF JUSTICE DY CHANDRACHUD:** Yes, of course Mr. Subramanium.

**GOPAL SUBRAMANIUM:** Thank you My Lords. My Lords, I wish to begin by saying that in constitutional arguments there can be multiple approaches...

**DINESH DWIVEDI:** He is from London My Lords. London is behind all these problems.

**GOPAL SUBRAMANIUM:** May I only correct my friend My Lord. I don't live in London. I am only of the suburbs. My Lord having said that, there are My Lord multiple approaches. One My Lord is what we call traditionally the historical argument. The second My Lord would be a textual argument. The third is a doctrinal argument. The fourth is prudential and the last is structural argument. My Lords these are all well-known methods of interpreting a Constitution. These are broadly My Lord, the topology of constitutional arguments. In this case whatever approach we may adopt, the end result will be the same. Whichever way we proceed to look at this matter, there will be...

**CHIEF JUSTICE DY CHANDRACHUD:** Subramanium, who are you appearing for in this batch of cases?

**GOPAL SUBRAMANIUM:** I'm appearing My Lords, if I may just point out to, I'm appearing in Writ Petition Civil 1104 of 2019.

**CHIEF JUSTICE DY CHANDRACHUD:** And is a petitioner there?

**GOPAL SUBRAMANIUM:** Yes My Lord, there is a petitioner Muzaffar Iqbal Khan.

**CHIEF JUSTICE DY CHANDRACHUD:** Muzaffar Iqbal Khan.

**GOPAL SUBRAMANIUM:** Yes. My Lords, my written submissions are also on Your Lordship's record.

**CHIEF JUSTICE DY CHANDRACHUD:** Yes Mr. Subramanium.

1 **GOPAL SUBRAMANIAM:** So, My Lords, I'm going to urge for Your Lordship's  
2 consideration, four important propositions. The first is, the Constitution of India and the  
3 Constitution of Jammu and Kashmir speak to each other. They exist together. And their  
4 complementary existence is a quintessence of the relationship between India and Jammu and  
5 Kashmir. The second....

6

7 **CHIEF JUSTICE DY CHANDRACHUD:** So they speak to each other and complement  
8 their existence.

9

10 **GOPAL SUBRAMANIAM:** They are complement to re constitutions. With respect to  
11 Justice Nariman, in one of the judgments he called it subordinate. I think the word is slightly  
12 in opposite, I would say complementary.

13

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

15

16 **GOPAL SUBRAMANIAM:** The second My Lord, is that Constituent Assembly by its very  
17 definition is a primary Assembly which is vested with this extraordinary task of framing a  
18 Constitution. That is why My Lord, the amending power is always called a derived power. An  
19 amending power, a power to amend the Constitution is always called a derived power. And  
20 here My Lord we have two Constituent Assemblies. The Constituent Assembly of India and we  
21 also have under the Constitution recognized by the Constitution, a Constituent Assembly of  
22 Jammu and Kashmir. This is the second.

23

24 But, what is its implication? I'll deal with it. Then the third, the impugned orders that is C.O.  
25 272 and C.O. 273, in sum and substance do away with the Constitution of Jammu and Kashmir.  
26 That My Lord is impermissible, it is not authorized. The last is about this expression 'people'.  
27 Here, My Lord, people have both the sense of being persons but in the Constitutional context  
28 they have a legal and juridical existence.

29

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

31

32 **GOPAL SUBRAMANIAM:** If I may now My Lord, submit, My Lord, Honourable the Chief  
33 Justice yesterday, made a very important observation and it is perhaps a critical observation,  
34 that in any representative democracy, we must look for expression through the institutions  
35 under the Constitution. And My Lord, I'm going to urge Your Lordships, to consider that the  
36 expression, 'Constituent Assembly' and 'Legislature of a State', are both institutions  
37 recognized under our Constitution. I will submit, My Lord that the basic structure, which Your

1 Lordships have to discern, in this case, to determine whether there could be any abrogation of  
2 it, will be deduced both from the Indian Constitution, and the Jammu and Kashmir  
3 Constitution. I will also urge Your Lordships to employ....

4

5 **CHIEF JUSTICE DY CHANDRACHUD:** Just one second. Yes Mr. Subramaniam.

6

7 **GOPAL SUBRAMANIAM:** I will urge Your Lordships to apply what is called the degree  
8 test, or the effect test applied by Chief Justice Kapadia in a case called *Glenrock* and it is by  
9 applying that test we assess the extent of abrogation. Most importantly, My Lord, our  
10 Constitution recognizes asymmetric federalism and the purpose of asymmetry is to take note  
11 of special conditions and special needs of people. Now My Lord, the great colossus Dr.  
12 Ambedkar, introduced a Constitution and his introductory speech had two themes. That  
13 speech My Lord, is available for Your Lordships in Document Volume 8. And in that opening  
14 speech, Dr. Ambedkar speaks about the Indian Constitution being federal. And he also says  
15 that people who live in a State can be given special rights, special privileges. There was another  
16 question, which I think I heard My Lord Justice Gvai mention, which was, there were also  
17 princes who merged their States at the time of the Constitution. There were agreements. What  
18 was the status of those agreements? Could they not be abrogated? And, My Lords, there is  
19 some answer which needs to be offered to that question. It's a very important question. Jammu  
20 and Kashmir was not like any other State at the time of accession. It was not like any other  
21 state. And I'll give Your Lordships, three reasons. The first, Jammu and Kashmir was a State,  
22 which had its own Constitution prior to the act of accession. They had a Constitution of 1939.  
23 Two, the accession by the Maharaja was qualified because people were still in the process of  
24 making up their mind. What, My Lord, the Indian Constituent Assembly did is that just as they  
25 felt a decision can only be taken by the people of a country, they thought it's appropriate and  
26 necessary that's the will of the people is ascertained.

27

28 My Lord, that is the first hallmark of this case. What did the Constituent Assembly and later  
29 in our Constitutional text proffer to do? They maintained the highest sense of democracy and  
30 respect. Just as we are enacting and giving unto ourselves the Constitution, we must give that  
31 Constituent Assembly to determine their future. And that My Lord is the reason why in draft  
32 Article 306(a). Which was introduced by Mr. Gopalaswami Ayyangar, spoke about the  
33 Constituent Assembly of Jammu and Kashmir taking a decision.

34

35 Now My Lords the entire controversy or dispute has been presaged, if I may say so, on one  
36 misunderstanding namely there is a unilateral exercise of power possible by the President  
37 under Article 370. This is how we've looked at the provision. Now I'm going to show to Your

1 Lordships, it is exactly the converse. What is the converse? I'll now take you My Lords to some  
2 portions of the debates of the Constituent Assembly of Jammu and Kashmir, and then Your  
3 Lordships would notice what was their final resolution. My Lords, they passed a resolution  
4 and the text of that resolution is the answer to the case. It is an answer to many questions. We  
5 have been very uncertain, that did the Constituent Assembly take a decision under Sub-Article  
6 3? What was their position on Article 371? Your Lordships will find answers. But I'm summing  
7 up first My Lords, so that Your Lordship knows what is that answer going to be. My Lords, just  
8 as the Constituent Assembly debates of India are inspiring, the Constituent Assembly debates  
9 of Jammu and Kashmir are also inspiring. Your Lordships will notice that it was really on the  
10 basis of Rousseau's model of Representative Democracy that the Constituent Assembly itself  
11 was formed. But more importantly, they took their decision in three steps, My Lord. Three  
12 steps. The first is, they left India in no manner of doubt, that they have faith and respect for  
13 the people of India, and are acceding to India. The second is My Lords, they were looking at  
14 all Constitutions of the world just like Sir B.N. Rau did. Just like Dr. Ambedkar did. In fact My  
15 Lord, one of the greatest gifts of government publications are the Complete Collected Works  
16 of Dr. Ambedkar, published by the Maharashtra Government. And My Lord the Editorial  
17 Chairman was is one Mr. R. M. Gavai. And that painstaking effort of putting all his letters  
18 together and all his letters are quite remarkable. Having said that, My Lord, they had many  
19 Constitutions to look at. They also looked at the Indian Constitution and they said we will need  
20 some special provisions for us. We will need some exceptions for us. One of the first States in  
21 India, My Lord, which looked at land reform was Kashmir. It was actually their throbbing  
22 concern, at that time, that we must give rights over the land to people and they must be  
23 permanent residents and people must have rights. So, my Lord, they wanted some exceptions.  
24 So the first time the My Lord, decision to accede, second, they said we will frame our  
25 Constitution, but we will request the Government of India, that each Constitution, with the  
26 exceptions which we need for Jammu and Kashmir, must be brought into effect, under Article  
27 370. That is why My Lord, we have three constitutional orders, which I'll show you shortly,  
28 one of '50, '52 and most importantly, '54. My Lord, it was the Constituent Assembly of Jammu  
29 and Kashmir, which invited, under Article 371, for the application of the provisions of the  
30 Constitution, with exceptions which were required in Jammu and Kashmir. I'll show you My  
31 Lord, that resolution. You will see it very shortly. And My Lord, the Government of India  
32 accepted that request, and issued the 1954 order. And, then they said, if we have already got  
33 an order, subject to exceptions and modifications, and in that My Lord, they omitted many  
34 parts of our Constitution, because they wanted it to come in their own Constitution, like  
35 Legislature. So, the Legislature, My Lord, is actually established under the J&K Constitution.  
36 The High Court of Jammu and Kashmir, is established under the J&K Constitution. So they  
37 said, we will take the '54 order as Indian Constitution, as applied to Jammu and Kashmir, and

1 that is how My Lord, the Jammu and Kashmir Constitution was born in 1957. The Jammu and  
2 Kashmir Constitution on 26-01-1957, recognized the application of the provisions of the  
3 Indian Constitution, under the '54 order. And also had, separate provisions, including My Lord  
4 the autonomy, in respect of framing of laws. And this is quite important My Lord, because this  
5 is the way two Constituent Assemblies My Lord, as a product of their fruitful energies, through  
6 now the Constitution, speak to each other. So My Lords even though the word 'temporary',  
7 occurred in the marginal note, the resolution of the Constituent Assembly of Jammu and  
8 Kashmir, My Lord, which I'm speaking, and I'm putting it within quotes was that,  
9  
10 "A Constitution of India must apply with these modifications, but more importantly, they said  
11 Article 1 and Article 370 must continue." I am talking of an affirmative resolution, My Lord, of  
12 a Constituent Assembly. It is not a matter of any non-formalistic expression and it is that  
13 formal resolution read with the J&K Constitution which finally, My Lord, fall up for you  
14 interpretation. My Lord what is significant is the two Constitutions, I said, speak to each other.  
15 Which is that provision through which they speak to each other? It is Article 370. So My Lord,  
16 Article 370, was not a repository of untrammelled power of application of Constitutional  
17 provisions. No. Article 370, was the medium by which the Indian Constitution could be applied  
18 and they could also act in terms of their Constitution. And My Lord, here lies what I call as a  
19 dual obligation. The dual obligation, My Lord, is to be discovered, one, in the words of Section  
20 147 of the Jammu and Kashmir Constitution, and the second, are the words in Article 370  
21 itself. In Section 147 My Lord, one of the laws which could never be touched by the Legislative  
22 Assembly ever in the exercise of its amending power was the provisions of the Constitution of  
23 India as applied to Jammu and Kashmir. This is My Lord, in some contrast and again, I am  
24 deeply grateful to My Lord, the Chief Justice who again in a thought provoking observation  
25 referred to Article 372, the power of adaptations. And in that Your Lordships will notice, the  
26 President can bring it in accord with the Constitution, but the Legislature of the State, which  
27 is competent, can always pass alone repealing, modifying, varying it, Your Lordships, recollect  
28 that provision in the Constitution. This is not there in 148 at all. So, 148 treated the provisions  
29 of the Indian Constitution as sacrosanct. And My Lord what did we under 370 offer? Under  
30 370 we offered the ability to frame a Constitution, and the ability to offer our Constitution  
31 subject to special exceptions. Your Lordships have not seen those exceptions. When Your  
32 Lordships see those exceptions, Your Lordships will appreciate that this is not a simple  
33 Constitutional Order. This is an order which is a product of bilateralism. And My Lords our  
34 Constitution by its very nature have so many checks and balances that bilateralism can be seen  
35 as at the imprimatur of our Constitution. So My Lord the only exceptional provisions where  
36 you can have unitary action are few, are limited and conditioned My Lord by a temporary

1 purpose. Having said that My Lord, may I just take you through a few documents so that I  
2 quickly make the point?

3

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

5

6 **GOPAL SUBRAMANIAM:** I also want to say one thing My Lord. I heard Mr. Sibal cite the  
7 decisions on Article 370 yesterday. There was one more Justice Nariman's decision, which  
8 needs to be cited. But My Lord, I want to just sum up and tell you, what are these decisions  
9 quintessentially saying. Justice Bhargava in *Sampat Prakash*, notes that the Constituent  
10 Assembly did not want to abrogate Article 370 and instead permitted its continuance. When  
11 Your Lordship see that sentence with the resolution of the Constituent Assembly of Jammu  
12 and Kashmir, Your Lordships will be left with no manner of doubt that that is the correct legal  
13 position. The judgment in *Damnoo*, which was cited by Mr. Sibal is a case, My Lord, where  
14 there was an amendment to the Jammu and Kashmir Constitution by the Assembly which was  
15 called the 6th Amendment in Jammu and Kashmir first. And Jammu and Kashmir, said *Sadr-*  
16 *e-Riyasat* will now mean Governor. And therefore My Lord, Article 367 was amended to bring  
17 it in accord with Jammu and Kashmir Constitution. That is the judgment of Justice Sikri. But  
18 more importantly My Lord, Justice Sikri refers to this very judgment in *Kesavananda*  
19 *Bharati*, and said that amendment did not alter the fundamentals or the basic structure for  
20 the Jammu and Kashmir Constitution.

21

22 Now My Lords just a quick recount of dates, and I go straight to what needs to be seen. Your  
23 Lordships have been told that there was a 1939 Constitution. And that My Lord is documents  
24 Volume 6, page 199. I'm not going to read it, but one of the features of that Constitution My  
25 Lord, as Justice Gajendragadkar noted, is that the Maharaja and all legislative, judicial, all  
26 powers, all powers vested in the Maharaja under the 39 Constitution. On 26-10-1947, is where  
27 My Lord, Hari Singh signs the Instrument of Accession, Your Lordships have seen it. It is  
28 Document Volume 1, page 9. But it was not that kind of accession which many other Maharajas  
29 did for the reason, the other Maharajas signed supplementary Instruments of Accession and  
30 merger agreements. Now, between the time he signs the agreement and the drafting of our  
31 Constitution, our Constituent Assembly did not ask the Maharaja to discover the will of people.  
32 They acknowledged that there should be a Constituent Assembly by which the will of the  
33 people of Jammu and Kashmir is ascertained. So My Lords, even though he was the titular  
34 head, in some sense the people of Jammu and Kashmir were acting now in a sovereign capacity  
35 to determine in a Constituent Assembly what should be their decision. This is the difference,  
36 My Lord, between the cases where agreements have been superseded or privileges have been  
37 superseded. And this case, why? Because when the accession happened completely, My Lord,

1 it was between the people of Jammu and Kashmir and India. Of course, My Lord, Your  
2 Lordships have been told, that on 27th October, 1947, Lord Mountbatten, the Governor  
3 General accepted the instrument of accession, that is document Volume 1, page 11, 12 and 5th  
4 of March '48, My Lord, there was an interim Government, appointed by the Maharaja for  
5 administration. And 17th of October 1949, is the date when, Your Lordships have referred to  
6 it, Documents Volume 8, page 1173, when N. Gopaldaswami Ayyangar, introduced Article  
7 306(a). One day before My Lord, our Constitution was going to be adopted. One day. On the  
8 25th of November '49, Maharaja....

9

10 **CHIEF JUSTICE DY CHANDRACHUD:** 25? Can you give a us date again?

11

12 **GOPAL SUBRAMANIAM:** 25th

13

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

15

16 **GOPAL SUBRAMANIAM:** November '49.

17

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

19

20 **GOPAL SUBRAMANIAM:** The Maharaja of Jammu and Kashmir said, "India is about to  
21 frame a new Constitution, and for the sake of continuity, the provisions of that Constitution  
22 must govern us till, such time as is necessary. That is at My Lord Documents Volume 4, page  
23 379. My Lords, on 26th January, 1950 of course, our Constitution came into force. But now, I  
24 would like Your Lordships to go past this date, and please see first, the proclamation  
25 convening, the J&K Constituent Assembly, that is dated 01-05-51. And would Your Lordships  
26 kindly turn to Documents Volume 6, page 276. If Your Lordship sees this document, 276...

27

28 **CHIEF JUSTICE DY CHANDRACHUD:** 276.

29

30 **GOPAL SUBRAMANIAM:** This is the proclamation dated 1st of May '51 convening Jammu  
31 and Kashmir's Constituent Assembly. Whereas it is the general desire of the people of the State  
32 of Jammu and Kashmir, that a Constituent Assembly should be brought into being, but the  
33 purpose of framing a Constitution for the State, whereas it is commonly felt that the convening  
34 of the Assembly, can no longer be delayed without detriment to the future wellbeing of the  
35 State. And whereas terms of the proclamation of the Maharaja dated 5th of March 1948, in  
36 regard to the convening of a National Assembly, as contained in Clauses 4-6 of the operative  
37 power, therefore, do not meet the requirements of the present situation. Which is why, My



1 Lord, the change of language. And please see, "I, Yuvraj Karan Singh, do hereby direct, a  
2 Constituent Assembly, consisting of representatives of the people, elected on the basis of adult  
3 franchise, shall be constituted forthwith, for the purpose of framing a Constitution for the State  
4 of Jammu and Kashmir. Then, of course My Lord, there was the other logistics were set out in  
5 the rest of the proclamation. Now My Lords after this, the Constituent Assembly of Jammu  
6 and Kashmir meets and by this time, because of the Instrument of Accession that certain  
7 entries in the union list on the three subjects My Lord, can be made applicable. The First  
8 Constitutional Order of 1950 was passed. And that Your Lordships will find is in Document  
9 Volume 3 and please see page 4 of that document volume. And this is My Lord, the 1950 order.  
10 And Your Lordships will notice that this 1950 order takes place in consultation with the  
11 Government of Jammu and Kashmir because these are all in respect of matters connected with  
12 accession.

13

14 Now, My Lords the second schedule also applied some provisions of the Constitution because  
15 there must be a Parliament there has to be an acknowledgment to Parliament, and Your  
16 Lordships will find there are three columns, My Lords in the schedule two. One is provisions  
17 of the Constitution applicable the second is exceptions, and the third is modifications. And  
18 Your Lordship will notice at page 7, in part 11, on the extreme right, Clause 1 of Article 246  
19 shall apply subject to the provisions of paragraph 2 of this order and Clauses 2 and 3 of 246  
20 shall not apply in relation to the State. This order My Lords, as Your Lordships have seen, is  
21 the first order. Now My Lords, alongside let me take you to the Assembly. This is the  
22 beginning. And now let us say, the Jammu and Kashmir Legislative Assembly itself. Your  
23 Lordships will find this in Documents Volume 7.

24

25 **CHIEF JUSTICE DY CHANDRACHUD:** What page of Document 7?

26

27 **GOPAL SUBRAMANIAM:** Yes, now would Your Lordships kindly look at page 32? I'm now  
28 trying to set out extraordinary goodwill between India and the State framing a Constitution  
29 and how it was expressed. Please see page 32. It's Appendix A.

30

31 **CHIEF JUSTICE DY CHANDRACHUD:** Where was this?

32

33 **GOPAL SUBRAMANIAM:** Page 32. PDF page 32, My Lords. Message of goodwill.

34

35 **JUSTICE B.R. GAVAI:** Running page 1391?

36

1 **GOPAL SUBRAMANIAM:** Yes. Yes. That is the print page. And this My Lord, is the  
 2 message from the President of the Indian Union. "On this historic occasion of the inaugural  
 3 meeting of their Constituent Assembly, I send my sincerest to greetings to the people of  
 4 Kashmir and their beloved leader Sheikh Abdullah in the hope that the assembly will guide it  
 5 in its deliberation by the single aim of shaping the life of the people of Kashmir as to make  
 6 them happy and prosperous. And then My Lord, Your Lordships may kindly come to page 250  
 7 PDF.

8

9 **CHIEF JUSTICE DY CHANDRACHUD:** Of the same volume?

10

11 **GOPAL SUBRAMANIAM:** Of the same volume. Your Lordship sees after in quotation  
 12 marks, Sheikh Muhammad Abdullah reads and he says and that My Lord is only to indicate  
 13 how they set about their debates. "This Assembly which is the centre of our hopes and  
 14 aspirations, held its first meeting in the first week of November, 1951. It is now meeting again  
 15 after an interval of the nearly 4 months. In the last session, I had drawn your attention to the  
 16 fact that though this Assembly possesses the unquestioned right to decide the future of the  
 17 country and that this House is going to exercise this right to the fullest measure. Nevertheless,  
 18 where anyone to question the right of the Assembly to do so, we would be prepared to seek the  
 19 verdict of the people outside on this question and all that need be done in this connection is to  
 20 create necessary conditions which would enable people to express their will freely."

21

22 Then Your Lordships may kindly see 257. If Your Lordships see in the middle, this precisely is  
 23 the important... see Section 370, of the Indian Constitution. The sovereignty and unfettered  
 24 powers of the Constituent Assembly have been recognized by the Indian Parliament. The  
 25 present constitutional relationship between Kashmir and India has time and again been made  
 26 clear by the Indian Government and it's prominent leaders. The speeches made by late Sardar  
 27 Patel, Gopaldaswami Ayyangar and Nehru himself in this behalf are still fresh in the memory  
 28 of people.

29 Then, My Lords please come to page 796. My Lord, just as our Constituent Assembly had  
 30 established committees, as Your Lordships recollect, to frame Articles for different purposes,  
 31 similarly, the Jammu and Kashmir Constituent Assembly did the same thing. So they had a  
 32 basic principles committee. What are the basic principles on which that Constitution will be  
 33 framed? And Your Lordship will find, this is the report at page 796 and Your Lordships will  
 34 notice, the first, 'the basic principles of the State Constitution will contain provisions relating  
 35 to the form of the State, the executive, the legislature, the judiciary, the Public Service  
 36 Commission, the official language and other ancillary matters. The recommendations of the  
 37 committee in regard to these matters are contained herein below.' And please see My Lord,

1 the first line, 'The State of Jammu and Kashmir will comprise such territories, which form the  
 2 part of the State on 15th of August '47, while retaining its autonomous character, the State will  
 3 continue to remain acceded with the Union of India. The sovereignty of the state resides in the  
 4 people therefore, and shall accept with regard to matters specifically entrusted to the union  
 5 we exercised on their behalf by the various organs of the State. The governing features of the  
 6 State Constitution would be based on democracy, equality and social and economic justice.' So  
 7 My Lord, they gave the broad outline of who will be the Head, elected Minister, who will be  
 8 the members of the Legislative Assembly, and please see page 798. The second para. "The  
 9 judiciary of the State will be independent of the executive." And then My Lord, they write about  
 10 the High Court and the High Court will also be a Court of Record. Then My Lord, appeals will  
 11 lie to the Supreme Court. All this My Lord, is a part of the framework. And finally we come My  
 12 Lord to page 800. The State of Jammu and Kashmir.

13

14 **JUSTICE B.R. GAVAI:** 800.

15

16 **GOPAL SUBRAMANIAM:** The second para, My Lord. "The State of Jammu and Kashmir,  
 17 having acceded to the Union of India, it becomes necessary to define the relationship of the  
 18 State with Centre. This relationship was originally based on the Instrument of Accession,  
 19 whereby the State of Jammu and Kashmir are acceded to the Union of India, in matters of  
 20 defence, foreign affairs, and communication. When the dominion of India became a Republic,  
 21 the relationship of the State with the Union was embodied in Article 370, of the Constitution.  
 22 The State's accession to the Union entails, certain responsibilities on the Centre, for protecting  
 23 the interests of the State and also for its social and economic development. In order to enable  
 24 the Centre to discharge its responsibilities, which devolve upon it under the Constitution,  
 25 those provisions of the Constitution of India, which may be necessary for this purpose, should  
 26 be made applicable to the State in an appropriate manner. While preserving the internal  
 27 autonomy of the State, all the obligations which flow from the fact of accession and also its  
 28 elaborations contain should find an appropriate place, in the Constitution." And then My Lord,  
 29 please notice the recommendation (i). "That a Directive be issued to the drafting Committee  
 30 to bring up appropriate proposals defining the sphere of Union jurisdiction in the State  
 31 suggesting additions, modifications and amendments, necessary to the Constitution  
 32 application of Jammu and Kashmir order, to suit the requirements of the State." So My Lord,  
 33 my submission is that the Constitution of India was made applicable, with exceptions and  
 34 modifications, as a part of the Constituent Assembly's decision. It was not, My Lord, an  
 35 imposition by the President at all. And Your Lordships would see, just at the bottom, "The  
 36 Drafting Committee should forthwith take up the drafting of the Constituent for the State in  
 37 the light of the recommendations contained in the report, in such other reports, as have been

1 adopted by this Assembly, from time to time." Now, My Lord, the Drafting Committee did  
2 make a report and let me take you straight My Lord to that. Your Lordships will find this at  
3 PDF page 936. At the bottom, Your Lordships notice, 11th of February 1954. This My Lord, is  
4 the report of the Drafting Committee. "In pursuance of the directives contained, in the reports  
5 of the Basic Principals Committee, and the Advisory Committee on Fundamental Rights and  
6 Citizenship, as adopted by the House, the Drafting Committee has considered the question  
7 how best to give effect to the recommendations embodied, in these reports. The task which the  
8 Committee has to discharge requires action in the following directions. Number one,  
9 preparation of the drafting Constitution of the state defining the sphere of Union jurisdiction  
10 in the State and for that purpose, suggesting the various provisions of the Constitution of  
11 India, along with modifications and exceptions subject to which these provisions should apply  
12 to the state. These would include appropriate modifications and exceptions in part 2, that is,  
13 'citizenship' and part 3 'fundamental rights' in their application to the State of Jammu and  
14 Kashmir in the light of the recommendations contained in the report of the Advisory  
15 Committee on Citizenship and Fundamental Rights. But My Lord please see number two,  
16 consequential amendments in the Jammu and Kashmir Constitution Act 1996, that is My Lord  
17 the 1939 Constitution. My Lords, that 1996 is the 1939 Constitution. Now let us go forward.  
18 Please see the last para of that page. The annexure to this report while reflecting the desire of  
19 the House for the ratification of the accession of the State with the Union of India indicates in  
20 detail provisions of the Constitution of India which generally correspond to defence, foreign  
21 affairs and communication, and such other matters, as are considered essential concomitance  
22 of the fact of accession. In accordance with the directions contained in the reports referred to  
23 above, the Committee has endeavoured to clearly demarcate the sphere of Union jurisdiction  
24 keeping intact all along the residual powers of the State. And My Lords, this has an annexure  
25 at the bottom. As Your Lordships see, My Lords, the Annexure-A to the drafting report. This  
26 My Lord is drafted by the Constituent Assembly. This Annexure-A. The provisions of the  
27 Constitution which in... Sorry, I'm sorry. I'm sorry My Lord. The provisions of the Constitution  
28 of India which, in addition to Article 1 and 370... My Lord, this article 1 and 370 is in the  
29 forefront of this

30 annexure...

31 Should apply in relation to the State of Jammu and Kashmir, and the exceptions and  
32 modifications subject to which they should so apply will be as follows. So My Lords, preamble,  
33 then Your Lordships will see this proviso to Article 3. It says, cannot be introduced without  
34 the consent of the Legislature of the State. My Lords, all these are the exceptions and  
35 modifications wanted by the Constituent Assembly of Jammu and Kashmir to apply the Indian  
36 Constitution. And Your Lordships will also notice that this provided under Article 32(2)(a)  
37 PDF page 940. There's a modification of Article 32. Please see page 940 of the PDF at the

1 bottom, 2(a). Without prejudice to the powers, confirmed by Clauses 1 and 2, the High Court  
 2 shall have power throughout the territories in relation to which it exercises jurisdiction to issue  
 3 to any person or authority, including in appropriate cases, any Government within whose  
 4 territories ... those territories, directions or orders or writs, including writs in the nature,  
 5 *Habeas Corpus, Mandamus, Prohibition, Quo Warranto and Certiori* on any of them, for the  
 6 enforcement of any of the rights conferred by this part.

7

8 And then My Lord, Article 35, Your Lordships will find protects the laws which were made  
 9 specially at the time of the commencement of the order. And that's why My Lord, you have  
 10 Article 35(a) at PDF 941, about permanent residence and they being specially protected. But  
 11 My Lord this annexure goes on and on. Now, what Your Lordships see at 942? PDF 942, is  
 12 part 11. In Articles 246, the words notwithstanding anything in Clause 2 and 3 occurring in  
 13 Clause 1 and 2 and 3 and 4 shall be omitted. What they did was, they applied some parts,  
 14 omitted some parts. That is they omitted part 6 for States, they omitted part 7, they omitted  
 15 part 8, they omitted part 9, they omitted part 10 of the Indian Constitution. And they applied  
 16 this Constitution. And this My Lord, Your Lordships will notice is verbatim. The '54 order, My  
 17 Lord.

18

19 And if Your Lordships will now kindly come to 949 PDF? I'll now show you the resolution. I'll  
 20 show My Lords, the Constituent Assembly forwarding it to the Government of India. Please  
 21 come My Lord to 949, bottom.

22 'Sir, the report is before the House.' Mr. Dogra. 'It is being discussed for the last two days.  
 23 When it is adopted by the House, the long standing desires of this country for which we have  
 24 been trying for the last six years will be fulfilled. It's adoption by the House will make the  
 25 accession of this country to India permanent. We are acceding to that India, which is the  
 26 defender of peace and which is trying to check the possibilities of war. It in any part of the  
 27 world, war breaks out or any disruption is created, India extends a hand of friendship and  
 28 peace and saves the part of the world from the disaster of war.' All this My Lord is said. Then  
 29 please come to, My Lord again, they speak feelingly about India and India offering the hand  
 30 of friendship. My Lords, that is stamped all over the debates. All over the debates. Your  
 31 Lordships will find very adulatory, praiseworthy references My Lord. But now, let us come My  
 32 Lord to the resolution which Your Lordships will find, is at...The resolution is page 978. This  
 33 report was accepted. This annexure. Please come My Lord to the end of the page 978, Girdhari  
 34 Lal Dogra.

35 'Sir, I beg to move the following resolution. Resolution that having adopted the report of the  
 36 Drafting Committee and

1 (b), having thus given its concurrence to the application of the provisions of the Constitution  
2 of India, in the annexure to the said report. This Assembly authorizes the Government of the  
3 State to forward a copy of the said annexure to the Government of India for appropriate  
4 action.'

5 And at the bottom My Lord, is the Chair at page 979 he resolves, it's to the same effect My  
6 Lords. Now My Lord this report is sent to the Government of India from the Constituent  
7 Assembly.

8

9 Now My Lords, the '54 order, which has now been superseded, is, kindly see this is C.O. 48.  
10 This is My Lord, 1954. But before 1954 My Lord, they also passed a resolution under Article  
11 373, which Your lordships will find, is reflected at C.O. 44. Please see page My Lord, PDF page  
12 12, this is Documents Volume D3, page 12.

13

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

15

16 **GOPAL SUBRAMANIAM:** Volume 3, My Lord.

17

18 **JUSTICE SANJAY KISHAN KAUL:** C.O. 44?

19

20 **GOPAL SUBRAMANIAM:** C.O. 44. My Lords, all these COs were My Lords, Constitutional  
21 Orders. That is why they have that nomenclature. And please see this, My Lord. "The  
22 Constituent Assembly was conscious of what it was doing and it said,, in exercise of the powers  
23 conferred by Clause 3 of 370, of the Constitution of India, the President, on the  
24 recommendation of the Constituent Assembly of the State of Jammu and Kashmir, is pleased  
25 to declare, that as from 17th November '52, the said Article 370 shall be operative, with the  
26 modification, that for the explanation enclosed one, the following explanation is substituted."  
27 So, My Lord, you have one order under 373, which says the only change we want in 370, is the  
28 change of the explanation from the Maharaja to *Sadr-e-Riyasat*. The second is, they have  
29 asked for an application, of the order, that is My Lord, the '54 order, also stating, that Article  
30 1 and 370 will continue to govern Jammu and Kashmir. Please see that. Now, My Lords this is  
31 the '54 order, which is at PDF page 13. And if Your Lordships see, this order, in exercise of  
32 powers, conferred by Clause 1 of...

33

34 **CHIEF JUSTICE DY CHANDRACHUD:** Where do we see that Mr. Subramaniam?

35

36 **GOPAL SUBRAMANIAM:** Sorry, so sorry My Lord?

37

1 **CHIEF JUSTICE DY CHANDRACHUD:** Next page?

2

3 **GOPAL SUBRAMANIAM:** This is page My Lord 13 PDF.

4

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

6

7 **GOPAL SUBRAMANIAM:** Now, please see, My Lord, it says, Article 2, "The provisions of  
8 the Constitution, which, in addition to Article 1 and Article 370, shall apply in relation to the  
9 State of Jammu and Kashmir, and the exceptions and modifications, subject to which, they  
10 shall so apply, shall be as follows." All these My Lord, correspond to Annexure A, resolved by  
11 the drafting. Your Lordships have seen... the Constituent Assembly, that Annexure A, which  
12 was forwarded to the Government of India. This is that Annexure A. This is My Lord, in  
13 response to My Lord, the Chief Justice's question again yesterday, "Was there any action of  
14 affirmation, by the government?" This is the action of affirmation. And now Your Lordships  
15 will see, their Constitution recognizes, the Constitution of India, as applied to Jammu and  
16 Kashmir. I'm going to show that My Lord, in a moment.

17

18 So My Lord the two articles speak to each other. The two constitutions speak to each other.  
19 But that could happen only through 370. And now let us look at My Lord, the Jammu and  
20 Kashmir Constitution. As I told Your Lordships, there were so many parts of the Indian  
21 Constitution which were accepted in the 54 order. So My Lord, in their Constitution, they first  
22 recognized the Indian Constitution. They said, "we are an integral part of India", they said "we  
23 have powers to legislate, except where Parliament of India has powers to legislate". And they,  
24 My Lords, created their Legislature. Their Statehood, My Lords, is defined by their  
25 Constitution. And now let us look at My Lord the J&K Constitution. Your Lordships will find  
26 that in Volume Documents 2 please. This is, My Lords, it starts at PDF page 1, and if Your  
27 Lordships will straightaway, come to the 'Preamble of the J&K Constitution'. Justice Nariman  
28 has also extracted it in his judgment. But My Lord, this is a collective decision of the people  
29 and "We the people of the State of Jammu and Kashmir, having solemnly resolved in  
30 pursuance of the accession of this State to India, which took place on the 26th day of October  
31 '47, to further define the existing relationship of the State with the Union of India as an integral  
32 part thereof, and to secure ourselves". And My Lords many parts have been inspired naturally  
33 from our Constitution. But My Lords, the word 'secular' Justice Kaul observed that the word  
34 'secular' was not here. That's in some other part of this Constitution My Lord. There's another  
35 Article, which deals with the secularism. Now having said that My Lord, please come to over  
36 the leaf that is at PDF 70. They chose My Lords, 26th of January '57 to correspond to India's  
37 date, of 26th January '50. This Constitution may be called the 'Constitution of Jammu and

1 Kashmir'. And would Your Lordship, kindly come to Section 2(1)(a)? Most critical My Lord.  
2 This Constitution recognized My Lord, The Constitution of Indi  
3 a and how did it define the Constitution is important My Lord. It's defined in 2(1)(a).  
4 Constitution of India means, the Constitution of India, as applicable in relation to the State.  
5 So My Lord, we have an act of affirmance from Government accepting the suggestions that the  
6 Constitution should be applied. They say, "please apply it subject to exceptions and  
7 modification" and Government agrees. And My Lord they make Constitution of India means  
8 'this Constitution. And My Lords, please see Section 147 should be interpreted in the light of  
9 this. That the Legislature can never touch Constitution of India, as applied to them. And My  
10 Lords, the question will be, "where does anybody get the power to abrogate this Constitution?"  
11 This is the central question in the case.

12  
13 Now My Lord, in addition, now please read Article 3 of this Constitution in this manner. And  
14 My Lord, it is necessary that relationship of the State with the Union of India, 'the State of  
15 Jammu and Kashmir is and shall be an integral part of the Union of India.' It is an integral  
16 part, My Lord, on the strength of the '54 Order and applying the provisions of the Constitution.  
17 And then please see territory.

18 'Territory of the State shall comprise all the territories which on the 15th of day were under the  
19 sovereignty or suzerainty of the ruler of the State.'

20 My Lord this is the distinction which I answered in the morning in response to Justice Gavai's  
21 question. Please see 5. 'The executive and legislative power of the State extends to all matters  
22 except those with respect to which Parliament has power to make laws for the State under the  
23 provisions of the Constitution of India.'

24 What My Lord was attributed, the expression residuary power but My Lords, this is the rest of  
25 the power excluding the powers of the Union Parliament, the rest is with the State Legislature.

26  
27 Now after this you have to only see two more provisions. One is My Lord, I request Your  
28 Lordships to kindly look at Section 92. But before that My Lord I mentioned, please come to  
29 page PDF 25. The Head of the State My Lord is under this Constitution, page 25. The Governor  
30 is appointed under this Constitution. The office of the Governor finds a place for Jammu and  
31 Kashmir in this Constitution. And Your Lordships will find Section 35 is a Council of Ministers  
32 to aid and advice the Governor. Even this form of Government is enshrined in this  
33 Constitution. And now if Your Lordships come to Section 92, which is at PDF page 59. Your  
34 Lordships will find that this Section 52 is... 92, I'm sorry, is in stark distinction to the  
35 provisions in our Constitution. So, My Lords the purpose of Section 5, was that 370 must  
36 continue, the list allocation must continue, 246(2) and (3), must not apply. But now let's look  
37 at 92.



1 'If at any time the Governor is satisfied that a situation has arisen in which the Government of  
2 the State cannot be carried on in accordance with the provisions of this Constitution, the  
3 Governor may assume to himself any or all functions of the Government of the State, make  
4 incidental and consequential provisions and so on.'

5 But Your Lordships notice he is not in a position to exercise the powers of the legislature and  
6 he has to do this My Lords, get popular government within six months. Because if you see  
7 92(3), it ceases to operate on the expiration of six months from the date on which it was first  
8 issued. So My Lord popular representative government is a part of the architecture of Section  
9 92 of the Jammu and Kashmir Constitution.

10

11 My Lords as I mentioned, the High Court is constituted under this Constitution, PDF, page 61.  
12 Page 61, My Lord. Your Lordships will see 93, 94 and 95, they're referred to My Lord,  
13 consultation with Honourable the Chief Justice of India. And then, please see My Lord, the  
14 powers of the High Court, at PDF 65. And now Your Lordships will find, that that '54 Order,  
15 was treated as a part of law applicable to them. Please see this at 65, Article 103. When Your  
16 Lordship read the '54 Order, I show 32(2)(a). 32(2)(a), My Lord, is only in the '54 Order. And  
17 here Your Lordships will notice, "The High Court will have power to issue directions with other  
18 than those mentioned, in Clause 2(a), of Article 32 of the Constitution of India." My Lord,  
19 therefore, the linkage between the '54 Order and the Constitution of India, as applicable, has  
20 been cemented by the Jammu and Kashmir Constitution, as well. And which is why the last  
21 provision My Lord, which I have to show you, is the amendment to the Constitution, 147. It  
22 has already been read. But My Lord, it is significant, that the architecture of the second proviso  
23 at PDF page 85, makes 3 non-derogable, 5 non-derogable, and application of Indian  
24 Constitution provisions non-derogable. Please see that, "Provided further, that no bill or  
25 amendment, seeking to make any change in this Section, or the provisions of Sections 3 and  
26 5. 5 also My Lord, is about their autonomy of lawmaking. 3 is, of course, integration with India  
27 or provisions of the Constitution of India, as applicable in relation to the State." So My Lord,  
28 the provisions of the Constitution of India were not applied only through a 370 order. They  
29 were embraced into the Jammu and Kashmir Constitution.

30

31 So, My Lords, I conclude this portion by the submitting, that when we read Article 370, we  
32 should not be waylaid, by that marginal expression, 'temporary', in the marginal note. But the  
33 entire article has worked out, everything has worked out. It would be incorrect to say 373 is  
34 *otiose*. No. In terms of 370, they said, we want to continue 370 and one, we want only these  
35 exceptions to the Constitution, which means they have expressly affirmed by a resolution, that  
36 they don't want it to be abrogated. It is an express act of resolution and that express act of  
37 resolution, is accepted My Lord, by the Government and the order is passed. So My Lords, I

1 submit, that the vexed question, as if the Constituent Assembly was silent, about the fate of  
2 370, it is not correct. On the contrary, they wanted its continuance. They wanted it to be...they  
3 wanted this to be the language of communication My Lord, between the two Constitutions.  
4

5 So My Lord if the Constituent Assembly of Jammu and Kashmir, which is the body of the  
6 people, if they have taken these proactive steps, we have accepted these steps, the question  
7 which arises for those is "Can we now abrogate this arrangement by that too unilaterally?  
8 Unilaterally. Can we, My Lords, can India ever... can we ever abrogate this arrangement?" My  
9 Lords, there is nothing called 'hierarchies' in Constituent Assembly in the definitions. Your  
10 Lordships will find theorists have written any number of books on Constituent Assemblies.  
11 The nature of the constituent power, My Lord which is exercised by an Assembly is as pristine  
12 and pure as any Assembly. This is the equality which we have practiced My Lord. This is the  
13 level of statesmanship which India practiced and waited. Nothing was done in a hurry, and My  
14 Lord nothing was imposed. Whatever the Constituent Assembly wanted, we accorded, we  
15 accorded it. My Lord, this is the most important aspect. If this factual foundation and this is  
16 beyond doubt if this is so My Lord, the question is ' can the Legislature of a State under the  
17 Jammu and Kashmir Constitution be rendered redundant?' Can it be rendered My Lord  
18 redundant? And then the question My Lord is, "what is the effect of those two seals. 272, 273.  
19 We'll go straight to them. You have only got to apply My Lord the degree test, effect test. What  
20 does it do? 272, 273. Let us look at both these orders and let us see My Lord whether the power  
21 has been exercised in alignment with the purpose of the Article. My Lord, the theory of *ultra*  
22 *vires* in Constitutional Law can be either in violation of power three or unsupported by  
23 lawmaking power. But there is a third species of *ultra vires* if it is not aligned to the purpose  
24 for which it has been entrusted. Then, in that case My Lord, it is an action which is *ultra vires*.  
25 These two Constitutional Orders. If Your Lordships will kindly see with me, are in Documents  
26 Volume 3. And Your Lordship will find that PDF 101 is the first. Now My Lord, the power  
27 which is now exercised as Your Lordships can see is 'the power under 370'. The issue before  
28 us My Lord is 'can the architecture of Article 370 obviate the requirements of the views of the  
29 other?' I am putting others. I'll develop what is meant by 'other'. 'The views of the other'. This  
30 is either the State Legislature or the State Government. My Lord this is an article which  
31 contemplates that there is a State and a State Legislature and a State Government within the  
32 scheme of the Jammu and Kashmir Constitution. And it has been used under Clause 1. In my  
33 submission, the purpose of power under Clause 1 My Lord, is based upon the principle of  
34 mutuality. Because My Lord the Article begins with the President, it doesn't mean that it is  
35 some untrammelled power. No. But there is an interesting thing in Article 371,  
36 notwithstanding anything contained in the Constitution. That notwithstanding was necessary  
37 because there could be exceptions and modifications to provisions of the Constitution,

1 especially for Jammu and Kashmir. And notwithstanding anything contained in this  
 2 Constitution also tells us the supreme nature of this provision under 370. So My Lords if we  
 3 look at the components of basic structure, we have to look at the components of the basic  
 4 structure, as is reflected from the J&K Constitution which applies the Constitution of India as  
 5 applicable. Can that be abrogated by a reference to the power under 371? 371, My Lord was a  
 6 means of communication, was to respect each other. But that order does not contain a power  
 7 if I may say so with great respect, to abrogate a legal compact. It is a legal compact My Lord.  
 8 And this legal compact is of two kinds. One of course, it's the traditional social contract theory  
 9 but this compact is founded on federalism. That's why My Lord, leading authors on federalism,  
 10 they often say that this is a different kind of social contract, federalism. So 370 established the  
 11 contours of this relationship in the federal sense. My Lord this federal principle must be read  
 12 as inbuilt in the application of Article 370. And that My Lord cannot be abrogated. Now please  
 13 read the order with me.

14 'In exercise of powers conferred by Clause 1, of Article 370, the President...' And let us My Lord  
 15 concentrate on the next few words, 'with the concurrence of the Government of State of  
 16 Jammu and Kashmir.'

17 What is that government contemplated by Article 370 is the question. It was a Government  
 18 which was elected and accountable to the Legislative Assembly under the J&K Constitution.  
 19 So, My Lords if it is so interpreted, this concurrence, which one must assume is the  
 20 concurrence of the Governor, is not the constitutionally mandated agreement in 370. Now My  
 21 Lord look at 1(2) of this order. "It shall come into force at once, and shall thereupon supersede  
 22 the Constitution application to Jammu and Kashmir Order 1954, as amended from time to  
 23 time."

24

25 **CHIEF JUSTICE DY CHANDRACHUD:** Apologies for the delay, Mr. Subramaniam.

26

27 **GOPAL SUBRAMANIAM:** Not at all, My Lord. Not at all. Just before the midday recess I  
 28 was inviting Your Lordships' attention to C.O. 272 itself.

29

30 **CHIEF JUSTICE DY CHANDRACHUD:** You have made the point that para 1(2) says that  
 31 C.O 1954 is superseded.

32

33 **GOPAL SUBRAMANIAM:** Yes, yes.

34

35 **CHIEF JUSTICE DY CHANDRACHUD:** That's where we left off at lunch.

36

1 **GOPAL SUBRAMANIAM:** That's right. Now My Lords, the implications of this are quite  
2 serious. The implications of the abrogation of the 1954 order is completely serious and it is  
3 irreversible. The reason being, if Your Lordships may kindly take a moment Documents  
4 Volume 7, PDF page My Lord 978. PDF 978, Documents Volume 7.

5

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

7

8 **GOPAL SUBRAMANIAM:** Your Lordships have seen at the bottom about the resolution.

9

10 **CHIEF JUSTICE DY CHANDRACHUD:** Yes. We saw that.

11

12 **GOPAL SUBRAMANIAM:** Adoption of the committee and forwarded to the Government.  
13 And this My Lordship, if Your Lordships see over the page, 'Sir, it is essential that the report  
14 of the Drafting Committee, which the House has passed just now should be got incorporated  
15 in the Indian Constitution, in this connection the President of India may possibly issue a  
16 decree under Article 370. This recommendation shall become a part of the Indian Constitution  
17 according to the provisions of his decree.' And then Your Lordships notice at the bottom of  
18 that page 979. This is where My Lord it is adopted, authorizes the Government of the State to  
19 forward a copy of the annexure to the Government of India for appropriate action. And at page  
20 990 My Lord, it's important. Please see this 990. Your Lordships will find PDF page 990. Mr.  
21 Dogra.

22 'Sir, this House had last taken certain important decision in respect of the application of  
23 certain articles and entries of the Constitution of India to our State. The recommendations of  
24 the House in this behalf, has been sent to the President of India, who in exercise of the powers  
25 conferred by Clause 1 of Article 370, was pleased to issue Constitution Application to Jammu  
26 and Kashmir vide Order '54. I lay the copy of this order on the table of the House.'

27 And, My Lord, when we look at the '54 Order, like Article 35A, which has a special provision  
28 in relation to the rights of residents, the same, My Lord, is actually mirrored in the State  
29 Constitution. Please first see, My Lord, the provision relating to Article 35A, which is at  
30 Documents Volume 3, page 15, My Lord. Your Lordships will notice at the bottom, 35A. 'After  
31 Article 35, the following new article shall be added, namely, notwithstanding anything in this  
32 Constitution, no existing law in force the State of J&K, and no law hereafter enacted by the  
33 legislature of the state defining classes of persons who are, or shall be permanent residents of  
34 the State of Jammu and Kashmir, or conferring on such permanent residents any special rights  
35 and privileges, or imposing upon other person, any restrictions as regards employment under  
36 the State Government, the acquisition of immovable property in the State, settlement in the  
37 State, or right to scholarships and such other forms of aid at the State Government may

1 provide, shall we void on the ground that it is inconsistent with, or takes away or abridges any  
2 rights conferred on the other citizens of India by any provision of this part.' My Lord, exactly  
3 Sections 6 to 10, Your Lordships may just make a note, which is in Documents Volume 2, is  
4 Section 6, My Lord, of the Jammu and Kashmir Constitution, defines Permanent Residence.  
5 Your Lordships will find that Documents Volume 2, PDF page 18. And there, My Lord, Your  
6 Lordships will find, after their definition and references. And Section 9 says, they will have  
7 special provisions relating to permanent residence. Section 10...mark this My Lord. Section 10  
8 at PDF page 20, refers to the Constitution of India. 'The permanent residents of the state shall  
9 have all the rights guaranteed to them under the Constitution of India.' So, this is why the  
10 whole [UNCLEAR] abrogation of the 1954 Order, with respect My Lord, which is the indication  
11 of a symmetric federalism constitutionally recognized under 370, cannot be abrogated. Now  
12 My Lord, there are two more defects in that order. If Your Lordships will kindly come back to  
13 C.O. 272. Your Lordships will notice, then it says, "All the provisions of the Constitution, as  
14 amended from time to time, shall applied in relation to the State of Jammu and Kashmir".  
15 Now, My Lord, this militates against the principle of exceptions and modifications which could  
16 be bilaterally urged and be granted. This does away with that bilateralism. This completely  
17 emasculates the bilateralism which is inbuilt in Sub-Article 1. And what it does, therefore, My  
18 Lord is, it applies the provisions of the Constitution, lock, stock and barrel, without the  
19 exceptions and modifications agreed to the State. And the exceptions and modifications  
20 subject to which they shall so apply, shall be as follows. So, a new exceptional modification is  
21 now carved out for the application of the entire Constitution. And that exceptions or  
22 modification, My Lord, is no more than, what is seemingly a change in a provision of  
23 interpretation. My Lord, the provision of interpretation or to aid interpretation is an aid to  
24 construction. It is no more than My Lord an aid to seek and designate the correct references  
25 of expressions in a Constitution. But if Your Lordship sees the new Clause that is D in this,  
26 please see the words of D. D says, 'In proviso to Clause 3 of Article 370 of this Constitution,  
27 the expression Constituent Assembly of the State referred to in Clause 2 shall read Legislative  
28 Assembly of the State.' Is this, My Lord, interpretation, is the question. Is this an  
29 interpretation? Is this exception permissible in a Clause of interpretation? My Lord in other  
30 words, if a Constituent Assembly and the Legislative Assembly of a State are by their very  
31 nature different bodies, they are different persona designator, then My Lord it cannot be an  
32 interpretation that the expression Constituent Assembly of the State referred to in Clause 2  
33 shall read Legislative Assembly of the State. This My Lord, is a direct amendment to Article  
34 370(3). And that amendment cannot be achieved by an interpretation provision. This My Lord,  
35 insofar as 272 is concerned. Let's look at the next order which is 273.

36

37 **JUSTICE SANJAY KISHAN KAUL:** Page number?

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**GOPAL SUBRAMANIAM:** And this is My Lord, PDF would be 103. This is a declaration under Article 373 of the Constitution.

**CHIEF JUSTICE DY CHANDRACHUD:** Mr Subramaniam, you are saying that what is done by Clause D of para 2 of C.O. 272, is it directly amends Article 370(3), the proviso. And that this could not be done by resorting to the form of an amendment of the interpretative provision, which is Article 367. What if they have done that by issuing an adaptation order?

**GOPAL SUBRAMANIAM:** My Lord, now an adaptation order, which takes place under 372. I'll just show that My Lord because that's very interesting. An adaptation order can be passed whenever a law prior to the commencement of the Constitution, which continues as on the date of the commencement of the Constitution, needs to be brought in conformity with the Constitution, the President, My Lord, can pass an adaptation order. But....

**CHIEF JUSTICE DY CHANDRACHUD:** There's also a power to exercise under the second proviso to Clause 1?

**GOPAL SUBRAMANIAM:** Yes, I'm coming to that. I'm just coming it if Your Lordships...

**CHIEF JUSTICE DY CHANDRACHUD:** What if they have exercised the power? I mean, because we have to test whether the power is sustainable with reference to any of the other proviso.

**GOPAL SUBRAMANIAM:** Certainly. I'll just do that.

**CHIEF JUSTICE DY CHANDRACHUD:** What if they have exercised power under the second proviso to Clause 1?

**GOPAL SUBRAMANIAM:** Let us look at that My Lords. If Your Lordships straight away can see that at this juncture. Please see My Lord.

**CHIEF JUSTICE DY CHANDRACHUD:** The 272 says that it is issued under Clause 1 of 270. Sorry. 370.

**GOPAL SUBRAMANIAM:** Yes. The second one My Lord, see your 273 is a clear order under Sub-Article 3.

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**CHIEF JUSTICE DY CHANDRACHUD:** Right. C.O. 272...

**GOPAL SUBRAMANIUM:** Yes.

**CHIEF JUSTICE DY CHANDRACHUD:** Is specifically issued under Clause 1 of Article 370.

**GOPAL SUBRAMANIUM:** That's right.

**CHIEF JUSTICE DY CHANDRACHUD:** Now the only provision of Clause of 371 which would apply is Clause D.

**GOPAL SUBRAMANIUM:** Yes My Lord. That's right. And let us see D, My Lords.

**CHIEF JUSTICE DY CHANDRACHUD:** Because if they are abrogating.... if they are abrogating, for instance, C.O. 1954...

**GOPAL SUBRAMANIUM:** Yes.

**CHIEF JUSTICE DY CHANDRACHUD:** Or they are for instance making an adaptation to the Constitution both are referable to the power under Clause (d) of... under Sub-Clause(d) of Clause 1 of Article 370.

**GOPAL SUBRAMANIUM:** Yes.

**CHIEF JUSTICE DY CHANDRACHUD:** In which case the only requirement under the proviso...I shouldn't say only requirement but 'the' requirement under the second proviso is...the first proviso is that you have to consult with the Government of the State if it relates to a matter covered by the Instrument of Accession and the concurrence of the State Government if it is a matter otherwise than what is covered by the Instrument of Accession. Which will then lead us to who was the State Government when they issued the order.

**GOPAL SUBRAMANIUM:** My Lords the question would be...

1 **CHIEF JUSTICE DY CHANDRACHUD:** As powers of the State Government at that stage  
2 and for this argument we will test it on the basis that the powers of the State were validly vested  
3 in the President of India.

4

5 **GOPAL SUBRAMANIAM:** My Lord on the *demurrer* we will proceed that he had powers.

6

7 **CHIEF JUSTICE DY CHANDRACHUD:** Exactly. Yes.

8

9 **GOPAL SUBRAMANIAM:** We will proceed on that footing. But, the question is, can he  
10 exercise the powers under this proviso is the question. In other words, what I'm submitting  
11 for Your Lordships kind consideration is as follows. The expression State Government for the  
12 purpose of 370 by the very nature of that article contemplates and validly elected  
13 democratically constituted State Government accountable to an Assembly. Sans that...Sans  
14 that, I submit with respect there is a polarity in 370's architecture i.e. President on the one  
15 hand and the State Government on the other. That polarity My Lord under 370 cannot be  
16 merged, and the President cannot advise himself...

17

18 **CHIEF JUSTICE DY CHANDRACHUD:** Are you for a moment suggesting that when a  
19 proclamation under Article 356 is in operation, there is a fetter on the exercise of the power  
20 under the second proviso to Clause-D of Article 370.

21

22 **GOPAL SUBRAMANIAM:** My Lords that is why with respect I'm submitting, Yes. I am  
23 actually submitting that the fetter My Lords is for the purpose of exercising 370. My Lords if  
24 Your Lordships don't mind...

25

26 **CHIEF JUSTICE DY CHANDRACHUD:** At the highest is not...at the highest and the best  
27 is not an express fetter. It's an implied limitation, which you are reading into, arguably.

28

29 **GOPAL SUBRAMANIAM:** It is an implied limitation. It is an implied limitation but even  
30 though it is implied, it is strongly expressively architecture of the whole of 370. If the whole of  
31 370, if Your Lordships accept my submission...respectful submission is a manifestation of the  
32 Constitutional Principle of Federalism in a manifest way. Then, in that case, My Lord, it is  
33 necessary that both parts of the federal principle must be available for enabling an exercise of  
34 the power under 370. And there is a reason My Lord. There is an additional reason. This Article  
35 370 is not like My Lord what we call as provisions of conditional legislation. Article 370 is  
36 application of provisions of Constitution. That My Lord by itself is a Constitutive Act. My Lord  
37 this provision under Article 370 applying the provisions of the Constitution is also a



1 Constitutive Act. And if it is going to be adjoined or actually sanctioned or concurred with by  
2 the State Government or by the Legislature, as the case may be, it is necessary, My Lord that  
3 that polarity, that dual Act as being on the scene is a *sine qua non* under 370.

4  
5 **CHIEF JUSTICE DY CHANDRACHUD:** The second aspect Mr. Subramaniam which I  
6 thought I'll just place at this stage. I didn't want to place it at the stroke of lunch, which was  
7 while our Constitution does speak about the Constituent Assembly of the State of Jammu and  
8 Kashmir, which was then in contemplation at the date of our Constitution on 26th of January  
9 1950. Significantly after 26th of January 1957, our Constitution does not speak of the  
10 Constitution of Jammu and Kashmir at all.

11  
12 **GOPAL SUBRAMANIAM:** My Lords I'll say with great respect. The reason being that the  
13 Constitution of Jammu and Kashmir was a product which envisaged because there was a  
14 Constituent Assembly. But the way it has happened is, the Constitution of India My Lords, the  
15 applicable provisions were brought into the J&K Constitution, and the J&K Constitution had  
16 its own chapters which I have pointed out to for Your Lordships consideration establishing its  
17 frame work.

18  
19 **CHIEF JUSTICE DY CHANDRACHUD:** Therefore, our Constitution speaks of only one  
20 institution, namely, the Constitution of India, and the Constitution of India as it applies to the  
21 State of Jammu and Kashmir, subject to modifications and exceptions.

22  
23 **GOPAL SUBRAMANIAM:** That's right, My Lord.

24  
25 **CHIEF JUSTICE DY CHANDRACHUD:** Therefore, the only document, the only compact  
26 or the only basic document that is within the contemplation of our Constitution, is this  
27 Constitution itself.

28  
29 **GOPAL SUBRAMANIAM:** I agree. But, My Lord now, the question is, was J&K Constituent  
30 Assembly not tasked with the framing of a Constitution, that is clear from Sub-Article 2 of  
31 370? Under 370(2) and (3) My Lord, if Your Lordship sees both these Articles...

32  
33 **CHIEF JUSTICE DY CHANDRACHUD:** ... post 1957...Post 1957, neither the Government  
34 or the Legislative Assembly of Jammu and Kashmir, nor for that matter, the political  
35 establishment in the rest of the country represented by Parliament, nobody ever thought of  
36 amending the Indian Constitution to bring the Jammu and Kashmir Constitution expressly  
37 within the fold of the Indian Constitution.

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**GOPAL SUBRAMANIAM:** My Lord, it may not be necessary, I'll tell Your Lordship why, if I can, My Lord? If I may humbly urge for Your Lordship's consideration? The Constitution for Jammu and Kashmir is intended to be applicable to the State of Jammu and Kashmir. But, it is a Constitution because it is framed by a Constituent Assembly.

**CHIEF JUSTICE DY CHANDRACHUD:** But the Constitution of Jammu and Kashmir imposes limitations on the power, on the executive power of the Union, and on the legislative power of and the organ of the Union, namely Parliament?

**GOPAL SUBRAMANIAM:** The Constitution of J&K doesn't impose any fetter.

**CHIEF JUSTICE DY CHANDRACHUD:** The Constitution of J&K refers to the fact, that the residuary power would be vested with...

**GOPAL SUBRAMANIAM:** Yes. My Lord, just forgive me. I'm obliged, I'm obliged.

**CHIEF JUSTICE DY CHANDRACHUD:** It's a clear fetter. I'm just giving you one example of the fetter. But therefore, there are fetters in the J&K Constitution on the operation of the Union Constitution.

**GOPAL SUBRAMANIAM:** My Lord, this is actually the asymmetry.

**CHIEF JUSTICE DY CHANDRACHUD:** What is not necessary after 1957, for the Constitution of the Union, which is now the only Constitution for the entirety of the country, including Jammu and Kashmir, which had acceded too.

**GOPAL SUBRAMANIAM:** Yes.

**CHIEF JUSTICE DY CHANDRACHUD:** Was it not necessary for the Indian Constitution to be amended to recognise some other Constitution as an intrinsic part of this Constitution?

**GOPAL SUBRAMANIAM:** My Lord, what they did was, in the Order, '54 Order... I'm answering My Lord, the Chief Justice's question, as an example. I'm answering the question, My Lord. If Your Lordship sees the '54 Order, the subject of stateless was omitted in its application. So, what we have done is, with the help of the '54 Order, we have imposed fetters on the Constitution. My Lord, that's the point for Your Lordships to consider. The '54 Order,

1 by saying that under Article 246 only Article 1 will be read, 2, 3, and 4 were initially omitted in  
 2 the '54 Order. Subsequently, My Lord, 3 and 4 were omitted, only 1 and 2 were retained. And,  
 3 in the list, namely, in the 7th Schedule, the state list was completely omitted. It has been  
 4 omitted, My Lord, in the order itself. So, what I'm submitting is, when Your Lordship said that  
 5 there is a certain degree of denudation of power, which otherwise is available under the  
 6 Constitution... like say, for instance Entry 97, My Lord. Entry 97 of List 1. But, Entry 97 of List  
 7 1, was in the '54 Order deleted. But, in their Constitution, they have said, whatever is their  
 8 domain of Parliament, whether it is in the concurrent list or in the union list, it is entirely for  
 9 Parliament to frame laws. The rest of it will be the residuary powers of the State Legislature.  
 10 So, this is what I meant, that the two talk to each other. The orders, that is, 370 Orders and the  
 11 Jammu and Kashmir Constitution, they both speak to each other. As Your Lordships rightly  
 12 said, there are some carve-out for Jammu and Kashmir. But, those carve-outs are volitionally  
 13 done. Those carve-outs in the Order of 1954, by giving them this sense that you have freedom  
 14 to legislate in your spheres, was a conscious carve-out. That is the point I am making.

15

16 **CHIEF JUSTICE DY CHANDRACHUD:** That's the problem, Mr Subramaniam. Because,  
 17 as you rightly said that these were volitional carve-outs. So just as the Union has therefore  
 18 issued those C.O.s, right from 1950, 1952, 1954, unless there is some higher constitutional  
 19 preset which prevents them from modifying that carve-out, what is there to restrain the Union  
 20 from modifying the terms of that carve-outs?

21

22 **GOPAL SUBRAMANIAM:** My Lords, the...

23

24 **CHIEF JUSTICE DY CHANDRACHUD:** Unless you make the Jammu and Kashmir  
 25 Constitution a part of our Constitution to impose fetters on the, fetters on the power of  
 26 Parliament or the executive. <INAUDIBLE> otherwise.

27

28 **GOPAL SUBRAMANIAM:** My Lords, May I answer?

29

30 **CHIEF JUSTICE DY CHANDRACHUD:** The question then arises about concurrence.

31

32 **GOPAL SUBRAMANIAM:** Yes.

33

34 **CHIEF JUSTICE DY CHANDRACHUD:** Concurrence and consultation and they just  
 35 decide whose concurrence was required in a State at a point of time when 356 is in operation.  
 36 If we accept your argument, during 356, the operation of 356, you cannot exercise the powers  
 37 under the second proviso to Article 370(1) (D) at all.

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**GOPAL SUBRAMANIAM:** Yes.

**CHIEF JUSTICE DY CHANDRACHUD:** If we accept that then you are home. You have lost completely.

**GOPAL SUBRAMANIAM:** Yes. But My Lord I want to...

**CHIEF JUSTICE DY CHANDRACHUD:** If you accept that during the time, that the power of the Union under the second proviso to Article 370(D) is not denuded when 356 is in operation, in that event the Union was clearly within its power. For instance suppose 356 is in operation, all the executive powers of the State are assumed by Union. Who issues an ordinance in the State?

**GOPAL SUBRAMANIAM:** My Lord.

**CHIEF JUSTICE DY CHANDRACHUD:** The ordinance has to be issued in the State.

**GOPAL SUBRAMANIAM:** Yes.

**CHIEF JUSTICE DY CHANDRACHUD:** Any State... State of the Union of India. Powers under 356 are assumed by the President of India, urgent circumstances arise, an ordinance has to be issued. Can the President not issue an ordinance for the purpose of that State?

**GOPAL SUBRAMANIAM:** My Lord the difference is between, My Lord, a power to make laws. I am submitting for Your Lordship's consideration. A power to make laws... My Lord my submission is... My Lord, my submission is...

My Lord, I wanted to answer Your Lordship's observations in serial order. The first is, Your Lordships asked about the Jammu and Kashmir Constitution being absent. It is not My Lords, it is absent, it is actually, there is a recognition of the position of the Constitution, because many parts of our Constitution under the '54 Order, were not applicable to the State of Jammu and Kashmir. That's the first. The second is, My Lord, the Jammu and Kashmir itself has fundamental features, is acknowledged in a passage of Chief Justice Sikri in *Kesavananda Bharati's* case, I'll point it out. Thirdly, as far as, My Lord, the power under Article 356 is concerned, it is conditioned, My Lord, for a certain purpose. Your Lordships have already heard submissions on it. Article 370 does not... it is completely alien to the purpose of 356.

1 Article 370, My Lord, is a case where there has to be bilateralism in the very nature of things.  
2 If Your Lordships were to read the transposition of power in the Governor and in the President,  
3 then the net effect is, that even though Article 370 begins with a Non Obstante Clause, it will  
4 be completely... it will be rendered negatory. My Lord, the reason why special powers are there,  
5 are only when they are conditioned by emergent needs. The scope of 356 is emergency, and  
6 My Lord, it is well settled. Even whatever is done during a President's proclamation in 356,  
7 cannot be irreversible. It cannot be final. My Lord, that is why, it is an interim arrangement  
8 for the continuance of the Constitution under 356. Under 356, My Lord, it is not intended to  
9 be a reservoir for power, for actually exercising powers under the Constitution which have  
10 nothing to do with emergency. They have nothing to do at all. Then My Lord, I say that 370 is  
11 outside the ambit of 356, because it is not germane to the purposes of 356. And 370  
12 contemplates. And in my respectful submission, My Lord, 370 contemplates limitations on  
13 that power. These are, My Lord, express limitations. And, these limitations cannot be obviated  
14 by taking recourse to 356. That is the point I'm making.

15

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

17

18 **GOPAL SUBRAMANIAM:** These are, My Lord, express limitations. So, My Lord, I submit  
19 with respect, 370 also, My Lord, is a power which is coupled with a duty. And the obligation,  
20 My Lord, under 370 is to act consistent with the very purposes of 370. And, the very purpose  
21 of 370, My Lord, was to enable another assembly to take a decision, and both of them work  
22 together. That is the scheme, as far as 370 is concerned.

23

24 **CHIEF JUSTICE DY CHANDRACHUD:** Mr. Subramaniam, now what is your next limb  
25 of submission?

26

27 **GOPAL SUBRAMANIAM:** Yes. Now, My Lord, the next limb of the submission, which I  
28 wanted to urge is, Your Lordships have looked at those four judgments under 370.

29

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

31

32 **GOPAL SUBRAMANIAM:** My Lord, I need to bring something to Your Lordship's notice  
33 in those judgments. Only what is relevant for my purpose.

34

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

36

1 **GOPAL SUBRAMANIAM:** My Lord, all those judgments, in my view, postulate the  
 2 continued existence of 371. And, the judgments clearly establish that, notwithstanding the  
 3 cessation of the Constituent Assembly, 370 would operate. And, My Lord, there's a reason why  
 4 it must operate. If the Jammu and Kashmir Constitution, My Lord, has to operate, 370 has to  
 5 be in existence. The application of the provisions of the Indian Constitution can happen only  
 6 through 370. And, because it has happened through 370, My Lord, 370 cannot be used to self-  
 7 destruct. It cannot be used to modify or amend itself. This My Lord, is established in the  
 8 judgments itself of Your Lordships, which I'll presently point out. The second is, in **Sampat**  
 9 **Prakash**, there is an express statement which is supported by legislative record, that the  
 10 Constituent Assembly did not abrogate, but insisted on the continuance of Article 370. If that  
 11 is so, My Lord, I submit, that **Sampat Prakash** takes the position that 370 is there to stay.  
 12 And, My Lord, there is another important aspect. Why is it that the J&K Constitution was not  
 13 taken note of by an express constitutional provision? The answer to that also is as follows, My  
 14 Lord.

15 The power to amend the J&K Constitution, being a Constitution created by a Constituent  
 16 Assembly, can only lie with the body which has been created by that Constitution. That My  
 17 Lord, is settled law, that if a constituent body or a constituent power prescribes a Constitution,  
 18 and elects the body under that Constitution, the power to amend that Constitution will lie with  
 19 that body. So, the body, My Lord, which is competent... I'm so sorry, My Lord...

20

21 **JUSTICE SANJIV KHANNA:** Mr. Gopal Subramaniam, on that there may be a slight issue  
 22 for a simple reason. One, when we read the earlier part of 1954 order, it was quite clear that  
 23 the Indian Constitution has been adopted to the omissions and modifications. We may call it  
 24 the J&K Constitution, it may have been referred to as J&K constitution, but what is adopted is  
 25 the Indian Constitution, with exceptions and modifications. One. Number two, Article 370 by  
 26 very nature is very flexible and normally Constitutions are flexible in time and space because  
 27 they are made once, but they last for a long time. Yes, we have the basic structure doctrine and  
 28 that argument of yours that basic structure is there. But if you look at 370 itself, it's a flexible  
 29 article. It says that modifications can be done to ensure that the Constitution of India, as  
 30 applicable to the State of J&K should assimilate whatever is applicable in other parts of  
 31 country.

32

33 **GOPAL SUBRAMANIAM:** My Lord with respect, I think I have to give My Lord an  
 34 absolutely candid answer. My reading of the Article 370...In the light of the structure of Article  
 35 370(1), (2), and (3), My Lords, orders may be issued under 370(1), but they have to be based  
 36 on bilateralism. And that bilateralism is necessarily to involve what is agreed upon by the State  
 37 or Internal Legislature. Sans the State, sans the Legislature, I submit My Lord, it will be... it

1 will not be consistent with constitutional principles to interpret 370 as if it can be done  
2 unilaterally. My Lord, the choices as follows, can the power be exercised under Article 370  
3 unilaterally? My answer is, no. The second, Your Lordship said, it is a constitutional power. I  
4 completely agree. Third, but My Lord, asymmetric federalism, by its very definition, means  
5 special provision for special places or States. Like My Lord, you have provisions in, all in the  
6 Constitution.

7

8 **JUSTICE SANJIV KHANNA:** That is basically is bilateralism and federalism, which is  
9 inbuilt in 370. If it is violated then it's.. then it cut... then that flexibility taken away. That's my  
10 question.

11

12 **GOPAL SUBRAMANIAM:** Then it becomes ultra vires My Lord. Then it becomes *ultra*  
13 *vires* 370. I'm very obliged for putting that question to me. My Lord, I can't...So federalism  
14 and supremacy of the Constitution are My Lords conjoined principles. Both supremacy and  
15 federalism. And if both of them are injected or infused necessarily, in 370, then we have to see  
16 whether the exercise of power under 370 can be destructive of those principles. That is the  
17 point My Lords in this case. And it is a crucial point My Lord, which we must consider. The  
18 Jammu and Kashmir Constitution can be overturned, repealed by that Legislature. But it  
19 cannot be abrogated by us. My Lord, that Constitution is also a document. It is also a  
20 document, which is a legal document. It is both a normative document and a prescriptive  
21 document that has constituted the Legislature. The organs of the State have been constituted  
22 under that Constitution. It is My Lord, entitled to be noticed. That Constitution cannot be  
23 wished away or abrogated unless the power to override that Constitution can be located  
24 somewhere. My Lord, this is the point here that without there being an express provision in  
25 the Constitution to override the Jammu and Kashmir Constitution, My Lord, what Your  
26 Lordships will see in C.O. 273 cannot happen. C.O. 273, if Your Lordship sees now with me.  
27 My Lord, it abrogates the Constitution and that cannot be done at all. Please just look at the  
28 document.

29

30 **JUSTICE SANJAY KISHAN KAUL:** Mr. Subramaniam.

31

32 **GOPAL SUBRAMANIAM:** Yes, I'm so sorry My Lord.

33

34 **JUSTICE SANJAY KISHAN KAUL:** Mr. Sibal's own argument was that as the orders were  
35 issued from time to time, very little remained inside 370. Actually that was his argument that  
36 very little remained inside 370. So do you have any examples where these C.O.s were issued.  
37 There were any negative comment on it from the assemblies on any of the situations?

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**GOPAL SUBRAMANIAM:** My Lord that is what I'm submitting. All the C.O.s which Your Lordships will notice some were issued before the dissolution of the Constituent Assembly of Jammu and Kashmir. It's to dissolve on the 20...

**JUSTICE SANJAY KISHAN KAUL:** We are talking about the post 1957.

**GOPAL SUBRAMANIAM:** Yes. Now, post 1957, there were orders which were passed. Those orders were with the concurrence of the Government. They were with the concurrence under D. There are other provisions which Your Lordship mentioned. For instance, Article 356 I'll give Your Lordships as an example. Article 356 My Lord was omitted in the 1954 Order. It was applied for the first time in 1965 by a constitutional order and Your Lordships have seen that in Article 356 the words are...'In order, in accordance with the provisions of this Constitution'. So My Lord, in the constitutional order, Article 356 was applied, saying the provisions of the Constitution in Article 356 will mean provisions of the Jammu and Kashmir Constitution. I can show that order My Lord, just as an example. That 356 itself came much later. My Lords it is not correct to say that by virtue of 370 everything has happened. No. These exceptions and carve-outs have continued. These exceptions and carve-outs have continued from the '54 Order, which is why what is today abrogated is the parent Order 54, as amended from time to time. My Lords that is why it is necessary to bear in mind that these adaptations were based upon bilateralism. These modifications were based on bilateralism. My Lord one important feature which I may bring to Your Lordship's attention is, in Article 370(2) My Lord, there is a proviso, that the competent Legislature can pass a law even after a President passes an adaptation order. That My Lord is not existent here because the Legislature under 147 cannot do anything to the provisions of the Constitution as applied in Jammu and Kashmir. May I, My Lord?

**JUSTICE SANJAY KISHAN KAUL:** Yes, Mr. Subramaniam.

**GOPAL SUBRAMANIAM:** My Lord, I may now straightaway point out to the two or three things in the decisions.

**CHIEF JUSTICE DY CHANDRACHUD:** Mr. Subramaniam, just one clarification I had.

**GOPAL SUBRAMANIAM:** Yes certainly, please.



1 **CHIEF JUSTICE DY CHANDRACHUD:** What happened to the instrument as a matter of  
2 law? What happened to the Instrument of Accession after the Constitution of J&K came into  
3 being?

4

5 **GOPAL SUBRAMANIAM:** My Lord, that Instrument of Accession, My Lord, really  
6 speaking, after the Constituent Assembly decided to accede, it was ultimately, My Lord, that  
7 decision which operated. The Instrument of Accession, My Lord, was done initially, in '48 as  
8 Your Lordships recollect. But, in that Instrument of Accession, there was a clear reservation  
9 that I'm not making any commitment to abide by the Constitution. My Lord, there were some  
10 conditions, reservations placed in it. But, normally, My Lord, if suppose, accession had to take  
11 place through the Maharaja, then there would have been a Supplementary Instrument of  
12 Accession, and a merger agreement, as was done with many others.

13

14 **CHIEF JUSTICE DY CHANDRACHUD:** No. Once, with the Constitution of Jammu and  
15 Kashmir recognizes that Jammu and Kashmir accedes to the dominion status of India, that it  
16 becomes a part of India..

17

18 **GOPAL SUBRAMANIAM:** Yes.

19

20 **CHIEF JUSTICE DY CHANDRACHUD:** Would it be correct to say then, really that  
21 Instrument of Accession ceases to exist as an independent document, in that sense?

22

23 **GOPAL SUBRAMANIAM:** No, My Lord, it did enable accession. For the purposes of  
24 sovereignty, My Lord...

25

26 **CHIEF JUSTICE DY CHANDRACHUD:** What would be the status of the Instrument of  
27 Accession once the Constituent Assembly of J&K designed and promulgated the J&K  
28 Constitution?

29

30 **GOPAL SUBRAMANIAM:** My Lord, if I may say so with respect, the Instrument of  
31 Accession is a historical fact.

32

33 **CHIEF JUSTICE DY CHANDRACHUD:** [INAUDIBLE] ... of J&K. Would it be subsumed  
34 in the State Constitution?

35

36 **GOPAL SUBRAMANIAM:** I'm sorry, My Lord. It's a historical fact.

37

1 **CHIEF JUSTICE DY CHANDRACHUD:** Would it be subsumed in the State Constitution?

2

3 **GOPAL SUBRAMANIAM:** Yes. Yes, My Lord. Because, the State Constitution itself  
4 recognizes the accession in '48. May I show that, My Lord? May I show that? The Constitution  
5 itself recognizes this.

6

7 **RESPONDENT'S COUNSEL:** It is subsumed now in Article 370. And only to the extent,  
8 Article 370 refers to it, it will be applicable.

9

10 **DINESH DWIVEDI:** It has no use after 370, because it incorporates those matters in 370,  
11 automatically.

12

13 **GOPAL SUBRAMANIAM:** Yes. My Lord, the Instrument of Accession was for a very limited  
14 purpose, at that time. But matters later on, as Your Lordships have seen, there was the  
15 Constituent Assembly, and accession was complete, and the Constitution of J&K itself has  
16 declared that integration to be complete. That was the decision.

17

18 **CHIEF JUSTICE DY CHANDRACHUD:** Mr. Subramaniam, the reason I asked you was  
19 this...Now I'll tell you why I asked you this question. Could it conceivably be that the fetter on  
20 the power of Parliament under Clause B as Article 371, was also a limited transitional provision  
21 which would operate so long as the Instrument of Accession held the field as an independent  
22 document?

23

24 **GOPAL SUBRAMANIAM:** No My Lords. There is no evidence to that.

25

26 **CHIEF JUSTICE DY CHANDRACHUD:** Once the Instrument of Accession gets subsumed  
27 in the post Constitution document evincing a transfer of power then to the extent of the  
28 Instrument of Accession itself held, being subsumed. Then the fetter on the power of  
29 Parliament cannot be relatable to the Instrument of Accession but has to be found somewhere  
30 else.

31

32 **GOPAL SUBRAMANIAM:** My Lord, I am grateful. The fetter on Parliament is by virtue of  
33 370 and My Lord have no direct relation with the Instrument of Accession. If I may just point  
34 out My Lords? 370 was there, as Your Lordships have seen in 1950. At that time there was only  
35 an Instrument of Accession. After the Constitution came into force, it is only in 1951 that the  
36 Constituent Assembly was constituted. And then My Lord, the Constitution was finally enacted

1 in 1957. But between '51 and '57...My Lord, the Instrument of Accession is already on the  
2 record. It is in document 1.

3

4 **CHIEF JUSTICE DY CHANDRACHUD:** That we have seen.

5

6 **GOPAL SUBRAMANIAM:** Your Lordships have seen. And that is very clear that it is a  
7 period of transition. But that period of transition and the fetter has been imposed on  
8 Parliament, My Lord, that was not the course of 370, if I may say so? I've understood what  
9 Your Lordships are putting to me that before a new sovereign body of legislature takes  
10 complete effect, is it not correct that the old is wiped out or there may be some purely  
11 transitory provision. But this is not transitory provision. That is why My Lord, if 370 in its  
12 true essence is not treated as a transitory provision but is actually a substantive provision  
13 meant to operate over a period of time, then My Lord, it is clear that concessions which have  
14 been sought and granted by My Lord...again by the Union Government by accepting the  
15 recommendations of the Constituent Assembly, I submit My Lord with respect then they get  
16 embedded into law by operation of 370 as well as by virtue of section 2(1)(a) of the Government  
17 of Jammu and Kashmir Constitution.

18

19 **CHIEF JUSTICE DY CHANDRACHUD:** Now, Mr. Subramaniam you have given us the  
20 Constitution Bench decisions?

21

22 **GOPAL SUBRAMANIAM:** Yes.

23

24 **CHIEF JUSTICE DY CHANDRACHUD:** According to you postulate the continuance of  
25 Articles [INAUDIBLE]

26

27 **GOPAL SUBRAMANIAM:** That's right My Lord.

28

29 **CHIEF JUSTICE DY CHANDRACHUD:** We take your point on *Sampat Prakash* as  
30 well as...

31

32 **GOPAL SUBRAMANIAM:** That was in para D. Now, My Lord this Judgment in *Damnoo*,  
33 which has been cited. I just want to, just take two minutes and I'll take Your Lordship to Chief  
34 Justice Sikri's judgment who makes a comment on this in *Kesavananda Bharati*. But My  
35 Lord in *Damnoo's* case the facts read as follows My Lords. The Jammu and Kashmir  
36 Legislative Assembly amended the Constitution of Jammu and Kashmir in 1965 by the 6th  
37 Amendment Act. As a consequence of the 6th amendment, they replace that expression 'Sadr-

1 e-Riyasat' with Governor. The Amendment first took place My Lord, in the J&K Constitution.  
 2 Therefore in order to see that that was reflected viz a viz our Constitution in Article 370 there  
 3 was My Lords, in the interpretation section, Your Lordships have seen that was varied. That  
 4 My Lords was challenged. The Amendment was challenged. The Constitution Amendment, as  
 5 well as My Lords the order in amending Article 367, one of the explanations was challenged in  
 6 **Damnoo's** case. In **Damnoo's** case Chief Justice Sikri said that what has been done by the  
 7 order explaining that the 'Sadr-e-Riyasat' is now Governor is in conformity with the  
 8 Constitution, 6th Amendment of J&K and therefore, there is no impairment of the basic  
 9 structure. But My Lords the learned judge has actually, if I may say so, relied upon an excerpt  
 10 in **Kesavananda Bharati**. In **Kesavananda Bharati**, where My Lords the word  
 11 power...the word amend was so widely worded. If Your Lordship sees one paragraph in  
 12 **Kesavananda Bharati** i.e. My Lords, that is Case Law Volume 15, and the relevant portion  
 13 which I wanted to show is para 306, PDF page 174. And Chief Justice Sikri refers to his own  
 14 judgment. And he refers to it to support the position that the fundamentals of J&K  
 15 Constitutions were not impaired. Please see para 306, PDF 174. Reference may be made to  
 16 **Mohd. Maqbool Damnoo vs State of Jammu and Kashmir**, where this court repelled  
 17 the argument of the Learned Counsel that the amendments made to the...

18

19 **CHIEF JUSTICE DY CHANDRACHUD:** Mr Subramaniam one second. You are on Case  
 20 Law Volume 15?

21

22 **GOPAL SUBRAMANIAM:** 15.

23

24 **CHIEF JUSTICE DY CHANDRACHUD:** 15 and PDF page?

25

26 **GOPAL SUBRAMANIAM:** PDF page 174 My Lord.

27

28 **CHIEF JUSTICE DY CHANDRACHUD:** 174.

29

30 **GOPAL SUBRAMANIAM:** Yes, 306.

31

32 **CHIEF JUSTICE DY CHANDRACHUD:** Yes, Mr Subramaniam.

33

34 **GOPAL SUBRAMANIAM:** Yes, para 306 My Lords. Reference may be made to **Mohd.**  
 35 **Damnoo vs State of Jammu and Kashmir**, where this court repelled the argument of  
 36 the Learned Counsel that the amendments made to Section 26 and 27 of the Constitution of  
 37 Jammu and Kashmir were bad because they destroyed the structure of the Constitution. The

1 arguments of the Learned Counsel was that fundamentals of the Jammu and Kashmir State  
2 Constitution has been destroyed.

3

4 This argument was refuted in the following words. But the passage cited by him can hardly be  
5 availed off by him, for the reason that the amendment impugned by him in the light of what  
6 we have already stated about the nature of the explanation to Article 370 of our Constitution,  
7 does not bring about any alteration, either in the framework or the fundamentals of the  
8 Jammu and Kashmir Constitution. The State Government still continues to be the head... the  
9 Governor still continues to be the head of the government aided by a Council of Ministers, and  
10 the only change effected is in his designation and the mode of his appointment. It is not as if  
11 the State Government, by such a change, is made irresponsible to the State Legislature or its  
12 fundamental character as a responsible government is altered. And, then My Lord, please see  
13 the last sentence. 'There is no question of such a change being one in the character of that  
14 government, from a democratic to a non-democratic system'.

15

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

17

18 **GOPAL SUBRAMANIAM:** And, My Lord, I submit with respect, when we look at the  
19 exercise of power under 370, My Lord, it must be informed with the idea that it should not  
20 offend any of the basic principles of the Constitution. And, the two principles which I invoke,  
21 My Lord, are federalism and federalism as it subset has autonomy and consent. The principle  
22 of federalism My Lord, is always autonomy and consent. And the other principle My Lord, is  
23 the supremacy of the Constitution. So, supremacy of the Constitution here, My Lord, I wish to  
24 point out, that the purposes of 356 and 370 are not coincidental, they do not coincide. And,  
25 because they do not coincide, the exercise of power under 356 cannot clothe you with legal  
26 authority under 370.

27

28 **CHIEF JUSTICE DY CHANDRACHUD:** Now what else remains Mr Subramaniam?

29

30 **GOPAL SUBRAMANIAM:** My Lord, I've kept my word. I've honoured my word. I said I  
31 wouldn't take more than a certain amount of time. But My Lord, I would request Your  
32 Lordships to ask any questions Your Lordships may consider.

33

34 **JUSTICE SANJAY KISHAN KAUL:** We've been doing this, Mr. Subramaniam.

35

36 **CHIEF JUSTICE DY CHANDRACHUD:** Thank you so much Mr. Subramaniam. That was  
37 a very brief and very insightful. Thank you very much.

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**GOPAL SUBRAMANIAM:** Thank you very much. Grateful My Lord.

**CHIEF JUSTICE DY CHANDRACHUD:** Mr. Zaffar Shah?

**ZAFFAR SHAH:** Much has been said, My Lord, by the Learned Counsel. I have already made submissions. But, speaking for myself, we belong to that State and we have lived through this 370, we have been brought up in 370. It's a part of our mindset this 370, and we were really shocked when the notification of 272 was issued on 5th of August 2019. It was unexpected and one could never imagine that this could so suddenly happen. In order to understand this 370, there are few approaches to its understanding. One would be, in the first instance, if the Maharaja, way back, perhaps before the birth of all of us... when he entered into restore accession only, why didn't he enter also into merger agreement at that point of time? All this debate would not have been here, it could have straight been a part of the Union of India. He did not do that. So, that's a question which should be inquired into, why didn't he do that? That's number one. And number two, if he only entered into Instrument of Accession, what's it that he parted with as a sovereign King, and what's it that he retained with himself?

My understanding of the case is this, and perhaps many things will become clearer, that the Union of India by itself is one authority. This Maharaja of a State, of a very large State among the native states was another authority. When the Indian Independence Act was passed, Government of India Act 35 was applicable, they became all independent sovereign states. All these native states, including the State of Jammu and Kashmir. Now we proceed on the premises that they become independent sovereign states, then comes the question of accession to either of the dominions. All other states in India, native states, whether they were as small as one kilometre or they were big states, either they merged it with themselves. But ultimately all of them merged with Union of India and this merger word is extremely important. I think that's the basis of this 370. He did not enter into this merger agreement at all. He entered into standstill agreement only with Government of Pakistan. The Government of India did not agree to enter into the standstill agreement. This was a situation in 1900...prior to 1947. Now My Lords, because of the extra ordinary situation which arose in the State of Jammu and Kashmir, having no choice in the matter, he enters into this Instrument of Accession on 26th of October 1947. What does he do under this? He, in simple language, he says that the Union of India will have the power to make law for defence, communication and foreign affairs. He doesn't give any other power for them. Only these three subjects. But for the remaining subjects, I mean when you are running a country you need so many laws, for the remaining subjects he retained all the powers with him under Clause 8 of this Instrument of Accession.

1 Now, in the absence of merger agreement, obviously these... was this power to make the law,  
 2 and while he had this legislative autonomy, would not have been transferred in the absence of  
 3 such an agreement. This is a situation. He left. Thereafter, he asked his son to takeover. His  
 4 son takes over. Dr. Karan Singh. He also does not enter into any kind of merger agreement or  
 5 supplementary agreement. This is a situation on the one side. On the other side of the picture  
 6 is, that so far as the Government of India is concerned, it was already in the process of making  
 7 the Constitution that was not meant for the State of Jammu and Kashmir but for entire  
 8 country. All native states had merged with and ultimately become part of the Union of India.  
 9 All those native states. There were three only left. That was Junagadh, that was Hyderabad  
 10 and State of Jammu and Kashmir. So far as Junagadh is concerned, there the King belonged  
 11 to a certain sect. He wanted to accede to Pakistan but the people did not want it. So therefore,  
 12 they ultimately held a referendum in Junagadh on 20th of February 1948 and the people  
 13 overwhelmingly voted to be a part of India. So for as Hyderabad is concerned, the situation is  
 14 altogether different. Ultimately, Hyderabad also merged with India. But State of Jammu and  
 15 Kashmir, out of these three did not enter into any kind of agreement. It remained a separate  
 16 state, but with only power with the Union on these three subjects which I have mentioned.  
 17 But when this Constitution of India was being made, a significant development takes place at  
 18 that point of time, which has its impact on this relationship which was normally between a  
 19 native state and the Union of India. That is the situation that was in the State of Jammu and  
 20 Kashmir such that then they have to go outside the country to the United Nations. When it  
 21 went to the United Nations as many as five or six resolutions were passed there. They also said  
 22 that this Instrument of Accession should be put to the people's ratification. This is on...not  
 23 only they said it there. On 27th of October letter which was already been read to Your  
 24 Lordships. It also said that as and when the situation in Jammu and Kashmir becomes normal  
 25 this particular Instrument of Accession will be put to the ratification of the people. It does not  
 26 take place. The UN Security Resolution, do not take place. But yet the Constitution of India  
 27 was being made and there was only Instrument of Accession. These are extremely three factors  
 28 which resulted in making this Article 370.

29

30 **CHIEF JUSTICE DY CHANDRACHUD:** What are the three factors? We can just itemize  
 31 them.

32

33 **ZAFFAR SHAH:** No merger agreement.

34

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

36

1 **ZAFFAR SHAH:** Yes. 27 October, 1947 Letter of the Governor General and three, UN  
2 resolutions.

3

4 **JUSTICE SANJAY KISHAN KAUL:** Mr. Zaffar Shah who are you appearing for, just for  
5 the matter of record?

6

7 **ZAFFAR SHAH:** Appearing?

8

9 **JUSTICE SANJAY KISHAN KAUL:** Which petitioner are you appearing for?

10

11 **ZAFFAR SHAH:** Bar Association.

12

13 **CHIEF JUSTICE DY CHANDRACHUD:** Bar Association. Which is the writ petition  
14 number?

15

16 **RESPONDENT'S COUNSEL:** 1268.

17

18 **ZAFFAR SHAH:** I may be excused because my files are not that organized as I see my senior  
19 friends. We are not used to this. We still have physical files with us. I may be excused for that.

20

21 **JUSTICE SANJAY KISHAN KAUL:** I don't think you need the files.

22

23 **ZAFFAR SHAH:** My lawyer will give Your Lordships the number.

24

25 **CHIEF JUSTICE DY CHANDRACHUD:** 1268. It is the Bar Association?

26

27 **ZAFFAR SHAH:** So the third factor was UN resolution. These were the three factors. Now,  
28 this is the situation preceding making of this Article 370. Now when it goes to the Constituent  
29 Assembly at that point of time the representatives of Jammu and Kashmir were not there in  
30 the Constituent Assembly. They become members in June 1949, after amendment is carried  
31 out in the procedures of becoming a member of the Constituent Assembly. So we have the  
32 representatives from Jammu and Kashmir in June 1949. By that time almost entire  
33 Constitution of India had been adopted. Because finally the Constitution was adopted on 26th  
34 November 1949. So hardly few months are left when the representatives of Jammu and  
35 Kashmir become members of the Constituent Assembly. Then in October 1949 this Article  
36 which was originally 306(a) is debated. In that debate which references can be made. I am just  
37 giving narrative to the whole case what I'm standing here for. There the mention expressly is



1 made, that look here the position of the Jammu and Kashmir is uncertain. Why is it uncertain?  
2 It was uncertain because number one of the Governor General's letter of 27-04-1947 and the  
3 Government of India being entangled. There's an exact word used in the Constituent Assembly  
4 debates "being entangled before United Nations". So one doesn't know what happens.  
5 Whether this is going to stay, this is not going to stay, whether it should merge with India, it  
6 should not merge with India. This is the situation existed and it is in this background that  
7 somebody had to think of, what do we do with this State. It had entered into Instrument of  
8 Accession. It was one of the federating States if I put it that way, but this was not fully a  
9 federating State like any other state because of the absence of merger agreement. Some way  
10 had to be found. My Lord's observation was correct that after this Instrument of Accession is  
11 executing 370(a) is made. if we look at 370(a) it seems to absorb, subsume within itself, that  
12 power which the king had, the Maharaja had. What is the power which he had retained with  
13 himself? He had retained the entire residuary if I say so sovereignty with him. What was the  
14 concept of sovereignty? The power to make the law? What does it mean sovereignty? That is  
15 the whole thing. The power to make the law. He had retained that with himself, I will make  
16 the law. Except on these three subjects, law related to defence, law related to foreign affairs,  
17 law related to communications. All of the powers I will retain. Then the question further arose  
18 that what happened to Jammu Kashmir? We need a Constitution. How do we run the State?  
19 We earlier had a Constitution of the Maharaja that's in 1956. But the structure of the  
20 Constitution was different. There was Praja, there was the king, he had the exclusive power  
21 under Section 5 and 6 of that Act. He could do anything. But since the democracy had set in,  
22 so therefore, that particular Constitution had become inappropriate. That's why Dr. Karan  
23 Singh in his communication said, because of the change in situation, we need a new  
24 Constitution. Why the need for new Constitution? Because the state had retained with itself  
25 the entire powers.

26

27 So, here essentially also we are concerned with the right of the State of Jammu and Kashmir,  
28 it's not the right of an individual. It's not simply the right of the people of the state, it is the  
29 right of the state which is in question, that what kind of right does this state possessed under  
30 the Instrument of Accession? So sir, this Article 370 is based, according to my perception, it is  
31 based number one, that it subsumes the sovereignty which was retained by Maharaja, number  
32 one. And number two, at the same time, its finality could not be determined of the state itself..  
33 Not of Article 370, but of the state itself because the pendency of the matters which are  
34 indicated.

35

1 **CHIEF JUSTICE DY CHANDRACHUD:** Mr. Zaffar Shah, what is your second point? The  
2 first one, you said is that Article 370 subsumes the sovereignty which was retained by the  
3 Maharaja.

4

5 **ZAFFAR SHAH:** And, number two I said...

6

7 **CHIEF JUSTICE DY CHANDRACHUD:** So, when you say subsumes the sovereignty, are  
8 you therefore suggesting that sovereignty still continued to reside in the state?

9

10 **ZAFFAR SHAH:** In 370 itself. But, which kind of sovereignty?

11

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

13

14 **ZAFFAR SHAH:** Power to make laws. Sovereignty of power to make laws. There could be  
15 semi- sovereignty, quasi sovereignty, there are different types of sovereignty. I'm here,  
16 focusing on the power to make laws was retained in terms of this 370.

17

18 **CHIEF JUSTICE DY CHANDRACHUD:** Would that be a correct reading? Once accession  
19 takes place, and what happens is that, there are certain fetters, there are certain reservations  
20 which are retained in the Instrument of Accession, that he unconditionally recognizes the  
21 sovereignty of India, but he retains certain exceptions, he carves out certain areas which he  
22 retains to himself. He says, I'm surrendering the power to make laws only in reference to  
23 defence, foreign affairs and communications, broadly the three heads.

24

25 **ZAFFAR SHAH:** I give it to you.

26

27 **CHIEF JUSTICE DY CHANDRACHUD:** ... that's right.

28

29 **ZAFFAR SHAH:** He donates the power.

30

31 **CHIEF JUSTICE DY CHANDRACHUD:** But, what does accession really mean? Accession  
32 means that, well I ... Jammu and Kashmir becomes a complete and intrinsic part of India.  
33 There would be no going back on that, isn't it?

34

35 **ZAFFAR SHAH:** One view would be that, whether in terms of territory it is transferred. What  
36 do we mean by 'accession', the word? One would be the territory itself is transferred to India.

1 Means, that *de facto*, the Union Government is in possession of the State of Jammu and  
2 Kashmir, but *de jure*, this sovereignty is not transferred to the Union of India.

3

4 **CHIEF JUSTICE DY CHANDRACHUD:** Or would it be... the correct reading would be,  
5 like for that matter take another other state. Take the State of Uttar Pradesh, Maharashtra,  
6 Tamil Nadu. There are certain fetters, even on the power of Parliament to enact laws. The  
7 Parliament cannot enact laws at all with respect to List 2. Parliament can enact laws only on  
8 List 1 and List 3. In relation to, say, NCT of Delhi which came in 1992, Parliament can enact  
9 laws on and list three in relation to, say, NCT of Delhi, which came in 1992, Parliament can  
10 enact laws on list 1, 2 and 3, but the State Legislature of Delhi cannot enact laws under List 2  
11 on entries 1, 2 and 18. So, there are different models which the Constitution is following.

12

13 **ZAFFAR SHAH:** Yes.

14

15 **CHIEF JUSTICE DY CHANDRACHUD:** What seems to happen with the Instrument of  
16 Accession is that, sovereignty is transferred and recognized in the dominion of India. But, the  
17 power of legislation, because legislation is an incident of sovereignty, but legislation is not the  
18 entirety of sovereignty. Legislation is one aspect of sovereignty. On that aspect, namely,  
19 legislation, the power is not entirely recognized as inhering in the Parliament of India, which  
20 it otherwise has in relation to the union list and the concurrent list. But, notwithstanding this,  
21 the Instrument of Accession says that unconditionally you are acceding to the dominion of  
22 India.

23

24 **ZAFFAR SHAH:** No, no, no, with respect...

25

26 **JUSTICE SANJIV KHANNA:** Paragraph 4 of the letter says, "I hereby accede to the  
27 dominion of India".

28

29 **ZAFFAR SHAH:** Accede.

30

31 **JUSTICE SANJIV KHANNA:** And then he says that, "On the assurance that if an  
32 agreement is made with the Governor General rule of the state, whereby any functions in  
33 relation to administration of any law..." so and so, so and so, "can be exercised". But, 5 then  
34 goes on to say, "That these terms of this Instrument of Accession shall not be varied by any  
35 amendment power of an act or Indian Independence Act, unless such amendment is accepted  
36 by instruments supplementary to this instrument".

37

1 **ZAFFAR SHAH:** Very right.

2

3 **JUSTICE SANJIV KHANNA:** Now what happens is, in the Constitution, one is, accepting  
4 that you're now merging with India, except these powers will be, as pointed out, these  
5 legislative powers or these administrative powers will still be vested with the ruler. And, it is  
6 subject to the condition that, by supplementary instrument, that can be further diluted; not  
7 the power taken already, the sovereignty which we have... the merger which has taken place,  
8 but with regard to that. Then when you become a members of the Constituent Assembly and  
9 then you decide how it goes about with passage of time. You participate in the minutes. Then  
10 there is a Constituent Assembly also for the State of J&K. Now is it... will it be correct to then  
11 go back so much in point of time?

12

13 **ZAFFAR SHAH:** First of all My Lords, which clause you read, kindly see Clause 8 also which  
14 gives to the Maharaja... he retains all the powers with himself except in respect of these three  
15 subjects. He retains all the powers. Now when he retains all these powers. Should I read that  
16 to Your Lordships?

17

18 **JUSTICE SANJIV KHANNA:** No. I have got it with me.

19

20 **ZAFFAR SHAH:** Your Lordship have got it. When he retains all these power with himself  
21 what is to be done with this? You accede, whatever the meaning of that accession may be, let's  
22 take it like that. But is it not also an act of state? Between the Union of India and the State of  
23 Jammu and Kashmir, this Instrument of Accession is an act of state. The two states to say, two  
24 independent states to say, two sovereign free states to say. Look here, I agree to be with you. I  
25 will shake hands with you, but I will not embrace you. if I put in that way. Metaphorically, if I  
26 put it, I'll shake hands with you. but I will not embrace you. Done by the King. Why King did  
27 that? History tells us that he wanted to retain the Jammu and Kashmir as an independent  
28 country. That's the whole basis of it. Otherwise nothing prevented him like any other native  
29 prince to merge with India, to totally erase itself of its statehood. What is it that if you enter  
30 only into Instrument of Accession, do you still retain sovereignty with you? We have the  
31 judgement of dispute. As I unfold my submissions, I'll show the judgment. You retain the  
32 sovereignty with you. You don't surrender the sovereignty merely by Instrument of Accession.  
33 You ... of course, you do that. Of course you do that subject to two conditions. One, your  
34 standstill agreement. And number two, you have the merger agreement. And both are  
35 provided for in the White Paper of States issued by the Government of India. He doesn't do  
36 that. See this problem of ours. Problem of the State of Jammu and Kashmir. When he doesn't  
37 do that and as a two separate states, he says, "I agree with you, but I'm going to run my own

1 state myself. You take care of my defence. You take care of my foreign affairs. You take care of  
2 my communication." Government says, "Okay, we'll take care of these three things." Because  
3 situation had emerged in the state where help was needed from India and the Indian Army  
4 landed there. So he says, "Look here, you take these three but rest I'll run my Government  
5 myself." That was the whole intention. Original intention of the Maharaja when he executed  
6 Instrument of Accession. Now when subsequently few changes take place, he leaves the state.  
7 His son also does not do that. But yet the Constitution is being made. What do you do with this  
8 state? I have not merged. So you don't treat me as one of these States of India. But yet I am the  
9 part of the federation, I am a federating unit. Therefore, this special relationship. Therefore,  
10 the genesis of Article 37. This is the special relationship between the State of Jammu and  
11 Kashmir and Union of India. The extent of other things will debate that as well. But this is the  
12 special relationship between the State of Jammu and Kashmir and the Union of India. What  
13 should the Constitution of India do with such kind of state which has not merged, which has  
14 yet asked me to make laws for it and yet remained separate? Therefore, 370 makes mention  
15 significantly of Instrument of Accession and making of the Constitution. Because Constitution  
16 was required. That state did not need 1939 Constitution at all. Constitution was required.  
17 Therefore, the letter of 1st of May 1951 saying that we have to constitute a Constituent  
18 Assembly for the State of Jammu and Kashmir. When by that date the Constitution of India  
19 had already been adopted. So consciously on the one part, the federating State on the other  
20 part the Union of India agreed that the State of Jammu and Kashmir, perhaps, perhaps and  
21 perhaps it looks like American Constitution. Your Lords would be well aware that there are  
22 two Constitutions, one of the state, one is the Federal Constitution. Something on those lines  
23 only for State of Jammu and Kashmir not for any other state in India. And I would go ahead  
24 and say once all States merged, they lost their personality. Even if tomorrow...I mean going by  
25 this perspective, even if tomorrow State list is not given to the other States, they can't say, sir,  
26 we agreed on this condition because they merged. They don't exist either under international  
27 law or under the domestic law. They don't exist. But our State was the only one which did not  
28 merge at all, so retained itself a separate personality. Some part of the State would retain with  
29 it. Therefore, 370. Now what does the 370 say? Look so far as the power to legislate is  
30 concerned, I say I have a choice. You do that with my concurrence. Your parliament you have  
31 list one, maybe list three. You have all the powers. All the plenary powers, but you will not, it  
32 will be limited to your plenary powers whether it is under list 1 or list 3 will be limited to by  
33 my concurrence. If I agree yes, on a subject please make the law for me. Then only you will  
34 make the law for me, not otherwise. Similarly, with regard to the constitutional provision, I  
35 had my own Constitution, I made provisions in my own Constitution whether it is High Court,  
36 whether it's Advocate General, whether it is the State Legislature, whether it is the  
37 membership of the members. I made my own Constitution. Now when I made my own

1 Constitution at once at the same time I also agreed through the mechanism of Article 370 that  
2 you apply A-B-C-D constitutes of provisions for me. I have to take care of it. That they don't  
3 come into conflict with my Constitution. I have to take care of that.

4

5 **CHIEF JUSTICE DY CHANDRACHUD:** We'll continue tomorrow morning.

6

7 **RESPONDENT'S COUNSEL:** [INAUDIBLE]

8

9 **CHIEF JUSTICE DY CHANDRACHUD:** But you can make an objection provided there is  
10 some demur on our side.

11

12 **RESPONDENT'S COUNSEL:** [INAUDIBLE]

13

14 **JUSTICE SANJAY KISHAN KAUL:** I am not sure what you want to argue, you will still  
15 have the same time. This is a very peculiar request to make I think. Honestly at the end of the  
16 day.

17

18 **JUSTICE B. R. GAVAI:** And in the midst of arguments.

19

20

21

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23

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***END OF DAY'S PROCEEDINGS***