

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

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SUPREME COURT OF INDIA
RECORD OF PROCEEDINGS

Writ Petition (Civil) No.1099/2019

In re: Article 370 of the Constitution

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2 **CHIEF JUSTICE DY CHANDRACHUD:** Yes, Ms. Ramakrishnan.

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4 **NITYA RAMAKRISHNAN:** So I was saying yesterday to Your Lordships, that the spoken
5 or unspoken assumption is that Article 370 is temporary, lying in wait for the greater
6 integration. I am saying that the view is completely fallacious because integration is not a
7 measure of how much control the centre has.

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9 **CHIEF JUSTICE DY CHANDRACHUD:** What did you say at the end? Integration is not
10 a measure?

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12 **NITYA RAMAKRISHNAN:** Is not measured by how much control the centre has. It is not
13 a function of central control or power and it would be pernicious to say that people in the
14 Union Territory are more integrated than, say people in a Sixth Schedule area. That's not how
15 our democracy works, and that's not how we view people. So this assumption, that Kashmir
16 and Jammu were not integrated even earlier, even in Ayyangar's speech, the awaiting is for
17 accession, whether they ratify it or they don't ratify it. But once they acceded, they became
18 Indians. And in fact, even before the Indian Army, when the facts are this, even before the Sikh
19 Regiment reached Srinagar, it was the Kashmiris of the Valley who fought the intruders and
20 many of them were martyred. Mir Maqbool Sherwani is only one name. He was strung up and
21 crucified as an example by the intruder. Hundreds of them.

22

23 [NO AUDIO]

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25 Nor crossover, it's heroism beyond belief. So we're not waiting for them to integrate anymore.
26 Now at the point of that, at the point of accession, aside from when the Maharaj yielded, how
27 much sovereignty, he retained, whether his pact is enforceable or not, and the fact between
28 two sovereigns, of whom one was subsumed, is a different matter. I'm saying there's a
29 democratic argument to be made of shared sovereignty, at the point of accession because
30 political sovereignty vests in the people. The people of Jammu and Kashmir became sharers
31 of Indian sovereignty as political sovereigns, and Your Lordships have recognized the theory,
32 that political sovereignty, then trusted to the legal sovereign, and the Constitution is an
33 embodiment of that. And Your Lordships have recognized in the *Indira Nehru Gandhi*
34 case, that this legal sovereignty it's a medieval concept to call it indivisible. It is essentially
35 divisible, the nation state is an association of associations and sovereignty, legal sovereignty is
36 spread over various units. Of course, that case was considering the legal sovereignty as

1 distributed among the three organs of the state, but the principle is equally applicable to the
2 divided sovereignty between the centre and the state, because long ago much has been said
3 about the dual polity, I don't have to repeat it. So what Article 370 recognizes, is this mode of
4 governance. It is a shared sovereignty of the people of Jammu and Kashmir, the merging of
5 their democratic will with that of the rest of India. So in that sense, there is a democratic pact
6 which has become part of Article 370. It has a constitutional recognition and guarantee. And
7 that is quite aside from whether the Maharaja's pact with Mountbatten is enforceable or not,
8 there is a Democratic principle behind it. So in my view Article 370 reflects and incorporates
9 an entrustment of popular sovereignty to a divisible and shared legal sovereignty between the
10 centre and the State of J&K.

11

12 **CHIEF JUSTICE DY CHANDRACHUD:** Just a second. Article 370 recognizes... Can you
13 come again on that?

14

15 **NITYA RAMAKRISHNAN:** An entrustment of popular sovereignty to a divisible and
16 shared legal sovereignty between the centre and the State of Jammu and Kashmir. And just as
17 integration is not synonymous with centralism, sovereignty, is not the preserve of the centre.
18 Article 370 also reflects and recognizes the historical and geopolitical background of a
19 democratic coming together of people's will. The will of the people of Jammu and Kashmir,
20 meeting the will of the rest of the Indians. It was really a democratic urge and many have
21 spoken about it, how they chose India over Pakistan, although they were not given the choice
22 of a plebiscite. Even so, they chose a secular and democratic option. They said, here is a state
23 which recognizes that sovereignty vests in the people. And also, as Your Lordship said in Indra
24 Nehru Gandhi, that this shared sovereignty is really a system of checks and balances. Equally
25 it is so between the centre and the states. So Article 370 also reflects a system of checks and
26 balances, central power and the power of the state, State of Jammu and Kashmir. Because the
27 people are never completely excluded from any process, although they have entrusted their
28 sovereignty, this is what the judgment says. So the checks and balance system is what
29 expresses the political sovereignty so that nobody encroaches. So Article 370, in that sense,
30 the will of the people of J&K permeates every part of Article 370, 370(1), and 370(1) survived.
31 It is not... I do not endorse the view that the whole article has come to an end. 370(1) the
32 concurrence and, I'm not saying it's binding. What Ayyangar's speech is certainly not binding,
33 but it reflects the fact that despite there being a titular monarch, the power of concurrence,
34 even when there was no State Legislature was given to the largest party because it was a
35 democratic step and that is why 371 vote for concurrence and for consultation, it's the state
36 government is emphatically defined as a Governor, advised by Council of Ministers. Even the
37 C.O. 272 says that. Whether by mistake or what, I don't know. So a Governor who is not advised

1 by a Council of Ministers, is not recognized by 370. And therefore any C.O. issued during a
2 period of President's Rule is simply not competent. Actually I checked. In all of, in 70 years,
3 all of five C.O.s have been issued during President's Rule or Governor's Rule. One in 1986, and
4 four extending the term of Presidential Proclamation in the year between '90 and '96 .

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6 **JUSTICE SANJIV KHANNA:** What's the number of the 1986 C.O.?

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8 **NITYA RAMAKRISHNAN:** 129, C.O. 129.

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10 **JUSTICE SANJIV KHANNA:** And what was it relating to?

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12 **NITYA RAMAKRISHNAN:** It was relating to I think the power under Article 249. It was a
13 temporary approach and it was challenged, but it was never tested. What I want to say this has
14 never been tested for constitutionality. It was challenged in the Delhi High Court, but
15 eventually it was dismissed as infructuous. So there is no ruling. So despite the peremptory
16 terms of Article 370, whether a non-responsible government, government not responsible to
17 the State Legislature could exercise this power of concurrence has never been tested and I'm
18 saying it cannot be done. I can hand over the five C.O.'s, it's there. And therefore, Article 356
19 which is not covered by a *non obstante* Clause, 370 is, its special term that *sui generis* power
20 to the state government is a power and it is not a function that can be taken over by the Central
21 Government...

22

23 [NO AUDIO]

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25 Function is a duty. Power is a discretion. It is *sui generis* power given to a state, a responsible
26 State Government, and consciously given to a responsible State Government. It cannot be
27 taken over under Article 356, which is subservient to Article 370 on the sheer terms. And even
28 a responsible State Government's consent will not suffice for changing the terms of the Article.
29 It has to emanate directly from a Constituent Assembly. A Constituent Assembly signifies an
30 exclusive agency. Exclusively devoted and representative of the people of Jammu and
31 Kashmir, fully and exclusively. So if a change has to occur, it has to occur by an emanate, the
32 recommendation has to emanate from an agency which is equal and mandate in stature to a
33 Constituent Assembly. This is how the will of the people of Jammu and Kashmir on a principle
34 of shared sovereignty is reflected in Article 370. And that agency which must be equal.... See
35 today, there is no Constituent Assembly. After '57, there is no such agency on the horizon. If it
36 has to be contrived, it will either be through political will, as they say, the hour. If I may
37 paraphrase, the hour may produce the means, else where it can be contrived in terms of the

1 existing Constitution, I do not think Article 368 will apply. Because the terms of Article 370 is
2 this Article and Article 1 will apply. So the limitations are there in the article itself, but whether
3 it applies or not, that's not what has been done. Some thought and sensitivity and democratic
4 stirrings are required to think of an agency which could express this well. But one thing is clear
5 it cannot be any agency or dissent. It cannot be because the democratic pact is between two
6 power centres of sovereignty. And this is not as though they're setting up their wills against
7 Indian sovereignty. As part of Indian sovereignty there's a checks and balances system with
8 the state and the centre. So how can the centre exercise the power which has been given to the
9 states?

10 On the face of it, it is absurd. So the constitutional intent is clear. It cannot be any agency of
11 the centre. People, the will of the people of the Jammu and Kashmir is integral to the mode of
12 governance specified in Article 370. And a process which is systematically with mal-intent,
13 erase the will of the people, can never legitimately affect Article 370. And their will had been
14 systematically erased in this fashion. I'll quickly give the run up. 20th of June, the Governor's
15 Rule is imposed because one... and it is stated in the order that because one party has
16 withdrawn and no other political party is ready to form the government. This is why the
17 Governor's rule was imposed. Not because of anything else. Not because there was security
18 issue. Not because the state was in any danger. Because no political party was willing to form
19 the government. Then what earthly reason had the Governor to dissolve the House within 30
20 minutes, of two agencies saying we are ready to form the government? Two political parties.
21 One a letter, what page is it? I am not going to read it, in the, in the writ petition compilation.

22

23 **JUSTICE BR GAVAI:** Mr. Sibal has already taken us through it.

24

25 **NITYA RAMAKRISHNAN:** Yes, I don't want to read it again. So 56 out of 87 MPs, stake a
26 claim. The Governor is not there. We cannot determine where the Governor is, but we can
27 inform you. It is on record that the Secretary has acknowledged the WhatsApp message. He
28 does not answer the phone. Fax doesn't go through. He is informed on WhatsApp and a public
29 tweet tagging the Governor, is issued. By 08:16 this is done and by 08:57, we are notified that
30 the House has been dissolved. What earthly reason has the Governor to dissolve a House, when
31 the Governor's rule was imposed only because no political party was ready to stake a claim?
32 And when political parties are ready and willing to stake a claim, what business does the
33 Governor to say, "I'm not here, I'm not there"? Then in this state of affairs, there is a
34 proclamation of President's Rule and the President usurps the power of the State Government
35 under Article 371. It is not permissible under Article 356, because it only allows them to take
36 over the functions of a state government, not *Sui generis* powers, protected by a *non obstante*
37 clause. And what need does the power? He has executive power to do whatever has to be done

1 on a regular basis in a State Government and temporary legislative powers. Where is the need
2 for this extraordinary power? It is not contemplated. And then we are told, the situation was
3 not okay for elections to be held. That means that situation must only be attributed to the
4 Governor and the President, because until then the reason was that no political party is coming
5 forth. With this I'll finish. So this is malice, and this power under Article 356, which is really
6 subject, Legislative Act there a subject to a post appraisal by the state legislature. This power
7 is ironically used to destroy all possibility of a legislature. So the people of Jammu and Kashmir
8 don't have a legislature when the act is contemplated of abrogating Article 370 and it has
9 ensured that they do not have any future Legislature either. And my friends, want Your
10 Lordships to believe that this is an expression of the will of the people of Jammu and Kashmir.
11 My Lords, this is, self-proclaimed agent through a series of proxies, strangling the principle
12 and telling Your Lordship, this is not murder but suicide. This is really that. And this C.O. 272
13 is not only legally untenable because of what I said about Article 371 and the *Sui generis* power.
14 Only one page, I want Your Lordships to see. There is this public functionary, Volume 13, page
15 435.

16

17 **JUSTICE SANJAY KISHAN KAUL:** Of the documents?

18

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

20

21 **NITYA RAMAKRISHAN:** Here is a Governor, who gives video interviews. I'm aware that
22 strictly a newspaper report is not evidence. It is not evidence, in the sense that you cannot base
23 the criminal conviction on it. But when a public functionary former.....

24

25 **JUSTICE SANJIV KHANNA:** What is this? What is this at page...

26

27 **NITYA RAMAKRISHNAN:** This is an interview given, a video interview given by the
28 Governor, who had dissolved the Assembly, not the person who imposed Governor's Rule, and
29 also it's supposed to have given concurrence for C.O. 272.

30

31 [INAUDIBLE]

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33 **NITYA RAMAKRISHNAN:** This is an interview he gave to [UNCLEAR].

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35 **TUSHAR MEHTA:** Why I am interrupting...

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37 **NITYA RAMAKRISHNAN:** It's part of the compilation.

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TUSHAR MEHTA: This is an impleadment filed in 22nd, 22. Never listed, for the first time being listed, therefore I'm asking My Lord.

CHIEF JUSTICE DY CHANDRACHUD: Yes. Which part do you want us to see?

NITYA RAMAKRISHNAN: I just want to read from the middle. So, Karan Thapar, 'So really, you had no idea.' He had no idea on the night of August 4 what was coming, and he had given concurrence like this. Satyapal Malik, 'Absolutely nothing. I did not know anything. I was merely called by the Home Minister one day prior, saying "Satya pal ,I'm sending a letter tomorrow morning. Please get it passed by a committee for 11:00 tomorrow and send it to me.'" The whole world is aware of this. We cannot sit in an ivory tower and behave it never happened.

JUSTICE SANJAY KISHAN KAUL: Post facto statement.

NITYA RAMAKRISHNAN: Post facto, I post facto statement? Only at that level Your Lordship may consider it as post facto statement. Obviously, before that he didn't even know, he could not have issued a statement. So this is people's will. Only two other points. This, Your Lordship will have to see Article 370, C.O. 272. It is true that in 1950, just two points and I'll finish. C.O. in 1954, when the Constituent Assembly was functioning and also doubling at the Legislative Assembly, for a brief while there was a C.O. saying references to the Legislative Assembly in the Constitution would be read as including a reference to the Constituent Assembly of Jammu and Kashmir. That was a situation where this made sense because there was a corresponding body which was functioning as a Legislative Assembly.

CHIEF JUSTICE DY CHANDRACHUD: This was in 1954? Ms. Nitya, this was in 1954, you said?

NITYA RAMAKRISHNAN: Yes.

[NO AUDIO]

NITYA RAMAKRISHNAN: Yes, there was a C.O. which page 18.

CHIEF JUSTICE DY CHANDRACHUD: Volume?

1 **S PRASANNA:** Documents volume 3, page 18.

2

3 **CHIEF JUSTICE DY CHANDRACHUD:** Sorry, tell me again.

4

5 **S PRASANNA:** Documents volume 3, PDF page 18.

6

7 **CHIEF JUSTICE DY CHANDRACHUD:** C.O. 54?

8

9 **NITYA RAMAKRISHNAN:** C.O. 54.

10

11 **S PRASANNA:** C.O. 48 in 1950.

12

13 **NITYA RAMAKRISHNAN:** Sorry C. O. 48 in 1950.

14

15 **CHIEF JUSTICE DY CHANDRACHUD:** Let's just see that for a second.

16

17 **NITYA RAMAKRISHNAN:** So that said, my friends are relying on it, saying it was done
18 then and they can do it now.

19

20 **CHIEF JUSTICE DY CHANDRACHUD:** Let's, to appreciate your submission.

21

22 **NITYA RAMAKRISHNAN:** References.

23

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

25

26 **S PRASANNA:** References...

27

28 **NITYA RAMAKRISHNAN:** References.

29

30 **JUSTICE SANJAY KISHAN KAUL:** What is the page number?

31

32 **NITYA RAMAKRISHNAN:** Page number, internal page number 18. PDF page 18.

33

34 **JUSTICE SANJAY KISHAN KAUL:** PDF page?

35

36 **NITYA RAMAKRISHNAN:** 18.

37

1 **JUSTICE SANJAY KISHAN KAUL:** 1-8?

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3 **NITYA RAMAKRISHNAN:** 1-8.

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5 **CHIEF JUSTICE DY CHANDRACHUD:** Oh 1-8.

6

7 **JUSTICE SANJIV KHANNA:** This was the, with reference to Article 367?

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9 **NITYA RAMAKRISHNAN:** Yes, it was done under Article 367. So they are saying it's been
10 done before and we can do it again. And I'll tell Your Lordships why that's completely
11 fallacious.

12

13 **CHIEF JUSTICE DY CHANDRACHUD:** Which clause is that?

14

15 **NITYA RAMAKRISHNAN:** Sub-clause 4(d), references to the Legislature or Legislative
16 Assembly of the said State shall be construed as including references to the Constituent
17 Assembly of the said state.

18

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

20

21 **JUSTICE SANJIV KHANNA:** Was this withdrawn later on?

22

23 **NITYA RAMAKRISHNAN:** Yes, it was temporary and then it was changed. Once the
24 Constituent Assembly stopped, then it was just Legislative Assembly.

25

26 **JUSTICE SANJIV KHANNA:** Was there a C.O. issued?

27

28 **NITYA RAMAKRISHNAN:** Yes, there's a C.O. issued. C.O. 1958 removed.

29

30 **JUSTICE SANJAY KISHAN KAUL:** 1958 would be post Constituent Assembly to that.

31

32 **NITYA RAMAKRISHNAN:** Yes. There was no Constituent Assembly in that. So...

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34 **JUSTICE SANJAY KISHAN KAUL:** Till the Constituent Assembly was there, this concept
35 of 4(d) was available?

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37 **NITYA RAMAKRISHNAN:** Yes.

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S PRASANNA: Removal is at page 26, Your Lordships may note that.

JUSTICE SANJIV KHANNA: What is the C.O. number?

S PRASANNA: C.O. 56 in 1958.

NITYA RAMAKRISHNAN: I'm saying that makes sense because there was a Constituent Assembly functioning, which doubled as a Legislative Assembly. What they had done now, my point is...

JUSTICE SANJIV KHANNA: I'm sorry. What is the page number of C.O. number 56?

NITYA RAMAKRISHNAN: 28.

S PRASANNA: 26.

NITYA RAMAKRISHNAN: 26.

CHIEF JUSTICE DY CHANDRACHUD: This will be Clause 7(C) is it? In para 14 relating to Part 19, C in Clause C, Sub-clause D shall be omitted. Yes.

NITYA RAMAKRISHNAN: But what they've done by way of C.O. 272, aside from the argument that they could not have done it because there was no power under 371, with the Centre or with the Governor the absurdity, you see, it is as an exercise under Article 367, it leads to a semantic absurdity. Now, I'll tell Your Lordship why. Your Lordship will just take a look at article 370. I know Your Lordships have read it many, many times. I just want to show. Now Sub-clause... Clause 3. It says, provided that the recommendation of the Constituent Assembly of the State referred to in Clause 2. And Clause 2, refers to a Constituent Assembly for the purpose of framing the Constitution of the State. Now I am making an argument on pure elementary logic. There is a reference to a Constituent Assembly as referred to in Clause 2, Clause 2 remains on the book for reference and it refers to a Constituent Assembly for the purpose of framing a Constitution of the State. So there is a relationship of identity between what the Constituent Assembly in Clause 3 and the Constituent Assembly in Clause 2. A is A. And so long as these two remain on the book you cannot now bring by way of an interpretation that A in 3 is not A. Because what C.O. 272 says, in Clause 3 alone, even what is referred to in Clause 2, becomes something else, non A. So long as this is there in for reference you can't

1 include Clause 2 and say it means something else. It's a logical absurdity. It's a semantic
2 absurdity. It cannot. A is either A. A cannot be A and not A at the same time. But that's what
3 they're trying to....

4

5 **CHIEF JUSTICE DY CHANDRACHUD:** Alright, this point we've got.

6

7 **NITYA RAMAKIRSHNAN:** Otherwise, the only way this exercise would have been valid is,
8 if they had, in fact what they have attempted to do is that they removed all these words and
9 substituted Legislative Assembly for it. In actual effect, that's what they have intended to do
10 which is an amendment. It cannot be an interpretation. And aside from that, even otherwise
11 A equals not A, Constituent Assembly is not Constituent Assembly, Governor who should act
12 on the advice of Council of Ministers equals Governor who is bereft of a Council of Ministers,
13 the entire exercise, My Lords is full of Carrollian, Lewis Carrol parallels. The whole thing is an
14 exercise and absurdity.

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16 **CHIEF JUSTICE DY CHANDRACHUD:** All right, thank you...

17

18 **NITYA RAMAKRISHNAN:** One last and I have referred to Humpty-Dumpty, I don't want
19 to read it again. Changing meanings after the event, that is it. And one last thing, I want to tell
20 Your Lordships, that this argument, even if Jammu and Kashmir flows with milk and honey,
21 the argument that in order to secure people their constitutional rights and development, we
22 have to destroy their entity, we have to destroy their statehood, that is the argument taken.
23 And that cannot be countenance regardless of anything. And one other, which is not a legal
24 submission and I'm not referring to facts. I'm winding up with this. In October 2019, with a
25 friend, I visited the Valley. And I was able to do it because I'm used to traveling unobtrusively,
26 not because people were not stopped. The one name that resonates in the Valley, with faith, is
27 that of Mahatma Gandhi. They remember him as a man who lived and died for his words.
28 Somewhere, that legacy will be kept in mind while deciding this matter. That's all.

29

30 **CHIEF JUSTICE DY CHANDRACHUD:** Thank you, Ms. Ramakrishnan. Dr. Guruswamy?
31 You have a formulation, Dr. Guruswamy, do you have a formulation on paper what you're
32 going to be submitting?

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34 **MENAKA GURUSWAMY:** I'm sorry, My Lord?

35

36 **CHIEF JUSTICE DY CHANDRACHUD:** You have a formulation on what you're going to
37 be submitting?

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MENAKA GURUSWAMY: Yes, My Lord.

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

MENAKA GURUSWAMY: We've submitted the notes My Lord. I think it's page 4 to 5 of your compilation, Volume 5. Page, 4 to 5, Volume 5. It's a two page note. My Lords have it?

CHIEF JUSTICE DY CHANDRACHUD: Yes.

MENAKA GURUSWAMY: My Lords, Justice Surya Kant has it?

JUSTICE SURYA KANT: Yes, page 4.

MENAKA GURUSWAMY: Yes My Lords. My Lords, yesterday, My Lord the Chief Justice had posed a question to Mr. Dwivedi, that can you look to the statement of a drafter, a Member of the Constituent Assembly and accord it as being enforceable on the will of the people. And it was a very important question. It's Volume 5, which only has the one pager or two pages that Your Lordship had asked for yesterday...

CHIEF JUSTICE DY CHANDRACHUD: Yes.

MENAKA GURUSWAMY: So it should be 15-20 pages between all of us, My Lords. Not just me, Justice Khanna, between all of us. I saw that look of shock and horror on Justice Khanna's face.

CHIEF JUSTICE DY CHANDRACHUD: Yes.

MENAKA GURUSWAMY: It will be my effort neither to shock nor horrify My Lords. So this was a question posed by My Lord, the Chief Justice yesterday. And it's a particularly important question, because one, and I'll just formulate the proposition. Because one, in this case you have not one, but two constituent bodies. So in many ways, it is unique to India's constitutional founding, because it is the only State with its own distinctive Constituent Assembly. Two, it forces upon us this seminal constitutional question, can the Constitution of India be altered in ways, opposed to her founder's constitutional intention? And I'm not saying a drafter's opinion, I'm not saying a debate within the Constituent Assembly. I am saying, can it be altered in ways opposed to her founder's constitutional intention? When we think of this

1 country's founding at a time of partition from 46 to 49, our Constituent Assembly is drafting
2 our Constitution. At the same time we know what is happening in Jammu and Kashmir. Ms.
3 Ramakrishnan, allured to that. A country's first Prime Minister, giving his speech in Hindi,
4 said, "We are a nation, whose land is strewn with blood, *khoon se ranga hua hai yeh zameen.*"
5 That is our constitutional founding. So my first proposition is this, there are certain seminal
6 founding moments for any constitution, but more specifically, Indian constitutionalism. Why
7 are those seminal founding moments important, crucial, significant while interpreting the
8 constitutions as Your Lordships will? It is because My Lords have walked the path of
9 transformative and expansive constitutional interpretation and your jurisprudential
10 moorings, with great respect, derive their legitimacy, their integrity and their intellectual rigor
11 from these founding moments, from our drafters' constitutional intention. If My Lords had
12 chosen, since the 1970s, a different path of minimalist interpretation, of limited review, then
13 we would not have to worry about constitutional founding moments. But Your Lordships have
14 embarked on this methodology of expansive and transformative constitutionalism and thank
15 heavens for that, because that goes back to the needs of our difficult founding. The creation of
16 this country, two Constituent Assemblies, and also the unique brand of federalism that was
17 envisaged by our founders for the State of Jammu and Kashmir, integrated with the Union of
18 India. And it's not just Article 1 and Article 370, which is part of that constitutional intention.
19 It is much more than that. It is the specific provisions. And I'll take you to them very briefly,
20 My Lords have read it, I'll just refer to them. It is the specific provisions of the Constitution of
21 Jammu and Kashmir, Sections 4 and 5. It is the specific provisions of territorial integrity of
22 the state of Jammu and Kashmir that our founders promised and the Jammu and Kashmir
23 Constitution recognized in its constitutional text. Such territorial integrity was not promised
24 to any other State. This is all part of the founding constitutional intention.

25
26 Now in the 1960s, on an aside, My Lord, when Thurgood Marshall was asked, "Why is it so
27 important to have Brown versus Board desegregate America?" He responded saying that, "it
28 is not about their humanity. It is about our humanity." So today I present to My Lords a
29 different version of that. It is not simply about that Constituent Assembly. It is about the
30 promises of our Constitution Assembly. It is about that legacy of interpretation that My Lords
31 started four decades ago. That is what this founding moment is about. That is what this model
32 of federalism is about. That is what the intricacies of this model of federalism that embraced
33 this version of what Ms. Ramakrishnan called shared sovereign. That is part of India's
34 federalist structure. Now, please see My Lords, may I take My Lords, to Section 4 of the
35 Constitution of Jammu and Kashmir, 1957. And the second proposition is this and it's in the
36 note. The abrogation of Article 370 has vitiated the unique internal sovereignty guaranteed by

1 both Constituent Assemblies of Jammu and Kashmir and India. And this is in the middle of
2 the note, My Lords.

3

4 So, Part 2 of the Constitution of Jammu and Kashmir categorically retains internal sovereignty
5 with the State, along with residuary powers to the State Government. This is unique to Jammu
6 and Kashmir, and distinct from the rest of India, where residuary powers under Article 248,
7 is vested with the Union Parliament. And to this, My Lords, My Lords have Sections 4 & 5, but
8 4 simply says this...'it provides that the territory as under 15th August 1947, under the
9 sovereignty of the ruler, that territory is comprised of the territorial integrity of the State. And
10 that territorial integrity of the State is guaranteed to be protected.' And Section 5 simply says
11 this...'it provides that the Legislative Assembly of the state and all Executive and Legislative
12 powers so the Legislative Assembly of the State is vested with the residuary powers'. Now this
13 brand of the vesting of the residuary powers, the Legislative residuary powers with the State
14 Assembly is unique to this state. So whether we want to display that in a conventional setting,
15 a conventional telling that only external sovereignty has been surrendered by the State, in
16 terms of Article 371, and that's a sub proposition, an internal sovereignty is retained by the
17 State, or whether we want to say that this is shared sovereignty, between the State and the
18 Union, between the two Constituent Assemblies. Either which way, and My Lords have heard
19 arguments speaking to both those ideas. But either which way, this brand of sovereignty is
20 unique to the State of Jammu and Kashmir, and it is especially important in appreciating the
21 unique federalism that is ascribed to the State, in the federalism that speaks to India.

22

23 My Lords, on this note, I won't take you to the speeches. But on this note, we've just made two,
24 three references My Lords, 'Speech of Kotwal Chuni Lal' during the Constituent Assembly
25 Debates of Jammu and Kashmir, and Your Lordship will just mark that and that is in the
26 Volume compilations. I'll just read a line from that. And he makes only two points. That the
27 territories, as on 15th August 1947, which were under the sovereignty of the ruler of the State,
28 that is what the state will comprise. And within that, the State will have a Legislative Assembly
29 and a Legislative Council. So, dual Houses and territory ascribed and guaranteed and
30 promised. This is part of the founding. And all of that is marked My Lords, so I won't trouble
31 My Lords with that. Now, the fourth proposition My Lords. The abrogation of Article 370 and
32 the subsequent Jammu and Kashmir's Reorganization Act, 2019, by abolishing, the bicameral
33 legislature of the State has further violated the unique Legislative autonomy secured by the
34 State of Jammu and Kashmir. And this is just on top of page 2 My Lords. Now for this, My
35 Lords, I'll just take Your Lordships to Sections 46-47 and 50 of Constitution of the State of
36 Jammu and Kashmir and My Lords, that's in Volume 2.

37

1 **CHIEF JUSTICE DY CHANDRACHUD:** We have it here, actually, in your note itself. It's
2 the Article, Section 46.

3

4 **MENAKA GURUSWAMY:** It's in Volume 2, My Lords, of the documents.

5

6 **CHIEF JUSTICE DY CHANDRACHUD:** 46, is at page 5.

7

8 **MENAKA GURUSWAMY:** Section 46, My Lords pertains to the Legislature for the States,
9 there shall be legislatures for the State,

10

11 **CHIEF JUSTICE DY CHANDRACHUD:** The bicameral Legislature, both the Legislative
12 Assembly as well as the Council.

13

14 **MENAKA GURUSWAMY:** Yes, bicameral...

15

16 **JUSTICE SANJAY KISHAN KAUL:** It is extracted in your note as the Chief Justice said..

17

18 **MENAKA GURUSWAMY:** Yes My Lords. But, My Lord, what is important and interesting
19 about this legislative model, is that Section 47 and Section 50 provide for the composition of
20 the Legislative Assemblies, the Assembly and the Council. Now the reason why I'm
21 belabouring this, is because the composition speaks to a unique.... My Lord Justice Surya Kant
22 has that?

23

24 **JUSTICE SURYA KANT:** Yes.

25

26 **MENAKA GURUSWAMY:** The composition speaks to a unique regional model of
27 governance and that unique regional model of governance, was only ascribed to the State of
28 Jammu and Kashmir. So 46, 47, and 50. 47 provides for the composition of the Legislative
29 Assembly and 50 provides for the composition of the Legislative Council.

30

31 **JUSTICE SANJAY KISHAN KAUL:** [UNCLEAR] Para 7 says?

32

33 **MENAKA GURUSWAMY:** Yes, My Lord. Yes, My Lords. Now Section 50, of the
34 Constitution of Jammu and Kashmir has unique requirements of this composition, and this
35 shows a thoughtful regional understanding of the state. The Legislative Council is intended
36 not only to have members from districts, but municipal councils, town area committees,
37 *panchayat*, so on and so forth. Now this is a very different understanding, from Article 171 of

1 the Constitution of India, which provides for legislative councils of a different kind. May I just
2 read My Lords, Article 171? Article 171 speaks to the composition of Legislative Council. Total
3 number of members, My Lords of each Council shall not exceed. Now Subclause 3 and 4.
4 These are only specialist qualifications. The idea of 171 is not to provide for representation by
5 region but only to have specialists of memberships, members from specialist institutions.

6

7 **JUSTICE SANJAY KISHAN KAUL:** ...Governance now in the Constitution has come in a
8 different fashion. It was not prevalent there, so possibly the thought process at that time while
9 creating the bicameral Houses was, to provide such representations from the government. But
10 the Indian Constitution has also changed over by inclusion of that?

11

12 **MENAKA GURUSWAMY:** My Lords, the reason why I'm showing these distinctions and
13 My Lord, is very correct. But, the reason why I'm showing this is, that there was a method, an
14 intention on how to keep. One, how to recognize the state, two, how to bring the diversity
15 within the state together...

16

17 **JUSTICE SANJAY KISHAN KAUL:** That is a representative character from a base level.

18

19 **MENAKA GURUSWAMY:** Yes and diversity of regional representation, the only Legislative
20 Council which had reservations on religious grounds. Sikhs had seats, very unique. So there
21 was an understanding of the people who knew the area best, that there would be a certain
22 regional representation to hold together Jammu, Kashmir and Ladakh. There is no other
23 Legislative Council which is thinking through regions, which is thinking through minority
24 representations in this form. So when you take that area and divide it up and chop it up into
25 two union territories, you take away all representation from Ladakh..

26

27 **CHIEF JUSTICE DY CHANDRACHUD:** We got the point. Thank you. Anything else, Dr.
28 Guruswamy?

29

30 **MENAKA GURUSWAMY:** Yes My Lords. Just two brief points. So, My Lord's, following
31 the abrogation of 370 then, and subsequent state reorganization, a Legislative Assembly, a 111
32 members, and the Legislative Council 36 members were dissolved. And then you had the state
33 conversion into two union territories. Now, of course, Article 169 of the Constitution of India
34 provides for a mechanism of the abolition of Legislative Councils. I'm saying this, My Lords
35 because it is not as if only 370 has been miraculously removed and ejected, in ways violative
36 of constitutional intent. It is that everything that has happened has been contra the
37 Constitution of India including, for instance, the dissolution of the Legislative Council, which

1 was envisaged by a framer. The Legislative Councils are meant to be dissolved in a certain
2 manner, but certainly not in this fashion. And that constitutional intention of a recognition of
3 identity, of a recognition of representative democracy, of a recognition of unique federalism
4 extends to all of this. So you are not just running roughshod over 370. You are running
5 roughshod over the small, how you dissolve a Legislative Council and the big, how you don't
6 hold elections for the last four years?

7

8 **CHIEF JUSTICE DY CHANDRACHUD:** What is the next point? The second point?

9

10 **MENAKA GURUSWAMY:** Yes, My Lords. Now, My Lords, a small point is that prior to the
11 impugned actions, Ladakh had 4 MLAs and 2 MLCs. It also...

12

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

14

15 **CHIEF JUSTICE DY CHANDRACHUD:** You said Ladakh had 4 MLAs.

16

17 **MENAKA GURUSWAMY:** Ladakh had 4 MLAs My Lords.

18

19 **CHIEF JUSTICE DY CHANDRACHUD:** And?

20

21 **MENAKA GURUSWAMY:** And 2 MLCs. 4 MLAs after the delimitation in 1995, and 2 MLCs
22 pursuant to Section 50, My Lords, of the Constitution of Jammu and Kashmir. Also, My Lords
23 it uses...

24

25 **CHIEF JUSTICE DY CHANDRACHUD:** ...representation goes away...the Legislature
26 itself ceases to exist..

27

28 **MENAKA GURUSWAMY:** Yes My Lords. And My Lords also, the Ladakh Autonomous
29 Hills Development Council Act, 1995, provided for this Hills Development Council, which
30 provided for decentralized, autonomous bodies for governance.

31

32 **CHIEF JUSTICE DY CHANDRACHUD:** And that has been rendered null and void.

33

34 **MENAKA GURUSWAMY:** Yes, My Lords...null and void.

35

36 **CHIEF JUSTICE DY CHANDRACHUD:** All right. Thank you.

37

1 **MENAKA GURUSWAMY:** This is also one of just two other short points. And I'll make it
2 very brief. One My Lord so I should tell My Lords, I appear in two matters, so that My Lords
3 has that. Writ Petition My Lords 1048 of 2019. Writ Petition 1048 of 2019..
4

5 **CHIEF JUSTICE DY CHANDRACHUD:** You already told me you are here as an
6 intervener...
7

8 **MENAKA GURUSWAMY:** I appear in two matters. This is Writ Petition 1048 of 2019.
9

10 **CHIEF JUSTICE DY CHANDRACHUD:** And?
11

12 **MENAKA GURUSWAMY:** And intervention number 138432 of 2023.
13

14 **JUSTICE SANJIV KHANNA:** 138?
15

16 **MENAKA GURUSWAMY:** 138432 My Lords, 2023. That's the Awami National Conference.
17

18 **CHIEF JUSTICE DY CHANDRACHUD:** Maybe the Nodal Counsel will have to just upload
19 or update our sheet, because...
20

21 **MENAKA GURUSWAMY:** Yes, My Lords..
22

23 **CHIEF JUSTICE DY CHANDRACHUD:** Just, maybe you can update the sheet, anyway,
24 anytime today, in the afternoon or evening, just give it to the Court Master..
25

26 **MENAKA GURUSWAMY:** Writ petition is Shakir Shabbir and the IA is the Awami National
27 Conference. Now the reason why I'm mentioning this also My Lords and I'm cognizant My
28 Lords, of the large clock at the back, My Lords we're tuned to Your Lordships looking to it. But
29 My Lords it's this, that in the writ petition, 1048 of 2019, there is also a separate intervention,
30 and that IA, actually speaks to delimitation.
31

32 **JUSTICE BR GAVAI:** Yesterday only we said that that stands [UNCLEAR] concluded by the
33 judgment of My Lord Justice...
34

35 **MENAKA GURUSWAMY:** My Lord. Yes. Now, My Lord, respectfully, respectfully, the
36 Judgment of Your Lordships, Justice Oka categorically States, that the abrogation, the State
37 Reorganization Act, is not being challenged in this judgment. My Lord Justice Kaul knows

1 that. My Lord Justice Kaul knows that. Therefore, My Lords and Justice Oka, in that case also
2 specifically says, that Counsel should have raised it initially, or it should have been pled in the
3 petition. He says that, in his judgment. And because it is not pleaded, we are not assessing
4 delimitation in context of that. That is abrogation and reorganization.

5

6 **JUSTICE SANJAY KISHAN KAUL:** We assess delimitation, but we did not go into any
7 other issue..

8

9 **MENAKA GURUSWAMY:** May I just show you those...

10

11 **JUSTICE SANJAY KISHAN KAUL:** How does a.... unless there is a reference made or
12 something.... How does that issue crop up here?

13

14 **MENAKA GURUSWAMY:** My Lord, because, Your Lordships are seized of everything that
15 falls out of abrogation and reorganization, including delimitation.

16

17 **CHIEF JUSTICE DY CHANDRACHUD:** But, that part....Now that part is concluded by
18 the judgment. I mean, there's no reference to this bench on that issue.

19

20 **MENAKA GURUSWAMY:** But My Lordship, at that time, Justices Kaul and...

21

22 **JUSTICE SANJAY KISHAN KAUL:** Somebody should have come there then. We have
23 heard other people there, whoever wanted to on delimitation. If this person was so keen and
24 that also either interven....he has moved an application of intervention in 1... there is 1028 of
25 2019. He's not a petitioner, according to you is suing...

26

27 **MENAKA GURUSWAMY:** No My Lords, the same petitioner. This writ petitioner...

28

29 **JUSTICE SANJAY KISHAN KAUL:** He filed a separate application?

30

31 **MENAKA GURUSWAMY:** Yes. In his own app.... In his own writ petition has filed an
32 additional application vis-a-vis delimitation. Because it occurs subsequently...

33

34 **CHIEF JUSTICE DY CHANDRACHUD:** This can't be in the form of an application in a
35 petition.

36

1 **JUSTICE SANJAY KISHAN KAUL:** See in a matter [UNCLEAR] this becomes too
2 complex to get into. You need to confine to what is there before us.

3

4 **MENAKA GURUSWAMY:** I follow and bow down. But I will only say this, My Lords, and
5 Your Lordships may just... I will only say this that at present, not only have these two the State
6 been turned into two Union Territories the delimitation exercise which breaks down individual
7 constituencies, which goes against that regional autonomous model of federalism promised in
8 the Constitution of Jammu and Kashmir is now rendered not.

9

10 **CHIEF JUSTICE DY CHANDRACHUD:** That point you have made.

11

12 **MENAKA GURUSWAMY:** And therefore, I went through all those points to show that this
13 is a unique model.

14

15 **JUSTICE SANJAY KISHAN KAUL:** That's fine.

16

17 **CHIEF JUSTICE DY CHANDRACHUD:** Now that point you have made no?

18

19 **MENAKA GURUSWAMY:** Yes. Now, if you've chopped up those constituencies and that is
20 what has happened, My Lord, is the chopping up of constituencies.

21

22 **JUSTICE SANJAY KISHAN KAUL:** That will happen... in delimitation exercise always
23 emphasizes inherently a change of constituencies. Otherwise why have a delimitation?

24

25 **MENAKA GURUSWAMY:** But My Lords a respectful submission is that, the delimitation
26 exercise must either conform to the Constitution's requirements...

27

28 **JUSTICE SANJAY KISHAN KAUL:** That we've adjudicated.

29

30 **MENAKA GURUSWAMY:** Yeah. Or and given that Your Lordships are seized of abrogation
31 and the Reorganization Act.

32

33 **JUSTICE SANJAY KISHAN KAUL:** That's fine.

34

35 **CHIEF JUSTICE DY CHANDRACHUD:** That point you have made, that you know this
36 eats into the regional [UNCLEAR] model of federalism. That point we have taken. Thank you
37 Dr Guruswamy.

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MENAKA GURUSWAMY: My Lords, and then I'll just end with this My Lords.

CHIEF JUSTICE DY CHANDRACHUD: Manish Tewari we will call upon.

MENAKA GURUSWAMY: My Lords, I will just end with this one point.

JUSTICE BR GAVAI: Almost 30 minutes now.

MENAKA GURUSWAMY: 30 minutes, My Lords, it can't be. It felt like two minutes. The best two minutes...

JUSTICE BR GAVAI: Watch is before us?

CHIEF JUSTICE DY CHANDRACHUD: All right. Last further point, yes.

MENAKA GURUSWAMY: I'll just end with this that part of this is that, we made promises. We the people through our drafters made promises. It is surely an axiom of decency, constitutional Integrity to keep our promises.

CHIEF JUSTICE DY CHANDRACHUD: Thank you, Dr. Guruswamy. Now, Mr. Manish. Tewari. Yes, Mr. Tewari.

MANISH TEWARI: May it please, Your Lordships, our intervention application number is 160049 of 2019 in writ petition number 1013 of 2019. In the paper books volume, The Intervention Application is at PDF page number 409 to 420. And our written submissions are in the written submissions synopsis volume at PDF page number 610 to 644.

JUSTICE SANJIV KHANNA: Volume?

MANISH TEWARI: This is the PDF Volume on submission, synopsis and formulation, Your Lordships.

JUSTICE SANJAY KISHAN KAUL: You represent who Mr. Tewari?

MANISH TEWARI: I represent Padi Richo, a former Minister in the Arunachal Government. And may I commence by answering what the Lord Chief Justice had referred to

1 yesterday when we were going through the scheduling that the six sub-parts of Article 371 are
2 not before Your Lordships in this matter and that is absolutely correct. However the
3 underlying principle of autonomy in Article 370 and 371, is more or less the same and so
4 therefore what Your Lordships will hold in this matter either way, will have implications on
5 Article 371. And that is what I am here to respectfully point out. Your Lordships, the
6 Constitution of India, in addition to being a politico-legal compact also served as a national
7 security instrumentality in terms of unifying the periphery of India to the hinterland. Because
8 national security is not merely the use of the hard power of the state. Your Lordships, when
9 the British were ruling India, they actually managed the periphery through a process of
10 treaties. And since there is a paucity of time, I will not lead Your Lordships through the various
11 treaties in the North-West, in the North- East of India. But independent India decided to
12 manage its periphery, its realm through Constitutional guarantees. And the reason is because
13 they were managing an empire and we were building a Republic. And that's how Article 370,
14 which applies to Jammu and Kashmir, which is a periphery state, Article 371, the six subparts
15 which apply to the North East and the Sixth Schedule of the Constitution, which applies to
16 Assam, Tripura and Meghalaya becomes relevant and germane in this matter. And may I very
17 respectfully point out, Your Lordships, that even a slight apprehension in the periphery of
18 India, can have serious implications and Your Lordships are currently dealing with one such
19 situation in Manipur, and I will not belabour that point further. Before I come to the North-
20 East, Your Lordship, I just wanted to point....

21

22 **TUSHAR MEHTA:** I am sorry for interruption, kindly give me a minute indulgence and I
23 have instructions to say this, but we have to be very, very responsible in assisting Your
24 Lordships and we must understand the difference between temporary provision, which is
25 Article 370, and special provisions with regards to other states, including North-East. The
26 Central Government has no intention to touch any part, which gives special provisions to
27 North-East and other regions. This submission would have a very potential mischief, and
28 therefore My Lord I am interrupting and making it clear. Let us confine to a temporary
29 provision for Jammu and Kashmir. Rest are special provisions, not temporary provisions. So
30 there is no apprehension and let us not try to create that apprehension. I am putting that
31 apprehension at rest, on behalf of the Central Government.

32

33 **MANISH TEWARI:** Your Lordship, may I very respectfully point out I was not referring to
34 the current Central Government. I was referring to the principal at stake....

35

36 **CHIEF JUSTICE DY CHANDRACHUD:** Why should we deal with anything in
37 anticipation or in apprehension? We are dealing with a specific provision, namely, Article 370,

1 which was applicable or it is applicable according to you, to the Jammu and Kashmir. We don't
2 have to really expand this ambit on what the impact of our interpretation would have on other
3 provisions of the Constitution.

4

5 **MANISH TEWARI:** Your Lordships, may I respectfully point out...

6

7 **JUSTICE SANJAY KISHAN KAUL:** Mr. Tewari, also another thing in what he says. This
8 is a special provision [UNCLEAR]. 370 is stated to be a temporary provision. Of course, the
9 Counsels have argued, it is not temporary that, it was temporary in the context of Assembly.
10 All those aspects are there interpretation of 370. Touching 371 is something which we should
11 take into in these proceedings.

12

13 **CHIEF JUSTICE DY CHANDRACHUD:** And particularly once, as a constitutional
14 principle, a Solicitor General is informing us that the Government has no such intent, why
15 should we apprehend that you know, this is what the Government is about to do in other parts
16 of the country.

17

18 **MANISH TEWARI:** Your Lordships may I..

19

20 **CHIEF JUSTICE DY CHANDRACHUD:** That's not before us and I don't think we should
21 really enter into that terrain at all.

22

23 **MANISH TEWARI:** Your Lordship, may I respectfully point out, you're absolutely correct
24 with regard to the....

25

26 **CHIEF JUSTICE DY CHANDRACHUD:** Draw the impact of, say, the abrogation of a state
27 into a union territory. What could be the fall out in other parts of the country? Certainly that
28 point has been made, that's present to our mind. But let's not now place specific focus on
29 North-East that you will probably do this in the North-East. I think the apprehension is allayed
30 by the statement which has been made on behalf of the Government. And beyond what was
31 argued by the petitioners, namely, that if you permit and that is independent of Jammu and
32 Kashmir, if you permit the abrogation of a state and its constitution into a union territory, why
33 would it be confined only to Jammu and Kashmir? That point has been made. We have made
34 a note of that. We will be hearing on the response to them.

35

36 **MANISH TEWARI:** My....

37

1 **JUSTICE SANJIV KHANNA:** Mr. Tewari, just one thing. I think as far as the other parts of
2 North-East is concerned because your written submissions specifically talked about it, that in
3 view of the statement made, I don't think we are required to go into all that, one. Number two,
4 as far as Article 3 & 4, whatever is there, if you have any submissions to make, just confine to
5 those Articles *dehors* North-East, that's possible. But otherwise we are dealing with only 370
6 and Article 3 & 4.

7
8 **MANISH TEWARI:** Your Lordships, I am extremely cognizant of what has fallen from Your
9 Lordships and I will try and confine my arguments to the constitutional interpretation,
10 primarily because you were absolutely correct that while Article 370 has a sub-heading as a
11 temporary or transitional provision, 371 and the rest of the provisions also have a subheading
12 as a special provision. So therefore, I am not trying to equate temporary, which has been
13 argued as permanent with special provisions, but the underlying principle of autonomy, which
14 runs through 370 and 371 is the same. And that's the limited argument that I want to make.
15 So, Your Lordships, before I go on to the arguments with regard to the Article 3 & 4 may I very
16 respectfully point out that....

17
18 **JUSTICE BR GAVAI:** Mr. Tewari, there are even certain special provisions with respect to
19 state of Maharashtra also. State of Maharashtra and Gujarat. What we are interpreting is only
20 370.

21
22 **MANISH TEWARI:** Your Lordship is absolutely correct. That's why....

23
24 **JUSTICE SANJAY KISHAN KAUL:** [UNCLEAR], see the interventionist bases his
25 intervention only on one principle, that is 371(a). Once we are not touching that, what does
26 the interventionist have to say in this?

27
28 **CHIEF JUSTICE DY CHANDRACHUD:** And Mr. Tewari, ultimately , you have nothing
29 to say on Article 370. So then why should we hear...

30
31 **MANISH TEWARI:** Your Lordships, may I have a submission with regard to 370, and then
32 I will try and make a submission as [UNCLEAR].

33
34 **CHIEF JUSTICE DY CHANDRACHUD:** You have not formulated anything in your
35 submissions on 370.

36

1 **MANISH TEWARI:** Your Lordships, there is a submission on 370 in our written
2 submissions.

3

4 **CHIEF JUSTICE DY CHANDRACHUD:** Let us see that and then we can close on that.

5

6 **MANISH TEWARI:** 619 to 623 of our written submissions Your Lordship.

7

8 **JUSTICE SANJAY KISHAN KAUL:** With respect to different areas, are different. There's
9 no 370(1)(a)...

10

11 **MANISH TEWARI:** Your Lordship, may I be...

12 [NO AUDIO] Your Lordship, may I make a submission with regard to 370. And then I'll go on
13 to Article 3 & 4 which we have formulated...

14

15 **CHIEF JUSTICE DY CHANDRACHUD:** Mr. Tewari, what we'll do is, we'll close your IA,
16 by taking the statement of the Solicitor General on the record. And we'll just close the IA right
17 now, so that there's no ambiguity left in on the adjudication, on the IA, or in the position of
18 the Union Government on any of the States in the North- East..

19

20 **MANISH TEWARI:** Well Your Lordships, if Your Lordships on the statement, which has
21 been given by the Union, would like to close the IA, I have absolutely no objection to it. But
22 may I just make one submission with regard to 370 with your indulgence?

23

24 **JUSTICE SANJAY KISHAN KAUL:** Mr. Tewari, that's not what the applicant has come
25 for. Applicant has come with some other basis. Whatever apprehensions may be in the mind,
26 which was not subject matter here, is also allayed by the statement. Why should we, in these
27 370 proceedings, you yourself say is a very sensitive area. Why should we take....

28

29 **CHIEF JUSTICE DY CHANDRACHUD:** We'll just say that the applicant, urging its
30 submissions through...urging their submissions through Mr. Manish Tewari, learned counsel,
31 has urged that apart from the provisions which are contained in Part 21 of the Constitution,
32 pertaining to the State of Jammu and Kashmir, pertaining to Jammu and Kashmir, there are
33 special provisions in the Constitution governing the North-East in the same part. So since it
34 has been submitted that the interpretation which would be placed by this Court on Article 370
35 is possibly impact upon the other provisions. The Solicitor General has submitted on the
36 instructions, specific Instructions of the Union Government that the Union Government has
37 absolutely no intent to touch or affect.. to affect any of the special provisions applicable to the

1 North-East and to any other part of India. Then next, the reference to the Constitution Bench
2 is confined to the provisions of Article 370 of the Constitution. There is no commonality of
3 interest between the issues which have sought to be, which are sought to be addressed by the
4 intervener and the issues which have been raised in the reference to this Constitution Bench.
5 In any event, the statement which has been made on behalf of the Union Government would
6 allay any apprehension in that regard. We therefore close the IA which will stand disposed of.

7

8 **TUSHAR MEHTA:** Obligated My Lord.

9

10 **ATTORNEY GENERAL R.ENKATARAMANI:** That's an addition to the well settled
11 principle that in constitutional adjudication, Court will not [UNCLEAR] directly arise for
12 adjudication. They will not stray to all those areas where court need not go into.

13

14 **CHIEF JUSTICE DY CHANDRACHUD:** Ms. Warisha Farasat.

15

16 **WARISHA FARASAT:** I'm very cognizant of the time. And I'll be very brief. My Lords have
17 heard very lengthy arguments. So I want to start by a quote by the Soviet Premier at the time,
18 Nikita Kurshev. And what he said was very interesting. He said, 'You Indians are a remarkable
19 people. How did you manage to liquidate the princely States without liquidating the Princes.'
20 So, my Lord, I want to start by saying that in fact, it was the Constitution writing was a
21 remarkable exercise. And the coming together of the Indian Union and the Indian Federation
22 was a remarkable exercise. And it's in that context and even the Soviet Premiere of the time
23 because it was not common practice. These nations were being born. And so My Lords, I want
24 to start... I started with that to come to my first point. I have three quick points and I'll try and
25 make them very quickly. The first is about the concept of federalism as it operates in the
26 context of India. And to that extent, My Lords, I want to say that, yes, at one level, Jammu and
27 Kashmir is unique. But at the other level it is also part of a Federal Union as federations are
28 understood. And I want to take the example of the United States, because it's the first
29 democratic country, federal country that comes to mind. And My Lords, in fact, the US
30 National Constitution is a very thin text. My Lord knows that. It only has 7 Articles,
31 supplemented by a total of 27 amendments. And it is importantly, Article 1, Section 8 of the
32 US Constitution that enumerates the specific powers taken over by the Congress and the
33 federal level of the government, leaving all other spheres of autonomy to the States by default.
34 This is the 10th Amendment which expressly defines this data. So My Lords, my point is that
35 federations, as we understand can have a variety of permutations and combinations. There is
36 no one kind of a typical state, even within federations, that can be envisaged. My Lords, my
37 point then comes to Jammu and Kashmir and how do we envisage states within the Indian

1 Federal Union. My Lords, there are various ways. One is we have a union territory. So, in a
2 way, it's state minus, minus. Then we have something, My Lord. Have dealt with it extensively
3 in the **GNCTD case** that it is a UT, but with legislative powers, My Lords. And so you have...
4 and then you have something like a Jammu and Kashmir My Lords, which is a State plus, plus,
5 with its own Constitution and with its... so, a Constituent Assembly was formed and a
6 Constitution was given. So we must see that there are various permutations and combinations
7 and it is unique, but also a normal part of federalism. And My Lords, there is a very important
8 concept within federalism. One is 'holding together' and the other My Lords, is 'coming
9 together.' So while I would, and my main proposition is that while most of the Indian union
10 represents what has been called a 'holding together' type of Federation, where a multicultural
11 polity with strong unitary features, constitutionally splits autonomy between the union and its
12 region to hold those regions together. However, Jammu and Kashmir represents much more
13 a 'coming together' federation, My Lords, where previously sovereign polities pooled their
14 sovereignties and resources to come together and form a more secure and long standing union.
15 So it is within that that we're envisaging the federalism, that is envisaged for J&K. My Lords,
16 I have said various things in my note. It supplements it, but I'll quickly then come to my second
17 point and my second point is about the fact that when we look at Article 368. I'm saying, let's
18 forget Article 370 for a little while. And the amending constitutional, amending provision that
19 373 provides. Let's just look at Article 368, which is the Constitutional Amending Power. Now,
20 by their very nature a Constitutional Amending Power is far stricter than the normal legislative
21 powers that even the Parliament has. My Lords, so therefore, there are many checks and
22 balances that Article 368 envisages, that is not envisaged in the general legislative powers that
23 are exercised either by state legislatures or by the parliament. So, My Lords, therefore, when
24 we are reading 370, so what is my point? My point is that therefore, when we are reading 370,
25 it must be a very strict interpretation of what can or cannot be done. And therefore when we
26 are reading 370, it cannot be that in a casual manner, we are substituting one authority with
27 another, as has happened in the Constitutional Orders that have been promulgated. My Lords,
28 I then come to in fact, My Lord Chief Justice's question, while I'm answering this and My Lords
29 have read this article, I don't know how many times. 370 but may I please urge you to read it
30 once more with me. Please, please My Lord, if you can come to Article 370 once more. Because
31 My Lords have asked a very important question from all of us on this side, and that is that,
32 how do we read 2 and 3, and the Constituent Assembly part in it? And there's a clear answer
33 for that. My Lord if we read this. Sorry, My Lords I apologize. Yes. If My Lords can read para
34 2 with me once more, there's a clear answer. 'If the concurrence of the Government of the State
35 referred to in paragraph 2 of Sub-clause B of Clause 1 or in second proviso to Sub-clause D of
36 that clause be given before the Constituent Assembly, for the purpose of framing the
37 Constitution of the State is conveyed. It shall be placed before such Assembly for such decision

1 as it may be taken thereon.' My Lords, I'm making a simple point that this was a transitional
2 provision because of the fact that it uses the word 'before such Assembly.' It only provided a
3 protection to place before the Constituent Assembly, when a Constituent Assembly had not
4 been formed. After that, the power that is vested in 2 was subsumed by 1. And therefore it
5 answers, My Lord's questions that are the subsequent Presidential Orders legal? Yes, they are.
6 Because they are not under exercise of power under 2, but under 1. And my concomitant point
7 with that is very respectfully, so our Constituent Assembly makers, or they were our
8 Constitution makers were aware that at some point in time, the Constituent Assembly of J&K
9 would have served its purpose and would no longer be there. And for that particular purpose,
10 they had given that how can you make changes and that was provided under 1. Right, My Lord?
11 So therefore, they were equally aware that the Constituent Assembly would cease to be in
12 power...

13

14 **JUSTICE SANJIV KHANNA:** Just one...

15

16 **WARISHA FARASAT:** My Lords, I'm sorry if I'm moving very quickly, but I'm just
17 cognizant of the time. My Lords, so, my essential point here is, that the Constitution makers
18 were aware of the fact that the Constituent Assembly would finish its function and then no
19 longer exist. And therefore for making any changes they had provided for the via media via 1,
20 but for the abrogation they only left it to the Consequent Assembly. My Lords, there is no other
21 way to reconcile the two. My Lords otherwise, how do we say that the Presidential Orders...
22 and that's a question that has been falling from My Lordships, I have seen very much from day
23 one. And the only way to look at it is, that Clause 2 was a transitional provision, was only
24 provided for... and My Lords, there is logic in it. Because of the fact that before the Constituent
25 Assembly was formed, the Government would have needed concurrence, because it was
26 transitional, we did not know how exactly they represented, whether they represented the will
27 of the people, etc., or not. And then after that, there was an assumption that the government
28 of the day would be representing the will of the people. And so at least with respect to certain
29 decisions, at least with respect to making certain other parts of the Constitution applicable to
30 the State. However, equally My Lords, if we take that interpretation, then we have to set in
31 time, the Constituent Assembly and its power and the recommendation being necessary for
32 the abrogation. My Lords, because then it will reconcile and My Lords, not just one, very quick
33 last point, is the question, My Lords, that even if we left everything aside, My Lords, what
34 happened on the 5th and 6 August 2009, and My Lords, are a Constitutional Court. My Lord's,
35 three former Chief Ministers were in detention. And these are all facts, My Lords. Three former
36 Chief Ministers, most of your Legislative Assembly, My lord's, the will of the people, is
37 exercised by the Legislative Assembly were in some form of detention or the other either under

1 the Public Safety Act, or My Lords, under you know, 107-105, it's laughable. In Delhi if... you
2 know... entire polity and all of the politicians who have actually supported you have been
3 Legislative Members, are put in this manner. And therefore I come to my last, but very
4 important argument, that this is malice-in-law, because what this demonstrates... and how do
5 we determine malice-in-law? By the actions surrounding the abrogation itself. And My Lords
6 I'll just read very quickly, because I don't want to burden My Lords with reading anything at
7 this stage. But malice-in-law is a very well settled principle. I'll just read it. And it has been
8 held by this Honourable Court as follows: This Court has consistently held that the State is
9 under an obligation to act fairly without ill will or malice, in fact or in-law, where malice is
10 attributed to the State. And My Lords, we are doing that. It can never be a case of personal ill-
11 will or spite on the part of the State. Legal malice or malice-in-law, means something done
12 without lawful excuse. It is a deliberate act in disregard to the...

13

14 **CHIEF JUSTICE DY CHANDRACHUD:** Read your submission below the quotation, the
15 abrogation of Article 370 was effected...

16

17 **WARISHA FARASAT:** Yes, yes.

18

19 **CHIEF JUSTICE DY CHANDRACHUD:** You can read those two sentences.

20

21 **WARISHA FARASAT:** Yes, My Lords. The abrogation of Article 370 was effected, secretly,
22 unilaterally and coercively. Not only was the democratic process disregarded, but also the
23 people and their leaders were kept in the dark, prevented from communicating with others,
24 My Lords, and even detained till the Union of India could issue them a *fait accompli*. In times
25 when pre-legislative public consultations, My Lords, and post-legislative social audits. My
26 Lords, we know that. Even before, you know, there's talk of whatever law, there are public
27 consultations and deliberations. But here, My Lords, what has happened is that the will of the
28 people has been trampled upon and there can be no other reading in this regards, My Lord.

29

30 **CHIEF JUSTICE DY CHANDRACHUD:** Thank you so much, Ms. Farasat...

31

32 **JUSTICE SANJAY KISHAN KAUL:** Whom do you represent?

33

34 **WARISHA FARASAT:** My Lords, I'm in IA 159655.... Mr.. Venkatesh Nayak.

35

36 **JUSTICE SANJAY KISHAN KAUL:** Just want to know who is he?

37

1 **WARISHA FARASAT:** My Lord, he is the RTI activist. He's a very well-known and respected
2 RTI activist. I'm so grateful.

3

4 **IRFAN LONE:** May I Lordship?

5

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

7

8 **IRFAN LONE:** My Lordship, I'm a little bit nervous because due to the time constraint, I will
9 try to avoid repetition and try to assist My Lordships. Lordships it's imperative *sine qua non*
10 to slightly touch the provisions of 370 concurrence 356 and Article 3, and federalism and
11 democracy very briefly, My Lordships. And the circumstances under which....

12

13 **CHIEF JUSTICE DY CHANDRACHUD:** Can we just run through your notes?

14

15 **IRFAN LONE:** Very briefly, within one minute....

16

17 **CHIEF JUSTICE DY CHANDRACHUD:** Let's look at your notes so that it'll just bring
18 clarity on what you want to argue.

19

20 **IRFAN LONE:** Yes Your Lordships. Your Lordships, and the circumstances under which
21 three... Instrument of Accession was signed. And the latter to the Maharaja by the Lord
22 Mountbatten, wherein he says that no sooner the normalcy returns, the will of the people will
23 be ascertained, and I believe, Lordships, the will of the people was expressed by the
24 Constituent Assembly, by J&K Constituent Assembly. And they framed the Constitution and
25 defined the constitutional relationship between Union of India and State of J&K My
26 Lordships, the Constituent Assembly of J&K provides in Article 370. My Lordships in 370, is
27 a self-contained provision which prescribes very candid clearly that consultation with regard
28 to the Instrument of Accession, the subjects mentioned and by that reference, My Lordships
29 the Instrument of Accession is part of the 370. Because, whenever we take recourse to the
30 subjects, we have to take recourse to the Instrument of Accession. My Lordships, I have in
31 my... submitted the document which I obtained under RTI with regard to supplementary
32 Instrument of Accession signed by the other States. J&K is the only state which didn't sign this
33 supplementary accession. Only State. Your Lordship 370, is the constitutional recognition to
34 the Instrument of Accession. My Lordship but the manner in which the concurrence, which is
35 very candid clear, My Lordship, express provision of the law that concurrence means on the
36 aid and advice of the consuls of the Ministers. My Lordship, the J&K Constituent Assembly in
37 1957 conveyed that the 370 will remain in the same form. They didn't recommend its

1 abrogation. In fact, My Lordships they recommended that it will continue as they pass the
 2 resolution. And My Lordships, the Constituent Assembly of the J&K temporary provision was
 3 only because it was left to the discretion of the J&K Constituent Assembly to take the final
 4 decision. Now Lordships, the concurrence by the Governor is not permissible under law.
 5 Because My Lordships concurrence affects the autonomy of the State. It's because of that
 6 reason, the concurrence is to be given by the duly elected government. It cannot be the
 7 Governor under Articles 93 or 356 of the Constitution. My Lordships the Article 3 of the
 8 Constitution says, view of the state. What happened in Jharkhand? Two years, three years
 9 debate. Telangana when was formed. And with regard to J&K, 356 invoked, the relevant
 10 provision suspended, which is unknown to law. And with regard to J&K, there was consent,
 11 My Lordship, I was a full-fledged state, I was having my own Constitution 1939, prior to the
 12 Indian Independence Act. And it's because of that reason, the other side of the Kashmir, which
 13 is with our neighbouring country, they have right now, maybe on the papers, they have the
 14 Prime Minister, they have the President, they have the Legislature. I'm functional democracy.
 15 I'm proud of it. I'm a Nationalist. But Lordship, I take liberty to share with My Lordships, I am
 16 being, people make mockery of me. Is this democracy you are proud of? They have the full-
 17 fledged state, I was having within the Constitution, my Prime Minister, my *Sadr-e Riyasat*,
 18 my Legislature. I am reduced it to the UT, LG. Forget My Lordship, about the Prime Minister.
 19 65th amid, in 65 Sixth Amendment in J&K Constitution, Sheikh Abdullah was in jail. The
 20 amendment was made, and this nomenclature was changed. Lordship, I'm concluding very
 21 important, Lordship with regard to the will of the people Lordship. The will of the people is of
 22 paramount importance, federalism, rule of law, democracy, Lordship is the soul of
 23 Constitution basic structure, held by *Kesavananda Bharati* case. Lordship, it's not mere
 24 elections democracy. It's beyond, it's vast, it's the functional democracy. My Lordship, will of
 25 the people is of paramount importance. I'm alive of the fact Lordships...

26

27 **CHIEF JUSTICE DY CHANDRACHUD:** Thank you Mr. Lone.

28

29 **IRFAN LONE:** Courts are not to get swayed away. I'm, one minute only Lordship. Courts are
 30 not to get swayed away by the emotions. But Lordships, here in this instant case, the will of
 31 the people. That is the Constituent Assembly of the J&K. The sentiments, aspirations, the
 32 desire of the people is intrinsic to the will of the people. That is to be looked by Lordships right
 33 now. Lordships, I am concluding but this is very important, Lordship. That is the report of
 34 State Autonomy, which is the will of the people. This autonomy report is by, its 8290, Volume
 35 14, document compilation. The Government has set up Your Lordship, it's very important.

36

37 **CHIEF JUSTICE DY CHANDRACHUD:** What is the page? PDF?

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IRFAN LONE: Page 8290, Lordship..

CHIEF JUSTICE DY CHANDRACHUD: Can somebody give us the...

IRFAN LONE: Volume 14 Lordship.

CHIEF JUSTICE DY CHANDRACHUD: One second, he will give us. All right. What is the point in there?

IRFAN LONE: Point is, My Lordship, the State Government set up a committee to examine the question of restoration of autonomy, the State of Jammu and Kashmir by Government Order Number 19(6). Dr. Karan Singh is the head of the Chairman of this committee. There are other members. Lordship very, within one minute or so, I will conclude. This is the aim and object of this committee. However other states exercise the choice.

CHIEF JUSTICE DY CHANDRACHUD: Yes.

GOPAL SANKARANARAYANAN: PDF 549.

CHIEF JUSTICE DY CHANDRACHUD: 549. Yes.

IRFAN LONE: How other Indian states exercise their choice, how they participated in Constitution framing, and in what form did they adopt it, in not our concern. This shall be referred to whatever necessary in pages to follow. But it's relevant to mention here that whereas other princely states signed the Instrument of Accession to India, and subsequently the Instrument of Merger. The accession of J&K State was limited only to the areas of defence, external affairs, and communication. Uniquely, J&K State is the only one to have negotiated the terms of membership of the Union right till the Delhi Agreement. It did not accept any provision of the Constitution of India, other than those agreed to the Instrument of Accession and retained its autonomy. Autonomy has remained since the days of accession. The heartbeat of the people of the state. State has lost all resilience to autonomy. Its erosion is the primary cause of Kashmir dissent. Keeping this in view, Shri Narasimha Rao, the then Prime Minister of India, announced in 1995 that the Union Government would be prepared to consider autonomy, short of independence for Jammu and Kashmir. Mr. Devegowda, as Prime Minister of Jammu and Kashmir maximum autonomy, the assurance was incorporated in this common minimum program of the National Front Government. This is very pertinent My Lordship.

1 This is the autonomy resolution, recommendations are there. This is by the State Legislature.
2 This is the will of the people. Lordships, Justice Saghir, a working group was constituted. One
3 of important was headed by Justice Saghir and the recommendation of that very committee
4 was that, the autonomy be restored to state of J&K. My Lordship, J&K was having its own
5 Constitution. This is embodiment of my emotions, desire and aspiration, the J&K
6 Constitution. My Lordship this provides the flag under Section 144, which is which is made
7 dysfunctional by the 273 C.O. impugned C.Os. My Lordship, very briefly, Lordship, with regard
8 to the which is very vital, and very important.

9

10 **CHIEF JUSTICE DY CHANDRACHUD:** Now we will conclude. the others have to...

11

12 **IRFAN LONE:** Only one minute, My Lordship. That is the Delhi Agreement...

13

14 **CHIEF JUSTICE DY CHANDRACHUD:** That was about three minutes ago. So I think
15 we'll conclude.

16

17 **IRFAN LONE:** One minute Lordship, only one minute.

18

19 **CHIEF JUSTICE DY CHANDRACHUD:** Thank you very much. Mr. Bhat now. Mr. Zahoor
20 Ahmed Bhat..

21

22 **IRFAN LONE:** I pray Lordship, keeping in with the democracy, federalism and the self-
23 contained provision of 370. We pray that it's not sustainable. The impugned C.Os, so justice
24 be done with the people of Jammu and Kashmir, Lordships.

25

26 **CHIEF JUSTICE DY CHANDRACHUD:** Thank you.

27

28 **JUSTICE SANJAY KISHAN KAUL:** Thank you.

29

30 **IRFAN LONE:** Obligated My Lords.

31

32 **ZAHOOR AHMAD BHAT:** Your Lordships, I teach Indian politics, to the students in
33 Jammu and Kashmir, and it is very embarrassing and very difficult for me. Like people like
34 me since 2019, when we teach this beautiful Constitution and beautiful democracy and then
35 they will ask it, are we really a democracy since post 19th August 2009, since August '19, that
36 is very difficult for us to answer. Basically, it was very unbelievable on 4th August 2019, when
37 despite the assurance of Honourable Governor, then Governor, that the Article 370 will not be

1 abrogated, in the midnight, curfew is being imposed, all three Chief Ministers, Cabinet
2 Ministers....

3

4 **CHIEF JUSTICE DY CHANDRACHUD:** Just formulate your point, just formulate the
5 point now, because we've heard all this almost several....also, I'll tell you why. There are other
6 people. Mr. Sankaranarayanan, has been waiting here for the last twelve days appearing...or
7 how many days...eleven...we have to give him some time. So please give us your specific points,
8 so we can leave some 20 minutes at the end. Mr. Baig has to argue for ten minutes.

9

10 **ZAHOOR AHMAD BHAT:** Within two days... within two days, 5th and 6th August, special
11 status of Jammu and Kashmir was downgraded into two union territories, union territory of
12 Ladakh and union territory of Jammu and Kashmir. These impugned actions are completely,
13 completely in violation to Constitution, morality of Constitution of India, a right to democracy
14 and consent of the people of Jammu and Kashmir and Ladakh, procedure established under
15 the law, national interest of this country, co-operative federalism, supremacy of Constitution,
16 rule of law. On 5th August and 6th August, Jammu and Kashmir had the Legislature, which
17 had basically the Legislature of Jammu and Kashmir, comprising the Legislative Assembly and
18 the Legislative Council.

19

20 **CHIEF JUSTICE DY CHANDRACHUD:** That point was made just this morning by Dr.
21 Guruswamy. She's made the point.

22

23 **ZAHOOR AHMAD BHAT:** This is what I am going to tell.

24

25 **CHIEF JUSTICE DY CHANDRACHUD:** Yes. Don't repeat that because that has already
26 been made this morning. Just you were listening to it. Same points has been made. Get on
27 with something new. Tell us something new. And Ms. Ramakrishnan also has made the same
28 point in the morning.

29

30 **ZAHOOR AHMAD BHAT:** I'm submitting, Legislative Council is having 36 members and
31 it was not dissolved on 5th and 6th August. It was dissolved in October 2019, so it was in
32 operation. Legislative Assembly was dissolved in May 2018 Because they are....State
33 Legislature is comprised of Legislative Council and Legislative Assembly. On 5th and 6th
34 August, it was there. So, if we respect the consent of the people, which is federal, which is basic
35 structure of the Constitution, so there could have been option to get any concurrence from,
36 even if recommendation for this Reorganization Act, some State Legislature which is
37 mandatory. So part of the State Legislature was that. So, when we see this, this was ignored.

1 This was ignored and this was not highlighted as on date. The Legislative Council 36 members,
2 they were also detained and some of them were detained and some of them was not detained..

3

4 **JUSTICE BR GAVAI:** This was already told us by so many people that all three CMs,
5 legislature, they were all detained...

6

7 **ZAHOOR AHMAD BHAT:** Few were detained and few not detained, because we don't have
8 absolute this information, it was, whole the state was under the blockade. Now Lordships,
9 when we go to Jammu and Kashmir State Reorganisation Act, why proviso third is suspended.
10 So it was [UNCLEAR] that... so basically there is....

11

12 **CHIEF JUSTICE DY CHANDRACHUD:** Alright. Thank you Mister...

13

14 **ZAHOOR AHMAD BHAT:** Very important submission. Proclamation dated December
15 2018. Clear President... President is knowing that, this is the intentions because
16 Legislative...then we get this Reorganization Act in the Parliament where it mandates State
17 Legislature. We are clear. Clear before one year in proclamation proviso third has been
18 suspended. Coming to the Article 371, important point which I want to highlight here. One is
19 consent of the people was not respected which is the very beautiful and basic structure in our
20 Constitution. Article 370 basically, it was as Guruswamy this ma'am said, that it was a
21 constitutional intention of Constituent Assembly of India and Constituent Assembly of Jammu
22 and Kashmir. They issued them some warranty and Constituent Assembly of Jammu and
23 Kashmir made the Constitution. When Jammu and Kashmir Constitution was framed, then in
24 my opinion, the proviso Sub-clause 3 of Article 370 has gone. That is no scope. So...

25

26 **CHIEF JUSTICE DY CHANDRACHUD:** We'll wrap it up now. Thank you very much. Yes.
27 Now Mr. Baig?

28

29 **ZAHOOR AHMAD BHAT:** This is one submission at last... Just one submission at last...
30 We hope that this impugned actions, impugned orders may be quashed and pushed
31 [UNCLEAR].

32

33 **CHIEF JUSTICE DY CHANDRACHUD:** Yes Mr. Baig.

34

35 **MUZAFFAR HUSSAIN BAIG:** My Lords, I must express my gratitude for you to give me
36 some time. There was some misunderstanding. I had an advocate on record about a month
37 back and he didn't inform me that he had withdrawn. So I had to make very urgent

1 arrangements. And the kind of assistance which this Honourable Court deserves, in one day I
2 could not really come up to that standard. My Lord, before I go to the present petition I must
3 inform My Lord that this issue had come in 1982. There was a conflict between two parties in
4 the Legislative Assembly on whether Article 370 should be made permanent or is totally
5 transitory temporary? Because the sideline says temporary and Special Provisions. 370 has 3
6 temporary transitory positions. My Lord, there is a history behind that why it was called 370
7 temporary. Because either they were bound by our misfortune. Our Prime Minister had gone
8 to United Nations with this issue about Kashmir and they had passed a resolution. And they
9 had said, you should have a plebiscite. That resolution is still there. Thanks Lord, nobody's job
10 after that United States resolution is for that reason that it had been called temporary. That's
11 the only reason.

12
13 Now, My Lord I am seeking Your Lordship's permission first of all, to refer to a scholar A.G.
14 Noorani, I know him personally. He had taken the permission from the Prime Minister to go
15 into the archives and take out the documents which were confidential and then he My Lord,
16 wrote this book. It was not out of imagination or out of some sources, like me and others or
17 some politicians. It was with the Sanction of the Government of India that he had access to
18 these archives My Lord. Now first of all, My Lord if Your Lordship have Volume 20, books- F.
19 I'll be reading from that Your Lordship has that volume, 20 books-F.

20

21 **CHIEF JUSTICE DY CHANDRACHUD:** What PDF page will that be?

22

23 **MUZAFFAR HUSSAIN BAIG:** It says My Lord Article.....

24

25 **CHIEF JUSTICE DY CHANDRACHUD:** Yes, we've got that. It's at page 1, Volume 20.
26 That's Mr. Noorani's book.

27

28 **MUZAFFAR HUSSAIN BAIG:** Article 370 of the Constitution of India relating to the State
29 of Jammu and Kashmir. Jammu is missing. Is now.... That time it was 60 years old. Now it is
30 much longer. The Constitution came into force on 26 January 1950, which our children
31 celebrate every year this 26th of and 15th of August, 26th January 1950 and with it this unique
32 provision. All other provisions were debated in the Constituent Assembly of India after
33 deliberate relations in its drafting committee and sometimes discussions in the Congress
34 Parliamentary Party. Article 370 was discussed for five months by the Prime Minister of India,
35 Jawahar Lal Nehru, and his colleagues with the Prime Minister of Jammu Kashmir, Sheikh
36 Mohammad Abdullah and his colleagues from May to October 1949, and then the reference is
37 there. The State of Jammu and Kashmir is the only state, only state in the Union of India which

1 negotiated the terms of its membership with the Union. The reason for that was Mr. Jawahar
2 Lal Nehru's Security Council and Resolution, which said that status quo should be maintained.
3 Then they decide which party is right. The Constituent Assembly merely put the imprimatur
4 approval on 17th October 1949, to a draft agreed between the Union and the States. Article 370
5 records, a solemn, compact. Neither side can amend or abrogate it, unilaterally except in
6 accordance with the terms of that provision. The Union Home Minister, Your Lordship may
7 forget that and move on to the next My Lord, page 2. 'A little over a decade after...' It's the
8 second para, 'A little over a decade after the enactment of Article 370, it's co-architect, Prime
9 Minister Nehru declared in the Lok Sabha on 27th November 1963, that Article 370 within
10 quotes "has been eroded". If I may use the word and many things have been done in the last
11 few years, which have made the relationship of Kashmir with the Union of India very close.
12 There is no doubt that Kashmir is fully integrated and that integration was not only
13 constitutional, it was also emotional. It was also based on certain principles. Kashmiri's
14 rejected the idea of Pakistan. Some fresh steps are being taken and in the next month or two,
15 they will be completed. We should allow it to go on. What had happened in the next couple of
16 months [UNCLEAR]. We do not want to take the initiative in this matter and completely put
17 an end to Article 370. That was in mind that in some form or the other, it should stay there,
18 maybe for emotional reasons.

19

20 There was no need for that, as the Union Home Minister Gulzarilal Nanda explained in the
21 Lok Sabha on 4th of December 1964. The only way of taking the Constitution of India into
22 Jammu and Kashmir is through the application of Article 370. It is a tunnel. It is through this
23 tunnel that a good deal of traffic has been passed. It is a one way tunnel, we are not unhappy
24 with that. He pointed out that while the normal process of constitutional amendment is subject
25 to stringent conditions, the process of amendment made available under Article 370 is very
26 simple. It's a pragmatic approach. Why to have a Constitutional Amendment from time to
27 time, if you can pass an executive order 370, why not resolve the case? Sorry sir. In regard to
28 the rest of India, if a state's power are to be curbed and correspondingly those of the Union
29 and law, the elaborate procedure laid down in Article 368 will have to be followed. In regard
30 to the state of Jammu and Kashmir, Nanda argued, a mere executive order made by the
31 President under Article 370 would suffice. His successors in office accepted this interpretation
32 of Article 370. Except My Lord as Your Lordship will see, that is it a tunnel? It is a tunnel
33 alright?

34

35 **CHIEF JUSTICE DY CHANDRACHUD:** It appears that Mr. Noorani's thesis is
36 substantially in terms of what Mr. Dwivedi argued, because Mr. Noorani also said that once

1 the Constituent Assembly of J&K was dissolved, and the Constitution was framed, then Article
2 370 came to an end. And then everything he says that happened thereafter, is unconstitutional.

3
4 **MUZAFFAR HUSSAIN BAIG:** Yes, My Lord. [UNCLEAR] Nanda concluded what
5 happened is that only the shell is there. Article 370, whether you keep it or not, has been
6 completely emptied of its contents, nothing has been left in it. Now Your Lordship may kindly
7 turn to page 3 of para 2. 'The Indian Independence Act empowered the Governor General of
8 India to adopt the Government of India Act 1935, as the Interim Constitution till the
9 enactment of a Constitution by the Constituent Assembly of the State. That act has adapted,
10 served as a Constitution from 15th of August 1947 to 25th of January 1950, My Lord.' Then My
11 Lord, the last five lines of this page, the Governor General had written a letter stipulated that,
12 'As soon as law and order have been restored in Kashmir and her soil cleared of the invader...'
13 Some years back, those invaders came, My Lord, not as just invaders but as militants, but as
14 terrorists. 'The Government of India made it clear that they would regard it as a provisional
15 until such time as the will of the people...'

16
17 **CHIEF JUSTICE DY CHANDRACHUD:** Mr. Baig, what is the drift of what you are
18 arguing? I mean, what is your contention? What is your submission?

19
20 **MUZAFFAR HUSSAIN BAIG:** My submission, My Lord, is finally this, that in all these
21 documents and orders I have studied, the abrogation of the State Assembly, the abrogation of
22 all its institutions, abrogation of Article 370 is unconstitutional, unnecessary. It is just a
23 political game. That is My Lord the pith and substance of my argument. Then My Lord, Clause
24 7 of the Instrument of Accession will show that in the beginning, our accession was on one
25 extreme and now it has gone from one extreme to another extreme. In the beginning,
26 according to the white paper on Jammu and Kashmir, published by the Government of India
27 early 1956 recorded, 'In accepting the accession, the Government of India made it clear that
28 they would regard it as purely provisional, until such time as the will of the people of the state
29 could be assessed.' Then My Lord, I go to the next page, in second paragraph. 'The state had
30 acceded to India 1947 in respect of only of defence, foreign affairs and communications,
31 negotiations were held on 15th and 16th of May '49. As the Deputy Prime Minister, Vallabhbhai
32 Patel's residence in New Delhi on Kashmir's future setup, Nehru and Abdullah were present.
33 Foremost among the topics were the framing of Constitution for the state and the subjects in
34 respect of which the State should accede to the Union of India. On the first, Nehru recorded in
35 a letter to Abdullah on 18th May that both Patil and he agreed that it was a....

36

1 **CHIEF JUSTICE DY CHANDRACHUD:** Possible to formulate because you formulated it
2 in your submissions. Instead of really reading us through Mr. Noorani's book, we'll certainly
3 look at Mr. Noorani, the book, all the other material which has been given to us. If you could
4 just formulate now your points, really, because a lot of this ground has been covered by the
5 counsel preceding you.

6

7 **MUZAFFAR HUSSAIN BAIG:** Yes, My Lord.

8

9 **CHIEF JUSTICE DY CHANDRACHUD:** Almost everything is...

10

11 **MUZAFFAR HUSSAIN BAIG:** ... written submission but anyway, I think since My Lord
12 want to go to the bottom of it, but in a very short... Before I go to this...My Lords, the written
13 submissions... I have also written submissions. This issue, arose for the first time, in Supreme
14 Court of India, in 1982. In a Presidential reference, My Lords. There was a dispute in the
15 Legislative Assembly of Jammu and Kashmir, which was also its Constituent Assembly. A
16 dispute arose, whether Article 370 should be changed or modified? That was the issue. My
17 Lords, this... it went to the Supreme Court. At that time, My Lord I was Vice Chairman of a
18 political party and I submitted... well on written note. It is here. My Lords, I'll pass it on. In
19 this My Lords, Your Lordships should see that after Your Lordships heard us, the simple order
20 was, we don't think it's necessary to intervene in this matter. And that's how it stood. That's
21 why nobody was bothered about it. After about every month, every two months, one entry or
22 the other was, My Lord, brought through Article 370, into Jammu and Kashmir. And when
23 Sheikh Abdullah objected to it, My Lord, he was sent to prison, for 19 years and his deputy
24 Bakshi Ghulam Mohammad, was taken into confidence. When he stopped playing the game,
25 he was a removed and Mr. Ghulam Mohammad Sadiq was made the Chief Minister maybe
26 because of majority.

27

28 Now My Lord, this is a tragic story and finally it has landed here in this August house for the
29 final saying. If this Article, as some people have said My Lord, that this article is useless. But
30 there is something more than bread and butter for human beings, whether they are people
31 from Jammu and Kashmir, Jammu or Kashmir, or Ladakh. They have My Lord.... they were
32 born with the idea, that somehow we will be protected. We have special rights under 370.
33 Article 3 was amended by the impugned legislation and totally contrary to the provisions of
34 Article 370, Ladakh, Jammu and Kashmir was broken into three parts. Governor was replaced
35 by Lieutenant Governor General, who is a gentleman of the highest order. There's no doubt
36 about that. But how can 370 be abrogated? What was the mechanism? First dissolve...ask the
37 Governor to dissolve the Legislative Assembly of Jammu and Kashmir. For what reason?

1 Nobody knows. He just passed the order at around 12:00 at night. The certain orders were
2 then issued by him. After some time he was transferred without any reason and sent to a
3 Godforsaken place. And what he said thereafter. I will not bring. I needn't bring it on record.
4 This is step two. What is the step three? You pass an order, by virtue of which the Constitution
5 of Jammu and Kashmir is abrogated.. And you pass that order under Article 370. After that
6 what is the next step? You abrogate Article 370. Now I'll pass on the documents to My Lords...
7 Your Lordships are [UNCLEAR] all the documents which are [UNCLEAR]. If I really go into
8 details My Lord, I will take quotes. And then my class fellow Mr. Kapil Sibal had taken. But
9 since Your Lordships have set a deadline, I must accept the guillotine and say that thank you
10 very much... and kindly let me place on record.

11

12 **CHIEF JUSTICE DY CHANDRACHUD:** Thank you so much. Thank you Mr. Baig. Mr.
13 Sankaranarayanan... What we'll...

14

15 **MUZAFFAR HUSSAIN BAIG:** My Lords please permit me....

16

17 [NO AUDIO]

18

19 **CHIEF JUSTICE DY CHANDRACHUD:** You are now the final counsel on your side. We'll
20 give you half an hour from 2:00 to 2:30.

21

22 **MUZAFFAR HUSSAIN BAIG:** My Lord, may I have permission to place our record...

23

24 **CHIEF JUSTICE DY CHANDRACHUD:** Why not, Mr. Sankaranarayanan, just tell the
25 Nodal Counsel to circulate what Mr Baig gave. Please circulate the... no difficulty. We have a
26 Nodal Counsel who will scan it and just make sure that it's on our record.

27

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

29

30 **CHIEF JUSTICE DY CHANDRACHUD:** Naturally. So Mr. Sankaranarayanan, we will
31 hear you between 2:00 to 2:30. But besides, I know you'd be able to do it in half an hour and
32 then...

33

34 **MUZAFFAR HUSSAIN BAIG:** My Lord, their attendance will be recorded...

35

36 **CHIEF JUSTICE DY CHANDRACHUD:** Certainly. We'll be back at 2:00. Thank you Mr.
37 Baig.

1 Yes.

2

3 **GOPAL SANKARANARAYANAN:** My Lords may I first express my deepest gratitude for
4 the immense patience that you have shown to all of us on the petitioner's side. You've not cut
5 us short terribly and you've allowed us all wide leeway and latitudes. I'm grateful for that. I
6 appear in Writ Petition 1068. 1068 of 2019 on behalf of Soayib Qureshi. Soayib Qureshi is an
7 advocate... an advocate on record of this court as well. He's from Kashmir. The large batch of
8 petitions before My Lords, which includes people who are not only from Kashmir, who are not
9 only politicians include the former Home Secretary from Kerala. It includes professors,
10 educationists, etc. The reason why I mentioned this, is this case the way we see it is not a case
11 only for Kashmir or Kashmiris. It actually opens a vista to many multifarious abuses that the
12 executive can heap on the Constitution if the means that they have adopted were to be utilized
13 in future as well. There is a principle called *obsta principiis*, which means that whenever
14 anything that is approaching or encroaching upon our rights starts, you must nip it in the bud,
15 that's the reason we are all here because this is an encroachment on something we cherish the
16 most, which is our Constitution. Kashmir is just an example or an avenue for how that is done.
17 And I will seek to demonstrate how that is. Now, Your Lordships were right when you said I've
18 been here for twelve days. But Your Lordships have also been here for twelve days. So I've seen
19 all the arguments that has come before mine, which is why I've managed to cut and crop a lot,
20 which has already been covered. I will largely be adopting the arguments that have been made
21 by Mr. Chandra Dev Singh and Dr. Dhavan and Ms. Nitya Ramakrishnan. I just wanted to tell
22 Your Lordships before I start that there are some documents which I won't take Your
23 Lordships through, but you may note it. I mentioned this on the last occasion, which will, I
24 think, benefit the Court when eventually you are drawing your conclusions My Lords. Mr
25 Ramachandran had at length gone through this matter and he created two list of dates. A short
26 list of dates which are at page 17 of the written submissions, Volume 1 and a long list of dates
27 where he extracted from every single document the relevant part and put it together. That's at
28 page 32 of the long list of dates. So page 17 is a short list of dates of the written submissions,
29 Volume 1, and page 32 is a long list of dates.

30

31 **CHIEF JUSTICE DY CHANDRACHUD:** The long list of dates is what Mr. Sibal took out.

32

33 **GOPAL SANKARANARAYANAN:** No, it's different. This is different. This is from Mr.
34 Ramachandran submissions.

35

36 **CHIEF JUSTICE DY CHANDRACHUD:** Right. Page 32 of Volume 2.

37

1 **GOPAL SANKARANARAYANAN:** Written Submissions Volume 1. Mr. Sibal's is written
2 submissions Volume 2. So in written submissions Volume 1, you have page 17, which is short
3 list of dates. Page 32, which is long list of dates. Then My Lords, V. P. Menon's Book on
4 Integration of Indian States, Mr. Prashanto Sen referred to yesterday a couple of pages. I
5 wanted Your Lordship just to note that there are two chapters. One is chapter 20, which deals
6 specifically with Jammu and Kashmir. A most remarkable man. If you see his writing, despite
7 him being first person there, you would never find any value judgments being made. It's only
8 purely descriptive of everything that took place. So chapter 20, which starts in Volume 15 PDF
9 page 1257. Volume 15, PDF page 1257 is chapter 20. And at PDF page 1304, same volume is
10 chapter 24. Now the second chapter deals with how the actual integration took place, the
11 mergers, accessions, etc. The third document, which I think would benefit My Lords, is the
12 white paper. And the white paper is the entirety of Volume 4. So Documents Volume 4 is
13 entirety of white paper. My associates in fact, have gone through them *para nuas* [UNCLEAR]
14 and have created a table.

15

16 **CHIEF JUSTICE DY CHANDRACHUD:** About para 224, there's a chapter on territorial
17 integration.

18

19 **GOPAL SANKARANARAYANAN:** Territorial integration. Exactly. Now...

20

21 **CHIEF JUSTICE DY CHANDRACHUD:** Just give me that reference again.

22

23 **GOPAL SANKARANARAYANAN:** That's white paper is Volume 4, My Lords. The entirety
24 of Volume 4.

25

26 **CHIEF JUSTICE DY CHANDRACHUD:** Yes. That's 1951.

27

28 **GOPAL SANKARANARAYANAN:** Yes, My Lord. Then this is not part of the compilation,
29 but Granville Austin's book on the Indian Constitution, which is the first book. 'Working of the
30 Democratic Constitution', second one. But the first one, which is definitely there in the
31 libraries.

32

33 **CHIEF JUSTICE DY CHANDRACHUD:** Cornerstone. Cornerstone.

34

35 **GOPAL SANKARANARAYANAN:** Cornerstone is 243 to 254.

36

37 **JUSTICE SANJAY KISHAN KAUL:** Just repeat the pages again.

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GOPAL SANKARANARAYANAN: Pages 243 to 254 My Lords.

JUSTICE SANJAY KISHAN KAUL: Of which volume?

GOPAL SANKARANARAYANAN: It's not in the...

JUSTICE SANJAY KISHAN KAUL: You're referring to the book.

GOPAL SANKARANARAYANAN: It's the book separately. Now one separate point just because we are on this history bit. The Chief Justice yesterday asked for the background of the Union Territories, and we were trying to assist. In *NDMC*, the Nine Judges Judgment My Lords, which is on record. It's PDF page 229, Volume 14. Volume 14, page 229. From paras 8 to 19, the entire background and sequence of how we came up with the 7th Amendment of the Union Territories is there which deals with 1919, the 1935, Chief commissioner's Provinces, all. So that I think is helpful

JUSTICE SURYA KANT: Paragraphs?

GOPAL SANKARANARAYANAN: 8 to 19. I'm sorry. 8 to 19.

JUSTICE SANJIV KHANNA: Which page?

GOPAL SANKARANARAYANAN: That's page 229 of Volume 14. Lastly, again on that point yesterday, My Lords, we had shared the photos of that original Constitution with the schedules. Now, if you notice in the schedules, they keep referring to Section 290-A of the Government of India Act, because all those are States, which have been added by virtue of Section 290-A. Now, strangely, it's not part of the Government of India Act, which we have as part of our documents. But it is part of the white paper. So in the white paper Volume, PDF page 77 is where Your Lordships will find Section 290-A, which was inserted for that purpose. Because I'm appearing for an advocate, I feel it was my duty. And this is what the instructions I have from the aforementioned advocate to ensure that we must be careful when we assist a Constitution Bench to ensure that the Court avoids pitfalls. Now it would not be fair of us to present the case, which is not supported by the precedent, or which the precedent has specifically squashed, which has happened. And I'm afraid I'll have to do that fairly unpleasant task of differing from some of the counsels who came before me on a couple of points. I want to clear that up right now. The first Mr. Dwivedi, he made arguments, with reference to 370

1 Clause 3 not surviving, and the entirety of 370, therefore not surviving, that the entirety of it
2 had come to an end. Your Lordships had said constitutional practice would trump that. There
3 was subsequent constitutional practice. But I'm afraid this was the exact argument that was
4 taken before this bench, and where Your Lordships passed the order in the *Shah Faesal*
5 matter when the reference was sought.

6
7 Now, the reason is *Sampat Prakash*, which is a five judges bench, had that argument taken
8 before it saying that 370 has come to an end. So, you couldn't pass any orders after 1957 by
9 advertence to 370, Clause 1. *Sampat Prakash* squarely rejected it. And when, in fact, couple
10 of our colleagues had wanted to have that reference, we also argued, as did the Government,
11 that it should not be referred. There's no conflict. This position is fine by us. So in fairness, I
12 must tell Your Lordships, that the *Shah Faesal* judgment is in Volume 17. It's PDF 42.

13

14 **JUSTICE SANJAY KISHAN KAUL:** Could you repeat that again, please?

15

16 **GOPAL SANKARANARAYANAN:** Volume 17. Case Law Volume, Case Law Volume 17.

17

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

19

20 **GOPAL SANKARANARAYANAN:** PDF 42. The extract of *Sampat Prakash* is at para
21 40, and Sampat Prakash's reasoning is that C.O. 44, which was the 1952 C.O. if Your Lordships
22 will remember. That was the one issued under Article 370, Clause 3. The 1952 one. Thereafter,
23 in 1954 with the Constituent Assembly, they issued 370(1)(d). The 1954 order. Now, the 1952
24 order is proof of the fact that the order itself says that, we allow 370 to continue to stand except
25 for this modification and that explanation. Your Lordships will remember yesterday that
26 explanation, much was being made of it. So, it was the conscious choice made at that point in
27 1952 by the Constituent Assembly, because that's the threshold, that's when we are going to
28 go ahead and make the Constitution. Now, if we are going to activate 370 Clause 3, why embark
29 on this exercise? We get the entire Constitution developed. But because they made that
30 conscious choice in 1952, they issued that the one and only order that's ever been issued under
31 370 Clause 3 until 2019, which is the 1952 order. Now that 1952 order is the reasoning adopted
32 by the *Sampat Prakash* bench to say, since you yourself have taken the decision that the
33 Constitution of India will apply with exceptions and modifications. And the only exception or
34 modification you have brought in is that explanation, which was a question that fell in
35 *Damnoo* later. But, because you yourself have said that, it's an accepted fact that 370
36 continues to apply. That is your conscious choice. I'm corrected to say, it's a declaration My
37 Lords, not an order. It's a declaration under 370 Clause 3. And at para 44 of *Shah Faesal*,

1 para 40 is where this extract of ***Sampat Prakash*** is. C.O. 44 is referred and at para 44, Your
2 Lordships have given that as the reason why you're not referring this to a larger bench. The
3 third reason given in para 44. The second again, I'm afraid, I'm sorry for the broad side, but I
4 have to be accurate on this. Article 357, there was an argument taken by Mr. Parikh yesterday.
5 And he was saying that part of it doesn't apply. In fact, it does. Which, if Your Lordships recall
6 how they issued these orders under 370(1)(d), was they chose the part and said the part will
7 apply subject to ABC exceptions or modifications. So they would refer to the Article under it
8 and then make those corrections. If you compare page 18 of Volume 3, which is the first order
9 when 357 was not made applicable, with page 38 PDF of Volume 3. So that's 1952, I think. 54
10 first and then 1958. Page 38 is 58. They while bringing 370, 357 back, 360 is omitted. So 357
11 continues to apply fully. So it wouldn't be appropriate for us to argue that 357 doesn't apply in
12 the state of Jammu and Kashmir. In any event, when you see Volume 1, page 188, which is the
13 documents dealing with how the Constitution of India applies to Jammu and Kashmir, that
14 page you'll find 357 there as it is.

15

16 **CHIEF JUSTICE DY CHANDRACHUD:** Volume 1, page 188. Right?

17

18 **GOPAL SANKARANARAYANAN:** Yes. Volume 1, page 188. So My Lord the points that I'll
19 deal with I'll just unfold for Your Lordships. There are some which I've decided I'll leave for
20 rejoinder. I won't trouble Your Lordships with that, because that can come at any stage. It's
21 not a particular thing that needs to come first up. My Lords on history there are a couple of
22 points that I wanted to make. In fact, I have put all my oral arguments.

23

24 **CHIEF JUSTICE DY CHANDRACHUD:** Mr. Noorani I was reading in the morning when
25 somebody cited Noorani's book. A G Noorani has of course criticized the judgment in ***Sampat***
26 ***Prakash*** on the ground that he says ***Sampat Prakash*** ignores the earlier... the first
27 judgment.

28

29 **GOPAL SANKARANARAYANAN:** Correct that is the argument that was taken. Seeking
30 the reference, but since...

31

32 **CHIEF JUSTICE DY CHANDRACHUD:** Now that has been declined.

33

34 **GOPAL SANKARANARAYANAN:** Now that has been declined. I think we'll go by what
35 the judges say. I believe those judgments do help us. There are portions of it which have
36 already been read to Your Lordships. So I don't think I should trouble Your Lordships with
37 that. Now what I've done, I just want to let Your Lordships know because I could share it with

1 Your Lordship but I needed your permission first. I have made a document of my oral
2 arguments, which will... because I saw Your Lordships were grappling with going to volume
3 and pages. So we have taken pictures of each page and put it in the note itself so you don't have
4 to go anywhere else. Plus there are tables, including what you asked Mr. Zaffar Shah, the
5 comparison. So the 70 page document comparing the Constitution of India, Constitution of
6 Kashmir and Constitution of Jammu and Kashmir showing what provisions would continue
7 to apply, which may be different or in some cases better, as far as Jammu and Kashmir are
8 concerned. Now I have the document here to make it easier reading if I'm permitted to share
9 that with you otherwise I can just do it like this because I know Your Lordship...this not a
10 written submission. There are no arguments here.

11

12 **CHIEF JUSTICE DY CHANDRACHUD:** Okay, you can...

13

14 **GOPAL SANKARANARAYANAN:** Rather than going to and fro from documents and
15 volumes, it's all put in one place.

16

17 **CHIEF JUSTICE DY CHANDRACHUD:** And you have it in the soft form? Soft copy?

18

19 **GOPAL SANKARANARAYANAN:** I have a soft form. It's ready to email if I can do that.

20

21 **CHIEF JUSTICE DY CHANDRACHUD:** So we'll label this now, six right?

22

23 **R. VENKATARAMANI:** If it is a one page note it is not a problem.

24

25 **GOPAL SANKARANARAYANAN:** No, it's not written submission.

26

27 **R. VENKATARAMANI:** We would have done it ourselves. But any....

28

29 **GOPAL SANKARANARAYANAN:** No, I'm saying I put pictures. The only reason is Your
30 Lordships...

31

32 **CHIEF JUSTICE DY CHANDRACHUD:** Pictures from the existing compilation.

33

34 **GOPAL SANKARANARAYANAN:** In every place I put volume and page number. So Your
35 Lordships can see it's from that volume and page number. There are no arguments. No
36 arguments at all. It's just the sequence of...

37

1 **CHIEF JUSTICE DY CHANDRACHUD:** Just putting it everything in one place.

2

3 **GOPAL SANKARANARAYANAN:** Yes, one place and for the annexures which is as per
4 everything here is a response to the questions that came from Your Lordships as the last word,
5 everything except one last segment, which is completely different, but everything else, which
6 is why it's only a response to the questions. I think we have to assist Your Lordships now. It's
7 been sent. It's been shared. Meanwhile, I'll just explain to Your Lordships how I'm dealing
8 with it. There's a little bit of history and one I think which is very important, which is the
9 previous attempt in Parliament to omit Article 370, in which there were debates in detail and
10 Mr. Gulzarilal Nanda, who was the Home Minister then. This is between his two tenures as
11 interim Prime Minister. He as Home Minister, says that there is no way that we can go ahead
12 and repeal or omit Article 370.

13

14 **CHIEF JUSTICE DY CHANDRACHUD:** Noorani has also referred to that part.

15

16 **GOPAL SANKARANARAYANAN:** Yes. In fact, I think just before me, Mr. Baig referred to
17 that tunnel that came from that answer to that debate. So the history... I think some aspects of
18 this history may be relevant to be looked at. Also, some of the speeches given in the Jammu
19 and Kashmir Constituent Assembly, you have seen a few, but I think it rings true. All of them
20 repeatedly are so happy and they always say applause and the cheers about the fact that they
21 joined India. There's no question about any kind of secession, any second thoughts about it
22 etc. The fact that Sheikh Abdullah in 1972, after his prolonged incarceration, when he was to
23 come back and form the government, they entered into an agreement. Sheikh Abdullah and
24 Mrs. Gandhi and it's interesting because that agreement provided for the fact that there would
25 be no question of you asking for an abrogation of 370 Clause 3, the accession is absolutely
26 complete. No secession arguments can be taken. That's also put on record, the Sheikh
27 Abdullah and Indira Gandhi agreement. Interestingly Indra on behalf of Mrs. Gandhi the
28 signing of that agreement which happened the day before he took over as Chief Minister was
29 done by Mr. Parthasarathy who was a famous diplomat, but also was the son of Gopalaswami
30 Ayyangar. Many ways that you find overlaps throughout, but this history, I think shows and
31 resonates how from then that day till now, the interpretation of 370 has been consistent
32 without any departure. 370 Clause 3 is the temporary provision. A choice had to be exercised
33 at that point of time, which was done and it was over and done. And the problem is the other
34 way around. If I may just digress for a minute. 370 Clause 1 says Article 1 will apply. You can't
35 make any changes to it, and it starts with a *non obstante* clause. 370 Clause 3 also starts with
36 a limited *non obstante* clause, which is not withstanding anything in the provision above. We
37 are looking at it throughout while the arguments are on, with the reference to the question of

1 complete integration or the Constitution completely applying. Why don't we look at it the other
2 way round. Suppose you had some Government at the Centre, which for reasons best known
3 to them have a sympathy to the cause of [UNCLEAR] and say that look, we will artificially
4 create some assembly to be treated as the Constituent Assembly. They will take a decision
5 whether 370 Clause 3 can be utilized to abrogate 370. Now, when you abrogate 370, please
6 note that Article 1 also goes with it. The other way around.

7

8 **CHIEF JUSTICE DY CHANDRACHUD:** But there is a problem, Mr. Sankaranarayanan.

9

10 **GOPAL SANKARANARAYANAN:** Yes.

11

12 **CHIEF JUSTICE DY CHANDRACHUD:** Article 1 is a permanent feature of the
13 Constitution, right?

14

15 **GOPAL SANKARANARAYANAN:** Absolutely. Yes.

16

17 **CHIEF JUSTICE DY CHANDRACHUD:** Now, what was the reason for Article 370 Clause
18 1 to contain a specific reference that Article 1 of the Constitution shall apply?

19

20 **GOPAL SANKARANARAYANAN:** Yes.

21

22 **CHIEF JUSTICE DY CHANDRACHUD:** Article 1 of the Constitution was in any case
23 applicable because that's an embedded part of a Constitution.

24

25 **GOPAL SANKARANARAYANAN:** Absolutely .

26

27 **CHIEF JUSTICE DY CHANDRACHUD:** The reason why they introduced a reference to
28 Article 1 in Article 370 was for this that during that interim period when there was a power to
29 modify the provisions of the Constitution those relatable to the Instrument of Accession with
30 consultation, those not relatable to the Instrument of Accession with concurrence, during that
31 period, there would have been a doubt as to whether or not Article 1 could also have been
32 modified with concurrence. So the object of putting that in Article 370 was to redouble the
33 Constitutional statement that Article 1 is a permanent feature of the Constitution. Now, if
34 Article 370 was intended to be permanent, there's no reason to include Article 1 and Article
35 370, because Article 1 any way is a permanent feature of the Constitution.

36

37 **GOPAL SANKARANARAYANAN:** Absolutely. You are right...

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JUSTICE SANJIV KHANNA: You see, when we refer to Article 370, Clause 3, it only refers to 370. It doesn't refer to Article 1.

GOPAL SANKARANARAYANAN: No, it doesn't. Correct. Correct. But, 370, which includes within it Article 1, compulsorily applying.

JUSTICE SANJIV KHANNA: But that... if one looks at it... the argument which you have raised, if one look at it, what you can abrogate is Article 370.

GOPAL SANKARANARAYANAN: Correct.

JUSTICE SANJIV KHANNA: Not Article 1.

GOPAL SANKARANARAYANAN: That's what I am ...

JUSTICE SANJIV KHANNA: 370 goes, the entire Constitution becomes as it is applicable to all the States will become applicable to the State of J&K.

GOPAL SANKARANARAYANAN: Which is why, if I may just read...

JUSTICE SANJIV KHANNA: Suppose....

GOPAL SANKARANARAYANAN: This is not my interpretation. This is the President of India's interpretation. Rajendra prasad... His letter is here. I'll show you the extract. His interpretation writing to Pandit Nehru. But allow me to just show Your Lordship for a minute. 370...

CHIEF JUSTICE DY CHANDRACHUD: You will never attribute to the Constitution.

GOPAL SANKARANARAYANAN: Yes.

CHIEF JUSTICE DY CHANDRACHUD: The use of a surplusage.

GOPAL SANKARANARAYANAN: Absolutely.

1 **CHIEF JUSTICE DY CHANDRACHUD:** Right? Every word in the Constitution...we
2 apply that principle to an ordinary statute of the Legislature. Most of the Constitution that...
3 you would never attribute to the Constitution makers any intent use of surplusage or
4 something without meaning.

5

6 **GOPAL SANKARANARAYANAN:** Absolutely.

7

8 **CHIEF JUSTICE DY CHANDRACHUD:** And the reason why Article 1 is specifically
9 referred to in Article 370 is that during that interim period, while other provisions could have
10 been modified, they were very clear that Article 1 will not be modified.

11

12 **GOPAL SANKARANARAYANAN:** Absolutely.

13

14 **CHIEF JUSTICE DY CHANDRACHUD:** Which is a clear indicator to the fact that 370 has
15 never intended to be permanent.

16

17 **GOPAL SANKARANARAYANAN:** I'm with Your Lordships...

18

19 **CHIEF JUSTICE DY CHANDRACHUD:** Probably your argument could be...

20

21 **GOPAL SANKARANARAYANAN:** No. No. I'm with Your Lordships.

22

23 **CHIEF JUSTICE DY CHANDRACHUD:** Yeah. That after the Constituent Assembly
24 arrived at an understanding, something further left to be done by the Indian Constitution.

25

26 **GOPAL SANKARANARAYANAN:** Right. So now...

27

28 **CHIEF JUSTICE DY CHANDRACHUD:** Now...which was never done. And we followed
29 this expedient of the C.O.s, that's what seems to have happened. It served everybody's purpose.
30 The Government of India could get the work of the Government done. The J&K Assembly
31 could have those beneficial provisions of the Constitution apply to them. As the then Prime
32 Minister Nehru said that it's now reduced to a shell. That's what he said. Now, as a result of
33 what this seems to have therefore been a very convenient expedient of having C.O.'s to apply
34 the Constitution to Jammu and Kashmir and progressively bring J&K into the mainstream
35 and integrate it fully on whatever issues that were left out. But possibly, these are clear
36 indicators within, intrinsic to Article 370 that these were in the sense of *pro tem* provisions
37 until some further action would be taken.

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GOPAL SANKARANARAYANAN: That's absolutely right. In fact, if Your Lordships would see from 379 onwards, fortunately, this book is there now. They've all been repealed. 379 to 390. Those are also *pro tem* provisions, dealing with the provisions of Parliament. In fact, the converse of...

CHIEF JUSTICE DY CHANDRACHUD: Yes.

GOPAL SANKARANARAYANAN: The converse of what was shown to Your Lordships earlier, about the explanation provided Jammu and Kashmir, of where the Constituent Assembly of Jammu and Kashmir would conduct itself as the Legislative Assembly. The identical provision is Article 379, which stands repealed, which is that the Constituent Assembly of India would be the provisional Parliament and they would elect the President of India for the time being, etc. Now, those are *pro tem* provisions. I'll show Your Lordships, that in detail. But on this point, the question I ask myself is 370 Clause 3 provides, and those opening words are very important. 'notwithstanding anything in the foregoing provisions of this Article'. Now that I think segues exactly with what My Lord, Chief Justice said. Wouldn't this be surplusage? What was the need for these words? The need in my view, for these words, because what is it in the provisions above that are standing in the way of 370 Clause 3? It appears that 370 Clause 1 has excluded the possibility of Article 1 and Article 370. 238 anyway, had gone by then. Of these two provisions being in any way the subject matter of orders under 370 Clause 1, Sub-Clause D. It had excluded it. What 370 Clause 3, and I had to look at it keeping two things in mind. 2023, when I'm making this argument and the fact that **Sampat Prakash** as well as Your Lordships have held that this position of 370(1)(d) being operationalized is the position, that's the correct position. There's no way of questioning it. If I keep those two parameters in mind, the Constituent Assembly sitting in 1952, is faced with the choice which is provided under 370 Clause 3. Which is, that notwithstanding anything in the provisions above, you have to decide whether you want to keep 370 alive in some form, with exceptions or modifications, or do you want to junk it as a whole? Now, if they were to take that other choice, and we are grateful that they didn't, but if it was a question of doing so, what is the impact on the Article 1 not being made applicable? What is the impact on it? The way I see it, the impact is and it's an unfortunate answer, the impact is that Article 1 wouldn't apply to them if they had decided so. And in my view, that's the danger of recreating a Constituent Assembly at any point. Article 368 in our Constitution doesn't permit repeal of the Constitution. Please see. It says amend, modify, repeal any provision of the Constitution, not the Constitution itself. And after the basic structure has come, there's no question of that. Now, what is our fear with this Constituent Assembly argument? It would be very difficult for

1 this court to give a verdict on the Constituent Assembly being resurrected as far as the State of
2 Kashmir is concerned, and in a future date, tell us that no, that's a principle that applies to
3 Kashmir, it doesn't apply to Constituent Assembly of India. My view is, it applies squarely to
4 the Constituent Assembly of India. There is no question of suddenly reviving or resurrecting
5 the Constituent Assembly of India in any fashion. It's done for. What you want to do, you do
6 by amending this Constitution. This is something we and our forebearers have tied ourselves
7 down to. That's the idea behind the basic structure. There is no way of incremental
8 modifications being made by virtue of resurrecting Constituent Assemblies. This case is
9 effectively about, one, whether a power exists, and two, has the procedure laid down for the
10 exercise of that power been followed. In Article 3, for example, there's a question that Justice
11 Kaul put to Mr. Chander Uday Singh yesterday. Converting a state into union territory is a lack
12 of source of power, that doesn't exist in the Constitution, It can't be done. But, subject to what
13 Justice Kaul said yesterday, can you take a part of a state and convert it into union territory?
14 Yes, you can. Article 3 provides for it. But there is a procedure for exercise of that power. That
15 procedure has not been followed.

16
17 I hope I'm making myself clear. So there's a source of power, whether it exists or not. And then
18 there is the exercise of that power. The same argument applies to Article 370. Does the
19 prospect of creating a Constituent Assembly exist today vis-a-vis Kashmir, or vis-a-vis India?
20 No. My answer is a square no. That's not provided for in the Constitution, therefore, it doesn't
21 exist. In any event and without prejudice to that argument, the exercise of the power and the
22 manner of exercise of that power is one of the most fraudulent invidious exercises that we have
23 seen in this country since 1970. And why do I say 1970? In 1970, when they wanted to get rid
24 of the privy process, they moved up Constituent Assembly Bill... Amendment Bill. That bill
25 went to the Lok Sabha and passed through the Lok Sabha. It went to the Rajya Sabha and it
26 was defeated by one vote, one vote. And then what did they do? Overnight the President issues
27 an order under Article 366. Definition, provision of the rulers and uses that power to say, from
28 tomorrow onwards there are no rulers. All your privy processes. What have they done
29 differently today? They just use the next provision. They used 367. And Your Lordships came
30 down like a ton of bricks on them. Nine is to two you held against that kind of an action. And
31 I want to show Your Lordships **Madhavrao Scindia** , because I believe it squarely applies.
32 They finally had to go back to the drawing board. They had to come with a Constitutional
33 Amendment that Constitutional Amendment was sustained in **Raghunathrao Ganpatrao**
34 20 years later. But the fact is, following procedures or laid down in the Constitution are
35 sanctified mechanisms which protect us, which protect this Constitution. The sovereignty
36 doesn't go to the executive. The executive is a creature of the Constitution, as is this court. The
37 people are the sovereigns under our Constitution. Let there be no doubt about that. Because I

1 believe that there is some feeling which is the same feeling that the government had at the time
2 of **Madhavrao Scindia**. That some level of paramountcy, some level of sovereignty had
3 devolved on the executive. So an executive has some residue power by which they will interpret
4 the Constitution differently. They will use definition clauses where they can't touch it directly.
5 My Lord, Justice Khanna on day one was considering the proviso to Article 370 and said, look,
6 that's a proviso. But the proviso is perhaps the most important thing in this Constitution.
7 Constitutional Amendments in this country have been struck down on only two grounds. Only
8 two. One was basic structure, the other was a proviso. The proviso in 368(2) was the reason
9 why, in **Kihoto Hollohon** para 7 was struck down. Again, the amendments that were brought
10 in for cooperative societies, Your Lordships struck down because it didn't meet with 368(2). I
11 remember My Lord, the Chief Justice mentioning on day one about 368(2) proviso, can you
12 use that by way of 356 route? I think that's a fantastic question. That's the heart of this case.
13 Can you do that? Can you use 367? Can use 366? Can you go sideways? The proviso provides
14 the procedure you will follow and you creature and servant of the Constitution will use no
15 other procedure. We are not sitting here in deference to our equals. Our elected representative
16 have taken a choice. They've made a choice that they will follow the Constitution. Their oaths
17 bind them to it. And they decided to follow devices like this and they possibly don't learn from
18 the lessons of the past. And I want to show Your Lordships the language of Justice
19 Hidayatullah, Justice Shah in majority and Justice Hegde conquering in **Madhavrao**. It
20 completely, in my view, covers this case fully. It's the exact same thing. In fact, it's less
21 complicated. Less experimental. But I'll come to that. That's the history part. On 370 because
22 these words are very, very important in our Constitution. We can't read them as out of context,
23 specific provisions with specific words. The words temporary, the words consultation,
24 concurrence, necessary, recommend, the *non obstante* Clause, even the colon. There are three
25 colons in Article 370. All of these are found in other parts of the Constitution. So if Your
26 Lordships were to look at this provision in isolation, and interpret it without at the very least
27 considering the other provisions where similar words are used, we would have a problem that
28 will arise on a future date, which is why I want to address Your Lordships on those. Then on
29 the frauds on the Constitution and the measures which keep those provisions intact. Three of
30 them, in particular, the ordinance making powers, which are exceptional. The expressions
31 Your Lordships have used are 'necessary evils but with safeguards'. And what is that
32 safeguard? That it will be temporary. Immediately after the Legislature comes in, the
33 Legislature will look at the ordinance and decide whether they want to continue or not, as they
34 have done in recent weeks, as far as the NCT of Delhi is concerned. Article 356, about how it
35 will be exercised, there are safeguards in the Constitution. And see the orders they passed
36 under 356. They suspend the Legislative Assembly. Once they suspend... and suspend has no
37 other meaning in law. It has absolutely no other meaning in law, except that it is for a fixed

1 time period. It's in the interregnum. It's between two things. I haven't terminated. I haven't
2 ended, killed, murdered, buried at 9ft-6ft under. I haven't done any of those things. It's just
3 suspension. What is effect of that order today? Exercising 356. They suspended the Legislative
4 Assembly and poof. Disappeared. What happened to it? These are series of abuses of the
5 Constitution which has taken place in this case.

6
7 And finally My Lords, there is one aspect which I thought is interesting and disturbing at the
8 same time. In 2018... coincidentally, just a month before the events, which transpired here
9 began, our friends across the border did something unusual. Pakistan occupied Kashmir - they
10 have another name for it - and Gilgit-Baltistan are the two areas which Pakistan claims as its
11 own. In their Constitution there's no reference to that as part of their territory. And I think
12 advisedly so for their sake, because they still harbour some hopes that there would be some
13 accession of Kashmir to them. In 2018, they decided one, to pass an amendment to the 1974
14 interim Constitution for as they call it Azad Kashmir. The other thing they did, was in the same
15 month they decided to pass a Geo with reference to Gilgit-Baltistan, which is the other area
16 which is also across the border. All part of erstwhile Kashmir or continues to be part of
17 Kashmir. In fact Section 47 Jammu and Kashmir's Constitution you will find a reference that
18 the territory of Kashmir has defined in the... in the Constitution is the territory as it was on
19 15th August 1947, which is the entirety of it without the 75,000 km², having gone to Pakistan.
20 Both those, that amendment and that order, what it did was to take away the right of self-
21 governance that the people in those two areas had and to vest it in themselves. As far as Gilgit-
22 Baltistan is concerned, it was challenged with the High Court. High Court allowed the
23 challenge. It was reversed by the Supreme Court, which strangely substituted the impugned
24 order, which had been passed by the Government with an order of its own. Effectively, what
25 the Government there has done is to rest direct control and vest it in a Council with the Prime
26 Minister. I asked myself that question, isn't India different? Are we not a democratic country,
27 run by a Constitution? Do we not adhere to certain promises that we make and which are
28 covenanted in the Constitution as a solemn promise on which five Constitution benches have
29 weighed in? Or are we going to follow the ill-advised example of people who put their prime
30 ministers in jail? Now, if Your Lordships have that note... I am not sure if it's been uploaded.

31

32 **CHIEF JUSTICE DY CHANDRACHUD:** [UNCLEAR]

33

34 **GOPAL SANKARANARAYANAN:** Sorry. Sorry. If Your Lordships can, then just skip
35 quickly down to page 2 My Lords. I won't take long. I've just given the outline already. From
36 page 2 onwards, I'll just quickly just read up the headlines. This is the sequence in which things
37 panned out. Cabinet mission memorandum on state treaties and paramountcy, that was in

1 May 1976. The second para there refers to how the rights returned to the states from the
2 Crown. This is important, apropos what Your Lordships had earlier observed on sovereignty.
3 So what the British Crown had taken, the British Crown gave back to the states. So after that,
4 it was between the states and the new Government of India to enter into whatever
5 arrangements. Which is why the Government of India Act 1935 had to be amended. This is
6 echoed by the cabinet mission at the bottom of that page. Next is the negotiating committee.
7 This is on behalf of the Princes. That's point number C. Then Mr. Vallabhbhai Patel's statement
8 in July, a month before Independence My Lords. If I can read the last three lines of the first
9 paragraph and the second paragraph. 'We ask no more of them than accession on these three
10 subjects in which the common interests of the country are involved. In other matters, we would
11 scrupulously respect the autonomous existence.' Next para, last three lines again. 'Nor would
12 it be my policy to conduct the relations of the new department with the states in any manner
13 which savours the domination of one over the other. If there would be any domination, it
14 would be that of our mutual interests and welfare.' Then the Indian Independence Act. These
15 are the two relevant sections. Then the Government of India Act. The amendments I've
16 referred to My Lords, that's 5, 6, 290 and 290(A). H. This is the three routes which are set out
17 in the white paper. H. The integration of states did not follow a uniform pattern in all cases.
18 Merger of states in the provinces geographically contiguous to them was one form of
19 integration. The second was the conversion of states into centrally administered areas, and the
20 third, the integration of the territories to create new, viable units known as unions of states.
21 Each of these forms has been adopted according to size, geography, and other factors relating
22 to each state or group of states. If Your Lordships were to tap on refer table 2, it will take you
23 to a table. If you just tap on that. Now that table splits the states into three types. States that
24 envisage their own Constituent Assembly, which are Madhya Bharat, PEPSU, and Rajasthan.
25 Second, states that ultimately formed a Constituent Assembly. And there are quite a few of
26 those. There's Mysore, Jammu and Kashmir, Junagarh, Saurashtra and Travancore and
27 Cochin So, because this question of Constituent Assembly came up, Your Lordships need to
28 know that there were these four states, which had Constituent Assemblies. But how three of
29 them decided to go ahead with the Indian Constitution after extended negotiation. The fourth
30 one was Jammu and Kashmir. The table below shows Your Lordships each, I'm sorry, My Lord.
31 Justice Kaul has that?

32

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

34

35 **GOPAL SANKARANARAYANAN:** The table below has princely state, the date of the
36 Instrument of Accession and a supplementary instrument, if at all, the Constituent Assembly,
37 if any, the remarks against that and the source. I've given Your Lordships the Volume and the

1 PDF number. And we have shown how Jammu and Kashmir is the only one where the
2 Constituent Assembly went ahead and formed the Constitution. I'm not going to take more
3 time. Your Lordships will see the table whenever you have leisure and... If Your Lordships have
4 any leisure. Can you click on, back on top to take you back to the beginning? At the top of the
5 page it says, back on top on the top right hand. If you just tap on that, it'll take you back to the
6 note. The next was supplementary instruments. I'm sorry. My Lord, Justice Gavai, you have
7 the note? I'm sorry, could I assist if there's any difficulty? Yes My Lords, are you back? Page 4
8 I think, page 4.

9

10 **JUSTICE B.R. GAVAI:** After Table 2.

11

12 **GOPAL SANKARANARAYANAN:** After Table 2. Yes. (i) Supplementary instrument. I'm
13 sorry?

14

15 **JUSTICE B.R. GAVAI:** Starts with Constituent Assemblies. Para 2?

16

17 **GOPAL SANKARANARAYANAN:** Yes, yes. Page 4 My Lords, bottom. We in fact, looked
18 at the guidelines the Court had issued yesterday for written submissions, etc., which says PDF
19 and page numbers has to be the same. So we tried to align that.

20

21 **JUSTICE SANJAY KISHAN KAUL:** You are reading the white paper *na*?

22

23 **GOPAL SANKARANARAYANAN:** Yes My Lords. That states with Constituent Assemblies.
24 There are those two bullet points below that. Seven princely states. Your Lordships have that?
25 Bottom of page 4.

26

27 **JUSTICE BR GAVAI:** [UNCLEAR] now committee.

28

29 **GOPAL SANKARANARAYANAN:** Yes.

30

31 **CHIEF JUSTICE DY CHANDRACHUD:** We saw Sardar Patel's statement. Now where are
32 we?

33

34 **GOPAL SANKARANARAYANAN:** Yes. Bottom of page 4. States with Constituent
35 Assemblies. Your Lordships have that?

36

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

1

2 **GOPAL SANKARANARAYANAN:** So these just give you the data points. 7 had covenants
3 to form Constituent Assemblies. 4 formed them. And then the next page top, page 5 top is
4 extract from the white paper.

5 'In existence, namely Saurashtra, Travancore, Cochin and Mysore. The Saurashtra Constituent
6 Assembly adopted the Draft Constitution in its entirety. The other two Constitution making
7 bodies proposed a few amendments. Some of these were incorporated in the amendments
8 finally accepted by the Constituent Assembly of India. Others were dropped as a result of
9 discussion with the delegation of these Assemblies.'

10 Next para deals with Kashmir, specifically. 'The State has therefore,'... I'm sorry, Your
11 Lordships have that?

12

13 **CHIEF JUSTICE DY CHANDRACHUD:** Yes. 'The State has therefore been included...'

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15 **GOPAL SANKARANARAYANAN:** 'The State has therefore been included in Part B States.
16 In view of the special problems arising in respect of the State and the fact that the Government
17 of India have assured its people that they would themselves finally determine their political
18 future, the following special provision has been made in the Constitution.' And 370 is
19 extracted. Your Lordship can see the first part of 370.

20 Now there is after that from the J&K Constituent Assembly debates. Mr. Baig speaking in the
21 Constituent Assembly also mentions why it is exceptional. Why 370 is unique.

22 'Why was a special position?'... Your Lordships have that? Bottom of the page. 'Why was a
23 special position granted to Kashmir. It is because of its special character and the struggle for
24 freedom which the people of Kashmir have led. Kashmir.'... Sorry... 'Kashmir let...' I'm sorry.

25

26 The second sentence there. "Kashmir, let me say, is the only state with this composition of
27 population, which chose voluntarily to accede to India, and we are happy about it. Within
28 brackets. "Cheers." This is the first reason. Secondly, Kashmir has a strong popular movement
29 behind it, for which it fought for 21 years. That movement was for the establishment of
30 communal harmony and welfare of the masses. Kashmir has therefore, a definite
31 socioeconomic program of its own. As an honourable member of this House has said it is with
32 a view to implement that program that we acceded to India, and we maintain special position.
33 In order to implement that program by common consent and agreement during the time of
34 Sardar Patel and other leaders... and other leaders of India, special position was given to us.
35 Therefore, any question of having given this special position to us for a temporary period does
36 not arise. It was never given to us because our question is hanging fire in the UN, or because
37 Pakistan put forward its right over Kashmir. But because of the reason I have mentioned. It is

1 a special position and taking it away will clearly be betraying the people of Kashmir. We made
2 our mind clear to India and I'm glad it was understood by the Indian Government. Honourable
3 members of this House have expressed their doubts as regards residuary powers, etc." Then
4 Dr. Rajendra Prasad's note as President. This is sent to Prime Minister Nehru on 6 September
5 '52. "There can be no doubt that Article 370 and particularly Clause 3 thereof, is of an
6 exceptional nature. While its," excuse me, "while its safeguards in Clause 2, the right of the
7 Constituent Assembly of Jammu and Kashmir to revise or annul any action taken by the
8 Government of that state in giving concurrence under Clause 1(b)(ii), and the second proviso
9 to Clause (1)(d) of Article 370. It excludes altogether the Parliament of India from having any
10 say regarding the Constitution of Jammu and Kashmir and places full power in the hands of
11 the Government, including the power to amend the Constitution of India. It is therefore
12 necessary to examine the wording of this peculiar clause with some care for a correct
13 application of the comprehensive terms that, Parliament could never have intended that such
14 an extraordinary power of amending the Constitution by Executive Order was to be enjoyed
15 without any limitation as to number of times on which it could be exercised, or as to the period
16 within which it was exercisable, or as to the scope and extent of the modifications and
17 exceptions that could be made. It cannot be seriously maintained that for all time to come the
18 application of our Constitution to Jammu & Kashmir would derive its authority from Article
19 370 to the complete exclusion of Parliament. The marginal note to Article 370 itself describes
20 the nature of the article as temporary provision with respect to the state of Jammu and
21 Kashmir." Please mark this My Lord. "The conclusion, therefore, seems to me to be irresistible
22 that Clause 3 of Article 370 was not intended to be used from time to time. The correct view
23 appears to be that recourse is to be had to this clause only when the Constituent Assembly of
24 the state has been fully framed." So it's a one-time exercise as far as 370 Clause 3 is concerned.
25 I know it's troubling Your Lordships about 370 being a temporary provision. Our case, at least
26 my case, 370 Clause 3 is a one-time decision making exercise to be carried out by the
27 Constituent Assembly. If abrogation is to be done, it's to be done once and if it's done, 370 is
28 out of the window, no problem. But, if they did what they did in 1952 and decided to have their
29 own Constitution, 370(1)(d) then continues to operate, and has been utilized precisely as that.
30 And that's why *Sampat Prakash* said it's permissible.

31

32 **JUSTICE SANJIV KHANNA:** Mr. Gopal Sankaranarayanan, this entire version can be read
33 differently also, against you also, that it was made as per Dr. Rajendra Prasad, that there'll be,
34 Clause 3 will be adopted and applied by the Constituent Assembly and it will be abrogated
35 forever. It can be read that way also. If we read it, if we read it carefully, that's the...

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37 **GOPAL SANKARANARAYANAN:** Even if I were to read it like that...

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JUSTICE SANJIV KHANNA: That's the....

GOPAL SANKARANARAYANAN: One thing is very clear. He says that it can.

JUSTICE SANJIV KHANNA: Just read what you have said.

GOPAL SANKARANARAYANAN: I've read that. I've read that. So he is very clear about one thing, about taking out Clause 3 and referring to it, that he is very clear about. He's also very clear about it not being used repeatedly.

JUSTICE SANJIV KHANNA: [UNCLEAR]

GOPAL SANKARANARAYANAN: No no, I'm saying there's no two ways. I don't think the President of India was under any misapprehension of what the Constituent Assembly of Jammu & Kashmir was.

JUSTICE SANJIV KHANNA: If you read the first portion.

GOPAL SANKARANARAYANAN: Yes.

JUSTICE SANJIV KHANNA: Probably the entire context in which he is saying is, this there Article 370 will probably not see the light of the day after Constitution Assembly of J&K....

GOPAL SANKARANARAYANAN: The abrogation...

JUSTICE SANJIV KHANNA:exercises the power under Clause 3 of the...

GOPAL SANKARANARAYANAN: It is temporary to the extent of abrogation. To that extent. To the rest of it, which is why 370 Clause 2 is transitory. 370 Clause 3...

JUSTICE SANJIV KHANNA: I'm not for a moment suggesting what the interpretation should be.

GOPAL SANKARANARAYANAN: No, no I agree. Its food for thought.

1 **JUSTICE SANJIV KHANNA:** What I am only trying to point out is there are two ways to
2 look at the speech in the context in which contextual interpretation is to be adopted.

3

4 **GOPAL SANKARANARAYANAN:** If Your Lordships were then to see the entirety, because
5 what I've extracted is page 774 and page 778, 779. If I read the entirety of it, which will take
6 some time, I don't think Your Lordship will be left...

7

8 **JUSTICE SANJIV KHANNA:** We will examine that. We will examine.

9

10 **GOPAL SANKARANARAYANAN:** I leave it to Your Lordships to examine. Just see the
11 whole letter. There's no doubt. There are three things that the President does. He takes a 370
12 Clause-3. Tries to understand its implication. He refers specifically to Constituent Assembly,
13 and he makes it clear that this is not a step that can be repeated. Those are three things that I
14 adopt. Now I have made a reference here My Lords. This is only because the entire history
15 with reference to all these aspects were also culled out by Justice Hidayatullah in
16 *Madhavrao Scindia's* Judgment. So I've referred here, but Your Lordship may just jot on
17 the side, paras 5 to 15 of Volume 6. It is here only. Volume 6. PDF pages 419-425.

18

19 **JUSTICE SANJAY KISHAN KAUL:** PDF pages?

20

21 **GOPAL SANKARANARAYANAN:** PDF pages 419-425.

22

23 **CHIEF JUSTICE DY CHANDRACHUD:** Where is *Madhavroa Scindia*?

24

25 **GOPAL SANKARANARAYANAN:** It's written here. Your Lordships can see. It's Volume
26 6.

27

28 **JUSTICE SANJIV KHANNA:** We need not do this.

29

30 **GOPAL SANKARANARAYANAN:** Starts at 390. It starts at page 390. PDF 390.

31

32 **CHIEF JUSTICE DY CHANDRACHUD:** Mr. Sankaranarayanan, you've given us a 143
33 page note.

34

35 **GOPAL SANKARANARAYANAN:** That's only a table. Your Lordships 60 pages of that is
36 that Constitution comparison. I'm not even going to take you through it. I'm just putting it
37 because you need to have the material, because all of this couldn't have come in our written

1 submissions in advance. When Your Lordships put those questions saying, we want to see the
2 comparison, we had to respond to that. So I'm not... I'm not going into any of that.

3

4 **CHIEF JUSTICE DY CHANDRACHUD:** How much more time, Mr. Sankaranarayanan?

5

6 **GOPAL SANKARANARAYANAN:** I will wrap up My Lords, I'll wrap up. I'm just going
7 quickly. That's why I'm not showing Your Lordships too much. So this was primarily to show
8 the unique nature of Kashmir. I am sorry My Lords. In fact it's interesting that for Kashmir we
9 had a Ministry in the Union Government. The Kashmir affairs Ministry which was headed by
10 Ayyangar but for everything else, it was Sardar Patel. And apparently there was a little bit of...
11 kind of discomfiture between the two of them about that. So Kashmir's unique position and
12 the reason why I'm saying this is because in the second *NCT* Judgment, Your Lordships have
13 unanimously looked at 239AA in Delhi as being not just a simple union territory like the rest
14 of them, but being a little different. I'm canvassing the same for Kashmir. It's very clearly
15 different. There is a different arrangement. Its inception was different. Its birth was different.
16 It's life has been different. It's got a Constitution. It's been running 70 years. Now if you're
17 going to upset it on a mere *Ipse Dixit* overnight, there's obviously some basic procedures and
18 protections which are provided in the Constitution have to be met. That's all we're saying. We
19 are not saying that you can't do this, especially when we have reached this far. In 1908.... I'm
20 sorry to digress, but in 1908 in the marathon in the Olympics, there was an Italian man who
21 was a mail man who took part in the Olympics.

22

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

24

25 **GOPAL SANKARANARAYANAN:** His name was Dorando Pietri. Dorando Pietri reached
26 after finishing the entire 42 kilometre stretch reached the stadium. And I think it was Paris,
27 and he ran into the stadium and then he was so exhausted and dehydrated that he was
28 collapsing. So thrice the empire's referees people who are standing near helped him pass the
29 finish line and he came first and then they stripped him off his medal. They said that you took
30 help and the rules don't permit you taking any help of any sort, whatsoever. But he did the
31 running himself and they disqualified him. The reason I'm mentioning this is, this is pretty
32 much where Kashmir had come with adopting India's Constitution. We had entered the
33 Stadium. Kashmir had entered the stadium, which was near the finish line. There was an
34 illegitimate assistance given to get it past the finish line which is completely unnecessary.

35

36 Completely uncalled for, contrary to procedure, you lose a gold medal as a consequence. Also
37 My Lords, the promises that were made at the beginning of the Constitution as against now.

1 There was the people of Kashmir through the Constituent Assembly took the decision not to
2 anyway adopt, exercise Article 370 Clause...

3

4 **CHIEF JUSTICE DY CHANDRACHUD:** Mr. Sankaranarayanan, can we not... I mean,
5 just as a hypothesis. It's sort of worrying me and that's why I'm putting it to you at this point.
6 Maybe a little digression.

7

8 **GOPAL SANKARANARAYANAN:** Yes.

9

10 **CHIEF JUSTICE DY CHANDRACHUD:** Can we not possibly read Article 370 as
11 indicating two terminal points?

12

13 **GOPAL SANKARANARAYANAN:** Yes.

14

15 **CHIEF JUSTICE DY CHANDRACHUD:** The first terminal point is in Clause 2 of Article
16 370 namely, the formation of the Constituent Assembly of the state for the purpose of framing
17 the Constitution.

18

19 **GOPAL SANKARANARAYANAN:** Framing the Constitution. That's correct.

20

21 **CHIEF JUSTICE DY CHANDRACHUD:** The second terminal point is indicated in the
22 proviso to Clause 3.

23

24 **GOPAL SANKARANARAYANAN:** Yes.

25

26 **CHIEF JUSTICE DY CHANDRACHUD:** That again, refers to the recommendation of the
27 Constituent Assembly.

28

29 **GOPAL SANKARANARAYANAN:** Correct.

30

31 **CHIEF JUSTICE DY CHANDRACHUD:** Interestingly, 370 is silent on what the regime
32 should be once the Constituent Assembly is formed and has taken a decision.

33

34 **GOPAL SANKARANARAYANAN:** That is right. Which is why two views...

35

36 **CHIEF JUSTICE DY CHANDRACHUD:** There is complete silence.

37

1 **GOPAL SANKARANARAYANAN:** Yes.

2

3 **CHIEF JUSTICE DY CHANDRACHUD:** Right? If there is complete silence in article 370,
4 then 370 possibly... possible interpretation, has worked itself out both in relation to Clause 1
5 and in relation to 2 and 3.

6

7 **GOPAL SANKARANARAYANAN:** That's a possibility.

8

9 **CHIEF JUSTICE DY CHANDRACHUD:** Right? In which case once that happens then we
10 have two options.

11

12 **GOPAL SANKARANARAYANAN:** Yes.

13

14 **CHIEF JUSTICE DY CHANDRACHUD:** Your line of thinking would be then... but
15 therefore, then the Constitution of the State of Jammu and Kashmir will fill in the void. And
16 that will trump. And that will be the supreme document.

17

18 **GOPAL SANKARANARAYANAN:** Yes.

19

20 **CHIEF JUSTICE DY CHANDRACHUD:** The other view possibly is, can the Constitution
21 of a federating unit ever rise about the source of the federating unit? Because we've always sort
22 of presumed because the C.O.s sort of led us up a certain line of thinking.

23

24 **GOPAL SANKARANARAYANAN:** Yes.

25

26 **CHIEF JUSTICE DY CHANDRACHUD:** That may have been done. That may have... and
27 we are not saying at all that is unconstitutional. It would be very, very improper... I mean, not
28 improper. But obviously, these are statesmen who have operated this nation for the last 70
29 years. And we shouldn't say that they did something which is unconstitutional. They did that
30 to sort of further the course of governance in the nation.

31

32 **GOPAL SANKARANARAYANAN:** That's what the judgement in *Sampat Prakash...*

33

34 **CHIEF JUSTICE DY CHANDRACHUD:** They did that to further the course of governance
35 in the nation. But if the terminal point is 370 is the Constituent Assembly's work, then is it not
36 necessary that the work of the Constituent Assembly of the State of J&K has to be embodied
37 in this Constitution to make it operational?

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GOPAL SANKARANARAYANAN: It's not necessary because it's not provided for by the Constitution. The Constitution looks at the

CHIEF JUSTICE DY CHANDRACHUD: Depending on what view of our federation we take. And if that is not so...

GOPAL SANKARANARAYANAN: Yes.

CHIEF JUSTICE DY CHANDRACHUD: Then is it not also possible to a construction and where was all this exercise necessary? Abrogation and everything...

GOPAL SANKARANARAYANAN: Yes.

CHIEF JUSTICE DY CHANDRACHUD: Abrogation postulates that it continues. Could be yes. As we also said that they applied 371 even post 1957 by all those C.O.s.

GOPAL SANKARANARAYANAN: Correct.

CHIEF JUSTICE DY CHANDRACHUD: But if 370 works itself out...

GOPAL SANKARANARAYANAN: No, if it works itself out. I'm with Your Lordship. I think we must rethink all these different ways of looking at it. But if it works itself out, it can't be touched thereafter. It's worked itself out. It exists in the Constitution.

CHIEF JUSTICE DY CHANDRACHUD: No. It doesn't exist in the Constitution.

GOPAL SANKARANARAYANAN: No.

CHIEF JUSTICE DY CHANDRACHUD: It's a provision.

GOPAL SANKARANARAYANAN: I am depending on the text.

CHIEF JUSTICE DY CHANDRACHUD: No.

GOPAL SANKARANARAYANAN: Without being able to..

1 **CHIEF JUSTICE DY CHANDRACHUD:** It's completely. But the text... it is there in the
2 Constitution.

3

4 **GOPAL SANKARANARAYANAN:** Yes.

5

6 **CHIEF JUSTICE DY CHANDRACHUD:** But it's a provision of the Constitution, which
7 itself points out its self-limiting character. Right? So it's not obliterated. But if the text itself
8 shows its self-limiting character then the very operation of 370 has to come into come to an
9 end once the Constituent Assembly of the state was formed. And that is a key reason why both
10 2 and the proviso to 3. But you are in a way, possibly right. We will have to of course.... when
11 I say you are right, it's part of the process of reflection. We have only finished half the
12 arguments in the case. We are on the anvil of finishing half the arguments. That the proviso to
13 3, when he speaks of... it doesn't say.... what does it say... declared that this Article shall cease
14 to be operative or shall be operative only with such exceptions or modifications.

15

16 **GOPAL SANKARANARAYANAN:** Yes.

17

18 **CHIEF JUSTICE DY CHANDRACHUD:** This exceptions or modification finds itself, find
19 expression 2 parts of this Article 370.

20

21 **GOPAL SANKARANARAYANAN:** Yes.

22

23 **CHIEF JUSTICE DY CHANDRACHUD:** Clause D. D refers to subject to such exceptions
24 and modifications as the President may specify.

25

26 **GOPAL SANKARANARAYANAN:** Yes.

27

28 **CHIEF JUSTICE DY CHANDRACHUD:** The second is Clause 3.

29

30 **GOPAL SANKARANARAYANAN:** Yes.

31

32 **CHIEF JUSTICE DY CHANDRACHUD:** Shall be operative only with such exceptions and
33 modifications, as he may specify.

34

35 **GOPAL SANKARANARAYANAN:** Yes.

36

1 **CHIEF JUSTICE DY CHANDRACHUD:** So, if you see, A, 238 will not apply. If 238, 238
2 applied the part, was part 6 of the Constitution. Part 6 of the Constitution dealt with the
3 Executive, the Legislature, the Governor, the High Courts, and the Subordinate Courts. So
4 there are five provisions of part 6. That will not apply. If that will not apply, what would apply?
5 It can't be that there was no Executive, Governor, Legislature, High Court or Subordinate
6 Courts in Jammu and Kashmir. 1939 arrangement would apply. Alright? That's an indication
7 of it's being a very pro-tem sort of a measure. Then, Parliament may modify. Parliament may
8 make laws with respect to those which are covered in the, in the Instrument of Accession.

9

10 **GOPAL SANKARANARAYANAN:** That's described in part of Parliament.

11

12 **CHIEF JUSTICE DY CHANDRACHUD:** For Parliament.

13

14 **GOPAL SANKARANARAYANAN:** Yes.

15

16 **CHIEF JUSTICE DY CHANDRACHUD:** Then such of the other provisions of this
17 Constitution, then comes Article 1 will apply.

18

19 **GOPAL SANKARANARAYANAN:** Yes.

20

21 **CHIEF JUSTICE DY CHANDRACHUD:** Right? Then D says such of the other provisions.
22 Now, which are the other provisions? Otherwise, other than what is stated in Clauses A to C,
23 that is 238, power of Parliament to make laws. Article 1.

24

25 **GOPAL SANKARANARAYANAN:** Yes.

26

27 **CHIEF JUSTICE DY CHANDRACHUD:** Such of the other provisions will apply with such
28 modifications and exceptions that the President may make.

29

30 **GOPAL SANKARANARAYANAN:** Yes.

31

32 **CHIEF JUSTICE DY CHANDRACHUD:** Alright? No such matter which pertains to the
33 Clause 2 will be made unless it has the concurrence of the state.

34

35 **GOPAL SANKARANARAYANAN:** Yes.

36

1 **CHIEF JUSTICE DY CHANDRACHUD:** Then why does 2 come in? 2 comes in that, in
2 case the consent was given before the Constituent Assembly were formed, place it before the
3 Constituent Assembly. The terminal point of Clause 2 is a Constituent Assembly. What does 3
4 say? Notwithstanding anything in this article, notwithstanding not anything in the
5 Constitution, but in this article, the President may declare that this article will not apply, not
6 any other provision.

7

8 **GOPAL SANKARANARAYANAN:** 3. 3 in my view overrides 2 and 1.

9

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

11

12 **GOPAL SANKARANARAYANAN:** 3 stands right at the very top.

13

14 **CHIEF JUSTICE DY CHANDRACHUD:** Because of the notwithstanding *non obstante*
15 clause.

16

17 **GOPAL SANKARANARAYANAN:** Which is why, just see the 1952 order for a minute.

18

19 **CHIEF JUSTICE DY CHANDRACHUD:** Right.

20

21 **GOPAL SANKARANARAYANAN:** Which is in terms of 3.

22

23 **CHIEF JUSTICE DY CHANDRACHUD:** Right. 1952 order therefore, will be the only
24 order before 2019 which applied Clause 3.

25

26 **GOPAL SANKARANARAYANAN:** Correct.

27

28 **CHIEF JUSTICE DY CHANDRACHUD:** The point now is this. That is there not intrinsic
29 evidence that 370 itself is self-limiting, once the Constituent Assembly has come to an end?

30

31 **GOPAL SANKARANARAYANAN:** As far as we are concerned, 370 Clause 3 comes to an
32 end with the Constituent Assembly. That's our argument.

33

34 **CHIEF JUSTICE DY CHANDRACHUD:** But then the point is this. Then do we say that
35 our Constitution might be so read to treat the Constitution of J&K as an overriding, as an
36 overriding document which will apply in preference to our Constitution?

37

1 **GOPAL SANKARANARAYANAN:** If you see the Constitution of Jammu and Kashmir, it
2 defers to the Indian Constitution.

3

4 **CHIEF JUSTICE DY CHANDRACHUD:** Absolutely. You're absolutely right.

5

6 **GOPAL SANKARANARAYANAN:** It only makes small nominal changes, and all...

7

8 **CHIEF JUSTICE DY CHANDRACHUD:** In this case, really speaking, though the
9 Constitution of J&K framed its, framed its relationship with the Union of India, unless that
10 relationship was embodied in the Indian Constitution, how will it bind the dominion of India,
11 or the successive Parliaments or the Executive here?

12

13 **GOPAL SANKARANARAYANAN:** For the simple reason that when the Indian
14 Constitution specifically recognizes a Constituent Assembly for only one state in the country,
15 and says that Constituent Assembly has the task of deciding to abrogate the clause or not, the
16 Constituent Assembly and its task, which is described in Clause 2, is constitutionally
17 recognized. So the fact that there is a Constitution coming at the end of this is an obvious
18 corollary.

19

20 **CHIEF JUSTICE DY CHANDRACHUD:** Does that mean that therefore anything that was
21 said by the Constituent Assembly of J&K, would bind the nation, bind Parliament, or bind the
22 Executive here?

23

24 **GOPAL SANKARANARAYANAN:** It couldn't.

25

26 **CHIEF JUSTICE DY CHANDRACHUD:** It had to be embodied subsequent to 1957, in a
27 binding arrangement reflected in our Constitution, which was never done. Everybody started
28 working on a working arrangement. The idea was to sort of gradually bring J&K into the
29 mainstream. Therefore, they didn't want to do that.

30

31 **GOPAL SANKARANARAYANAN:** Which is thankfully what has happened and which is
32 why if we take the extreme position that there is no question of 370 Subclause 1 continue after
33 1957. If I can show Your Lordships.... sorry.

34

35 **CHIEF JUSTICE DY CHANDRACHUD:** Mr. Sankar now I think 3:40 we'll finally wrap
36 up and give them 20 minutes to start opening the...

37

1 **GOPAL SANKARANARAYANAN:** This is not anything that has been said before, which is
2 why I'm saying it. In fact I abandoned this interpretation of 370 except to say one last thing.
3 370 Clause 3 says President may. So 370 Clause 3 need never have been operationalized.
4 Please note that. If the recommendation didn't come from the Constituent Assembly at any
5 stage, then the President would have nothing to decide a recommendation on. So while the
6 Constituent Assembly was on, if 370 Clause 3 sat there quietly in the waiting room and was
7 never called in and then the Constituent Assembly went after the Constitution came in, 370
8 Clause 3 would expire there without it ever having been operationalized because there was a
9 question of may, necessary, recommendation, Constituent Assembly. With those 4 absent
10 there's no question then of it being operationalized. But Your Lordship's question on Jammu
11 and Kashmir Constitution being recognized here. The Jammu and Kashmir Constitution refers
12 to the Constitution of India as it goes through its avatars. That's in the Definitional Clause.
13 There are several articles that refer to the Indian Constitution. All the C.Os that came after
14 1954 and including '54, refers to the Constitution of Jammu and Kashmir. So as Mr.
15 Subramaniam said, there is a bridge and that acknowledgment is there even in
16 correspondences which have been shown, to that extent. But the answer has to be, no. If Your
17 Lordship's question is, is the Constitution of Jammu and Kashmir referred to in the
18 Constitution? No, it's not. But it's understood that it's there. It's a classic federal situation, like
19 in the US, where States have their own constitutions, flags etc., etc.

20

21 Now, the next point My Lords, page 8. This is the earlier attempt to abrogate Article 370. If
22 Your Lordship sees this is to omit Article 370. Just a couple of paras. This is on the right side.
23 if Your Lordships will see Sri Nanda. Right side column at page 8. He is the Home Minister at
24 that point and let me just show Your Lordships after the extract, and this extract is important.
25 I don't know if Your Lordships were shown that 368 has a proviso in its application to Jammu
26 and Kashmir. Now, because of that proviso, I have to differ a little bit from Mr. Sibal's
27 interpretation. When Your Lordships asked, what are the ways they could have done it, if they
28 didn't adopt 370 Clause 3? My response on that day and this, is 370 Sub-Clause (1)(d) is the
29 only way they could have done it by following the procedure under (1)(d). What they would
30 have to do under (1)(d) is as follows. First, they would have to get rid of this proviso under 368
31 because the proviso requires that every time India's Constitution is amended...

32

33 **JUSTICE SANJAY KISHAN KAUL:** They have not done it, they have not done it.

34

35 **GOPAL SANKARANARAYANAN:** They haven't done it.

36

37 **JUSTICE SANJAY KISHAN KAUL:** If they do it, we'll see how it is to be tested. That's all.

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GOPAL SANKARANARAYANAN: Yes. The reason I'm giving the solution to the government

JUSTICE SANJAY KISHAN KAUL: You are not an advisory jurisdiction to tell them how to do it, how not to do it.

GOPAL SANKARANARAYANAN: I know, but the reason I need to tell them how to do it. Not for my sake or theirs, but to....

JUSTICE B.R. GAVAI: But what they have done is correctly done or not.

GOPAL SANKARANARAYANAN: I agree.

JUSTICE B.R. GAVAI: You have to give them advices

JUSTICE SANJAY KISHAN KAUL: [UNCLEAR] they not do it. We will determine could they do it or could they not do it. At this stage, if they need your advice they will ask you to do it in another manner.

GOPAL SANKARANARAYANAN: Very well. So he won't, I may. The reason is that it troubles Your Lordships' conscience. And I can understand why, if there was absolutely no way of totally integrating Kashmir with India, that was never at all considered. There is a legitimate way. They know what the legitimate way is.

JUSTICE SANJAY KISHAN KAUL: It is happening. It's happening over a period of time. C. O.s have been issued

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GOPAL SANKARANARAYANAN: Then it'll come to its logical conclusion...

JUSTICE SANJAY KISHAN KAUL: it is just that the further movement of the remaining assimilation could have been done by this method or not. That's what we are deciding.

GOPAL SANKARANARAYANAN: That's exactly what we're saying and that is why Mr. Nanda gives the reasoning next page, if Your Lordship sees page 9. This qualification, or this proviso, which excludes the scope of amendments to 370 without certain steps having been taken under 370 itself we cannot amend the Constitution. Those steps have not been taken,

1 and therefore this bill will suffer from an inherent disability. This may be taken up later on, if
2 need be, and if necessary. But apart from this, I can leave the rest of that. Next para, this is
3 important. The position is this while the rest of the contents of the Constitution to which I've
4 made reference negates the application of the provisions of Constitution to Jammu and
5 Kashmir, some of them, by extension, others directly. The only avenue of taking the
6 Constitution into Jammu & Kashmir is through the application of the provisions of Article 370.
7 That is the only way of bringing back the Constitution in J&K. That is my reading of the
8 Constitution. Then the sentence about the tunnel. And I say, "May I submit to him and the
9 other friends that Article 370 is neither a wall nor a mountain, but that it is a tunnel." And he
10 explains further that, at the bottom of the page, why he thinks 370 is beautifully conceived,
11 etc., etc. I won't spend any more time on that.

12

13 On, the next is my interpretation on 370. There are a few tables which are annexed to it. The
14 first is with reference to "temporary." If you click on Table 7 My Lords, it shows all the
15 temporary and transitional provisions, as on 26 January 1950, in Part 21 of the Constitution.
16 I've included those which have subsequently been repealed by the 7th Amendment. But all of
17 these, and the second column shows which are "temporary", which are "transitional." The head
18 of the chapter, if Your Lordship may note, initially said only "temporary" and "transitional".
19 "Special" came later, by way of an amendment. So it wasn't there initially. There were only
20 "temporary" and "transitional." And these are the provisions. Your Lordships can go back to
21 top. Also, because I think, perhaps we shouldn't pay too much attention to this "marginal note"
22 and "temporary" troubling us, because there are many provisions across the Constitution
23 outside of Part 21, which are also temporary in nature, which is in Table 8. And the last column
24 in Table 8, if you click on Table 8, the last column shows what those provisions are predicated
25 on until a law is made by Parliament, etc., etc. For example, appointment of the Election
26 Commission. Your Lordships found that there was a void. And until the law is made the
27 Lordships provided a mechanism. Now the Government realized that mechanism should have
28 come much earlier, so they've made a law. The time periods. Just for a minute, if you see 334,
29 Article 334. Anglo Indians. Their reservation has come to an end. 70 years has been substituted
30 and remained substituted. But for the SC/ST, they made it 80 years. So that's a temporary
31 provision. It was allowed as long as those extensions existed. I won't spend any more time on
32 that. But just to say that when Your Lordships look at it...

33

34 **CHIEF JUSTICE DY CHANDRACHUD:** 73(ii) is not a temporary provision. These are
35 not, Article 73(ii), these are not temporary provisions. These are provisions which will
36 continue unless varied by any law of Parliament, but these are not temporary.

37

1 **GOPAL SANKARANARAYANAN:** Correct. No, no, unless an action is taken. So, similar
2 to 370 Clause 3, where the action had to be taken by the Constituent Assembly, but didn't
3 happen. Similarly here, where Parliament has to make a law, but doesn't make a law, it
4 becomes predicated on an action by one of the instruments. That's all. So we are pointing out
5 that the other parts of the Constitution, like when you say 70 years, there's no doubt. It initially
6 said ten years, for the reservation, so that ten years is temporary. Otherwise, they wouldn't put
7 a time period on it at all. And I shouldn't give them more ideas. But they shouldn't put a time
8 period on this, the reservation would go on forever. So, the marginal note. *Kesavananda's*
9 four judgements we have put there, which show that marginal note can really be used as an
10 aid. It is only on the temporary part of it. Then if Your Lordship sees para 2 on page 10, I've
11 referred to Table 1, which are the Constituent provisions applicable to Jammu and Kashmir.
12 Just for a minute if you click on that, I'm just rushing now. This is, Your Lordships have it on
13 the screen. This gives you an example. The ones in green are the important provisions relating
14 to Jammu & Kashmir. So the first column is the provision of Indian Constitution, second
15 column is that which was made applicable to Jammu & Kashmir with what modification and
16 the last column is the supplementing provisions of Jammu & Kashmir Constitution. It makes
17 a very important reading because there are a few topics on which they had exercised their
18 rights to have exceptions or modifications. Those are largely, those are the ones in green.
19 Territory, permanent residence, property rights. Fundamental duties have not been adopted
20 there. Directive principles. They have what seems to be a more robust set of directive principles
21 than we do, in their Constitution. Lok Sabha representation, services, consent for 352, 356,
22 358, then 367 and 368 and Schedule 7. These are the broadly, the ones in green. This is 60
23 pages. This document.

24

25 My associates have spent a lot of time going provision by provision of all three to make sure
26 that it can be an exhaustive table that's set up. If Your Lordships come back to the note,
27 consultation and concurrence. Now these phrases used elsewhere in the Constitution and it
28 can't be that for the purpose of 370(1)(d), where the impugned note notification has come, that
29 you've treated it so casually because there is this particular purport and the direction when
30 you seek consultation and you get concurrence. In the demonetisation case Justice Gavai was
31 part of the bench and speaking through him, para 245 talks about the different types of
32 consultation. These paras are set out. I'm not reading them. Second is the consultation which
33 Your Lordships in as far as appointment of judges in both scora as well as the special reference,
34 you've read consultation in a particular way. So there is a meeting of minds. Now it may not
35 be the 124 interpretation that you have to have but you have some basic meeting of minds as
36 with the RBI in the demonetisation case, as between the collegium and the Government. Here
37 a certain meeting of minds. That meeting of minds doesn't mean your mind meeting your own

1 mind. It has to mean some entity outside of yourself. You can't by this device of 356, say, what
2 do you think about this, and then tell yourself, oh, it's a great idea. Somebody else has to do
3 that for you. And that's what they have sidestepped and they've done it in the Constitution,
4 which is why it's shocking. This is not some order by an executive of hearing. This is a
5 Constitutional Amendment that you have effectively wrought about by way of this device. In
6 Article 338(b)(9), which deals with the OBCs and the Commission required for that. Your
7 Lordships in the Maratha Reservation case, said that the consultation there is mandatory.
8 When you decide to add the Marathas to the lists, you should have consulted. You didn't
9 consult. Now all these are example examples of where else in the Constitution you have
10 consultation and what it means. And you're weighed in, in Constitution bench after
11 Constitution Bench up to nine judges repeatedly you have weighed in to say, this is what it
12 means. This is the meeting of minds. That's completely thrown overboard by what they have
13 done. Importance of the proviso I have mentioned these two judgments. **Kihoto** and
14 **Rajendra Shah**. Colons, the Indoor Development Constitution bench links the proviso to
15 the main provision. So there's no question about that. Recommendation, we have a table on
16 recommendation, etc., etc. which is Table 6. Which shows the many places in the Constitution
17 where the word recommend is used and what its implications are and it's necessary because it
18 provides a kind of balance. A recommends to B. B can't set up A to recommend to B. A
19 independently recommends to B and that's also been thrown overboard. The *non obstante*
20 Clause in Article 370 is very, very important. This *non obstante* Clause effectively trumps the
21 other provisions in the Constitution, which don't have *non obstante* clauses. 3- 356, 367 all
22 don't have *non obstante* Clauses. Now why does 370 say, notwithstanding anything in this
23 Constitution? It is so that in a situation where any of these other provisions could be in conflict,
24 370 is the one that will prevail. Which is why we have set out what those provisions are. The
25 first bullet point talks about to Article 3, that proviso which is in the... if I can show in para 8,
26 on page 15 just how Article 367... 366 was misused in **Madhavrao Scindia**. 367 is being
27 misused here. Just see 367 you please note, falls in part 19 My Lords. So it's not covered by
28 368(2) proviso. So everything in 368(2) proviso, which needs half the states to give its consent,
29 they can do by way of 367. Just say for each of these articles this provision will read thus.
30 Examples, the word person in Article 21 can be interpreted to mean person accused of an
31 offense. In 367, I'll put an Interpretation clause, which is person in Article 21 will mean person
32 accused of an offense. So all other rights that Your Lordships have read in into Article 21 is out
33 of the window because only person accused of an offense. Why? Co-location. It's right next to
34 Article 20. It's 21. So it's similar kind of people, that's justification they could give, if we allow
35 this to happen.

36 'Using 367, the phrase 'the Legislatures of not less than one half of the States', in the second
37 proviso of 368, could be read as Rajya Sabha or the Law Minister.'

1 You could say that. We have followed the right procedure. We have followed a procedure of
2 doing it by way of 367.

3

4 **CHIEF JUSTICE DY CHANDRACHUD:** You are giving all these ideas, Mr
5 Sankaranarayanan.

6

7 **GOPAL SANKARANARAYANAN:** Which is why...which is why please take a
8 sledgehammer to this. This invidious method of trying to suborn the Constitution. And the
9 reason why I say this, is because Justice Hidayatullah in *Madhav Rao Scindia* says - we
10 must take extreme examples to test what they are doing. Only when you take extreme
11 examples. He talks about the Maharaja of Sindh and says, suppose the Maharaja of Sindh is
12 now said to be the Maharaja... said to be the Nizam of Hyderabad. Of course, the President
13 would never do anything like that. But we must take extreme examples for this purpose, which
14 is why I'm forced to take these extreme examples to show that if they are allowed to do this,
15 heaven knows what they'll do next.

16

17 Now I won't read the next bullet point for many reasons. Your Lordship should may read it on
18 your own. If Your Lordships come to page 17. Frauds on the Constitution. Ordinances, three
19 judgments on that. *Wadhwa, A K Roy* and *Krishna Kumar Singh*, My Lords, Justice
20 Chandrachud's own judgment. In fact, *A K Roy* is the other Mr. Justice Chandrachud's
21 judgment. We have put both those extracts there so Your Lordships can see. In fact, both Your
22 Lordships have spoken in very similar terms about how the Constituent Assembly held forth,
23 as it were, an assurance to the people that an extraordinary power shall not be used in order
24 to perpetuate a fraud on the Constitution, which is conceived with so much faith and vision
25 that assurance must, in all events be made good. Your Lordships have said - 'An edifice of rights
26 and obligations cannot be built in a Constitutional order on acts which amount of fraud and
27 power. This will be destructive of the rule of law.'

28 Similarly, in President's Rule, how abuses are done. *S R Bommai's* paragraphs.
29 *Rameshwar Prasad*. Privy purse is.... I'll read separately in a few minutes. Possible
30 consequences of such abuses. If you see point 5 at page 19, there's a separate table on this
31 where we have substituted Legislature of the state with Parliament everywhere in the
32 Constitution, so you can see how absurd it becomes. Because by using powers under 356, can
33 you do things which are irreversible and destructive? The idea of 356, much like 123, is a
34 stopgap. It's in between. So that eventually Parliament or the Government will take a call on
35 it. It is not that you can do something completely irreversible and say - Sorry, I had the power
36 to do it. You didn't. Votes on accounts, GST, procedure of legislatures, panchayats,
37 municipalities... even 246, where list 2 is with a State Legislature. Parliament can say State

1 Legislature is Parliament and then start making laws on its own. Surely that was not what is
2 envisaged. Federalism in Article 3 has been exhaustively covered by Mr. C. U. Singh. I've just
3 put some extracts of both the **GNCTD** cases, particularly to show that the **GNCTD 2** is one,
4 that is, I think, very, very clear, the unique position. And one small thing at point 2, page 22.
5 Second point. 'Twelve Reorganization Acts have been enacted'
6 We have given that list. That's table 4. This is 2(B) My Lords. Bottom of page 22. ' 12
7 Reorganization Acts enacted till date show that a state has never been annulled.' The first one
8 is this where by way of this Kashmir Reorganization Act, Entry 15 has been deleted. Everything
9 has been renumbered and moved up one. It's never happened before. All that's happened is
10 Union Territories have moved into the state list. That's all. You never had a situation where
11 the converse has happened. This is the first. My Lords, **Mangal Singh**... Mr. Singh referred
12 to it. **Mangal Singh** effectively said that States must have legislature, executive, judiciary,
13 etc. And all of these must be in existence. By going ahead, not following the procedure with
14 reference to the legislative council. You've heard that point already. So I'm not referring to that
15 again. Yes. **Mangal Singh** is reiterated in **Kesavananda Bharati**. Your Lordship may see
16 that.

17

18 **CHIEF JUSTICE DY CHANDRACHUD:** That Mr. Baig had pointed it out.

19

20 **GOPAL SANKARANARAYANAN:** Yes, And point 4 at pages 25, 26. 'The irreversible effect
21 on States Rights under the Constitution. Point c, d, e and f, Mr. Naphade made. a, b, g and h
22 is what we are canvassing. I just want Your Lordships to chew on one point. If this were
23 permitted in an Article 131 suit, which say, the state of Punjab files against the Union of India,
24 the Union of India will impose President's rule on Punjab, be on the other side, withdraw the
25 suit and disappear. Article 356. The manner of the exercise. Those **S. R. Bommai** paras have
26 been extracted My Lords. We have given an illustrative list, which is now in my written
27 submission, the original written submission. I mentioned it here at page 28. Para 26 of the
28 written submissions, which lists all the possible misuses that are possible under this and one
29 important point My Lords. What is permitted on the 356(1)(a) is only for the functions of the
30 Government to be taken by the President. Functions. Not powers. Now what is provided in
31 370 is not a function, with the greatest of respect, it's a power. 356 didn't permit it. Their
32 proclamation under 356 is in the same terms. It says functions. So the only thing that could
33 have been taken over was functions, not powers. So this was a power, and they have taken over
34 what effectively is a power and they've utilized it. I think this is an argument that they must
35 meet. They must explain how possibly this was a function. A function under 356, which is
36 temporal, is something which is a day to day activity, which needs to be done. It's not a
37 discretion which has not been exercised in 70 years, suddenly becoming a function. I have

1 pointed out how the irrevocable changes cannot be made. And the last point, I've given Your
2 Lordships, the details of the judgement, the amendments, etc. Dealing with Pakistan, Gilgit-
3 Baltistan, as well as what they call Azad Kashmir, and hopefully we will not tread down the
4 same path.

5
6 My Lords, I just want to conclude with one last thing which I have set out. Page 16. This is
7 Vattel's "Law of Nations." It's a very, very old book. I'm grateful to Mr. Rahul Narayan, who
8 lent it to me. It's in fact, one of the oldest books on international law and laid down the
9 principles. George Washington didn't return his copy to the local library in Philadelphia, and
10 they discovered it 200 years later. Now, if I can just read two paragraphs of this, it's set out at
11 page 16. I'll just read that because I think it's important for us to bear in mind. Para 30. "The
12 Constitution laws of a state are the basis of the public tranquillity, the firmest support of
13 political authority and the security for the liberty of the citizens. But this Constitution is a vain
14 phantom, and the best laws are useless if they may not religiously observe. The nation ought
15 then to watch very attentively in order to render them equally respected by those who govern
16 and by the people destined to obey. To attack the Constitution of the State and to violate its
17 laws is a capital crime against society." Please note this. "And if those guilty of it are invested
18 with authority, they add to this crime a perfidious abuse of the power with which they are
19 entrusted. The nation ought constantly to repress them with its utmost vigour and vigilance
20 as the importance of the case requires." And then para 35. "But in treating here of the change
21 of the Constitution, we treat only of the right. The question of expediency belongs to politics.
22 We shall therefore only observe in general that great changes in a state being delicate and
23 dangerous operations, and frequent changes being in their own [INAUDIBLE] a people ought
24 to be very circumspect in this point, and never be inclined to make innovations without the
25 most pressing reasons or an absolute necessity. The fickleness of the Athenians was ever
26 unamicable to the happiness of the Republic, and at length, proved fatal to that liberty of which
27 they were so jealous without knowing how to enjoy it."

28
29 My Lords in *Madhavrao Scindia* I'll just give Your Lordships the paragraphs. Please read
30 it at your own leisure. And it's very, very important. Justice Shah speaking for seven judges.

31
32 **CHIEF JUSTICE DY CHANDRACHUD:** Mr. Sankaranarayanan, you said that twice or
33 thrice "at your own leisure." But have you left us any, after this comprehensive...

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35 **GOPAL SANKARANARAYANAN:** I'm so sorry. I don't want to take more time.

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37 **CHIEF JUSTICE DY CHANDRACHUD:** No, no, absolutely.

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JUSTICE SANJAY KISHAN KAUL: <UNCLEAR> leisure for now, for the next couple of months.

GOPAL SANKARANARAYANAN: I'm so sorry.

CHIEF JUSTICE DY CHANDRACHUD: We must compliment you, and thank you and your juniors as well, for putting this together because it's actually very, very.... was just telling Brother Justice Sanjiv Khanna, very, very...

GOPAL SANKARANARAYANAN: <UNCLEAR> assisted me in the <UNCLEAR> I've put them in the written submissions, but there have been more...

CHIEF JUSTICE DY CHANDRACHUD: Put it all together, so it makes our task so much easier than to constantly cross reference.

GOPAL SANKARANARAYANAN: Grateful My Lord. My Lords, if Your Lordships can note. Justice Shah. This is at PDF, page 448 is where Justice Shah starts speaking for 7. He's joined by Justice Hidayatullah earlier, and Justice Hegde later. Paras 94, 111. Then Justice Hegde, who says it's fraudulent and for collateral reasons. At 173 and 176. Should I repeat those? 173?

CHIEF JUSTICE DY CHANDRACHUD: You have put it in the note?

GOPAL SANKARANARAYANAN: No, that's not in the note. That's why. I'm so sorry.

CHIEF JUSTICE DY CHANDRACHUD: Just one second. Come again then. This is *Madhavrao* right?

GOPAL SANKARANARAYANAN: Yes. Justice Shah paras. 94 and 111. There's lots more. But I'm just giving what I think is most...

CHIEF JUSTICE DY CHANDRACHUD: 94 and 111.

GOPAL SANKARANARAYANAN: Yes, Justice Hegde at 173 and 176. Paras 173 and 176 and Justice Hidayatullah at paras 42, 53 and para 73. 73 is where he says extreme examples are necessary to solve extreme cases. My Lords, I believe this is an extreme case, mainly

1 because of the way they have conducted themselves. I'm most grateful for the patient hearing
2 you have given.

3

4 **CHIEF JUSTICE DY CHANDRACHUD:** Thank you Mr. Sankaranarayanan. So just a little
5 announcement. One second. Just a little announcement for next week. For next week we will
6 commence the...Of course we are sitting tomorrow. Friday will be miscellaneous, but next
7 week onwards, to ensure that we complete the hearings in continuity, we will be sitting on
8 Monday as well. So the Constitution bench will be assembling on Monday in the next week.

9

10 **CHANDER UDAY SINGH:** Just one thing. I made a small error in my oral arguments
11 yesterday. It doesn't change the argument. I said the explanations would not apply in Article
12 3 to Jammu and Kashmir because they were never extended. But if Your Lordships were to
13 uphold C.O 272 which came on the 5th, then with that upholding those explanations, as well
14 as the proviso... the proviso which applies in the Constitution of India, all three would then
15 apply, but it doesn't change my argument. My argument was remains the same that unless
16 both Houses made the recommendation, the bill would not be tabled at all. So that argument
17 remains because both the second House did it only on sixth. Just factually the explanations
18 would apply.

19

20 **CHIEF JUSTICE DY CHANDRACHUD:** Tomorrow we open with the... How will we be
21 opening tomorrow?

22

23 **ATTORNEY GENERAL R. VENKATARAMANI:** We have division of labour My Lord.
24 That we will indicate to Your Lordships. Some opening note and then we have divided our
25 work on some respect.

26

27 **CHIEF JUSTICE DY CHANDRACHUD:** So there'll be no overlap then between your...

28

29 **ATTORNEY GENERAL R. VENKATARAMANI:** [UNCLEAR] tomorrow morning

30

31 **CHIEF JUSTICE DY CHANDRACHUD:** And basically on your side, it will be the Learned
32 Attorney General, the Solicitor General...

33

34 **TUSHAR MEHTA:** First Mr. Salve, Mr Jethmalani, Mr Guru Krishnakumar...

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36 **CHIEF JUSTICE DY CHANDRACHUD:** Of course Attorney you and the Solicitor will
37 complete first.

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TUSHAR MEHTA: Mr. Nataraj and Mr. Vikram. But we have My Lord a realistic time assessment.

CHIEF JUSTICE DY CHANDRACHUD: And the Attorney and the Solicitor will argue the lead case first, then after you both are done, who will argue thereafter?

TUSHAR MEHTA: Mr. Dwivedi, Mr Salve.

CHIEF JUSTICE DY CHANDRACHUD: Alright. Give it to us. We just have the [UNCLEAR] over here tomorrow.

TUSHAR MEHTA: By evening My Lord. Mr. Sanjay.

CHIEF JUSTICE DY CHANDRACHUD: Between Attorney and the Solicitor broadly how long do you both anticipate you will take?

ATTORNEY GENERAL R. VENKATARAMANI: It's like I am supposed to give my opening summary of arguments and then good part of the history and other things my learned Solicitor will cover. And then I'll come back and try to respond to the major legal submissions. That's how we have divided our work.

CHIEF JUSTICE DY CHANDRACHUD: So tomorrow in the opening, how long would you take about?

ATTORNEY GENERAL R. VENKATARAMANI:I will take about 10-15 in the opening.

CHIEF JUSTICE DY CHANDRACHUD: Fair enough

ATTORNEY GENERAL R. VENKATARAMANI: Then learned Solicitor will take over on the entire historical background and things like that.

CHIEF JUSTICE DY CHANDRACHUD: Then Solicitor will cover the rest of it

ATTORNEY GENERAL R. VENKATARAMANI: Thereafter on the legal point main summary I'll come back and...That's how three of us have divided.

1 **CHIEF JUSTICE DY CHANDRACHUD:** And then Mr. Dwivedi what's is the...Mr.
2 Solicitor, how long would you take? Will you wrap up tomorrow or you'll be spilling over to..

3

4 **TUSHAR MEHTA:** It will spill over.

5

6 **CHIEF JUSTICE DY CHANDRACHUD:** Alright. How much time on Monday do you
7 anticipate?

8

9 **TUSHAR MEHTA:** I think Monday.

10

11 **CHIEF JUSTICE DY CHANDRACHUD:** All right. So by Monday evening, then the
12 Attorney and the Solicitor between the two of you, I think you can both be covered. Of course.
13 These are not hard and...

14

15 **TUSHAR MEHTA:** Hopefully My Lord. I will ensure that nothing is repeated. But some of
16 the....

17

18 **CHIEF JUSTICE DY CHANDRACHUD:** Obviously by now you know that these are not
19 hard and fast, but we're just having a broad estimate...

20

21 **TUSHAR MEHTA:** None of us on this side have substantially bored Your Lordships. Your
22 Lordships would find some of the judgments name familiar, but the relevant paras My Lords
23 were missed. Therefore, we may have to read it and only unavoidable repetition would be
24 there. Otherwise, My Lord we will ensure that there is no repetition.

25

26 **CHIEF JUSTICE DY CHANDRACHUD:** Any estimates. Mr. Dwivedi, how long you would
27 take? Depends on what they cover but roughly.

28

29 **DINESH DWIVEDI:** [UNCLEAR] it will get reduced.

30

31 **RESPONDENT'S COUNSEL:** I hope for 2 hours then if Your Lordships are pleased to give
32 me 90 minutes I will be....

33

34 **CHIEF JUSTICE DY CHANDRACHUD:** Has Mr. Salve indicated how long he would take?

35

36 **TUSHAR MEHTA:** My Lords, he is saying... he is saying one and a half days, without
37 knowing about the earlier part.

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RESPONDENT'S COUNSEL: My Lord, I'll take one hour.

GURU KRISHNAKUMAR: I'll take one hour. But I'll restrict myself depending on what all we cover.

TUSHAR MEHTA: Mr. Nataraj has said 45 minutes. Mr. Jethmalani....

RESPONDENT'S COUNSEL: Mr. Jethmalani said 90.

TUSHAR MEHTA: We are just sharing My Lords, this is not the list prepared by us.

RESPONDENT'S COUNSEL: What's in list?

TUSHAR MEHTA: Time. This is the estimate Mr. Kanu Agrawal received from various counsels.

JUSTICE SANJAY KISHAN KAUL: Since the whole case is opened so many times...

TUSHAR MEHTA: Yes.

JUSTICE SANJAY KISHAN KAUL: Ultimately, you are giving your propositions.

TUSHAR MEHTA: Correct.

JUSTICE SANJAY KISHAN KAUL: Of course, as you say, perspective in a judgment or perspective maybe in some fact scenarios, is what has to be done.

TUSHAR MEHTA: Or some of the judgments not read or not fully read, etc.

ATTORNEY GENERAL R. VENKATARAMANI: For instance, I have...

JUSTICE SANJAY KISHAN KAUL: Personally speaking I think... It's a little overestimate I find of time.

TUSHAR MEHTA: We are in Your Lordships' hands. My Lord we ensure....

1 **CHIEF JUSTICE DY CHANDRACHUD:** Once the first two arguments are concluded then
2 perhaps rest would know how much to take.

3

4 **TUSHAR MEHTA:** Yes. Yes. We'll use that discretion. All of us would use that discretion.

5

6 **JUSTICE SANJAY KISHAN KAUL:** Would you... Given from this overestimate of time, as
7 if he is arguing ... this is my perspective of it.

8

9 **JUSTICE B.R. GAVAI:** <UNCLEAR>

10

11 **GURU KRISHNAKUMAR:** IST is Indian Stretchable Time, but we will keep it as Indian
12 Standard Time.

13

14 **JUSTICE SANJAY KISHAN KAUL:** The Chief is far more patient.

15

16 **TUSHAR MEHTA:** Obliged, My Lords.

17

18

19

END OF DAY'S PROCEEDINGS