

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

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

Writ Petition (Civil) No.1099/2019

In re: Article 370 of the Constitution

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04-September-2023

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BIMAL ROY JAD: My Lord with the kind permission of My Lords, may I mention circulation of an additional affidavit My Lords. It is very important. I say petitioner... I'm sorry. I have filed an affidavit with permission for application to file an additional affidavit in Writ Petition No: 1037 of 2019. That's Mohammad Akbar Lone vs Union of India. My Lords affidavit, something very startling has come to our knowledge. The petitioner number one, Mohd. Akbar Lone, he had said so many forums and in the Legislative Assembly, Pakistan Zindabad. And My Lord he still has no remorse about that. I have annexed along with my additional affidavit, all his My Lord...

CHIEF JUSTICE DY CHANDRACHUD: We also read the newspapers because a lot of things which are said in affidavit are pre-empted by giving the news to the newspaper. So we have seen the newspapers. It's alright. Why... fair enough.

TUSHAR MEHTA: The lead petitioner in the lead petition saying Pakistan Zindabad, on the floor of the House has its own seriousness. Your Lordships may look at it then who is contesting claim of continuing 370.

CHIEF JUSTICE DY CHANDRACHUD: We are going to hear you for two minutes so you can make that point when you are called out.

BIMAL ROY JAD: My Lord in addition, I have submitted my additional note three pages notes. That will be taken part... on Saturday I have filed.

CHIEF JUSTICE DY CHANDRACHUD: Anyway, you've made your point.

RAKESH DWIVEDI: He should at least apologise My Lords.

TUSHAR MEHTA: He should file an affidavit that I owe allegiance to the Constitution of India, because I am before the highest court of the court.

RAKESH DWIVEDI: There is no remorse.

TUSHAR MEHTA: And I object My Lord, he must say that I strongly oppose terrorism and secessionism in Jammu and Kashmir. The learned AG is here...

1 **ADVOCATE GENERAL DC RAINA:** It is part of the summary record also. It's not the
2 newspaper alone. It's a full threat, and not only within the floor of the House, he reiterates
3 outside, I stand by it. It is not that the newspaper merely carries it out and makes [UNCLEAR]
4

5 **BIMAL ROY JAD:** And My Lords, we have media reports that he says accession is not
6 complete. It's not complete at all. He said so many other things My Lord.
7

8 **RAKESH DWIVEDI:** Since he is mocking Constitution of India then we can't stand outside
9 the Constitution of India [UNCLEAR]
10

11 **CHIEF JUSTICE DY CHANDRACHUD:** All right. We got your point.
12

13 **BIMAL ROY JAD:** I'm grateful.
14

15 **MAHESH JETHMALANI:** It's a matter of propriety, My Lord.
16

17 **ADVOCATE GENERAL DC RAINA:** But there must be some remorse...
18

19 **TUSHAR MEHTA:** Not remorse, My Lord, he must say that, I oppose and object to terrorism
20 and any secessionist activity by Pakistan in Jammu and Kashmir or elsewhere. Must come on
21 record, My Lord.
22

23 **CHIEF JUSTICE DY CHANDRACHUD:** He is a petitioner in which petition?
24

25 **TUSHAR MEHTA:** In the lead petition, My Lord. But for Your Lordship's decision that it
26 would be titled as Re Article 70 he would have been the main petitioner.
27

28 **BIMAL ROY JAD:** Main petitioner, 1037 of 2019.
29

30 **TUSHAR MEHTA:** Shah Faesal, My Lord after withdrawal he is the next...
31

32 **BIMAL ROY JAD:** Mohammad Akbar Lone.
33

34 **TUSHAR MEHTA:** And he's not an ordinary man, My Lord. He is a Member of Parliament.
35

36 **CHIEF JUSTICE DY CHANDRACHUD:** Writ petition 1037...
37

1 **BIMAL ROY JAD:** 1037 of 2019, titled My Lord, Mohammad Akbar Lone & Anr vs Union of
2 India. I'm grateful My Lord.

3

4 **CHIEF JUSTICE DY CHANDRACHUD:** Yes, Mr. Giri.

5

6 **RAKESH DWIVEDI:** My Lord, I have requested Your Lordships that I will give a note
7 mentioning the paragraphs of *I.R. Coelho*.

8

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

10

11 **RAKESH DWIVEDI:** I have circulated.

12

13 **CHIEF JUSTICE DY CHANDRACHUD:** You have circulated that. Alright.

14

15 **RAKESH DWIVEDI:** Also drawing attention to a speech of Sardar Patel where he says
16 democracy is not in alliance with dynasty.

17

18 **V. GIRI:** May it please Your Lordships. Just one submission My Lord. Somebody comes
19 before the highest court of the land, before the Constitution Bench of the Supreme Court,
20 challenges, My Lord, Presidential Orders, prays for several other comprehensive reliefs and,
21 My Lord he doesn't apologize to Your Lordships. If he has made that statement, My Lord, his
22 submission should be taken into account only if his apologizes before Your Lordships, puts it
23 on affidavit. That is one...

24

25 **CHIEF JUSTICE DY CHANDRACHUD:** We'll put it to Mr... Counsel when the rejoinder
26 is culled out.

27

28 **TUSHAR MEHTA:** My Lords it is not [UNCLEAR] before the court. Despite it being brought
29 to the notice of the Court. If he does nothing, it might encourage others. The efforts of the
30 nation to bring in normalcy, which is substantially, My Lords, successful, might be affected.
31 And coming from responsible leaders, it has its own context, and it has its own seriousness.

32

33 **CHIEF JUSTICE DY CHANDRACHUD:** Yes, Mr. Giri.

34

35 **V. GIRI:** Yes. Now My Lords one aspect on federalism My Lord, which has I believe My Lord,
36 trying to present a facet before Your Lordships, which obviously Your Lordships would have
37 been taken through earlier, but just one aspect of it My Lord in the context of abrogation of

1 370. My Lords, if Your Lordships could kindly come to some portions, My Lords of the opening
2 remarks of Dr. Ambedkar, Volume 8. Both the opening remarks and the closing remarks My
3 Lord are at Volume 8 of the...

4

5 **JUSTICE SANJIV KHANNA:** Volume 8 of what?

6

7 **V. GIRI:** ...Convenience Compilation of Documents. PDF page 5. By the way, My Lord the
8 opening remarks presenting the Draft Constitution was made by Dr. Ambedkar on 04-11-1948.
9 And the closing remarks came after the draft Constitution was... after the Constitution was
10 drafted on 25-11-1949. But if Your Lordships kindly come to PDF page 5, the paragraphs which
11 begin or just a short paragraph in between, 'So far I have explained the form of government
12 under the Draft Constitution. I will now turn to the other question, namely, the form of the
13 Constitution. Two...

14

15 **CHIEF JUSTICE DY CHANDRACHUD:** Very famous speech. Very famous extract from
16 the Dr. Ambedkar's... yes

17

18 **V. GIRI:** One reads it, reads it again and again and wonders, astounded by the vision of this
19 great man. 'Two principle forms of the Constitution are known to history. One is called Unitary
20 and the other Federal. The two essential characteristics of a Unitary Constitution are the
21 supremacy of the central polity, and the absence of subsidiary sovereign polity... polities.
22 Contrariwise, a Federal Constitution is marked by the existence of a Central Polity and
23 Subsidiary Polities, side by side, and by each being sovereign in the field assigned to it. In other
24 words, federation means the establishment of a dual polity. The draft Constitution is a federal
25 Constitution, as such, as it established what may be called a dual polity. This dual polity under
26 the proposed constitution will consist of the Union at the centre and the States at the periphery
27 each endowed with sovereign powers to be exercised in the field assigned to them, respectively
28 by the Constitution. The dual polity resembles the American Constitution. The American
29 polity is also a dual polity. One of it is known as the Federal Government and the other states,
30 which correspond, respectively, to the Union Government, the State's Government, and the
31 draft Constitution. Under the American Constitution, the Federal Government is not a mere
32 League of the States, nor are the state's administrative units or agencies of the Federal
33 Government. In the same way the Indian Constitution proposed in the draft Constitution, not
34 a League of States, nor are the state's administrative units or agencies of the Union
35 Government. Here, however, the similarities between the Indian and the American
36 Constitution and the differences that distinguish them are more fundamental and glaring than
37 the similarities between the two. The points of difference between the American Federation

1 and the Indian Federation are mainly two. In the USA this dual polity is followed by a dual
2 citizenship. In the USA, there is a citizenship of the USA, but there is also a citizenship of the
3 State. No doubt the rigors of this double citizenship are much assuaged by the 14th
4 Amendment to the Constitution of the United States, which prohibits the States from taking
5 away the rights, privileges and immunities of the citizen of the United States. At the same time,
6 as pointed out by Mr. William Anderson, in certain political matters, including the right to
7 vote, and to hold public office, states may and do discriminate in favour of their own citizens.
8 This favouritism goes even farther in many cases. Thus, to obtain employment of the service
9 of state or local government what is it most places required to be a local resident or citizen.
10 Similarly, in the licensing of the persons for the practice of such public professions as law and
11 medicine, residents or citizenship in the state is frequently required, and in distance, where
12 public regulation must necessarily be strict, as in the sale of liquor and the stocks and bonds,
13 similar requirements have been upheld. Each state has also certain rights in its own domain
14 that it holds for the special advantage of its own citizens. Thus, wild game and fish in a sense
15 belong to the state. It is customary from the states to charge higher hunting and fishing license
16 to non-residents and its own citizens. The States also charge non-residents higher tuition....

17

18 **CHIEF JUSTICE DY CHANDRACHUD:** Mr. Giri, You can skip that...

19

20 **V. GIRI:** I'll skip that.

21

22 **CHIEF JUSTICE DY CHANDRACHUD:** And you can come to page 8.

23

24 **V. GIRI:** He proposed Indian Constitution....

25

26 **CHIEF JUSTICE DY CHANDRACHUD:** Page 8. Internal page.. sorry... PDF page 7.

27

28 **V. GIRI:** Yes, My Lord.

29

30 **CHIEF JUSTICE DY CHANDRACHUD:** The proposed Indian Constitution is a dual polity
31 with a single citizenship.

32

33 **V. GIRI:** ...is a dual polity with a single citizenship. There is only one citizenship for the whole
34 of India.

35

36 **CHIEF JUSTICE DY CHANDRACHUD:** Then another very important thing which Dr.
37 Ambedkar makes a pointed reference to. If you look at page 8, top. The position in the US.

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V. GIRI: Yes.

CHIEF JUSTICE DY CHANDRACHUD: Each state in America is free to make its own constitution.

V. GIRI: Correct, My Lord.

CHIEF JUSTICE DY CHANDRACHUD: And therefore the power of altering.

V. GIRI That's right.

CHIEF JUSTICE DY CHANDRACHUD: And then what... you know Dr. Ambedkar says, Babasaheb says thereafter at page 8.

V. GIRI: Yes, My Lord.

CHIEF JUSTICE DY CHANDRACHUD: This is not true of the...

V. GIRI: True of the proposed Indian Constitution.

CHIEF JUSTICE DY CHANDRACHUD: Just read that para. I think that you concluded.

V. GIRI: Yes. This is not true of the proposed Indian Constitution. No States and anyway those in part 1 My Lord, part 1, as it was originally envisaged because of the Indian Independence Act, under Section 6. But then that underwent a change when it came to the final remark, have a right to frame its own Constitution. The Constitution of the Union and of the States is a single frame from which neither can get out and within which they must work. So far I have drawn attention to the difference between the American Federation and the proposed Indian Federation. But there are some other special features in the proposed Indian Federation, which mark it off not only from the American Federation, but from all other federations. All federal systems, including the American, are placed in a tight mould of federalism. No matter what the circumstances, it cannot change its form and shape. It can never be unitary. On the other hand, the Draft Constitution can be both unitary as well as federal according to the requirements of time and circumstances. In normal times it is framed to work as a federal system, but in times of war it is so designed as to make it work as though it was a unitary system. Once the President issues a proclamation which he is authorized to do

1 under the provisions of Article 275 My Lord, it must have become 356 later, the whole scene
2 can become transformed and the state becomes a unitary state. The Union under the
3 proclamation can claim, if it wants the power to legislate upon any subject, even though it may
4 be in the State List, the power to give directions to the States as to how they should exercise
5 their executive authority in matters which are within their charge, the power to vest authority
6 for any purpose in any officer, and the power to suspend the financial provisions of the
7 Constitution. Such a power of converting itself into a unitary state no Federation possesses.
8 This is one point of difference between the Federation proposed in the draft Constitution and
9 all of the federations we know of. This is not the only difference between the proposed Indian
10 Federation and other Federations. Federalism is described as a weak if not a fit form of
11 Government. There are two weaknesses from which federation is alleged to suffer. One is
12 rigidity and the other is legalism. That these faults are inherent in federalism, there can be no
13 dispute. A Federal Constitution but cannot but be a written Constitution and a written
14 Constitution must necessarily be a rigid Constitution. A Federal Constitution means division
15 of the sovereignty by no less a sanction that the law of the Constitution between the Federal
16 Government and the States with two necessary consequences; one that any invasion by the
17 Federal Government, the field assigned to the States and vice versa, is a breach of the
18 Constitution and such breach is justiciable matter to be determined by the judiciary alone.
19 This being the nature of federalism a Federal Constitution, have been found in a pronounced
20 form in the Constitution of the United States of America. Countries which have adopted
21 federalism at a later date have attempted to reduce the disadvantages following from the
22 rigidity and legalism which are inherent there. The example of Australia will be referred to in
23 this matter. The Australian Constitution has adopted the following means to make its
24 federation less rigid. Then My Lord in coming to My Lords the paragraph, the last paragraph
25 beginning thereon. 'In assuaging the rigor of rigidity and legalism the draft Constitution
26 follows the Australian plan on a far more extensive scale than has been done in Australia. Like
27 the Australian Constitution, it has a long list of subjects for concurrent powers of legislation.
28 Under the Australian Constitution, concurrent subjects are 39; under the draft Constitution,
29 they are 37. Following the Australian Constitution there are as many as six articles in the Draft
30 Constitution, where the provisions are of a temporary duration and which could be replaced
31 by Parliament at any time by provision suitable for the Constitution. The biggest advance made
32 by the Draft Constitution over the Australian Constitution is in the matter of exclusive powers
33 of legislation vested in Parliament. While the exclusive authority the Australian Parliament to
34 legislate extends only to about three matters. The authority of the Indian Parliament is
35 proposed in the Draft Constitution will extend to 91. It has then come to 97. 97, being an
36 omnibus residuary clause. In this way, the Draft Constitution has secured the greatest possible
37 elasticity in its federalism, which is supposed to be rigid by nature. It is not enough to say that

1 the Draft Constitution follows the Australian Constitution or follows it on a more extensive
2 scale. What is to be noted is that it has added new ways of overcoming the rigidity and legalism,
3 inherent in federalism, which are special to it and which are not to be found elsewhere. First,
4 is the power given to Parliament to legislate on exclusively provincial'... sorry...

5

6 **CHIEF JUSTICE DY CHANDRACHUD:** Go ahead.

7

8 **V. GIRI:** 'In normal times, I refer to Articles 226, 227, and 229. Under Article 226, Parliament
9 can legislate when a subject becomes a matter of national concern, as distinguished from
10 purely provincial concern, though the subject is in the State List, provided our solution is
11 passed by the Upper Chamber, resolution must be My Lord. Upper Chamber by two third
12 majority in favour of such exercise of the power by the Centre. Article 227 gives a similar power
13 to Parliament in a national emergency. Under Article 229, Parliament can exercise the same
14 power of provinces consent to such exercise. Though the last provision also exists in the
15 Australian Constitution, the first two are a special feature of the Draft Constitution. The second
16 means adopted to, My Lord, I'll... My Lord, please come to the next page My Lord. PDF 12.

17

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

19

20 **V. GIRI:** Not that the others are not important My Lord, but then to save time because anyway
21 Your Lordships would be going through it. One can therefore safely say that the Indian
22 Federation will not suffer from the faults of rigidity or legalism. Its distinguishing feature is
23 that it is a flexible federation. There is another special feature of the proposed Indian
24 Federation, which distinguishes it from other federations. A federation being a dual polity
25 based on divided authority, with separate Legislative, Executive, and Judicial powers. For each
26 of the two polities is bound to produce diversity in laws, in administration and in judicial
27 protection. Up to a certain point this diversity does not matter.

28

29 **CHIEF JUSTICE DY CHANDRACHUD:** Just skip that little bit now and then go to the
30 bottom of that page.

31

32 **V. GIRI:** Yes.

33

34 **CHIEF JUSTICE DY CHANDRACHUD:** The draft Constitution has sought to forge means
35 and methods, whereas whereby India will have federation.

36

1 **V. GIRI:** And at the same time we'll have uniformity in all basic matters which are essential
2 to maintain the unity of the country.

3

4 **CHIEF JUSTICE DY CHANDRACHUD:** And then on the next page, Dr. Ambedkar, refers
5 to three things. A single judiciary...

6

7 **V. GIRI:** Uniformity in fundamental laws, civil and criminal...

8

9 **CHIEF JUSTICE DY CHANDRACHUD:** And all India Civil Services.

10

11 **V. GIRI:** My Lord, rest of it My Lord. But of course, Your Lordships would be, with the utmost
12 respect My Lords, I would commend that Your Lordships have a look...

13

14 **CHIEF JUSTICE DY CHANDRACHUD:** We have seen the key, the key factors, the key
15 features of the Constitution, which make it federal at the same time preserve the need for a
16 certain degree of uniformity at the national level.

17

18 **V. GIRI:** That's right. Now, My Lords, would immediately if Your Lordships cut the chase to.
19 The closing remarks of the famous My Lord, speech by Dr. Ambedkar.

20

21 **JUSTICE SANJAY KISHAN KAUL:** 25th November...

22

23 **CHIEF JUSTICE DY CHANDRACHUD:** 1949. Where is that?

24

25 **V. GIRI:** That is, My Lord, that is page, PDF Page 1299. Same Volume.

26

27 **V. GIRI:** Yes.

28

29 **TUSHAR MEHTA:** I wanted to read that.

30

31 **V. GIRI:** Would you like to read it? You can. You can lay emphasis on..

32

33 **JUSTICE SANJIV KHANNA:** Where it starts from Mr. Giri?

34

35 **V. GIRI:** PDF Page 1299. Starts at 1299. The relevant portion is at 1307.

36

37 **JUSTICE SANJIV KHANNA:** 4160.

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V. GIRI: Yes, 4160. The relevant portion is again 1307, continuous page is 4168. Can I read it, My Lord?

CHIEF JUSTICE DY CHANDRACHUD: Yes.

V. GIRI: 'There is only one point of constitutional import to which I propose to make a reference. A serious complaint is made on the ground that there is too much of centralisation and that the States have been reduced to municipalities. It is clear that this view is not only an exaggeration, but is also founded on a misunderstanding of what exactly the Constitution contrives to do. As to the relation between the Centre and the States, it is necessary to bear in mind the fundamental principle on which it rests. The basic principle of Federalism is that the Legislative and Executive authority is partitioned between the Centre and the States not by any law to be made by the Centre but by the Constitution itself. This is what Constitution does. The States under our Constitution are in no way dependent upon the Centre for their legislative or executive authority. The Centre and the States are co-equal in this matter. It is difficult to see how such a Constitution can be called as centralism. It may be that the Constitution assigns to the Centre too large a field for the operation of its legislative and executive authority than is to be found in any other Federal Constitution. It may be true the residuary powers are given to the Centre and not to the States. But these features do not form the essence of federalism. The chief mark of federalism as I said lies in the partition of the legislative and executive authority between the Centre and the Units by the Constitution. This is the principle embodied in our Constitution. There can be no mistake about it. It is, therefore, wrong to say that the States have been placed under the Centre. Centre cannot by its own will alter the boundary of that partition. Nor can the Judiciary. For as has been well said: Courts may modify, they cannot replace. They can revise earlier interpretations as new arguments, new points of view are presented, they can shift the dividing line in marginal cases, but there are barriers they cannot pass. Definite assignments of power they cannot reallocate. They can give a broadening construction of existing powers, but they cannot assign to one authority powers explicitly granted to another. The first charge of centralisation defeating federalism must therefore fail.

The second charge is that the Centre has been given the power to override the State.' Then, My Lord, Dr. Ambedkar says, this charge must be admitted. But before condemning the Constitution for containing such overriding powers, certain considerations must be borne in mind. The first is that these overriding powers do not form the normal feature of the Constitution. Their use and operation are expressly confined to emergencies only. The second

1 consideration is : Could we avoid giving overriding powers to the Centre when an emergency
2 has arisen? Those who do not admit the justification for such overriding powers to the Centre
3 even in an emergency, do not seem to have a clear idea of the problem which lies at the root of
4 the matter. The problem is so clearly set out by a writer in that well known magazine "The
5 Round Table" in its issue of December 1935 that I offer no apology for quoting the following
6 extract from it. Says the writer: "Political systems are a complex of rights and duties resting
7 ultimately on the question, to whom, and to what authority, does the citizen owe allegiance.
8 In normal affairs the question is not present, for the law works smoothly, and a man goes about
9 his business obeying one authority in this set of matters and another authority in that. But in
10 a moment of crisis, a conflict of claims may arise, and it is then apparent that ultimate
11 allegiance cannot be divided. The issue of allegiance cannot be determined in the last resort
12 by a juristic interpretation of statutes. The law must conform to the facts or so much the worse
13 for the law. When all formalism is stripped away, the bare question is, what authority
14 commands the residual loyalty of the citizen. Is it the Centre or the Constituent State? The
15 solution of this problem depends upon one's answer to this question which is the crux of the
16 problem. There can be no doubt that in the opinion of the vast majority of the people, the
17 residual loyalty of the citizen in an emergency must be to the Centre and not to the Constituent
18 States. For it is only the Centre which can work for a common end and for the general interests
19 of the country as a whole. Herein lies the justification for giving to the Centre certain
20 overriding powers to be used in an emergency. And after all what is the obligation imposed
21 upon the constituent States by these emergency powers ? No more than this, that in an
22 emergency, they should take into consideration alongside their own local interests, the
23 opinions and interests of the nation as a whole. Only those who have not understood the
24 problem, can complain against it."

25

26 Now, My Lord, there is an anguish. Sorry. Just one paragraph, in the next... two lines in the
27 next paragraph. How the... what was the anxiety which he shared and how prophetic....
28 Sometimes one feels that so prophetic he could have been. 'Here I could have ended. But my
29 mind is so full of the future of our country that I feel I ought to take this occasion to give
30 expression to some of my reflections thereon. On 26th January 1950, India will be an
31 independent country. What would happen to her independence? Will she maintain her
32 independence or will she lose it again?' This is the first thought that comes to my mind. It is
33 not... These lines which start the point.... these context My Lord... the anxiety and the anguish
34 My Lord was...

35

36 **COUNSEL:** You must complete reading that, Mr. Giri. It's a very interesting passage.

37

1 **V. GIRI:** Yes, yes. 'This is the first thought that comes to my mind. It is not that India was
2 never an independent country. The point is that she once lost the independence she had, will
3 she lose it a second time ? It is this thought which makes me most anxious for the future. What
4 perturbs me greatly is the fact that not only India has once before lost her independence, but
5 she lost it by the infidelity and treachery of some of her people. In the invasion of Sind by
6 Muhammad ibn al-Qasim, the military commanders of King Dahar accepted bribes from the
7 agents of Muhammad ibn al-Qasim and refused to fight on the side of their King. It was
8 Jaichand who invited Muhammad Ghori to invade India and fight against Prithvi Raj and
9 promised him the help of himself and the Solanki kings.' Then, My Lord, I'll leave the rest.
10 Next one, 'Will history repeat itself ? It is this thought which fills me with anxiety. This anxiety
11 is deepened by the realisation of the fact that in addition to our old enemies in the form of
12 castes and creeds we are going to have many political parties with diverse and opposing
13 political creeds. Will India place the country above their creed or will they place creed above
14 country? I do not know. But this much is certain that if the parties place creed above country,
15 our independence will be put in jeopardy a second time and probably be lost for ever. This
16 eventuality we must all resolutely guard against. We must be determined to defend our
17 independence with the last drop of our blood.'

18

19 Now, My Lords, these two speeches made by Dr. Babasaheb Ambedkar, two different points
20 of time, one before presenting the, while presenting the Draft Constitution, the other after the
21 Draft Constitution concluding remarks. There's not much variance My Lord except to say that
22 the slanting My Lord if any, in the distribution of power, lawmaking power My Lord, towards
23 the Centre was justified by Dr. Ambedkar, after the Constitution was drafted. Now, My Lord,
24 it is after taking into all this that Your Lordships have also over the years after 1950 interpreted
25 the Constitution, interpreted the federal structure of the Constitution. My Lord it has been
26 done in many cases, but for the present My Lord, can I just give the paragraph numbers and
27 the PDF page numbers of some of the judgments My Lord?. Starting with ***State of***
28 ***Rajasthan vs Union of India.***

29

30 **CHIEF JUSTICE DY CHANDRACHUD:** Just give us the page, the PDF.

31

32 **V. GIRI:** Yes, My Lord, Volume 26. Volume 26 . My Lord **1977 (3) SCC 592.**

33

34 **CHIEF JUSTICE DY CHANDRACHUD:** That's okay. Just give us the PDF volume now.

35

36 **V. GIRI:** Yes. My Lord that is PDF Page 54.

37

1 **CHIEF JUSTICE DY CHANDRACHUD:** At?

2

3 **V. GIRI:** 54.

4

5 **CHIEF JUSTICE DY CHANDRACHUD:** At para?

6

7 **V. GIRI:** At paragraph, My Lord just a minute.

8

9 **CHIEF JUSTICE DY CHANDRACHUD:** So you're giving the PDF page of the relevant
10 paragraph or of the beginning of the case? Whichever way you want to do it. Just give us that
11 page at which the case begins and the page at which you are stressing the extract.

12

13 **V. GIRI:** Yes. Yes, My Lord. PDF 21. PDF 54, My Lord, is the relevant paragraph. Three
14 paragraphs My Lord from Chief Justice begs opinion.

15

16 **CHIEF JUSTICE DY CHANDRACHUD:** All right. The next?

17

18 **V. GIRI:** The next is My Lord ***Bomma***. ***Bomma***, My Lord is in Volume 2, Page 2, onwards.

19

20 **CHIEF JUSTICE DY CHANDRACHUD:** Page? And at page?

21

22 **V. GIRI:** My Lord that's what, My Lord there are multiple opinions in ***Bomma***, as Your
23 Lordships would have...

24

25 **CHIEF JUSTICE DY CHANDRACHUD:** Right. But which are the paragraphs you are...?

26

27 **V. GIRI:** My Lord see, paragraphs My Lord, can I start with My Lord, in the order in which it
28 is given My Lord.

29

30 **CHIEF JUSTICE DY CHANDRACHUD:** Sure. no problem.

31

32 **V. GIRI:** Justice Pandian's opinion doesn't deal with federalism separately. PDF paragraphs
33 1 to 9, therefore PDF page 2 to 6. Sorry, PDF page 65 My Lord, sorry. Sorry. PDF 65. The rest
34 is all My Lord, editorial notes. Paragraphs 1 to 9 and in Para 2, he agrees with the conclusions
35 of 12428 of Justice Sawant's opinion My Lord.

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37 **CHIEF JUSTICE DY CHANDRACHUD:** Alright, then?

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V. GIRI: Kindly note that, My Lord.

CHIEF JUSTICE DY CHANDRACHUD: Yes

V. GIRI: My Lord see PDF 68, Justice Ahmadi's opinion para 10 onwards.

CHIEF JUSTICE DY CHANDRACHUD: Justice Ahmadi.

V. GIRI: And the relevant portion My Lord with regard to the federal character of the Constitution is at PDF 69, paragraph 13.

JUSTICE B.R. GAVAI: PDF?

V. GIRI: 69. Paragraph 13.

CHIEF JUSTICE DY CHANDRACHUD: Next?

V.GIRI: Para 23 and 24 at PDF 75.

CHIEF JUSTICE DY CHANDRACHUD: All right, next?

V. GIRI: My Lord... [NO AUDIO] Para 247 and 248. PDF 206. My Lords the....

CHIEF JUSTICE DY CHANDRACHUD: Para?

V. GIRI: Paragraph, My Lord, Justice Ramaswamy's opinion Para 247 and 248 at PDF 206.

CHIEF JUSTICE DY CHANDRACHUD: All right. So you have covered them.

V. GIRI: My Lord see, There is a conspectus of the earlier decisions, including *Rajasthan* and *Bommai* in NCT 2, Volume 14, PDF 3, paragraph 68 to paragraph 77. Paragraph 68 to Paragraph 77, I'll give the Page number... Volume 14.

JUSTICE B R GAVAI: Volume?

V. GIRI: It doesn't have an SCC citation so far. SCC online is there.

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JUSTICE B.R. GAVAI: Para 68 to...

V. GIRI: Para 68 to Para 77..

CHIEF JUSTICE DY CHANDRACHUD: We have an SCR citation. I think all of you must now get into the habit of again citing SCRs. SCR is now digital. We have already got e-SCR. Hopefully in the next few weeks we'll have a digital SCR. A digital SCR is exactly as it appears in the Volume, while the e-SCR is of course is an electronic copy. And we have updated the head notes right up to probably the last month or so now. I'm not sure exact date, but we are pretty much now abreast. So we have a regular authorized reporting of reporter of the Supreme Court, because SCR had fallen way behind its time, but now it's up to date and it also has neutral citations as well.

V. GIRI: That's right, My Lord. It has neutral citations.

CHIEF JUSTICE DY CHANDRACHUD: But we are now moving from an e-SCR into a digital SCR, so a digital SCR will have a Volume.

KAPIL SIBAL: It always has neutral citations. It always had. And we were in fact, used to only citing the SCR. Then, of course, it was not updated for many, many....

CHIEF JUSTICE DY CHANDRACHUD: I would really encourage all of you to this at least skim through the e-SCR and if there any further improvements to be made, then feel free to let me know , because...

DUSHYANT DAVE: e-SCR in the first 20 years were head notes. It was outstanding.

KAPIL SIBAL: Absolutely.

DUSHYANT DAVE: And that is what it is missing. They gave complete picture of the case and what Your Lordships....

CHIEF JUSTICE DY CHANDRACHUD: Now please have a look at the recent head notes. If there is some improvement. I'll be happy to do it .

V. GIRI: My Lord and the corresponding ILRs in the High Courts, also.

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CHIEF JUSTICE DY CHANDRACHUD: We have revamped our editorial team for the SCR. We have a much broader editorial team. We also have a Centre for Research and Planning in the Supreme Court, which is manned by several very talented young people who have been brought in from outside.

KAPIL SIBAL: 24 hours are not enough for you?

CHIEF JUSTICE DY CHANDRACHUD: They're not Mr. Sibal. When I leave for home, there's so much to be done every evening after that as well.

KAPIL SIBAL: We appreciate this.

DUSHYANT DAVE: [UNCLEAR] Outstanding members of our Bar. Perhaps with some..

CHIEF JUSTICE DY CHANDRACHUD: Of course, with pleasure.

DUSHYANT DAVE: Likes of Mr. Sankaranarayanan can [UNCLEAR] I have no doubt about it.

CHIEF JUSTICE DY CHANDRACHUD: But please do have a look at our e-SCR and very shortly we'll have the digital SCRs. So if there's any change, any improvement, let me know so that we'll do it.

V. GIRI: My Lord, do not strictly on this but then I have to anyway, I thought of referring it in another context on which My Lord. I'll do it do it in a minute or so.

CHIEF JUSTICE DY CHANDRACHUD: Also, the best part is it's a free service, so you can imagine lawyers across the country, from the District to the High Courts have this free availability of the material. Law colleges which can't afford to purchase software, they have this free service.. It is searchable, absolutely. Yes.

V. GIRI: My Lords, early days I was a reporter in the for the ILR My Lord in the High Court. And one good thing was My Lord it kept one abreast with all these judgments, My Lords which used to..., but the numbers were not, it was not so numerous then, but then writing the head note always My Lord was a task. Giving the head note was always a task. And one had to send it back to the learned judge to get his approval also, because otherwise sometimes one misses

1 out the crux of the judgement. My Lord the one, My Lord I'll just hand it over kindly permit
2 me. When **Bommai** came out, **Bommai** was delivered. Mr. Sorabji My Lord wrote an article
3 in the... which was published in the SEC. My Lord, just give 5 minutes. My Lord, I'm not taking
4 Your Lordships, but then Your Lordships have the time just....

5

6 **CHIEF JUSTICE DY CHANDRACHUD:** Just keep that and put it in the.... Give us the
7 citation you don't have to add papers now anymore.

8

9 **V. GIRI: 94 (3) SCC Journal 1.**

10

11 **CHIEF JUSTICE DY CHANDRACHUD:** It's 1994?

12

13 **V. GIRI: 1994 (3) SCC Journal 1.**

14

15 **CHIEF JUSTICE DY CHANDRACHUD:** What is Mr. Sorabji's...

16

17 **V. GIRI:** My Lord it's relevant, how Mr. Sorabji argues and persuasively how Justice Savant's
18 opinion should be treated as a majority opinion in **Bommai**, not on the aspect of federalism.
19 And then My Lord sees, this I'll immediately say why it is relevant is because it isn't Justice
20 Savant's opinion that paragraph 153 comes as a conclusion. And 153(4) especially that
21 decisions could be taken, the irreversible decisions there is a restriction on irreversible
22 decisions. During the currency of a President's Proclamation till such time as a proclamation
23 is approved by both houses of the parliament. That is in para 153(4), I think the learned
24 Solicitor has brought it Your Lordships' notice.

25

26 **CHIEF JUSTICE DY CHANDRACHUD:** Yes we know that.

27

28 **V. GIRI:** Since the provisions contained that is at page 149 of the report. Since the provisions
29 contained in Clause 3 of Article 356 are intended to be a check on the powers of the President
30 under Clause 1 thereof, it will not be permissible for the President to exercise powers under
31 Sub-Clause A, B, and C of the latter clause to take irreversible decision... actions till at least
32 both the Houses of Parliament have approved of the proclamations. This should be treated,
33 in my respectful submission as your opinion on the bench as a majority opinion of the bench
34 My Lord. I commend this with great respect. They come under this article of this of Mr. Sorabji
35 for that purpose. It's in the beginning itself. It's at page... On federalism, I'll just make this
36 proposition, and leave it before Your Lordships. I've given My Lord the relevant paragraphs in
37 the judgments My Lord. I have placed Dr. Ambedkar's opening remarks and the closing

1 remarks. Especially in the last judgment of NCT 2, where Your Lordships had a conspectus of
 2 the earlier judgments which dealt with federalism. There are two or three features which Your
 3 Lordships have outlined. One is that federalism is a basic feature of the Constitution. Now, My
 4 Lords, when Your Lordships have... when Your Lordships have said that the federalism that is
 5 revealed from the reading of the Constitution as a whole..... Please keep 370 for a moment
 6 aside..... Is where the distribution of the Legislative Powers with the parliament and the and
 7 the State Legislatures, and with the slanting My Lord in favour of the State. The reasons have
 8 all been given. I need not repeat it myself, because Your Lordship have articulated it so well in
 9 the other part in the earlier judgments. Now My Lord see, whatever it is, Your Lordships will
 10 find that 370 constituted a.... when Your Lordships have a holistic picture of the constitution
 11 and the relationship between the Union and all the other States and then if Your lordships
 12 looked at 370. 370 put in an area or carved out an area which is not in sync with the general
 13 federal features of the Constitution for the rest of the country, for the Union and the rest of the
 14 country. Dr. Dhavan, pointed out other features in part 21... 370(1), onwards. Point is, when
 15 over a period of about 25 years, different provisions were introduced, were inserted in the
 16 Constitution, giving a certain special provisions for some other states and all therefore, and
 17 amendment to the constitution and the Parliamentary Legislation. But point is, there are two
 18 or three features which have emanate out of 370. One is that parliament requires the consent
 19 of the State, the Government of the State in relation to matters which are included in List 1
 20 and 3, but not relatable to the Instrument of Accession. That the concept of the state is required
 21 for making applicable certain provisions, all provisions of the Constitution, which have been
 22 mentioned in Clause D.

23

24 **CHIEF JUSTICE DY CHANDRACHUD:** Just one second. As a consent of the Government
 25 of the State on List, and List 1 and 3 matters.

26

27 **V. GIRI:** Yes.

28

29 **CHIEF JUSTICE DY CHANDRACHUD:** Which matters do not relate to the IOA. That's
 30 in right. Yes.

31

32 **V. GIRI:** Yes. No My Lord it's in...

33

34 **CHIEF JUSTICE DY CHANDRACHUD:** That is B(2)?

35

36 **V. GIRI:** Yes, B(2). B deals with such of the other provisions of the Constitution shall apply
 37 in relation to that State, subject to such exceptions and modifications as the President may be

1 order, specify, and then the second proviso, concurrence of the Government is necessary. That
2 it has been done repeatedly My Lord, from 1950 onwards is a historical fact. But the point is
3 My Lord, this sets out the relationship between Union and Jammu and Kashmir at a plane.
4 I'm not saying higher or lower. I am saying it a plane different from the constantly
5 interworking relationship between the Union and all other States in the country. All other
6 States forming part of the Union. My Lord, when 370 is abrogated, you have a situation My
7 Lord which is, My Lord please consider the bifurcation of the stated into two Union Territories
8 My Lord differently. That came about on 31-10-2019. I'm saying My Lord when 370 was
9 abrogated by 272 and My Lord all the provisions of the Constitution became *instanto... eo*
10 *instanti* applicable to the State of Jammu and Kashmir. Jammu and Kashmir therefore
11 became a state My Lord on a complete par with all other States My Lord in the Union, in so
12 far as the Federal structure is concerned, even otherwise. Now My Lord, what do the
13 petitioners want? As a Solicitor, My Lord it pains to point out there is a great deal of expansion
14 of rights My Lord, which could be enforced by the persons who reside in the state. But My
15 Lord, what do the petitioners want? They want the 272 and 273 to be set aside and Article 370,
16 to be resurrected. If 370 is resurrected, we would come back to a stage where there is an oddity
17 insofar as the Federal structure of the Constitution is concerned. J&K, would continue to be
18 placed or would once again be placed on a plane different from all the other States of the Union
19 and the Federal working relationship which the Constitution beholds us to do will meet with
20 a roadblock, one way or the other. My Lord, I'm not saying that one principle of administrative
21 law which Your Lordships have always, always applied is. Your Lordships would not issue a
22 prerogative writ in setting aside any order or setting aside any action taken by the executive.
23 My Lord if such interference by Your Lordship resurrects My Lord, a situation that was also
24 not completely legal. My Lord paraphrase it. If setting aside 272 and 273 resurrects Article 370
25 in my respectful submission, if Article 370 is resurrected, that would also be violative of the
26 basic structure of the Constitution. Yes.

27

28 **CHIEF JUSTICE DY CHANDRACHUD:** This might be a little too farfetched, because then
29 that would be to postulate that original Article 370 was violated of the....

30

31 **V. GIRI:** There's a challenge. There was a challenge pending here for several years. 1986 My
32 Lord a batch of repetitions was then made over to the High Court, that's still pending. There
33 are people My Lord who wanted to prosecute it but of course My Lord one of the writ petitions
34 challenging 35(a) is also My Lord pending.

35

36 **CHIEF JUSTICE DY CHANDRACHUD:** It was a part of the Constitution Mr....

37

1 **V. GIRI:** I'm saying My Lord the Federal structure, My Lord I would only, My Lord let me go
2 by the path of least resistance.

3

4 **CHIEF JUSTICE DY CHANDRACHUD:** You can't invite us to hold in your favour on an
5 un-statable proposition.

6

7 **V. GIRI:** No, No I'm saying My Lord, Your Lordships, that let me take the path of least
8 resistance. The federal structure, which emanates My Lords, from 370, is on a different plane
9 from the federal structure.....

10

11 **JUSTICE SANJIV KHANNA:** Mr Giri you are not today confronted in a situation where
12 Article 370 is in the Constitution.

13

14 **V. GIRI:** I'm saying My Lord there is a resurrection, that My Lord, there is still My Lord a
15 cause of action. .

16

17 **CHIEF JUSTICE DY CHANDRACHUD:** 35(a) etc. is under a different....

18

19 **V. GIRI:** I understand My Lord. I am saying My Lord....

20

21 **CHIEF JUSTICE DY CHANDRACHUD:** I think we better wrap up. Another...

22

23 **V. GIRI:** My Lord, just one aspect on which Your Lordships, wanted an answer My Lord. In
24 *Madhav Rao Scindia, 1971, 1 SCC, 85*, Volume 6 PDF 390. My Lord I'll just give the
25 page number, relevant PDF page numbers and paragraphs Chief Justice Hidayatullah's
26 opinion, para 65 PDF 443, para 76, PDF. 447.

27

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

29

30 **V. GIRI:** Volume 6, My Lord of the Case Law Compilation.

31

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

33

34 **V. GIRI:** It starts, the decision starts at PDF page 390.

35

36 **CHIEF JUSTICE DY CHANDRACHUD:** So what is the proposition you're citing it?

37

1 **V. GIRI:** My Lord it's only this the Solicitor had taken Your Lordship extensively through
2 ***Ganpat Rao*** which came about later. My Lord, the matter that was issued in ***Madhav Rao***
3 ***Scindia***, My Lord where after a serious bit of ratiocination Your Lordships came to the
4 conclusion. both, Chief Justice Hidayatullah and Justice Shah, that the rights which is claimed
5 by the petitioners emanates from Article 291, Constitution and 362, and not from the
6 Covenant. And this is same conclusion was arrived at to hold that 363, which is a bar on the
7 Courts, My Lords entertaining such disputes is not attractive, because a right claim by the
8 petitioner's is on a, rights, which is generated and frame worked in the Constitution and not
9 in the Covenant. That is why a mandamus was issued. You don't have a parallel...

10

11 **CHIEF JUSTICE DY CHANDRACHUD:** Just a second. You say that the rights.... Chief
12 Justice Hidayatullah and Justice Shah said that the rights which were claimed by the
13 petitioners originated in Articles 291 and...

14

15 **V. GIRI:** And 362,

16

17 **CHIEF JUSTICE DY CHANDRACHUD:** And not in the covenant.

18

19 **V. GIRI:** Not from the covenant.

20

21 **CHIEF JUSTICE DY CHANDRACHUD:** And what is the next? What is the sequitur that...

22

23 **V. GIRI:** Therefore My Lord that 363 was not attracted. 363 has been subsequently repealed,
24 but 363 was not attractive, and therefore a mandamus was issued. Therefore, the right claim
25 by the Petitioners were under the Constitution itself. 291 and 362 were repealed. Earlier My
26 Lord, it was only a question of withdrawing the recognition of a Ruler under 366, 22. That
27 was found to be inadequate because 291 and 362 were still intact. That is why My Lord in the
28 first matter, in ***Madhav Rao Scindia*** are matter mandamus was issued. When 291 and 362
29 were repealed by a Constitutional Amendment, no further rights survived. There was no Privy
30 Purse My Lord which the right to a Privy Purse which emanated from the Constitution or
31 embedded in the Constitution. The right was taken away by a Constitutional Amendment. And
32 that's why in ***Ganpat Rao***, a challenge to the Constitutional Amendment on the ground that
33 it violated the basic structure of the Constitution was repealed. My Lord, Petitioners cannot
34 draw any sustenance My Lord from the decision of ***Madhav Rao Scindia*** , is my respectful
35 submission..

36

37 **CHIEF JUSTICE DY CHANDRACHUD:** Thank you Mr. Giri.

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V. GIRI: I'm deeply obliged to Your Lordships.

CHIEF JUSTICE DY CHANDRACHUD: Thank you, Mr. Giri. Who are you appearing for?

K.M. NATARAJ: For the Union.

CHIEF JUSTICE DY CHANDRACHUD: But for the Union how many people will appear, Mr Nataraj? We don't want to stop you because it's an important matter, but...

K.M. NATARAJ: I'll not repeat anything.

CHIEF JUSTICE DY CHANDRACHUD: Can you formulate what....?

K. M. NATARAJ: Yes, I'll formulate? I'm cautious of the arguments already advanced on behalf of Union of India and equally conscious of the time factor which is daring at me through your eyes.

JUSTICE SANJAY KISHAN KAUL: Timed you to 10 minutes.

K.M. NATARAJ: Just only on a different approach, which I'd like to give to the entire facets of this one with regard to the matter. Basically, I formulated four issues which I will cover up in within 10 or 15 minutes. I will not go beyond that. Article 370 is the only provision in the Constitution, which has a self-destruction mechanism. There are other Articles which would lapse by a flux of time. That is a different scenario altogether. Number 2, this article did not confer any kind of right. Number 3, continued application of...

CHIEF JUSTICE DY CHANDRACHUD: One minute.

K.M. NATARAJ: I'm sorry.

CHIEF JUSTICE DY CHANDRACHUD: ...continued application?

K.M. NATARAJ: ... of Article 370 discriminated and opposed to basic structure. Fourthly, Doctrine of Federalism the foundation which they are laid.

CHIEF JUSTICE DY CHANDRACHUD: Just wait.

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K.M. NATARAJ: Yes. In the *stricto sensu* has no application in so far as Article 370 process is concerned.

JUSTICE BR Gavai: What is the fourth one?

K.M. NATARAJ: The Doctrine of Federalism. That Federal structure principle has no application in *stricto sensu* in so far as process under Article 370 is concerned. Now, first, let me deal with the last point with regard to the Federal Structure Theory, which they advanced or propounded in support of their contention, by virtue of it is the Article 370 abrogation, and all these process federal structure has been violated. While dealing with that first let me take this Honourable Court to the provisions under the Constitution where under the constitutional provisions can be amended. That is Article 368. Now kindly have... take Article 368 in juxtaposition with Article 370. There are two situations. Under Article 368, that is, the provision under which the Constitution can be amended. That is the provision which recognizes, (1) Constituent power. (2) While amending the constitutional provisions in most of the cases, we require the majority or the two third of the majority, as provided under Article 368(1). The second part is equally important, which recognizes federalism is the next part where the ratification. Article 368(2), that recognizes federalism in the matter of amendment to the Constitution.

CHIEF JUSTICE DY CHANDRACHUD: Yes.

K.M. NATARAJ: Kindly see the keywords under Article 368. Kindly take the keywords under Article 368. 368(1), notwithstanding anything contained in this constitution. President, may in excess of its constant power. Constant power is explicitly brought into the constitution provision for the purpose of amendment under Article 368(1). In exercise of constituent power amend by the way of addition, variation, or repeal, any provision of this Constitution in accordance with the procedure laid down in this Article. So for the purpose of repeal the power exercised is recognized as a constituent power under Article 368(1). Now kindly go to (2). An amendment of this Constitution may be initiated only by the introduction of a bill for the purpose of either House in a Parliament and when the bill is passed, each House, by a majority of total membership of that House and by a majority of not less than two thirds of the members of the House are voting, that is the second part. Then proviso, provided that if such amendment seeks to make any change in Articles 54, 55 and so and so, so and so, the amendment shall also require to be ratified by the Legislature of not less than one half of the States. So the collective consent theory is introduced under Article 368 for the purpose of

1 amendment of the Constitution. It is a collective consent, which is required under Article 368
2 for the purpose of amending the Constitution. In a way, it is a veto power conferred upon the
3 majority of the States. Now have 370, Articles 370 in a juxtaposition. Kindly direct go to Article
4 370(3). Notwithstanding anything contained in these provisions of this Article, the President
5 may, by notification, declare that this article shall cease to be operative or shall be operative
6 only with such exceptions or modifications, as may specify, provided that the recommendation
7 of the Constituent Assembly of the State, so and so, so and so shall be necessary so and so.
8 368, speaks of the ratification, a collective consent, and the veto power as a recognition of
9 federal structure is embodied under Article 368. However, when it comes to Article 370, the
10 language is only recommendation which already they pointed out, it is only a...

11

12 **JUSTICE B.R. GAVAI:** It has been argued consistently. What recommendation, has been
13 argued.

14

15 **K. M. NATARAJ:** Argued. Therefore, I'm not touching. I am pointing out to the difference
16 between the ratification as a matter of the federal structure, which is brought in for the purpose
17 of Amendment and 370, which only says the recommendation.

18

19 **CHIEF JUSTICE DY CHANDRACHUD:** But equally the adaptation to the Constitution
20 ensured that even in the matter of an amendment, the President has to still go through the
21 route of Article 370(1),

22

23 **K. M. NATARAJ:** Absolutely. Absolutely. Therefore, the *stricto*, in the *stricto sensu*, Article
24 368 principles of getting it ratified will not be applicable to, when it comes to 370 only the
25 recommendation is required, which has a very, very limited time.

26

27 **CHIEF JUSTICE DY CHANDRACHUD:** When additional safeguard was introduced and
28 that safeguard is not merely in matters which require ratification by half the states.

29

30 **K. M. NATARAJ:** Correct.

31

32 **CHIEF JUSTICE DY CHANDRACHUD:** But any Constitutional Amendment has to go
33 through the process of Article 370.

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35 **K.M. NATARAJ:** 370.

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37 **CHIEF JUSTICE DY CHANDRACHUD:** In relation to J&K.

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K.M. NATARAJ: J&K.

CHIEF JUSTICE DY CHANDRACHUD: As it then stood.

K.M. NATARAJ: Yes, that's right. But However reading these two articles in a different language will make either of them read on it. Otherwise, straight away, we can go under Article 368 for any kind of amendment of the Constitution.

JUSTICE SANJAY KISHAN KAUL: Whether amendment provisions will have impact on different States.

K.M. NATARAJ: Correct.

JUSTICE SANJAY KISHAN KAUL: This is a provision which only has an impact on [UNCLEAR]

K.M. NATARAJ: Yes. When the larger power under Article 368 itself is conferred for the purpose of certain amendments of the Constitution, when 368 itself is available, there is no question of applying 370. Reading in any other form makes 370 redundant, or if you apply 370 in another form 368 makes redundant.

JUSTICE SANJAY KISHAN KAUL: It has always been put to us that 370(3) was a self-destructive mechanism so far as 370 is concerned. That we've already noted.

JUSTICE SANJIV KHANNA: Mr. Nataraj, what you're probably trying to highlight is that the argument that the Federal structure gets affected because of abrogation of 370s should not be accepted for the reason that the Federal structure is protected by 368. And you cannot say the federal structure is diluted in case 370 is.....

K.M. NATARAJ: 370 is concerned. So federal structure is applied and protected under Article 368 and under Article 370 there is no such strict application of Federal structure for the purpose of Article 370. Any other interpretation would, in a way makes either 370 or 368 a redundant provision. No constitutional provision. So therefore power conferred under Article 370 is a unique, superior power. It is neither a Constituent Power nor a Legislative power, nor an Executive power. However, it has the flavour of all three. It is a superior power conferred under the Constitution on the President to make introduce.

1

2 **CHIEF JUSTICE DY CHANDRACHUD:** Now look at our problem, two ASGs arguing two
3 different things. Mr Dwivedi, said it's a Constituent Power.

4

5 **K.M. NATARAJ:** It has.

6

7 **CHIEF JUSTICE DY CHANDRACHUD:** Of course Mr. Dwivedi is not [UNCLEAR]. The
8 point is he's on your side now at some point we were told that they had differing interpretation.
9 Now we are in a situation where the Respondents are coming with....

10

11 **K.M. NATARAJ:** It has the flavour of all three. It has the flavour of all three.

12

13 **JUSTICE SANJAY KISHAN KAUL:** What I don't understand the Attorney and Solicitors
14 are given a perspective of how the Constitution is understood from the global perspective. Will
15 we have different perspectives?

16

17 **K.M. NATARAJ:** No. Not at all. Not at all. Not at all. It is in line with the argument advanced
18 by learned Solicitor General. What we say that it is a unique, extraordinary power conferred
19 on the President to abrogate or to bring in certain changes in the Constitution which has the
20 flavour of Constituent Power, which has the flavour of Executive Power, which has the flavour
21 of Legislative Power. So that is a Plenary Power conferred on the President and when such a
22 power is conferred on the President, plenary power, we need not, or we should not read with
23 any kind of limitations for exercise of such power. The... such an extraordinary power
24 conferred on the President need not be or should not be read with any kind of limitations and
25 it must be given fullest meaning and to be applied without any procedural restrictions.

26

27 **JUSTICE B.R. GAVAI:** The proviso has to be followed?

28

29 **K.M. NATARAJ:** The proviso has to be followed. There is no doubt about it, but you can't
30 equate with the Article 368, that the stricto...

31

32 **JUSTICE B.R. GAVAI:** That proviso has to be followed. Then what happens to the
33 requirement there in?

34

35 **K. M. NATARAJ:** No the requirement is correct, but the yardstick is totally different. We
36 can't equate with the procedure required to be followed under Article 368. Proviso need not
37 be in strict sense it need not be followed, and when it's a Plenary Power, it need not be read

1 with the limitations as held in *R versus Burah*, which has been applied in the case of
2 *Kesavananda Bharati*.

3

4 **CHIEF JUSTICE DY CHANDRACHUD:** Thank you thank Mr. Nataraj. Mr. Jethmalani?

5

6 **TUSHAR MEHTA:** Clarification, whether the power is Constitutional Power. Executive
7 Power, or Administrative Power? That exercise is irrelevant. It is a *sui generis* power, given
8 only in one Article through the highest constitutional. Thats My Lord the [UNCLEAR].

9

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

11

12 **MAHESH JETHMALANI:** My Lord, I appear for the interveners in 171690.

13

14 **JUSTICE SANJAY KISHAN KAUL:** Would you repeat that, Mr. Jethmalani?

15

16 **MAHESH JETHMALANI:** My Lord, IA Number 171690 in Mohammad... in the lead
17 petitions... In the lead petitions and the intervener. One of my clients...

18

19 **CHIEF JUSTICE DY CHANDRACHUD:** In 1047?

20

21 **MAHESH JETHMALANI:** Yes, in 1037.

22

23 **CHIEF JUSTICE DY CHANDRACHUD:** In 1037.

24

25 **MAHESH JETHMALANI:** My clients basically are members of the *Gujjar Bakeral*
26 Community in Jammu and Kashmir. They're members of a Scheduled Tribe. And My lord,
27 they constitute 73.25% of the total Scheduled Tribe population of Jammu and Kashmir.

28

29 **CHIEF JUSTICE DY CHANDRACHUD:** 73.25%?

30

31 **MAHESH JETHMALANI:** 73.25%. But of course we strongly support the amendments for
32 the reason that the provisions in the constitution pertaining to Scheduled Tribes, 330 etc. were
33 never applied.

34

35 **CHIEF JUSTICE DY CHANDRACHUD:** But Mr. Jethmalani, your knowledge is
36 theoretical. Unless you can state with certainty before us that you have driven around in
37 Ladakh. Have you been to Ladakh?

1

2 **MAHESH JETHMALANI:** I've been to Ladakh. I have been to Ladakh. But many years ago,
3 many, many years ago. In the days when houseboats used to flourish, in those days and they
4 have come back now.

5

6 **JUSTICE B.R. GAVAI:** Houseboats are not there.

7

8 **CHIEF JUSTICE DY CHANDRACHUD:** Is it there in Ladakh. I have not seen a houseboat
9 in Ladakh.

10

11 **MAHESH JETHMALANI:** No, no. Houseboat in Srinagar and then from there on. Why
12 don't you go there? I'm told a lot of people go there now it's a... Go there and take a look for
13 yourself. Empirical evidence will stare you in the face.

14

15 The Himalayan Car Rally which used to take place then in the former days has now been
16 revived. My daughter's scheduled to go soon to Leh and Ladakh, in that Himalayan Car Rally.
17 So they're taking a sports car themselves and traveling up. She and her friends.

18

19 **CHIEF JUSTICE DY CHANDRACHUD:** Justice Variava used to participate.

20

21 **MAHESH JETHMALANI:** Yes Your Lordship is right. Justice Variava used to. All
22 affirmations on the.. reaffirmations on the other side about the congenial climate that now
23 takes place in Jammu and Kashmir. But my clients are restricting themselves to the challenge
24 to 370(3) and the proviso thereto. As also to the Amendment to 367 brought about by C.O.
25 272. I am not going to the question of 356 and the territorial reorganization. That's beyond
26 tribal folk. I know it's 356 really deals with the satisfaction of the President and the Governor's
27 report and so on. Matters which are best dealt with by the Government. So I'm not going into
28 that. I'm going with these two questions only.

29

30 **CHIEF JUSTICE DY CHANDRACHUD:** So you're going to go into 370(3)?

31

32 **MAHESH JETHMALANI:** 370, the proviso.

33

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

35

36 **MAHESH JETHMALANI:** And 367 amendment which replaced by C.O. 272, dated 5th
37 August 2019 which substituted the word Constituent Assembly with the word Legislative

1 Assembly. Now, incidentally, I might just mention that my clients are the beneficiaries
2 subsequent to 5th August 2019.

3

4 **CHIEF JUSTICE DY CHANDRACHUD:** Actually you've helpfully identified the four key
5 areas in the case, if the case turns. One, 370 itself and the proviso to 370(3) to the use of the
6 amending power under 367; three, the reorganization and four, 356.

7

8 **MAHESH JETHMALANI:** 356. those are really the four issues which arise at the moment.

9

10 **CHIEF JUSTICE DY CHANDRACHUD:** Key four areas I would say because there are
11 issues which arise from....

12

13 **MAHESH JETHMALANI:** So with regard to the latter two, I'm adopting the arguments of
14 the State, of the Government.

15

16 **CHIEF JUSTICE DY CHANDRACHUD:** All right. How do you formulate your... so that
17 then we can...

18

19 **MAHESH JETHMALANI:** Yes. My Lord I've submitted written submissions two days ago.

20

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

22

23 **MAHESH JETHMALANI:** My Lord, briefly on the question of sovereignty. Where does
24 sovereignty lie? Because it then dovetails into the questions which are the subject matter to
25 the two issues I am going to deal with. Just a brief overview about the sovereignty question My
26 Lord. And I divided My Lord sovereignty can be looked at in various different ways, there are
27 many divisions, external, internal, political, legal. But I am going to just talk about the political
28 and legal sovereignty very briefly. These two issues. My Lord, as far as political sovereignty is
29 concerned there is no doubt that the other side has not even seriously challenged it. Political
30 sovereignty vests with the Union. And the clearest indication of that is the preamble. Yeah,
31 political sovereignty vests with the... qua the State. And a simple look at the preamble would
32 indicate that. The preamble of the two, the Union and the Federating Unit to the State of
33 Jammu and Kashmir would reveal that. A point noted by Justice Nariman in the ***State Bank***
34 ***of India case***. Your Lordships will kindly have a look first at our preamble very quickly. "We
35 the people of India, having solemnly resolved to constitute India into a sovereign". My Lord
36 the word Sovereign is key. Socialist, Secular, Democratic Republic. Now My Lord, in contrast,
37 the Constitution of Jammu and Kashmir has the following preamble. 'We the people of State

1 of Jammu and Kashmir having solemnly resolved in pursuance of accession of this State to
2 India, which took place on 26 October 1947, to further define the existing relationship of the
3 State with the Union of India as an integral part thereof.' So My Lord the preamble itself
4 makes no mention of sovereignty. In fact, the preamble is dealt with further defining the
5 existing relationship of the State with the Union as an integral part thereof. So My Lord it's an
6 acknowledgment of the Union sovereignty over the state. This is political sovereignty. The
7 Constitution was geared towards defining the relationship of Jammu and Kashmir for the
8 Union as an integral part of the Union.

9

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

11

12 **MAHESH JETHMALANI:** And My Lord first and foremost the Permanent Residents of the
13 State of Jammu and Kashmir are citizens of India. Although Mr. Lone may sometimes behave
14 that like he is not, but in fact he is. However, I come to the question of legislation. Legislative
15 Sovereignty is divided between the Union and the State. Look at Article 370, which is the
16 governing Article of the relationship between the Union and the State. Matters in the
17 Concurrent and Union List acceded to by the then Maharaja, are within the realm of the
18 Centre, the Union. And broadly speaking My Lord, the other parts of the Constitution, are
19 within the jurisdiction of the State.

20

21 **CHIEF JUSTICE DY CHANDRACHUD:** Therefore, the sequitur of your argument would
22 be that matters which do not form part of the Instrument of Accession in relation to which the
23 Union was given exclusive control, the four matters, the legislative sovereignty would
24 therefore continue to vest with the Jammu and Kashmir Legislative Assembly...

25

26 **MAHESH JETHMALANI:** Subject to the power of the President to apply the provisions of
27 the Constitution under B 1, and 2, but with the concurrence of the consultation of the State.
28 So any provision theoretically speaking if those qualifications arise, if that concurrence or that
29 consultation takes place, then the entire Constitution can be applied to the State of Jammu
30 and Kashmir under 371. 373, is distinct from 371 because it's at a one stroke abrogation of the
31 entire Article 370.

32

33 **CHIEF JUSTICE DY CHANDRACHUD:** Therefore Mr. Jethmalani, you therefore also
34 necessarily accept that there is a concept. Sovereignty has two connotations. One, external
35 sovereignty, which undoubtedly vests completely with the Union of India. Internal
36 sovereignty, which is then distributed between the Union and the States.

37

1 **MAHESH JETHMALANI:** Yes, that My Lord, the patent look at that. Nobody can deny that.
2 But the Constitution envisages that from time to time, further and further and that's been the
3 you know, as has been pointed out repeatedly during the course of these arguments, that with
4 the passage of time from 1950 onwards more and more provisions of the Constitution have
5 been made applicable, and some of them are those which were not originally applicable to the
6 legislative or within the legislative jurisdiction of the Centre. My Lord, But ultimate legal
7 sovereignty vests with the Union and My Lord that is to be, that is Article 370(3). Article 370,
8 Sub- Article (3), is indicative of the fact that ultimate legal sovereignty in the sense that you
9 can get rid of the tunnel altogether that connects the Union with the State, legally and
10 Constitutionally. Ultimate legal sovereignty rests with the Union of India and My Lord 370(3)
11 , is key is one of the key issues in this entire discussion in all these arguments 370(3) and My
12 Lord the reading of the proviso. The effect of the proviso. That establishes most of the issues
13 that arise in this case, at least it My Lord it sets a platform whereby the others can be. Absent,
14 that there would be nothing else. Which is why the other side is at pains to point out that after
15 the Constituent Assembly dissolved or became extinct, 370(3), has no application. In other
16 words, the substantive path of 370(3), is now swallowed by the proviso. The absence of the
17 Constituent Assembly and the power of recommendation, which was vested in it has now
18 disappeared. That's their case. Now My Lord, on that proviso I'll have something to say. But
19 this is the sovereignty issue. Now that is also Article 147, which is some indication of legal
20 sovereignty of the State of Jammu and Kashmir. That's the amending part. That is an
21 acknowledgment. The third part of C, Clause (C) of 147 is an acknowledgment by the State of
22 Jammu and Kashmir that they cannot touch the Constitution of India, as applicable to the
23 State of Jammu and Kashmir. Now the issue of Article 370(3), and the proviso thereto, it
24 actually dovetails into three questions, which I'll just frame, which are at the heart of the
25 controversy here. The first is, is Article 370 temporary or permanent? Did the extinction of the
26 Constituent Assembly of Jammu and Kashmir referred to in the proviso to that article render
27 entire Article 370(3) otiose? And third, was the amendment by C.O. 272 dated 5th, August
28 2019, to Section 367, sorry to Article 367, Article 367 by the addition of Clause (4)(d), that
29 article which made Constituent Assembly read as Legislative Assembly, was that
30 constitutionally valid?

31

32 **CHIEF JUSTICE DY CHANDRACHUD:** Since we have 55 minutes now to lunch. We'll
33 give you time till 12: 20. Mr. Guru 12:35. Then we will hear the interveners for two to five
34 minutes and then we'll give Mr. Banerjee, the interveners between 12:35 and 12:50 and Mr.
35 Banerjee 12:50 to 1:00.. That's the way we'll do it.

36

1 **MAHESH JETHMALANI:** My Lord because I have to read some extremely important
2 Constitutional Orders, see just very briefly.

3

4 **CHIEF JUSTICE DY CHANDRACHUD:** Give us the page reference and the para.

5

6 **MAHESH JEHTMALANI:** Yes, My Lord, I just want to read the portion. I'll tell your
7 Lordship what my argument is. I'll come to in a minute.

8

9 **CHIEF JUSTICE DY CHANDRACHUD:** All right. Let's get to the argument. Otherwise
10 we're losing time. there's 15 minutes available.

11

12 **MAHESH JEHTMALANI:** Yes, let's not waste time. Time management. I agree. Now My
13 Lord as far as the temporary and permanent part is concerned, two issues have already been
14 discussed. One is Article 370 is a provision that is a part of Chapter 21 of the Constitution of
15 India, which deals with temporary provisions. Lordships have already noted that. Second is,
16 the title of the article which describes its provisions as temporary provisions, with respect to
17 the State of Jammu and Kashmir. And My Lord third is, the effect of the proviso requiring the
18 prior necessary recommendation of the Constituent Assembly of Jammu and Kashmir before
19 the President can act under 370(3)(1).

20

21 **CHIEF JUSTICE DY CHANDRACHUD:** So your contention is that the Constituent
22 Assembly of Jammu and Kashmir was necessarily limited in point of time and purpose. The
23 time, the framing of the Constitution for the state purpose. Once that purpose was over, it had
24 to come to an end. That's your submission?

25

26 **MAHESH JETHMALANI:** And My Lord the proviso. The proviso and just one judgment,
27 which I'll just give Your Lordship, the citation that it is a principle of construction that unless
28 clearly indicated, a proviso would not take away substantive rights or powers conferred by a
29 section or a subsection. That's *Badu Gopal's* case and the citation is in my written
30 submissions, Paragraph 7.

31

32 **CHIEF JUSTICE DY CHANDRACHUD:** Just give us the Volume, PDF page and para.

33

34 **MAHESH JETHMALANI:** Yes. I've annexed it to my note. I've annexed it to my note. But
35 if Your Lordship wants in the PDF.

36

1 **CHIEF JUSTICE DY CHANDRACHUD:** Just give it to us here. We're taking it down. You
2 don't have to flip.

3

4 **MAHESH JETHMALANI:** It's not in a PDF. It's not in the.... Your Lordship.

5

6 **JUSTICE SANJIV KHANNA:** Case not pdf

7

8 **CHIEF JUSTICE DY CHANDRACHUD:** Case not pdf.

9

10 **MAHESH JETHMALANI:** It's a very short judgement My Lord, two and a half page.

11

12 **CHIEF JUSTICE DY CHANDRACHUD:** G.P. Singh's interpretation of statutes. it's a
13 whole section on how to construe a proviso.

14

15 **MAHESH JETHMALANI:** Yes.

16

17 **CHIEF JUSTICE DY CHANDRACHUD:** Sometimes it's explanatory. Sometimes it's an
18 exception, it's clarificatory.

19

20 **MAHESH JETHMALANI:** But My Lord the principle seems to be that unless clearly
21 indicated, it would not take away the substantive rights conferred by the main section.

22

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

24

25 **MAHESH JETHMALANI:** Now My Lord, just a look at 373, and then I take you to my
26 submissions on this most important point.

27

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

29

30 **MAHESH JETHMALANI:** Now My Lord this, the Constitution and its provisions have to
31 be looked at the perspective of people drafting it in 1950 or in 1950 when they did not know
32 who the ultimate constituent power would be in Jammu and Kashmir. Essentially, what was
33 370? 370(3), which talked about the article ceasing to be operative altogether because it was
34 the terminus of the entire Article. That Article required the Constituent Power on behalf of the
35 Union, acting on the one hand, which is the President of India, qua 370 and Article 3, qua
36 Jammu and Kashmir through Article 370, he was acting as a Constituent Power. And on the
37 other hand, the Constituent Power for the State of Jammu and Kashmir at that time was a

1 Constituent Assembly. All documents from 1948 to 1950, all constitutional documents indicate
2 that a Constituent Assembly for the purpose of framing a Constitution was necessary and that
3 was the way forward. Which is why Article 373, referred to the Constituent Assembly. But that
4 didn't mean that once the Constituent Assembly completed its task, which was the task of
5 framing the Constitution, that Article 373, it would have no meaning. It would be otiose. Now
6 on the contrary, on the contrary the C.O.s issued from 1948 onwards. My Lords, now this is
7 important, indicate two things. I'll just take Your Lordships very quickly through the C.O.s
8 now.

9
10 **CHIEF JUSTICE DY CHANDRACHUD:** What do they indicate?

11
12 **MAHESH JETHMALANI:** Yes. First they indicate expressly that the Constituent Assembly
13 and the Legislative Assembly insofar as it applies to Constitution of India are synonymous. In
14 other words...

15
16 **CHIEF JUSTICE DY CHANDRACHUD:** Come again. That the Constituent Assembly and
17 the Legislative Assembly...

18
19 **MAHESH JETHMALANI:** Are synonymous. I'll point out that expressly.

20
21 **CHIEF JUSTICE DY CHANDRACHUD:** Where do you get that from?

22
23 **MAHESH JETHMALANI:** From the various orders right up to 58. That they have to be
24 read as the same, they have to be read as same. Now, Your Lordships, kindly see straight away
25 the first one, which is C.O. 10. What's the date C.O. 10, 26th January 1950. Now My Lords,
26 this was the same time as the Constitution, adoption of our Constitution, 26 January, 1950.
27 This C.O....

28
29 **CHIEF JUSTICE DY CHANDRACHUD:** So, what part of C.O. 10, are you relying upon?

30
31 **MAHESH JETHMALANI:** 2nd January.

32
33 **CHIEF JUSTICE DY CHANDRACHUD:** Just give us a Volume and page just so that we
34 have it at one place ,

35
36 **MAHESH JETHMALANI:** Documents Volume 3, PDF Page 7.

37

1 **CHIEF JUSTICE DY CHANDRACHUD:** What does the second schedule?

2

3 **MAHESH JETHMALANI:** Now My Lords, the second schedule, says Article 54 and 55 shall
4 apply subject to the modifications. Now My Lords, Article 54, 55 refers to the elections for the
5 President of India.

6

7 **JUSTICE SANJIV KHANNA:** What is the PDF page number?

8

9 **MAHESH JETHMALANI:** Yes 7, in Documents Volume 3,

10

11 **CHIEF JUSTICE DY CHANDRACHUD:** Volume 3?

12

13 **MAHESH JETHMALANI:** Yes. This is in Column 3 of the second schedule, that the
14 reference to the elected members of the Legislative Assemblies of the State and to each such...
15 has Your Lordship got it?

16

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

18

19 **MAHESH JETHMALANI:** And to each such elected member shall be deemed to include
20 respectively, a reference to the members of the Constituent Assembly of the State.

21

22 **CHIEF JUSTICE DY CHANDRACHUD:** Because there was no Legislative Assembly at all.

23

24 **MAHESH JETHMALANI:** There was no Legislative Assembly. Absolutely right. There was
25 no Legislative Assembly at that time. But even when there was, so that's the whole point. The
26 point is, it was deemed to be a Legislative Assembly for the purpose of our Constitution. Why
27 was this necessary? In '55 you require... They were trying to get members of the Legislative
28 Assembly of Jammu and Kashmir.

29

30 **CHIEF JUSTICE DY CHANDRACHUD:** All right, which is the next point. Which is the
31 next article?

32

33 **MAHESH JETHMALANI:** The next...So by a deeming fiction, the Legislative Assembly
34 member were the constitution...

35

36 **CHIEF JUSTICE DY CHANDRACHUD:** Please give us the next one, because we are now
37 five minutes short of the.....

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MAHESH JETHMALANI: Yes, then My Lord the next one is C.O. 39. That's at PDF page 10. Volume 3, again. PDF page 10.

CHIEF JUSTICE DY CHANDRACHUD: C.O. 39.

MAHESH JETHMALANI: PDF page 10.

CHIEF JUSTICE DY CHANDRACHUD: Yes

MAHESH JETHMALANI: Reference to the elected members of the Legislative Assemblies of the States and to each such elected member shall be deemed to include, respectively a reference to the members of the Constituent Assembly of the State and to each such members. Now My Lord, in C.O.48, which is the next one. I'm running to it now and this was in the 1954. The date of C.O. 48 is 15th, May 1954. Now in this C.O....

CHIEF JUSTICE DY CHANDRACHUD: That C.O. you're saying?

MAHESH JETHMALANI: That's Volume 3, PDF page 13 and I'm reading at page 18.

CHIEF JUSTICE DY CHANDRACHUD: That is C.O. number?

MAHESH JETHMALANI: 48, dated 15th, May 1954.

CHIEF JUSTICE DY CHANDRACHUD: Right 1954. At page 18. All right.

MAHESH JETHMALANI: Now My Lord, in this C.O. for the first time previously it was done by C.O.s but for the first time Article 367 was amended as applicable to J&K.

CHIEF JUSTICE DY CHANDRACHUD: How is it relevant for your argument that Constituent Assembly means Legislative Assembly?

MAHESH JETHMALANI: Because that's what the Union of India has done. They have amended 367.

CHIEF JUSTICE DY CHANDRACHUD: Sub-Clause (d)?

1 **MAHESH JETHMALANI:** Yes, yes. That's C.O. 272, which is under challenge. The same
2 procedure was done was undertaken in 1954 for the first time this was done.

3

4 **JUSTICE B.R. GAVAI:** This was also pointed out to us by I think the learned Solicitor.

5

6 **CHIEF JUSTICE DY CHANDRACHUD:** In fact, that's in his list of dates. This is the first
7 exercise of 367 power.

8

9 **MAHESH JETHMALANI:** But it was even.. Yes, but even earlier they were synonymous.
10 The Legislative Assembly and the Constituent Assembly. [UNCLEAR] 1948.

11

12 **CHIEF JUSTICE DY CHANDRACHUD:** I think it's 14th of May 1954. This 14 May 1954.

13

14 **MAHESH JETHMALANI:** Yes, the 15 May 1954. Right.

15

16 **CHIEF JUSTICE DY CHANDRACHUD:** When there's no Legislative Assembly in Jammu
17 and Kashmir.

18

19 **MAHESH JETHMALANI:** No, it's not. But now an amendment is made that they will be
20 the same even when there's no Legislative Assembly. And now we are not talking about for the
21 purpose of a Presidential Election. This is now, for every purpose.

22

23 **CHIEF JUSTICE DY CHANDRACHUD:** All right. Which is the next C.O.?

24

25 **MAHESH JETHMALANI:** Your Lordship might just see a provision in the Constitution of
26 Jammu and Kashmir, 85(2). 85 Sub-Section(2).

27

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

29

30 **MAHESH JETHMALANI:** This is at PDF page 56, Volume 2.

31

32 **CHIEF JUSTICE DY CHANDRACHUD:** PDF page?

33

34 **MAHESH JETHMALANI:** PDF page 56. Until rules are made under Sub-section 1, the
35 Rules of Procedure and Standing Orders in force immediately before the commencement of
36 this Constitution with respect to the Constituents, with respect to the Constituent Assembly,
37 while discharging the functions of the Legislative Assembly shall have effect in relation to each

1 House of the Legislature. There was only one. Subject to such modifications and adaptations, as
2 may be made therein by the Speaker of the Legislative Assembly or the Chairman of the
3 Legislative Council, as the case may be. My Lord substantively and in matters of procedure the
4 Constituent Assembly and the Legislative Assembly. In fact, what emanates from all this is
5 that the constituent...

6

7 **CHIEF JUSTICE DY CHANDRACHUD:** But Mr. Jethmalani, the fact still remains that
8 after the Constitution of Jammu and Kashmir was framed on 26 of January 1957, Article
9 367(4)(d) was again amended. So delete Clause (D).

10

11 **MAHESH JETHMALANI:** Yes.

12

13 **CHIEF JUSTICE DY CHANDRACHUD:** So that equivalence between the Constituent
14 Assembly and the Legislative Assembly ceases the moment the Constitution of Jammu and
15 Kashmir has failed.

16

17 **MAHESH JETHMALANI:** Yes, Your Lordship is absolutely right. I'm coming to that last
18 one in Part 58. That's the last piece. But My Lord, what happened is....

19

20 **CHIEF JUSTICE DY CHANDRACHUD:** That you will find at your Volume 3, page 25,

21

22 **MAHESH JETHMALANI:** Yes, Yes Your Lordship is right, at page 25. The point is all this
23 shows that the Legislative Assembly, My Lord why was this deleted? This was deleted because
24 after the dissolution or the extinction of the Constituent Assembly, the constituent power in
25 Jammu and Kashmir was now the Legislative Assembly. The power of amendment in Article
26 368, it's in virtue of its being a constituent power that Parliament can amend. This is also
27 recognized by at least three judgments in *Indira Gandhi's, Nehru's case, Raj Narain*. I
28 go back to the beginning of what I said right at the outset, that the idea was that 373, being the
29 final step after which Article 370 altogether ceased to exist.

30

31 **CHIEF JUSTICE DY CHANDRACHUD:** The only distinction is that a legislature which
32 exercises the power of amendment, is not a Constituent Assembly. It's exercising a constituent
33 power.

34

35 **MAHESH JETHMALANI:** I agree it is. I agree it is. But otherwise the alternative
36 interpretation would be that abrogation ceases to exist. You can never abrogate Article 370.
37 That would be the alternative conclusion. My Lord we have to see why Parliament amended

1 Article 370, through 367 in the manner which it did; that's the whole challenge to 272. That is
2 the whole challenge. And it did so. It did so because not only was it synonymous for a.... My
3 Lord they wore two hats. The Constituent Assembly wore two hats. The same people, the 75
4 people who constituted the Constituent Assembly in 1951, when it was convened were the same
5 people who were also members of the Legislative Assembly.

6

7 **CHIEF JUSTICE DY CHANDRACHUD:** Argument to the Learned Solicitor is that,
8 independent of the amendment of Article 367.

9

10 **MAHESH JETHMALANI:** Yes.

11

12 **CHIEF JUSTICE DY CHANDRACHUD:** 370(3), and the exercise of that power still
13 stands.

14

15 **MAHESH JETHMALANI:** Of course it stands.

16

17 **CHIEF JUSTICE DY CHANDRACHUD:** And it still survives.

18

19 **MAHESH JETHMALANI:** Of course. I'll tell the Lordship why.

20

21 **CHIEF JUSTICE DY CHANDRACHUD:** I have to go as far as, according to him. He has
22 not pitched it though he said look 367 has also been used in the power..

23

24 **MAHESH JETHMALANI:** Yes

25

26 **CHIEF JUSTICE DY CHANDRACHUD:** The three times it was used, but yes as
27 independent of 367 the [UNCLEAR]

28

29 **MAHESH JETHMALANI:** It can still be done. Which is why I come to my next point and
30 that's one of the 360.... My Lord they became the successors, A. They were certainly the
31 successors. If there was any constituent power which could replace the Constituent Assembly
32 in the proviso, it was certainly only the Legislative Assembly. Now Your Lordship is right, 367
33 could not be the source for, it did not necessarily have to be the source for that replacement
34 between the Constituent Assembly and the Legislative Assembly. It did not have to be a source.
35 But it was implicit in any event. All 367 did, or the Amendment to 367 did by C.O. 272 was to
36 recognize an implicit position. It was not only synonymous for a substantial period of time,
37 but it was a successor and C.O. 272 did not make a substantive change. It made a change of it

1 was a clarificatory change, which was already inherent, which was already implicit in Article
2 373 proviso.

3

4 **CHIEF JUSTICE DY CHANDRACHUD:** All right, anything else, Mr. Jethmalani now?

5

6 **MAHESH JETHMALANI:** Now My Lord, *Damnoo*, the *Damnoo's* case applies. Please
7 one look at *Damnoo* My Lords to consolidate this argument.

8

9 **CHIEF JUSTICE DY CHANDRACHUD:** *Damnoo* we have seen. We'll have a look at it.

10

11 **MAHESH JETHMALANI:** Just some paragraphs with special emphasis.

12

13 **CHIEF JUSTICE DY CHANDRACHUD:** Which are the paragraphs?

14

15 **MAHESH JETHMALANI:** Yes, I'll give it. And I'll give Your Lordship the paragraphs,
16 Paragraph 25. Your Lordships just give me a minute. Yes My Lords the factual situation which
17 My Lord makes the question of law decided clearer is in paragraph 6, 1, 7 and 8.

18

19 **CHIEF JUSTICE DY CHANDRACHUD:** Of *Damnoo*?

20

21 **MAHESH JETHMALANI:** Of *Damnoo*. that's a factual situation but if Your Lordships ,
22 recall it was that change it was that change of *Sadr-e-Riyasat* to the Governor of Jammu and
23 Kashmir, and the findings are at 19 to 22.... actually 19 to 28. 19 to 28. And My Lord 367 was
24 upheld by that Constitution Bench. The Amendment to 367 was upheld by the Constitution
25 Bench on the ground that it was merely a clarificatory. It was not an.... It was not an
26 amendment of substance. So also here. I bring my submission within the four corners of
27 *Damnoo* that this was inherent.

28

29 **CHIEF JUSTICE DY CHANDRACHUD:** Alright , anything else Mr. Jethmalani because
30 now your second point you have covered this.

31

32 **MAHESH JETHMALANI:** As my learned friend pointed out, that *Damnoo* also refers to
33 it. *Damnoo* says it sought its aid of the judgment. Section 18 of the General Clauses Act.

34

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

36

1 **MAHESH JETHMALANI:** So, My Lord. General Clauses Act applies because it's my
2 contention that the Constituent Assembly is the successor, the Legislative Assembly is the
3 successor, and Section 18 of the General Clauses Act will squarely apply. As it does so the
4 powers vested in the original authority will devolve to the successor authority in this case, in
5 this case the Constituent Assembly.... the Legislative Assembly.

6

7 **CHIEF JUSTICE DY CHANDRACHUD:** Thank you Mr. Jethmalani. Yes Mr. Guru?

8

9 **GURU KRISHNAKUMAR:** I appear in IA My Lords, 9596. In WP My Lords 1037 of 2019.
10 My Lords just a minute, My Lord

11

12 **CHIEF JUSTICE DY CHANDRACHUD:** Who are the applicants?

13

14 **GURU KRISHNAKUMAR:** The applicants My Lords are persons displaced persons from
15 that portion of Jammu and Kashmir, which is now called Pakistan Occupied Jammu &
16 Kashmir. They represent that set of people My Lords and their interests. These are the
17 interveners. With prejudice to my time limit which My Lords have given, just an aside My
18 Lords. I'm reminding myself of being that apocryphal son-in-law under Hindu Law My Lords,
19 which Sir Alladi referred to. Apparently My Lords, there was a very intricate problem of Hindu
20 succession under Mitakshara Dayabhaga Law, before an English Judge. The questions were
21 getting so complicated that the Judge tongue in cheek asked, Sir Alladi, what would the son-
22 in-law get? I believe, Sir Alladi said, whatever he's able to lay his hands on. That My Lords
23 seems to be my position in terms of both time and submissions to really...

24

25 **CHIEF JUSTICE DY CHANDRACHUD:** What are the key submissions?

26

27 **GURU KRISHNAKUMAR:** Key submissions. I'll refer to this. The rights perspective is
28 probably the decisive factor in determining My Lords the tenability of the challenge which has
29 been mounted by the petitioners. In other words, the rights perspective will trump or override
30 all or any contentions or allegations of processual infirmities. And the reason why I'm making
31 the submission is this My Lords, whether it be these intervening applicants or any of the other
32 intervening applicants whom Mr. Salve represented, Mr. Giri represented, or for that matter,
33 Mr. Jethmalani represented, they represent a cross section of people from Jammu and
34 Kashmir, who have suffered discrimination and loss of rights. Therefore the impugned C.O.'s
35 which make provision for rights for such people across the spectrum the validity will have to
36 be seen in that perspective and in that light. That's my submission for My Lord's consideration.
37 For example, these intervening applicants whom we are referring to? They are probably My

1 Lords, the first victims of the problems which occurred during partition. When the aggression
2 took place and the incursion came, these are the persons who had.. who were displaced by
3 force of circumstances from those areas, Mirpur, Gilgit, Baltistan and all those places. They
4 moved therefore to other parts of Jammu and Kashmir and two other parts of India. Now what
5 is really the problem that they have suffered over the decades now? Because of Section 6 of the
6 Jammu and Kashmir Act... Jammu and Kashmir Constitution and the 35(a) of the Constitution
7 of India as applicable to Jammu and Kashmir. Six purported to set out who permanent
8 residents are, 35(a), introduced My Lords by Constitutional Order 1954, C.O. 48. That
9 provided that permanent residents as defined in 6, they will get certain benefits and the fact
10 that persons who are not permanent residents will not get those benefits cannot be called in
11 question as a matter of justiciability.

12

13 **JUTICE SANJAY KHANNA:** Mr. Guru, just for clarification people who came from the
14 Pakistan occupied Kashmir they were not given rights under 35(a)?

15

16 **GURU KRISHNAKUMAR:** No. For the reason why, I'll tell My Lords why. Because that
17 referred to Permanent Residents. Permanent Residents is defined in the act as, Is any citizen
18 of India, but subject to three important riders. Rider(1) The person must be a state class citizen
19 1 or 2 as on 14th May 1954. (2) He must be ordinarily resident in the State of Jammu and
20 Kashmir, during a period of at least 10 years prior to that date. So the date is shifted back to
21 1944. That therefore meant that even those who were there citizens in Jammu and Kashmir in
22 their own right because of the external aggression during September-October of 1947, they are
23 excluded. That's where the pinch is My Lords.

24

25 **JUTICE SANJAY KHANNA:** If they'd settled down in other parts of the country, they
26 would have got citizenship?

27

28 **GURU KRISHNAKUMAR:** No, they would have had to be only

29

30 **JUTICE SANJAY KHANNA:** Other parts of the country?

31

32 **GURU KRISHNAKUMAR:** Yes, they won't get. If you're in Jammu and Kashmir. Yes. But
33 if we went to other parts of the country, you won't get.

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35 **JUTICE SANJAY KHANNA:** Sorry you are saying the other way around.

36

37 **GURU KRISHNAKUMAR:** May I show six...

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JUTICE SANJAY KHANNA: You're saying the other way round.

GURU KRISHNAKUMAR: No. May I show 6 My Lords? Can I show six?

JUTICE SANJAY KHANNA: Jammu And Kashmir Constitution is in Part 1....Part 2, Part 2?

GURU KRISHNAKUMAR: Volume 2, page 18.

KAPIL SIBAL: I'm sorry to interrupt. There are ten petitions here, which challenge 35(a). My Lords, those have to actually be delinked. Because we are not here concerned with the challenge to 35(a) we are concerned with 370. All that is fine, but that's not to be decided by Your Lordships. If this is upheld if what the Union is saying is upheld, this is unnecessary.

JUTICE SANJAY KHANNA: That's right.

KAPIL SIBAL: Doesn't exist.

JUTICE SANJAY KHANNA: Mr. Sibal therefore, we are going into this.

KAPIL SIBAL: I'm only saying this will only take up the time of the court. That's all.

GURU KRISHNAKUMAR: Every person... I'm at Volume 2, PDF page 18. Every person... May I read it My Lords?is deemed to be a Citizen of India. Under the provisions of the Constitution of India, shall be a permanent resident, if, on the 14th day of May, 1954, he was a State subject of Clause One or of Clause Two or having lawfully acquired immovable property in the State, has been ordinarily resident in the State for not less than ten years prior to that date. Any person who before the 14th day of 1954 was a state subject of so and so, so and so who having migrated after first day of March, 1947. This is an anomalous provision. I'll just show that My Lords. So the first part is 6(1), that talks about two dates 1954 and ten years prior to that. Second.....

JUSTICE SANJIV KHANNA: It's an alternative. A and B is an alternative.

GURU KRISHNAKUMAR: That's right. That's right. But then in terms of actual application they have always been applied together. All these are persons.

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JUSTICE SANJIV KHANNA: They've been applied, treated as cumulative.

GURU KRISHNAKUMAR: Yes, you are outside Jammu and Kashmir, you don't get it. In fact I've given in my application My Lords, the case of how 8700 people and odd people left that place during that time, during partition. Today, My Lord's after the promulgation of the impugned C.O.s, at least 23,000 people have received domicile certificates. About 23-24,000 people. We have mentioned that in our submissions.

CHIEF JUSTICE DY CHANDRACHUD: So states subject of Clause 1 or Clause 2, defined in Clause 3.

GURU KRISHNAKUMAR: Yes.

CHIEF JUSTICE DY CHANDRACHUD: Section. Subsection 3.

GURU KRISHNAKUMAR: Yes.

CHIEF JUSTICE DY CHANDRACHUD: Namely, that refers you to....

GURU KRISHNAKUMAR: 1927

CHIEF JUSTICE DY CHANDRACHUD: So are out there.

GURU KRISHNAKUMAR: Yes.

CHIEF JUSTICE DY CHANDRACHUD: You don't come in there.

GURU KRISHNAKUMAR: No. In fact...

CHIEF JUSTICE DY CHANDRACHUD: Clause 2

GURU KRISHNAKUMAR: No. Because by 1944 What happens is this My Lords, they expect you to be holding property as of 1944. And even though I qualify in fact....

CHIEF JUSTICE DY CHANDRACHUD: Let's say in POK, they are not governed by Clause 3 of Section 6?

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GURU KRISHNAKUMAR: No My Lord. What will happen is they will be governed by Clause 3. That's why I'm saying it is applied cumulatively. You should be a state citizen, state subject of Clause 1 or Clause 2 and you should have been holding.....

CHIEF JUSTICE DY CHANDRACHUD: It says or.

GURU KRISHNAKUMAR: No, but cumulatively it's being applied where you should have held property as of 44.

CHIEF JUSTICE DY CHANDRACHUD: But then Mr. Krishnakumar;

GURU KRISHNAKUMAR: No. All I'm saying is this

JUSTICE SANJIV KHANNA: Mr. Krishnakumar, I don't think 2 can be read as cumulative because it imposes the condition of owning a new property. That owning property.....

GURU KRISHNAKUMAR: No, no, I understand. But the fact of the matter is...

JUSTICE SANJIV KHANNA: No, it cannot be. It cannot be.

GURU KRISHNAKUMAR: The fact of the matter is My Lords, they were entitled, but they have not been provided. That's the factual position.

JUSTICE SANJIV KHANNA: The only thing is because under A and B, if you are not under A, if you're not, if you're Class A and Class Two citizen then you have to go for 1927. Then to get documents of 1927, it will be very difficult for anybody.

GURU KRISHNAKUMAR: That's another aspect My Lord. Absolutely. I bow down to that.

CHIEF JUSTICE DY CHANDRACHUD: Now in Clause B prior to that date refers to which day? 14th of May 1954?

GURU KRISHNAKUMAR: Yes, that's right. 1954. That 14th of May, 1954...

CHIEF JUSTICE DY CHANDRACHUD: For Clause A, Subsection 3 applies?

1 **GURU KRISHNAKUMAR:** That's right. 27.

2

3 **CHIEF JUSTICE DY CHANDRACHUD:** So it's a 1927 order?

4

5 **GURU KRISHNAKUMAR:** Correct.

6

7 **CHIEF JUSTICE DY CHANDRACHUD:** For Clause B, you have to own property, and
8 you must have been ordinary resident at least for ten years prior to 14th May 1954.

9

10 **GURU KRISHNAKUMAR:** I bow down. And that date...

11

12 **CHIEF JUSTICE DY CHANDRACHUD:** So it's actually from 14 May 1944 onwards.

13

14 **GURU KRISHNAKUMAR:** That's right.

15

16 **CHIEF JUSTICE DY CHANDRACHUD:** Comes within the [UNCLEAR]

17

18 **GURU KRISHNAKUMAR:** Should hold property and that 1954 date, My Lord will recall,
19 is the date of CO of 1954.

20

21 **JUSTICE SANJIV KHANNA:** That's also very odd because to say that you must own a
22 property to get selected to be a citizen.

23

24 **GURU KRISHNAKUMAR:** Exactly. Exactly. Now, one more thing My Lords, one more
25 aspect. One more aspect My Lord, please have a look at 2 Section.

26

27 **CHIEF JUSTICE DY CHANDRACHUD:** What you are really trying to say is you're
28 supporting the C.o. 272 and 273.

29

30 **GURU KRISHNAKUMAR:** Correct.

31

32 **CHIEF JUSTICE DY CHANDRACHUD:** By pointing out the anomalies which would
33 otherwise arise in the realm of Article 35. Section 6 and 35.

34

35 **GURU KRISHNAKUMAR:** I bow down. The challenge My Lords would really mean that
36 they want to resurrect, amongst other things, this and 35(a). That's the point. Of course.

37

1 **JUSTICE SANJAY KISHAN KAUL:** Of course challenge to 35(a) has....

2

3 **GURU KRISHNAKUMAR:** It stands, it stands. but I bow down My Lord.

4

5 **JUSTICE SANJAY KISHAN KAUL:** Kept aside. The application to assist otherwise, that
6 challenge has been kept aside to await the fate of the decision.

7

8 **GURU KRISHNAKUMAR:** I bow down, My Lords. But then I am saying that this is
9 important.

10

11 **JUSTICE SANJIV KHANNA:** A provision which doesn't exist as a talk cannot be
12 challenged.

13

14 **GURU KRISHNAKUMAR:** No, that's true. The effect of upholding the C.O.s is to ensure
15 that this anomaly doesn't exist anymore. I am respectfully submitting My Lords that I am
16 placing the submission from the perspective of rights which are being made available by the
17 impugned C.O.s. That's the point. I'm making. One more anomaly to add to what fell from My
18 Lord. My Lord. Justice Khanna also, may have a look at it. Section 2, Sub-Section 2. Any
19 person who before the day of 1954, was a State subject of Clause 1 or Clause 2, and who having
20 included migrated after the 1 March 1947 to the territory now included in Pakistan, returns to
21 the State under a permit for resettlement in the State or a permanent return, issued by or
22 under the authority of any law made by the State Legislature shall on such return be
23 permanent resident of the State. So you make an exception out of this by saying those persons
24 who may have gone to Pakistan, if they come back, they will get the benefit. The anomaly is
25 writ large.

26

27 **JUSTICE SANJIV KHANNA:** This included in Pakistan, will not include Pakistan
28 Occupied.....

29

30 **GURU KRISHNAKUMAR:** No, it won't that they are very clear.

31

32 **JUSTICE SANJIV KHANNA:** It will not include Pakistan?

33

34 **GURU KRISHNAKUMAR:** No, it won't. That's why a separate provision is brought in.

35

36 **JUSTICE SANJIV KHANNA:** It will be portions other than...

37

1 **GURU KRISHNAKUMAR:** Other than other than POJK. There is one My Lords very
2 ironical aspect. The Jammu and Kashmir Constitution makes provision for seats for POJK in
3 the Assembly but says because it is under.... Now there are two other perspectives I'll place
4 and then I'm done. In fact, this is something which nobody has referred to that's the reason
5 why I'm even troubling My Lords, with some of the nitty gritty of this. So this is one aspect.
6 35(a). Just have a look at that for a minute. My Lords, now, because there's a striking parallel
7 to 31(b) under the Constitution. *Coelho*, please see the kind of dilution which took place in
8 *Coelho*. Just have a look at 35(a) for a minute. My Lords, this should be Volume 1, PDF page
9 90. 99. May I read that My Lords? 'Notwithstanding anything contained in this Constitution no
10 existing law enforce in the State of Jammu & Kashmir, and no law hereafter enacted by the
11 Legislature of the State, defining the class of persons who are or shall be permanent residents
12 of the State of Jammu and Kashmir, or conferring on such permanent residence, any special
13 rights and privileges, or imposing any other person's, any restrictions as respects employment
14 under the State Government, acquisition of immovable of property in the State, settlement in
15 the State or rights to scholarship for such other forms of aid as the State Government may
16 provide, shall be void on the ground that it is inconsistent with or takes away or abridges rights
17 conferred on the other citizens of India by any provision of this part'.
18

19 Now 31(b), under the Constitution, provides that anything included in the 9th Schedule shall
20 be immune from challenge on grounds of violation of Part 3.
21

22 **CHIEF JUSTICE DY CHANDRACHUD:** Guru, now in your.... I also note that in your
23 written submissions, you've really highlighted what was the anomalies and what has been
24 restored in the rights perspective.
25

26 **GURU KRISHNAKUMAR:** Exactly. Right. Perfect. That's right.
27

28 **CHIEF JUSTICE DY CHANDRACHUD:** I think let's go into...
29

30 **GURU KRISHNAKUMAR:** I'll the just three more things My Lords. I'll take only three
31 four minutes My Lords. Now 31 B. In *Coelho* My Lords, very extensively referred to the
32 foundational value of the Fundamental Rights, golden triangle of 1419 and 21. I've given all
33 those paras in my submissions for notes. In fact, I've given the extracts of all those paragraphs
34 in *Coelho*. Now ultimately, My Lord said you cannot take away judicial review and any law
35 included in the 9th schedule, can be tested on the angle of basic structure. Now, surely you
36 cannot have a position and that's what petitioners are bargaining for. What was there in the
37 original Constitution My Lords this is the approach of this Honourable Court. They can't, the

1 petitioners can't bargain for a position. Bargain for a position where the Jammu and Kashmir
2 Constitution, which is admittedly inferior in terms of the constitutional governing instrument
3 than the Constitution of India. They have something better than that. This is the kind of
4 importance which has been given under the constitutional scheme of India. In fact, 31(b) itself
5 My Lord said at one part in paragraph 78, just make a note of it. The validity of 31(b) was not
6 in challenge, and therefore My Lords did not go into it. My Lords assumed that in ***Shankari***
7 ***Prasad*** and in ***Sajjan Singh***, it was upheld therefore, My Lord didn't go into it. But said
8 judicial review cannot be excluded. And you cannot say by placing it there I am making it
9 immune to challenge. That's precisely what 35(a) purports to do. That's the second part My
10 Lords. Third part, ultimately all this all the nuts and bolts and the nitty-gritty looked at. What
11 does it come down to, My Lords? The basic structure is the gun knob. That's the touchstone
12 on which any constitutional decision making has to be considered, the validity of any
13 constitutional decision making has to be seen. Today what are they arguing in terms of basic
14 structure. At the highest, apart from me if I may say so, diffuse arguments of fraud and
15 constitution two square features which they want to invoke in various forms. One is federalism,
16 the other is representative government. So far as representative government is concerned, I
17 think that already the solicitor is pointed out, it's a Puducherry model. There is representation.
18 So far as federalism is concerned the highest that they are able to put it on is some kind of a
19 derivative form of federalism based on what My Lords just said in the ***2023 NCT judgment***
20 . That's the highest they want to put it at. Where they say that My Lords are referred to an
21 asymmetric federalism. Paragraphs 40 and 41, of 2023, My lords have been given. The citation
22 is there in my notes of submissions. What they want to say now is, asymmetric federalism has
23 been recognized. Now please stretch this and say the multi-symmetric federalism of 370
24 should also be taken to be a basic feature of the facet of federalism. That's the argument. I will
25 give the page, page numbers of Dr. Dhavan's arguments. Page 280, page 211, Volume 1 of
26 submissions. After extracting from My Lords decision in NCT in 2023, they say that this now
27 has to be stretched further to say multi-symmetric federalism. There, page.. para 40 and 41 of
28 2023 at the risk of carrying coals to Newcastle. My Lords, Interestingly, have referred to
29 370(1), and all those provisions for various states by way of special provisions. There refer to
30 how they are special provisions in 370(1), and it is on that basis by relying on the marginal
31 note. My Lords have pointed out how constitutionally some kind of asymmetric arrangement
32 has been made. So, it is on the basis that it is a special provision in 370(1). Today what they
33 want to do is, equate 370, which is temporary with 370(1) special provision I hope I make
34 myself clear?

35

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

37

1 **GURU KRISHNAKUMAR:** Therefore, that is why I said it's a derivative argument they
2 want to make. 370(1) consciously referred to the marginal notes and said how these are special
3 provisions. And that's how they provide for special provisions. That cannot be stretched to say
4 that it has to be applied to 370. The temporary character, nuts and bolts of 370. All of them
5 have been argued. I don't want to take the time anymore. I'm adopting those arguments. In
6 the light of that, I would respectfully submit.... In fact the impugned C.O.s are reflective of
7 transformative constitutionalism. What was argued by Dr. Dhavan, in my respect to
8 submission, the boot lies on the other foot. The impugned C.O.s ensure that the Constitution
9 of India, with all its plenary scope applies to the state. In my respectful submission, the
10 challenge of the petitioners is really a contradiction in terms. Because this is a case where the
11 application of the Constitution of India, the plenary document is sought to be challenged. The
12 effect of the C.O.s is to ensure that the entire Constitution applies to the state with all part 3,
13 rights, with all the other provisions. And even on federalism My Lords, there is one other
14 portion in the opening remarks of Dr. Ambedkar while placing the draft constitution My Lords
15 before the Assembly, Constituent Assembly

16

17 **JUSTICE B.R. GAVAI:** Mr. Giri has extensively read it.

18

19 **GURU KRISHNAKUMAR:** No, there is another portion apart from what Mr. Giri read. So
20 I have extracted that in my submissions, so My Lords could have a look at that. Therefore My
21 Lords, sum and substance.

22

23 **CHIEF JUSTICE DY CHANDRACHUD:** Thank you Mr. ...

24

25 **GURU KRISHNAKUMAR:** In sum and substance My Lords, this is for perpetuation of
26 vested rights and the COs My Lord make provision for realization of rights under the
27 Constitution. I'm obliged.

28

29 **CHIEF JUSTICE DY CHANDRACHUD:** Thank you. Who are you appearing for?

30

31 **RESPONDENT'S COUNSEL:** I am for the writ petitioner who had filed the repetition in
32 January 2018 against the effacement of all articles in respect of Me in relation to Jammu and
33 Kashmir. Part 3 effacement of Part 3, a core value from the Part 3 I challenged that before this
34 court and that has been thanked. Enough has been argued. But I am arguing for the Class,
35 ***Radhika Gill versus Union of India.***

36

37 **CHIEF JUSTICE DY CHANDRACHUD:** Which is that?

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2 **RESPONDENT'S COUNSEL: Radhika Gill versus Union of India** and my synopsis is
3 placed compilation is 426. I'll take only two bits My Lord. My Lord this Radhika Gill and the
4 other person belongs to that class who are descendants to those persons who have been lifted
5 from Gurdaspur to Jammu and Kashmir in 1957 to handle the sanitation problem which had
6 arisen an account of the long strike in Jammu and Kashmir. So they were settled in the outskirts
7 of Jammu and Kashmir and My Lord that now has converted it now with the passage of time.
8 Those are the slums. No property rights, etc. No education rights, etc. Now Your Lordship may
9 kindly see my prayer, the whole effacement of Part 3 in relation to Jammu and Kashmir, I have
10 challenged in my writ petition. I have My Lord, Your Lordship may kindly see the Solicitor
11 General referred to Article 40, Article 14 effacement also. Your Lordship may kindly see 35(a)
12 Clause (A). What exactly it does? It does one thing, My Lord. Delegating the power to the State
13 Legislature to define the permanent resident and not challengeable. That's what My Lord, the
14 delegation has been done to the State Government, State Legislature My Lord, in this class,
15 Your Lordship may kindly. Defining the Class of Permanent residents and delegating it to State
16 Legislature and not challengeable. So My Lord, Your Lordships have not allowed such a
17 delegation to the State Government so far as the Part 3 aspect is concerned. So that's what My
18 Lord the Solicitor said that core value of Article 14 has also been taken away. And with the aid
19 and assistance of this delegation, Section 6 was incorporated. And this is nothing but a homage
20 to define ancestry and none else. Whosoever is there on a particular cutoff date. I was there in
21 '57 only my Lord, so my predecessors were in '57 and we were there and now we are denied. I
22 am born there at least no fundamental rights are available to me. That's why I challenge that
23 right to education. Right, Section 6, has also been challenged in that. Now My Lord, Your
24 Lordships may kindly, I am now, so far as my synopsis is concerned, paragraph 17 and
25 subparagraphs have dealt with 2-3 aspects.. One is the powers of President, are constant in
26 nature. Your Lordships may kindly see paragraph 7 subparagraph B.

27

28 **JUSTICE SANJIV KHANNA:** That has been argued.

29

30 **RESPONDENT'S COUNSEL:** Now My Lord one thing, relationship between 368 and
31 Article 370.

32

33 **JUSTICE SANJIV KHANNA:** That have been also argued.

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35 **RESPONDENT'S COUNSEL:** My Lord, yes. I've taken this. I've taken this herein.

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

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CHIEF JUSTICE DY CHANDRACHUD: Thank you. Anything else? Yes, what about you?

BIMAL ROY JAD: I'm appearing in IA number 153121.

CHIEF JUSTICE DY CHANDRACHUD: IA Number?

BIMAL ROY JAD: 153121 of 2019, that's roots in Kashmir. Roots in Kashmir is an organization which is espousing the cause of Kashmiri migrants now called Displaced Persons My Lord. Since 1989 they are 5 Lakh people that's one petition. Number two, is My Lord, Dr. Charu Wali Khanna My Lord. That's at writ petition in 2017 My Lord. 369. My Lord that is 396 of 2017 My Lord. Submission is My Lord I have given detailed written submission that are conjoint written submission Volume 3,

CHIEF JUSTICE DY CHANDRACHUD: Page?

BIMAL ROY JAD: Volume 3, page, 444 to 456. And My Lord for convenience I have filed a small note, three page note, My Lord, which was taken on record My Lord. I'll read it My Lord.

CHIEF JUSTICE DY CHANDRACHUD: We'll have a look at it, but you can just sort of in one minute, just highlight what is the central point?

BIMAL ROY JAD: I'll say My Lord the Instrument of Accession dated 26-10-1947 is final an issue of proclamation and the Article 1 and is completely applicable My Lord. So it's being an integral part of the India, Dominion of India. My Lords. Then My Lord.....

CHIEF JUSTICE DY CHANDRACHUD: Say something which has not been argued earlier..

BIMAL ROY JAD: It's not Mu Lord. I say My Lord with respect to the Article 370, which has been raised My Lord here in, that the devolution of power of Constituent Assembly is transferred to a Legislative Assembly, as there is no constituency as on 57. Therefore, it's not the...

JUSTICE B.R. GAVAI: That has already been argued so many times

1 **BIMAL ROY JAD:** It's not My Lord. Concurrence given to the Government of a State but
2 also <UNCLEAR> ratification has been done to the Parliament. So absolute majority
3 Parliament had acquired the [UNCLEAR]. One is that. And two is My Lord and it's not a basic
4 structure, as I am going to.....

5

6 **CHIEF JUSTICE DY CHANDRACHUD:** We got the point.

7

8 **BIMAL ROY JAD:** I have a I relied on my **(1973) 4 SCC Volume 15**, My Lord in
9 **Kesavananda Bharati** of Justice Khanna. He has given that one and My Lord. Then
10 **Bomma** also is not a Federal... it is a quasi-federal state. Then **Puran Lal Lakhan Pal...**

11

12 **CHIEF JUSTICE DY CHANDRACHUD:** That has been covered.

13

14 **BIMAL ROY JAD:** I had one judgment My Lord, because I could hold that, that is **S Sant**
15 **Singh and others versus State of Jammu & Kashmir** reported in 1959, Jammu &
16 Kashmir, page 35. That's a full bench judgment My Lord., which deals with modification
17 Clause of Article 30 J&K Tenancy Act. 1959 Jammu & Kashmir page 35, dealing with the
18 challenge to provisions of Jammu & Kashmir Tenancy Act, inserted in Ninth Schedule, was
19 upheld and did not violate any of the Fundamental Rights pursuant of Article 3. This is My
20 Lord, then **Coelho** said that it's not a fundamental, it's not a violation of fundamental rights
21 under Article... para 102. **Coelho**, is at page ...

22

23 **JUSTICE B R GAVAI:** **Coelho** has been argued so many times. Everybody has referred to
24 **Coelho**.

25

26 **BIMAL ROY JAD:** Then My Lord we have very less time. My Lord that's why I'm going to
27 all these things.

28

29 **CHIEF JUSTICE DY CHANDRACHUD:** [UNCLEAR] time to Mr. Dwivedi.

30 .

31 **BIMAL ROY JAD:** **Indira Sahani** My Lord. 35, 35(a) I have challenged substantive writ
32 petition in 2017 which a notice was issued and this was referred to the Constitution Bench in
33 that time only. Then it was tagged along with this one. So I have four judgments to cite on My
34 Lord, **Indra Sahani** that's equality. 19 My Lord. what has happened....

35

36 **CHIEF JUSTICE DY CHANDRACHUD:** Put it in your note.

37

1 **BIMAL ROY JAD:** 27 and 32 notification...

2

3 **CHIEF JUSTICE DY CHANDRACHUD:** We have three minutes now. Let's hear some
4 other people's arguments.

5

6 **BIMAL ROY JAD:** I will take 2 minutes.

7

8 **CHIEF JUSTICE DY CHANDRACHUD:** [UNCLEAR] We'll read your written
9 submissions.

10

11 **RAJESH BHUSHAN:** I am appearing in IA 146764 My Lords.

12

13 **CHIEF JUSTICE DY CHANDRACHUD:** Absolutely not. We have to conclude by lunch. I
14 mean, we have made that clear yesterday.

15

16 **BIMAL ROY JAD:** One minute I'll take My Lord. I'll say.....

17

18 **CHIEF JUSTICE DY CHANDRACHUD:** We had said we are going to conclude that 01:00.
19 We had requested everybody to so structure that arguments that the others. We're not going
20 to cross 1 minute after 01:00 for this side.

21

22 **BIMAL ROY JAD:** My Lord, I will read an update My Lord, which I mentioned in the
23 morning.

24

25 **CHIEF JUSTICE DY CHANDRACHUD:** You can argue for the next three minutes. But
26 you know what the consequences. We are rising at the stroke of lunch.

27

28 **BIMAL ROY JAD:** Let me read this article....

29

30 **JUSTICE SANJAY KISHAN KAUL:** This is not fair. You said I'll give half-an-hour to Mr.
31 Dwivedi.

32

33 **BIMAL ROY JAD:** Half an hour to me My Lord. I cannot curtail my half an hour...

34

35 **CHIEF JUSTICE DY CHANDRACHUD:** Mr. Jad you specifically said, I am giving my half
36 an hour to Mr. Dwivedi.

37

1 **BIMAL ROY JAD:** My Lord, can I read my affidavit?

2

3 **JUSTICE SANJAY KISHAN KAUL:** Read it. What is there? [UNCLEAR]. Read it.

4

5 **BIMAL ROY JAD:** In my affidavit My Lord, I am making only one submission, My Lord.

6

7 **CHIEF JUSTICE DY CHANDRACHUD:** The element of [UNCLEAR] doesn't apply to
8 legal arguments.

9

10 **BIMAL ROY JAD:** That he's a citizen of India, and he doesn't support terrorist states. Let
11 him put an Affidavit. Mr. Sibal, learned counsel is here My Lord.

12

13 **JUSTICE B.R. GAVAI:** [UNCLEAR]

14

15 **CHIEF JUSTICE DY CHANDRACHUD:** Alright, one second. Just one second now. One
16 second. Mr. Agrawal, what point do you want to make? Just formulate it. Come.

17

18 **KANU AGRAWAL:** Affidavit for NOC [UNCLEAR] Dr. Dhavan....

19

20 **BIMAL ROY JAD:** My Lord only one thing....

21

22 **CHIEF JUSTICE DY CHANDRACHUD:** Your time is over. Your time is over.

23

24 **BIMAL ROY JAD:** I was appearing for Jammu and Kashmir High Court Bar Association.
25 My Lord, President of the bar is here. He wants to say something. That's all. I am curtailing
26 my argument.

27

28 **CHIEF JUSTICE DY CHANDRACHUD:** We are in charge of whom we will hear. You are
29 not in charge of who will follow you. Mr. Kanu Agrawal.

30

31 **BIMAL ROY JAD:** Okay My Lord. That is all. I leave it to Your Lordships.

32

33 **KANU AGRAWAL:** On the issue of federal diversity, Dr. Dhavan sought to rely on the
34 judgment of *RC Poudyal*. If My Lords sees to my understanding federal diversity in the Indian
35 Constitution exists on a two dimensional plane. At the centre would, as far as I understand,
36 would be the classical states would be the classical understanding of a state, the state which
37 has fully governed by Schedule 7 and other provisions of the Constitution. To the right of it,

1 would be states which have limited special features would be states like the limited features
2 like Gujarat or Maharashtra, all taken through by Dr. Dhavan. Thereafter, would be States
3 which say fall under the Fifth Schedule and the Sixth Schedule and some other States which
4 have further special features. To the right end of it, perhaps was the erstwhile Article 370.
5 What the petitioners forget My Lords, is that there is a scale to the left of it as well. The scale
6 to the left of it is the Union Territories with Legislature, is the Union Territory of the GNCT of
7 Delhi. And further, perhaps pure and simple Union Territories. Therefore, Federal diversity
8 My Lords is undoubted that diversity is a constitutional fact. But not all constitutional facts
9 can be elevated to the level of basic structure. When we adopt the identity test. In terms of
10 identification of basic structure, not all constitutional facts become basic structure. **R. C.**
11 **Poudyal** was relied upon to further the argument that there was this diversity a manifestation
12 of which was Article 370 erstwhile Article 370 is a part of basic structure. Incidentally, My
13 Lord, para 128 was read in **R.C. Poudyal**. If My Lords sees the last three lines of para 128, I
14 think those last three lines itself completely demolished the case of the petitioners on Federal
15 Diversity because those last three lines itself indicate that these provisions, which were in
16 consideration in **R. C. Poudyal**, were for a limited transitional period. The word transitional
17 has been used. Therefore, My Lords, as far as the fact that federal diversity may be integral, it
18 would not necessarily lead to it being a basic structure. The method and the methodology
19 adopted by the Union, whether under 368 or 370(3), has been fully taken care of. I don't wish
20 to address it further. The second point is on My Lords, Constituent Assembly and the nature
21 and the nomenclature of Constituent Assembly. Mr. Gopal Subramanian specifically
22 highlighted that there are no hierarchies. That was the submission that there are no at a
23 normative level, that's an absolutely correct statement. There cannot be any hierarchies in
24 Constituent Assembly. However, there are not many things that move on a normative level in
25 Jammu and Kashmir. There are three facts in this regard that My Lord need to see there are
26 two kinds of constituent power. One is original constituent power and the other could be
27 derivative constituent power. It was on this jurisprudential basis that **Kesavananda**
28 **Bharati** was delivered, and thereafter, other judgments which state that the original
29 constituent power is always with the original Constituent Assembly, the plenary power. But
30 derivative constituent power is something that is always with further legislatures, the
31 Parliament in this case, therefore the question that we need to interrogate is whether the
32 Constituent Assembly of the Jammu and Kashmir Constituent Assembly had any original
33 constituent power. The three facts which, according to me, clearly point towards the fact that
34 they had no original constituent power were (a). it was established under the proclamation of
35 a Maharaja that had already signed an Instrument of Accession. Number two...

36

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

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KANU AGRAWAL: It's there in the three pages My Lords.

CHIEF JUSTICE DY CHANDRACHUD: Yes.

KANU AGRAWAL: Number (2) The Maharaja had already issued a proclamation dated 25-11-1949 recognizing the supremacy of the Indian Constitution. And number (3) unequivocally Article 1, was in force. So on the date in 1951 when the proclamation to establish the Constituent Assembly of Jammu and Kashmir was issued, the Maharaja who was not a sovereign, could not have passed a better title than what he had. If he was not a sovereign, the Constituent Assembly of Jammu and Kashmir could never have been a Sovereign Constituent Assembly. Could never have established a Sovereign Constitution. The suggestion from the other side is that under 370 Sub-Article 3, they could have severed their ties with India at the time of dissolution of the Constituent Assembly. My Lords, I submit that is an absolute impossibility as far as the Indian Constitution is concerned, because Article 1 would have applied to them irrespective of the nature of Article 370,

CHIEF JUSTICE DY CHANDRACHUD: Which is the page of your written submission?

KANU AGRAWAL: My Lords, page 2.

CHIEF JUSTICE DY CHANDRACHUD: No. In the volume 3?

KANU AGRAWAL: That is not there in volume 3. If My Lords, allow I...

CHIEF JUSTICE DY CHANDRACHUD: All right, thank you.

KANU AGRAWAL: Please My Lord, just one more aspect My Lord. If the J&K Constituent Assembly had no original constituent powers it automatically exercised only derivative constituent powers. If it is exercising derivative constituent powers, it is akin to a Legislative Assembly. My Lords one of the letters that was highlighted by Mr. Sankaranarayanan was a letter by Mr. Rajendra Prasad to Mr. Nehru. My Lords may remember 1952 6th of September, I think 1952 by Rajendra Prasad. That letter finds mention in Mr. Noorani's book at Volume 20, page, PDF 222 I believe. Mr. Noorani has done a lot of research he should have also pulled out the letter which was written by the then Prime Minister Mr. Nehru. In reply to the letter of Mr. Rajendra Prasad, Mr. Nehru wrote a letter dated 7-11-1952 to Mr. Rajendra Prasad on a host of issues after Mr. Rajendra Prasad had also written a letter to the then Home Minister

1 K.M. Munshi. And he highlighted the fact that how this issue has been discussed with the law
2 officers of the Union at the highest level with Mr. Gopaldaswami Ayyangar and with other
3 people, I have annexed it to my note My Lords. And therefore requested the President
4 requested being the word requested the President to consider passing the C.O. That was on
5 7th of November 1952. Within eight days, My Lords, the Learned President passed the C.O.
6 44, which was 15-11-1952 under 373, thereby changing Maharaja to *Sadr-e-Riyasat*. Therefore
7 My Lords, I think the SG had also pointed it out that actions speak louder than words.

8

9 **CHIEF JUSTICE DY CHANDRACHUD:** Yes Mr. Vikramjit.

10

11 **VIKRAMJIT BANERJEE:** My Lords, I'll just make a small submission. My Lords
12 everything is, My Lords, my submission is this. My Lords have seen the original Constitution.
13 The original Constitution.

14

15 **CHIEF JUSTICE DY CHANDRACHUD:** Mr. Biju, move towards the centre.

16

17 **VIKRAMJIT BANERJEE:** My Lords the original constitution there were transitional and
18 temporary provisions. It wasn't, the special provision was subsequently added as an
19 amendment at a later point of time. So the original Constitution in this chapter was as to
20 temporary and transitional provisions. So the very fact that this is taken to be a transitional
21 and temporary provision means that this is the entire objective of the original path.
22 Subsequently, a large part of it My Lords will recall has from 75 to 91 have now been amended
23 out. So the original intention of including 370 in that chapter and it was *intergenus* of that,
24 was this was a transitional provision. And My Lords, will see 391 and 392. There were
25 Presidential powers which were given [UNCLEAR].

26

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

28

29 **VIKRAMJIT BANERJI:** My only submission is this. This was permissible.

30

31 **JUSTICE SANJAY KISHAN KAUL:** This was already argued Mr. Banerjee

32

33 **CHIEF JUSTICE DY CHANDRACHUD:** Thank You, Mr. Banerjee. Now, Ms. Pathak.
34 Come along. Come forward. One second. We'll call out, we are calling out people. Don't jump
35 the gun. Yes? One second Biju. Yes Ms. Dave, what do you want to?

36

37 **ARCHANA PATHAK DAVE:** I'm appearing in an IA 1722 of 2019 well,

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CHIEF JUSTICE DY CHANDRACHUD: What's the point?

ARCHANA PATHAK DAVE: The point that I'm making is, My Lord the permanent resident-ship, My Lord no one has talked about the rights of the women that were taken away. So the permanent resident-ship could not come to the women who have married outside the State of Jammu in Kashmir. So My Lords....

JUSTICE SANJAY KISHAN KAUL: That was set aside. That was ultimately set aside.

ARCHANA PATHAK DAVE: So, my Lord yes *State of J&K Versus Dr. Sushila Sahani. 2002* judgment. In fact the full Bench of the Jammu and Kashmir High Court held that they will have permanent resident-ship even if they marry outside. But we stayed then. My Lords the Learned AG there made a statement that they will not get in fact My Lords, the right to employment, right to scholarship, as well as the right to hold immovable property was taken away if you marry to a person who is outside the State of Jammu and Kashmir.

CHIEF JUSTICE DY CHANDRACHUD: Thank you Ms. Dave.

ARCHANA PATHAK DAVE: My written submissions.....

CHIEF JUSTICE DY CHANDRACHUD: Yeah we'll take it. What is your page of the written submission?

ARCHANA PATHAK DAVE: My Lords, I'll give it to the Learned Court Master My Lords. We had submitted to the nodal counsel. Two pages only My Lord.

CHIEF JUSTICE DY CHANDRACHUD: Volume three. Right?

ARCHANA PATHAK DAVE: Yes, My Lords. Just one thing My Lords, we have got these rights now after 2019. Can a writ petition filed under 32 take away fundamental rights given to the other citizens of the country My Lord, is My respectful submission. I am obliged My Lords.

CHIEF JUSTICE DY CHANDRACHUD: Yes, Biju.

1 **VK BIJU:** I am appearing for my client who is a retired major. He dedicated his substantial
2 time in the area in person which is J&K. And My Lords my IA 171000 of 2019. Writ petition
3 civil number 1782 of 2019 My Lords. Kindly note this.

4

5 **CHIEF JUSTICE DY CHANDRACHUD:** Biju just make a point now.

6

7 **V.K. BIJU:** Yes My Lords. 171000 of 2019 is WTC number.

8

9 **JUSTICE SANJAY KISHAN KAUL:** We will see that....

10

11 **CHIEF JUSTICE DY CHANDRACHUD:** Just what's the substance. What's the point and
12 substance?

13

14 **V.K. BIJU:** My Lords, my point is this My Lords, before that Page 515 to 525 of Volume 3,
15 my written submissions, where I substantiate, what are the ground realities, where I
16 substantiate what was happening as My Lords already asked. My Lords what is after and after
17 going again and again 370 Sub-Article 3, proviso there is a special provision. And if it is not
18 functioning, then what is the way out?

19

20 **CHIEF JUSTICE DY CHANDRACHUD:** This point has been argued. Some on now, tell
21 us something new...

22

23 **VK BIJU:** My Lord, what is the next remedy. My Lord, My respectful submission is extremely
24 clear in the Constitution of India, Article the 368(1), then (2), is saying that 368(2), says that
25 if so and so and so Articles or chapters if you are going to touch or if you are going to touch
26 basic structure principle, then you have to have the ratification of the 50% of State
27 Government. In that Sub-Clause 2, there is nothing to do with 370. So 368(1) is starting itself.
28 Is My Lord extremely important. That language that notwithstanding anything containing....
29 notwithstanding.....

30

31 **CHIEF JUSTICE DY CHANDRACHUD:** Thank you Biju. We got your point. Biju, there is
32 somebody at the back from Srinagar, from Jammu who is....

33

34 **VK BIJU:** This is one area then my respective submission My Lord. What I read this again
35 and again I was repeatedly reading My Lords judgments from 1950 onwards...at least five
36 judgments, which are Constitutional Judgment, saying that there is every power from Indian
37 Parliament than the President of India. That I My Lord separately indicated in paragraph....

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CHIEF JUSTICE DY CHANDRACHUD: Yes. We'll see all that. What is your point?

RESPONDENT'S COUNSEL: I am appearing in 108 and 4(3), of 2018 My Lord. [UNCLEAR] belongs by the filed by the Bar Association of High Court of J&K. Now I adopt the submissions of the SG and everybody belonged who is supporting this My Lord, C.O. One submission My Lord if the Honourable Court would permit me is that whether My Lord at this 76th year of our association with a country a question mark My Lord on our nationality also would not hit My Lord in the extended interpretation of Article 21. If I would seek the Honourable Court's indulgence My lord, that whether right to live with dignity My Lord starting from Menaka Gandhi's, 78 would also include a right to have a nationality after having lived with the country and identified one self-way. So My Lord we take pride in being Indians outside of India but when it comes within India can there be somebody to raise a question mark on our nationality. Because My Lord when I was following this My Lord, debate on the VC from J&K, questions like referendum also My Lord, were addressed. Now in this My Lord, 75th Golden Jubilee, which we say if at this point in time also a question mark on our identity with a particular nation, where we have contributed and we live with pride within India. If this is still is hanging in balance, though we owe our gratitude to the Constitution that this debate is still permissible. But then whether the Constitution My Lord can be so flexible as to include a debate also, as to a person who has contributed a lifetime, this is a third generation into it. My Lord. from '47 onwards now we My Lord are in 2023 and in 2023 if I have to prove to somebody that I am an Indian. Whether My Lord, my life is actually a life of dignity is My Lord my humble submission. I'll seek Honourable Bench indulges.

CHIEF JUSTICE DY CHANDRACHUD: Thank you very much. Thank you.

RESPONDENT'S COUNSEL: My Lord, 35(a) is linked to Section 6 of the Constitution of Jammu & Kashmir and is linked to 370. If 272, and 273 is not uphold what the consequence is, that there is a tap on the application of the Constitution of India, including Part 3, which can be turned on, turned off at the discretion of the State Government, which by itself is inherently discriminatory.

CHIEF JUSTICE DY CHANDRACHUD: [UNCLEAR]

RESPONDENT'S COUNSEL: Which has been therefore, apart from *IR Coelho* think most important is *Puttuswamy*, where Your Lordships have upheld a socioeconomic interpretation, because for a long time fundamental rights were essentially social in nature.

1 But an economic angle has been brought about. Our problem is we are being deprived of that.
2 One very brief point, My Lord, the consistent position of Republic of India and I deliberately
3 say Republic of India before the United Nations Security Council, is that there was no
4 sovereignty of any kind slightest nature residing with the State of Jammu and Kashmir, neither
5 under International Law nor under comparative Constitutional Law. For comparative
6 Constitution law, there's an opinion of Dr. Ambedkar, which is in my written submission
7 where he said, why there is no, not even an iota of certainty with any princely state, including
8 State of Jammu and Kashmir. In International Law literature it is very clear settled position
9 of Customary International Law, which was also taken by the Republic of India in the Security
10 Council in M C Chagla's speech and also Krishna Menon's speech very clearly spelled out that,
11 under international law there's no possibility of any such constituent, which is an integral part
12 of India to have any sovereign right. So that is clear. So therefore, no question of Constituent
13 Assembly or Maharaja having any sort of sovereign power. In fact, it was made expressly clear
14 in the Security Council itself by both of them that that aspect rests entirely with the Union. So
15 what is being now called as residual sovereignty can't conceptually exist. It contradicts the very
16 idea of sovereignty propounded by Bentham, or even by Max Huber. Therefore, sovereignty,
17 there is only one sovereignty. All that they can have is legislative competence. That is also to
18 minimal extent. Apart from that, there was a major argument which was made that Instrument
19 of Accession had to be approved by JK Constituent Assembly. It wasn't necessary. The only
20 requirement was Section 6 of the Government of India Act. This was the consistent position
21 again put forward by M.C. Chagla before the United Nations Security Council. Also under
22 section.. One very last point, India was the successor state, which included princely states that
23 comes from section 311 of the Government of India Act. Therefore, by virtue of that, India
24 already a singular entity where all sovereign authority rests with the Union and the
25 constituents don't have any
26 other power. To use the phrase of Krishna Menon they are sub-sovereign entities.

27

28 **ADVOCATE GENERAL D C RAINA:** Being an Advocate General and nothing for UTs
29 [UNCLEAR].

30

31 **TUSHAR MEHTA:** United Nations [UNCLEAR]. This is past history. There is nothing
32 pending in United Nations or India. It is our internal.

33

34 **RESPONDENT'S COUNSEL:** Yes. Only thing I was saying that's the position that there's
35 no such internal....

36

1 **ADVOCATE GENERAL D C RAINA:** Being the AG first of all, I subscribe to the
2 submissions made by Attorney and Solicitor General and my colleagues on this side. One
3 aspect perhaps need to be brought but the basic fundamental rights include the health also.
4 And health generates from the health medical education. All judgments whenever would come
5 I am passing a judgment just now kindly see the pride in J&K. Whenever it comes to the taking
6 a health care, the point would be that we because of 370 will not allow for those benefits which
7 are emanate from Article 21 to flow to J&K, Now I pass into judgment of this Honourable
8 Court, whenever this issue comes this 1984 where they say yes. For the rest of the country that
9 sending 70% of seats are 30 for local is fine, but when it comes to J&K even this Honourable
10 Court says we'll wait till the time come. How long will this medical facilities which are, My
11 Lord just have a look to this judgment in this last paragraph, the Court says so far, J&K and
12 Andhra's are concerned we are told that there's some constitutional provisions therefore we
13 deal. The result was that for so many years the State of Jammu and Kashmir and now UT
14 remain deprived of the best the basic fundamental rights, including the medical education. So
15 let's just have a look to this.

16

17 **CHIEF JUSTICE DY CHANDRACHUD:** We'll have a look at that. Thank you, Mr.
18 Attorney General. Now we want 1 minute each [UNCLEAR].

19

20 **ADVOCATE GENERAL D C RAINA:** Yes before I conclude. All speech is not because I
21 know time, all exercise, understanding, and the literature. One word is very important. All
22 leaders, including Mr. Sheikh Abdullah in unequivocal terms, had accession not the aggression
23 in the Parliament on 8th June '48...8th January '48 January everywhere, even at this stage of
24 75 year. Yet we have to define our relationship with it. But as Article 370(4), part (d), part (3),
25 were discuss so. In all cases, we are the integral part of this great nation of India. All argument
26 to the contrary are too late in the day when the Castle of India had all its place and now it is
27 only academic. Otherwise we are a part of that. I'm grateful My Lord.

28

29 **CHIEF JUSTICE DY CHANDRACHUD:** Thank you, Mr.

30

31 **RAHUL G. TANWANI:** My Lord a Short submission. This Amendment A cannot be seen as
32 a silo in light of the larger, transformative nature of a Constitution. Three bullet points that
33 come in it. The violation of rights of those who are persecuted is so extensive, My Lords, that
34 it has been recognized as a grave human right violation in 2019. A violation My Lords which
35 is considered an international crime in International Law, therefore attracts customary
36 International Law and is a *Jus Cogens law*. So therefore My Lords when such an
37 acknowledgment does come in really a case for restorative and transitional justice does arise.

1 So clearly My Lords those who have been persecuted and they want to go home, it will have to
2 happen that security is ascertained and restorative and transitional justice does arise. So fact
3 finding missions, truth commissions, transitional commissions therefore become the norm.
4 Unless and until My Lords an amendment of this nature does not come in, that takes away the
5 conditions of operations that were there, and that ensured that they were not only persecuted,
6 but had an exodus in '89 and '90 is not taken away. This higher feature cannot really be
7 attained. So therefore My Lords, I submit that this has to be seen holistically and attributing
8 of responsibility My Lords.

9

10 **CHIEF JUSTICE DY CHANDRACHUD:** You can put it in your note. It's in your note.

11

12 **EKLAVYA DWIVEDI:** Now I'll limit my intervention on just two aspects My Lords. One is
13 the proviso under Article 3 My Lords. The contention of the other side was that the
14 requirement of taking the views of the State Legislature is a condition precedent. My Lord, as
15 the Learned Solicitor General, has shown already that wherever Article 356 was invoked, this
16 proviso to Article 3 was suspended. Secondly, My Lords the views of the State Legislature
17 under the proviso are not binding on the Parliament. Your Lordships have so held in **Babulal**
18 **Parate's case**. Thirdly My Lords, Article 3 is a plenary power. So any interpretation, any
19 construction cannot be given to the requirements of obtaining the views of the State
20 Legislature which denudes from this plenary power. My Lords the second argument is
21 **Rajagopal case. Karunanidhi's case**, which was cited by the petitioners is wholly
22 inapplicable, My Lords. That is a one paragraph judgment. And the finding that is given in that
23 judgment is that dissolution of State Assembly will not be a ground to hold that the
24 Constitution machinery has been broken down in the State. **Rajagopal case** relies on **UNR**
25 **Rao**, which is by delivered by the same bench of Your Lordships. In **UNR Rao**, the contention
26 was that a writ of *quo warranto* was sought against the Prime Minister and her Cabinet. The
27 contention was that since the House of People has been dissolved and since the Cabinet is
28 responsible to the House of People under Article 75(3), the President should dismiss the
29 cabinet. Your Lordships rejected this contention and said that Article 75(3) will only apply
30 where the House is not dissolved or pro [UNCLEAR]. So this case is wholly inapplicable. My
31 Lords route is Volume Six, PDF Page 50. Kindly consider that. I'm grateful.

32

33 **RAJESH BHUSHAN:** My Lords my IA is 146764.

34

35 **CHIEF JUSTICE DY CHANDRACHUD:** Yes, Mr. Bhushan. What do you have to say?

36

1 **RAJESH BHUSHAN:** Yes my Lords, I have to say, make only one submission, that this
2 temporariness and permanent-ness of Article 370 has to be looked through the prism of word
3 further in the preamble of Jammu and Kashmir, read with Section 3 and 147 of Constitution
4 of Jammu and Kashmir also. Even Constitution of Jammu and Kashmir has not given power
5 to itself to amend Section 3 where it is said that it is and shall be the integral part of the
6 Constitution of India My Lords. And second is will of people. This was argued strenuously.

7

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

9

10 **DR. KHANNA:** Lordship I appear for Youth for Kashmir, Pannu Kashmir. We were the
11 people who were displaced in 1990s, whom I represent. Lordship, my first point of submission
12 is when the Instrument of Accession was signed that day it was complete and formal
13 integration with India.

14

15 **CHIEF JUSTICE DY CHANDRACHUD:** That point has been made. What is the next
16 point?

17

18 **DR. KHANNA:** Lordship the second point that I wanted to make that because of 370, there
19 was no economic integration with India. That was, we were making. And the other point I
20 wanted to make was regarding the women's right which Ms. Pathak has...

21

22 **CHIEF JUSTICE DY CHANDRACHUD:** Pathak has already...

23

24 **DR. KHANNA:** And Lordship the final point I want to make it till 2016 even transfer
25 petitions could not be filed in this court under the regular provisions. We have to approach
26 under 32 or in the other provisions.

27

28 **CHIEF JUSTICE DY CHANDRACHUD:** Thank you. Yes sir what do you have to say?

29

30 **RESPONDENT'S COUNSEL:** I am [UNCLEAR] 19618 My Lord. In my matter, my Lord no
31 counter, no senior citizen [UNCLEAR]. I got [UNCLEAR] I shall be able to file the written
32 submission only after hearing to the court. May I kindly be allowed to....

33

34 **CHIEF JUSTICE DY CHANDRACHUD:** What is that SLP?

35

36 **RESPONDENT'S COUNSEL:** [UNCLEAR]

37

1 **CHIEF JUSTICE DY CHANDRACHUD:** Filed by whom actually? You are the SLP
2 petitioner. What is the order that you are challenging?

3

4 **RESPONDENT'S COUNSEL:** My Lord I'm challenging the order on the part of the High
5 Court filing. [UNCLEAR] My Lord to declare, to declare Article 370 a lacked provision. Second
6 My Lord, second My Lord, declare separate Constitution for the J&K vide as an issue. I am
7 seeking permission to file written submission in view of my letter, My Lord, which I circulated
8 on 27th July.

9

10 **CHIEF JUSTICE DY CHANDRACHUD:** So we'll come back after that.

11

12 **KAPIL SIBAL:** During recess may I just file my submission so that they are on record.

13

14 **RESPONDENT'S COUNSEL:** After going through my submissions.....

15

16 **TUSHAR MEHTA:** They are longer than the main.....

17

18 **KAPIL SIBAL:** I have to reply My Lords. I have to put it....

19

20 **TUSHAR MEHTA:** They are longer than the main arguments.

21

22 **KAPIL SIBAL:** I am sorry?

23

24 **CHIEF JUSTICE DY CHANDRACHUD:** You can open your submissions. We will see.

25

26 **KAPIL SIBAL:** that is what I am saying My Lords, that I will...

27

28 **CHIEF JUSTICE DY CHANDRACHUD:** We will hear you Mr. Sibal. After lunch we will
29 hear you.

30

31 **KAPIL SIBAL:** Yeah in the meantime I should be able to file My Lords.

32

33 **TUSHAR MEHTA:** They are longer than the main submissions.

34

35 **KAPIL SIBAL:** One second. You have filed hundreds of documents. I never objected. Even
36 my first submission... What's all this?

37

1 **CHIEF JUSTICE DY CHANDRACHUD:** We'll carry on after lunch.

2

3 **RESPONDENT'S COUNSEL:** Written submissions kindly permitted to file My Lords.

4

5 **CHIEF JUSTICE DY CHANDRACHUD:** Sir, we are concluded now. Yes, Mr. Sibal. No sir,
6 thank you sir, sorry. Thank youalright thank you.

7 [NO AUDIO]

8

9 **CHIEF JUSTICE DY CHANDRACHUD:** Yes, Mr. Sibal.

10

11 **KAPIL SIBAL:** Please Your Lordship.

12

13 **JUSTICE SANJAY KISHAN KAUL:** What we have said has been said. The Chief Justice
14 had to say, has been said. We've heard, both sides, I think for 15 days, quite patiently. Maybe
15 not everybody can be heard of since I have realized. Don't try to ever, don't try ever to browbeat
16 the Court. We will never try that with you. Either with the Chief or with me, anybody, you try
17 that. Okay. Thank you.

18

19 **CHIEF JUSTICE DY CHANDRACHUD:** Yes, Mr. Sibal.

20

21 [NO AUDIO]

22

23 **JUSTICE SANJAY KISHAN KAUL:** Next matter. Yes, Mr. Sibal.

24

25 **CHIEF JUSTICE DY CHANDRACHUD:** We are not appearing before a trial court, we are
26 appearing before a Supreme Court, so yes, Mr. Sibal.

27

28 **KAPIL SIBAL:** Now My Lords, at the outset, I wish to state that this case has been argued at
29 several levels. And My Lords most of them unsolicited without reference to the arguments
30 made by us. I don't think anybody on this side challenges the sovereignty of India. Nobody on
31 this side challenged the sovereignty of India. I at the outset stated that Jammu and Kashmir
32 is an integral part of India.

33

34 **JUSTICE SANJAY KISHAN KAUL:** They say your first petitioner has said something
35 which are not in sync with what you are saying.

36

1 **KAPIL SIBAL:** I'm not concerned with that, if the first petitioner has said something, if he
2 has said it. In what circumstances, he said it. Is it recorded? You ask him for an affidavit. I
3 have nothing to do with it.

4

5 **TUSHAR MEHTA:** He has...Mr. Sibal he has...

6

7 **KAPIL SIBAL:** Let's not take time on that. One second. Let's not take time on that. I am not
8 standing for him for what he said, if he said it. I am not here...

9

10 **CHIEF JUSTICE DY CHANDRACHUD:** Mr. Sibal, do we take it that Mr. Lone therefore,
11 unconditionally accepts that sovereignty of India and that Jammu and Kashmir is an integral
12 part of it?

13

14 **KAPIL SIBAL:** He is a Member of Parliament today. He has sworn to the Constitution of
15 India. He is a Citizen of India. How can he say otherwise? And if anybody has said it, My Lord,
16 I at my level will deprecate it. Now, My Lord, ...

17

18 **TUSHAR MEHTA:** My Lord, it's not the point of Mr. Sibal to deprecate that.

19

20 **KAPIL SIBAL:** Let's not go into an issue...

21

22 **TUSHAR MEHTA:** Appearing before Your Lordship...

23

24 **KAPIL SIBAL:** Ask him to file an affidavit then. I have nothing to do with it.

25

26 **TUSHAR MEHTA:** It's your client. You have to ask.

27

28 **KAPIL SIBAL:** I don't know. You are making an allegation which I don't know...

29

30 **TUSHAR MEHTA:** Terrorism...

31

32 **CHIEF JUSTICE DY CHANDRACHUD:** Let them reflect...

33

34 **KAPIL SIBAL:** Take down any pleadings. Ask him to file an affidavit. I am not here appearing
35 for him. I don't know My Lords. I have not to answer, what an allegation that is made.

36

1 **CHIEF JUSTICE DY CHANDRACHUD:** Because when he invokes the jurisdiction of our
2 courts under Article 32 of the Constitution, he therefore necessarily abides by and he has
3 allegiance to the Constitution.

4

5 **KAPIL SIBAL:** He's a member of the Lok Sabha. He is a citizen of India. He's a citizen of
6 India.

7

8 **CHIEF JUSTICE DY CHANDRACHUD:** That is his submission Mr Sibal. But we want to
9 have it from him that he unconditionally accepts that Jammu and Kashmir is an integral part
10 of India, and that he abides by, and owes allegiance to the Constitution.

11

12 **KAPIL SIBAL:** Of course, and he has sworn to it that's why he became a member of the Lok
13 Sabha.

14

15 **TUSHAR MEHTA:** It's terrorism...

16

17 **JUSTICE SANJIV KHANNA:** But Mr. Sibal, because then when you argue and you accept,
18 as far as sovereignty is concerned, you accept the sovereignty of two things.

19

20 **KAPIL SIBAL:** Of course.

21

22 **JUSTICE SANJIV KHANNA:** Number one, the people of India. Number two, that J&K is
23 integral part of India. When you argue, your client says something outside the court,
24 something different to it. There's contradiction and probably, probably, then he's also
25 accepting there was an issue and a problem which has to be dealt with.

26

27 **KAPIL SIBAL:** My Lords, if I start recounting...

28

29 **JUSTICE SANJIV KHANNA:** No, I'm not saying that. For me, clear on that.

30

31 **KAPIL SIBAL:** My Lords, it will unnecessarily lead only My Lords, to a media coverage. Let
32 us not go that route. We are arguing a pure constitutional issue. There was a Speaker of the
33 BJP who was present there, when this allegedly happened. There are some people who asked
34 him to say something, which he did not say. Why do you want me to go into all this?

35

36 **TUSHAR MEHTA:** No, please go into it. I have no difficulty. My Lord, there is an...

37

1 **KAPIL SIBAL:** It is not part of the record. It has been withdrawn. It has been deleted from
2 the record. It is said earlier... What is all this? It is said in the Assembly, the BJP Speaker was
3 there. Speaker not of his party. BJP Speaker was there. He was asked to say something which
4 people ask, other people to say on the streets of this country. Why do we want to go into this?

5

6 **TUSHAR MEHTA:** We would insist, My Lord. He must go into it.

7

8 **CHIEF JUSTICE DY CHANDRACHUD:** Therefore, he accepts...

9

10 **KAPIL SIBAL:** Of course, unconditionally.

11

12 **CHIEF JUSTICE DY CHANDRACHUD:** We proceed on the basis that he's willing to file
13 an affidavit before our Court, saying that well, he owes allegiance, like every other Indian
14 citizen to the Constitution of India, and that Jammu and Kashmir is an integral part of India.

15

16 **KAPIL SIBAL:** Of course My Lord.

17

18 **TUSHAR MEHTA:** There's another aspect. I'm sorry for the interruption. there is another
19 aspect. The affidavit mentions that in all public speeches of Petitioner number 1, he supports
20 separatist elements and other elements. Let him say he does not support secessionism and
21 terrorism. No citizen of this country can have any objections in filing that affidavit.

22

23 **KAPIL SIBAL:** There is another petitioner, Justice Masoodi. Please allow me to argue. For
24 Justice Masoodi. You want to take any action against the gentleman, you take action. Please
25 don't derail a pure legal submission.

26

27 **CHIEF JUSTICE DY CHANDRACHUD:** We'll hear you, for Mr. Lone as well. There's no
28 difficulty. He has come to our Court. We are more than duty bound to hear his submissions.
29 And we are in the course of hearing his submissions. All that we want to say is like everyone
30 else here, because we have had people from across the political spectrum in Jammu and
31 Kashmir who have presented rival viewpoints before us, different perspectives, which is
32 welcome. That's why we are here to resolve those issues. But, all of them have come here in
33 one spirit, which is that they abide by the integrity of the....

34

35 **KAPIL SIBAL:** You cannot be a member of the Lok Sabah and be a member there without
36 abiding by the Constitution and the oath of office, that I abide by the Constitution of India. He
37 has to take that oath before he enters the Lok Sabha as we all do. And, there is an affidavit filed

1 there. How can that be? But be that as it may, I did not know of this fact till this morning
2 somebody mentioned it.

3

4 **CHIEF JUSTICE DY CHANDRACHUD:** Just ask him to file a short affidavit before us, a
5 one page affidavit. That is all that is necessary.

6

7 **BIMAL ROY JAD:** We have given a copy to Mr. Sibal's client.

8

9 **KAPIL SIBAL:** He will give the affidavit. There is no question, My Lord. I would not stand
10 here if he doesn't give it. I would not stand here arguing for him.

11

12 **CHIEF JUSTICE DY CHANDRACHUD:** Before we close the argument, tomorrow just ask
13 him to file a one page affidavit. That is all there is.

14

15 **TUSHAR MEHTA:** I would request Mr. Sibal to insist to his client that no citizen would have
16 any objection in saying that I do not support terrorism and separatism activity. Let him say
17 that or say that I will not say this. Let me be clear.

18

19 **KAPIL SIBAL:** What is all this? We will certainly My Lord.

20

21 **CHIEF JUSTICE DY CHANDRACHUD:** We will convey it to him, and he will file a short
22 affidavit.

23

24 **KAPIL SIBAL:** Had I known this, I would have myself...it's 2:30, half an hour is lost just on
25 this.

26

27 **TUSHAR MEHTA:** It is not just on this My Lord. It is a serious issue.

28

29 **KAPIL SIBAL:** What is a serious issue? Do you want me to say something that I shouldn't
30 say in Court?

31

32 **ATTORNEY GENERAL R. VENKATARAMANI:** Mr. Sibal, he wants his fundamental
33 rights to be enforced in this country.

34

35 **KAPIL SIBAL:** Everybody has fundamental rights in this country including those who on the
36 streets you vilify.

37

1 **TUSHAR MEHTA:** They are also wrong then.

2

3 **KAPIL SIBAL:** That's all right. Then you should apologize for them. Let me argue the case,
4 please.

5

6 **TUSHAR MEHTA:** They are not present here, we have

7

8 **CHIEF JUSTICE DY CHANDRACHUD:** Mr. Solicitor, we have indicated to Mr. Sibal. I
9 think we are now open to argument.

10

11 **KAPIL SIBAL:** Your Lordship, I have made a commitment that there will be an affidavit.

12

13 **CHIEF JUSTICE DY CHANDRACHUD:** Yes, Mr. Sibal, you open the argument now.

14

15 **KAPIL SIBAL:** Yes, please. So, this case has been argued at different level levels. I was
16 somewhat pained when one Counsel argued that we respect the sentiments of the people of
17 Jammu and Kashmir. But you must also respect our sentiments. I think that we cannot reduce
18 this case to an emotive majoritarian interpretation of the Constitution of India. My Lords, all
19 residents in Jammu and Kashmir are citizens of India, they as much a part of India as anybody
20 else. If historically, there is an Article of the Constitution that gives them certain rights My
21 Lords, they are entitled to defend that, as a matter of law.

22

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

24

25 **KAPIL SIBAL:** Those rights may be taken away, may not be taken away, Constitutionally or
26 without reference to the Constitution is another matter. But to say, that you must respect our
27 sentiments as if they are somebody else, itself is creating a kind of chasm, that shouldn't be
28 created, especially in court, that's number one. Number two, My Lords, and I adopt Mr. Salve's
29 argument, that we are concerned with the interpretation of 370. Read the text, understand the
30 context and interpret 370. I entirely agree with that. And that's exactly what I'm going to do
31 before Your Lordships. Number three My Lords, if you look at the history of India, in that
32 context My Lords, you will find that Jammu and Kashmir had no links with the rest of India,
33 geographically. No links. No part of the territory of Jammu and Kashmir was linked to the rest
34 of India. And the two principles on the basis of which, accession had to take place, was
35 contiguity, you have to be contiguous. That's how My Lords, States like, Junagarh, Hyderabad,
36 many other States, which are internally, which were within India, could never accede to
37 Pakistan because that principle could not be established. So you have to have integrity...

1 contiguity and you have to have population, these were the two principles. And the decision,
2 the third, was to be taken by the ruler. These were the three principles on the basis of which
3 accession took place. Factually My Lords, Jammu and Kashmir was not contiguous to India.

4

5 **JUSTICE SANJAY KISHAN KAUL:** How do you say that, Mr. Sibal ?

6

7 **KAPIL SIBAL:** Because My Lord, it is Radcliffe line, when he came and he made the award,
8 he gave Gurdaspur to India. That's how we got contiguity. That's part of the Radcliffe Award.
9 Of course, Radcliffe, when he came, knew nothing about India. So you might appreciate My
10 Lords, what were the forces behind it. And Ferozepur, was a district connected to Gurdaspur,
11 which had a Muslim majority population. Ferozepur, was also given to India. That established
12 contiguity. That one historical fact My Lords, Your Lordships may know, and it's part of the
13 records, My Lords, of the case. The second grave issue, that was confronting India, at that
14 point in time, was, Greater Punjab was Muslim dominating, not the bifurcated Punjab. The
15 majority population was Muslim. If you gave Greater Punjab, or what was Punjab at that time
16 to Pakistan, their boundary would reach Delhi. Nobody could afford that. And if India got all
17 of Punjab, our boundary would reach Lahore. Neither Pakistan would accept it, nor India
18 would accept it. These are historical, this is a historical background in the context of which the
19 fate of Jammu and Kashmir was to be decided.

20

21 Note another fact. Jammu and Kashmir had a Constitution. A detailed Constitution of 1939,
22 which had an administrative structure, like any other democratic structure, except that the
23 Praja Sabha was dominated by Dogras. In fact, all the nominees in the Praja Sabha were
24 Dogras. Sheikh Abdullah who was...who had an egalitarian outlook was dead against the ruler
25 and therefore was imprisoned. There was a popular movement in Kashmir against Hari Singh.
26 Sheikh Abdullah and Pandit Nehru were of the same bend of mind because Pandit Nehru also
27 showed utter distaste for the concept of rulership. In fact, it was Sardar Patel, who said, we
28 must honour our Constitution. Nehru said, No, we shouldn't. We shouldn't give anything. No
29 privy purses to the ruler. That's all a part of record and history. That's why when the invaders
30 came into Jammu and Kashmir, Nehru said release Sheikh Abdullah first. And he became the
31 interim Prime Minister. He then was made a member of the Constituent Assembly of India to
32 negotiate the terms of the, details of the accession. And remember the Constitution of Jammu
33 and Kashmir, like no other Princely State in India, no other I say was drafted after 1950. And
34 came into force in 1956.... '57. It was completed in '56, came into force in 1957. Only State...
35 only Princely State. That's one set of historical facts that Your Lordships must keep in mind.
36 Second set. Even more important. The Indian Independence Act was passed in Parliament in
37 UK on the 18th of July 1947. Originally, India was to be granted Independence in May 1948.

1 The date was preponed to 15th August '47. So after the Indian Independence Act was passed
2 on 18th July, you had 12 plus 17 days to complete the process of signing 562, if at all
3 Instruments of Accession. On the 25th of July, note this date. That's why I said I needed you
4 to put it on record because Your Lordship don't allow me because my learned friend filed 18
5 pages of written submissions and then 250 My Lords. I tried to file five pages and I was told, I
6 cannot. But doesn't matter. This is all part of the record, I wanted to place but it doesn't matter.
7 I think Your Lordship should take it on record, but I'll leave it to Your Lordships. Anyway...

8

9 **CHIEF JUSTICE DY CHANDRACHUD:** Is it the only thing that you want to file is now
10 this five page submission?

11

12 **KAPIL SIBAL:** No that was originally which Your Lordships denied me at that time because
13 he has made some list of dates.

14

15 **CHIEF JUSTICE DY CHANDRACHUD:** Mr. Sibal, what do you want to file now?

16

17 **KAPIL SIBAL:** Nothing My Lord. Just basically, I have to meet the argument.

18

19 **CHIEF JUSTICE DY CHANDRACHUD:** Fair enough. So, long as what you are filing is
20 not much more than what everybody else is to file. We don't want to be confronted with a 300
21 page document.

22

23 **KAPIL SIBAL:** I will not waste a minute of Your Lordship's time.

24

25 **CHIEF JUSTICE DY CHANDRACHUD:** How big is it? And what is it you want to file?

26

27 **KAPIL SIBAL:** 38 pages.

28

29 **CHIEF JUSTICE DY CHANDRACHUD:** All right, file the 38 pages. No difficulty.

30

31 **JUSTICE SANJAY KISHAN KAUL:** Sibal, we have even taken note of your earlier 15
32 pages, but if we had permitted you to file the whole sequence it would have
33 become...[UNCLEAR].

34

35 **KAPIL SIBAL:** I agree. I'm not complaining.

36

37 **CHIEF JUSTICE DY CHANDRACHUD:** Everyone else could have done [UNCLEAR].

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KAPIL SIBAL: I never My Lord, raised the issue. But, when I was told that I can't file...

JUSTICE SANJIV KHANNA: Mr. Sibal, it was not meant for you. It was meant for everybody. Across the board.

KAPIL SIBAL: The problem is everybody filed. The problem is everybody filed.

CHIEF JUSTICE DY CHANDRACHUD: But, ultimately we took down...

[NO AUDIO]

..the need of having record in writing what you have argued. But now we've taken into your submission.

KAPIL SIBAL: It's alright. No problem. So, My Lords, as they say...

JUSTICE B.R. GAVAI: The list of dates is 100 pages document..

KAPIL SIBAL: His list of Dates. Not mine. No, we have already had it. Your list of dates are made a blue mark. If you have these green and yellow... and I've just added a blue mark to your list of dates. That's all. Not my list of dates.

CHIEF JUSTICE DY CHANDRACHUD: So, their list of dates as I recall is about a 110 pages.

KAPIL SIBAL: 110 pages. I've just added five pages to that to give some correct....

CHIEF JUSTICE DY CHANDRACHUD: So, the 115 includes the earlier 110 and the 5 you have added. That we don't mind. There's no difficulty. And you have followed the same format, the same format. We know what you have added.

KAPIL SIBAL: Exactly, it's in blue, it's in blue My Lords.

CHIEF JUSTICE DY CHANDRACHUD: So long as, otherwise it becomes impossible when we are to just sit down and dictate the entire...

1 **KAPIL SIBAL:** Of course, I told them we mustn't burden Your Lordships. And therefore, we
2 did it that way. Anyway. So let's move on. So, My Lords on 27....

3

4 **CHIEF JUSTICE DY CHANDRACHUD:** Just a second. You're filing. Therefore, your list
5 of dates, which are 115 pages...

6

7 **KAPIL SIBAL:** And my written submissions in response.

8

9 **CHIEF JUSTICE DY CHANDRACHUD:** The written submissions are 38 pages.

10

11 **KAPIL SIBAL:** Yes.

12

13 **CHIEF JUSTICE DY CHANDRACHUD:** So, all of you are now filing...one second.

14

15 **KAPIL SIBAL:** There's an appendix, there is an appendix to it My Lord.

16

17 **CHIEF JUSTICE DY CHANDRACHUD:** There are total 67 pages, submissions are 1 to 38,
18 annexures are 39 to 67.

19

20 **KAPIL SIBAL:** That's an appendix, that's an appendix data My Lord. That's all. Nothing
21 more than that.

22

23 **CHIEF JUSTICE DY CHANDRACHUD:** What is the nature of the data?

24

25 **KAPIL SIBAL:** Data. For example, he said reservation didn't apply to Jammu Kashmir. So,
26 I'm saying it applies. This is the article. So, these kind of things.

27

28 **CHIEF JUSTICE DY CHANDRACHUD:** All Right.

29

30 **KAPIL SIBAL:** They say for example, low education. Actually education in Jammu Kashmir
31 is fere up to University. Free education till University, in the Constitution itself. These are facts
32 which should have been stated by the other side. They say there's no official language. There
33 was an official language.

34

35 **CHIEF JUSTICE DY CHANDRACHUD:** That you can file it because we've been now...
36 this five basically, five pages of list of dates added on, and your submission is about 38 pages.
37 So, Annexure is to explain what according to you has been made available or what is...

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KAPIL SIBAL: That's all. Nothing more.

CHIEF JUSTICE DY CHANDRACHUD: But, in the same vein that you said, don't take into account what they have said on the more, should we say developmental aspects, we shouldn't take into account what you have said also and what is available. We have to answer purely based on constitutional issues.

KAPIL SIBAL: Exactly. That's why I never went into that.

JUSTICE SANJAY KISHAN KAUL: Mr. Sibal, when you say five pages on the lighter side, and I quote, at least when I used to say five pages, if somebody handed over ten pages has to remove the last five pages,

CHIEF JUSTICE DY CHANDRACHUD: And confined to the first five pages.

KAPIL SIBAL: Now My Lords, note another thing. On 25th of July 2000....sorry 1947. The Chamber of Princes met. So My Lords, in the Chamber of Princes, Sardar Patel said, we will only have with us, that the Union, communications, external affairs and defence. You are autonomous for the rest. 25th of July. 25th of July. That's also part of the record that I've given you. Mountbatten said it, on the 5th of July, he had said it also. So, My Lords, therefore, and that was the understanding with the Princes. It will be a federal structure, communications, foreign affairs and defence would be with the Union, and the State should be autonomous.

That's one part. The other part was My Lords, there were some Princely States My Lords, one of them, the only property it had was a well. He was a Prince of that well, My Lord, he had no means of livelihood. They naturally, such small states had to join larger Princely States, Kathiawar, Saurashtra. Saurashtra had incorporated 220, Princely States within it, the whole processing of, 17 days, was an entirely asymmetric process. Idea was to persuade all of them, to please sign Instruments of Accession. PEPSU was one of them. Faridkot, PEPSU, all those. That was happening, My Lords, with Sardar Patel and VP Menon and Mountbatten, who had personal relations with all the Princes, which neither Sardar Patel had nor VP Menon had. Because then the Governor General Mountbatten, was actually served in India for a long period of time. And each of these Princely States had a resident. And they would be told, that you only should spend 10% of your revenue of the State on yourself, the rest, you should spend on the public, where most of them spent 80% on themselves. But ultimately My Lords, they all acceded, they all signed the Instruments of Accession, by 15th of August, with a Standstill

1 Agreement and nothing more. Some of them My Lord, merged into larger administrative units,
2 didn't have to do that My Lords, because then they were represented by the larger
3 administrative units. So my learned friend the Solicitor is right, that many of them Princes did
4 not sign, did not merge, because they were merged with other larger administrative units. So,
5 it was an entirely asymmetric way of actually getting them all together in 17 days. It was a
6 herculean task. Ultimately who stood out? Hyderabad, Junagadh, Kashmir and Travancore.
7 In fact the first ruler to revolt was Travancore, because of the advice of the *Dewan*, who
8 ultimately got attacked and was in hospital and then they signed the Instrument of Accession.
9 That's just My Lords, I know, I don't want to take....And My Lords, now you were left with
10 Junagadh, you were left with Hyderabad and Kashmir and as far as Kashmir was concerned,
11 Your Lordship knows, the Instrument of Accession was signed, subject to certain conditions.
12 In many of the Instruments of Accession, that were signed by others, with other Princes, had
13 a provision that there can be a supplementary Instrument of Accession, but there cannot be
14 unless I give consent, that is, the ruler gave consent. So some of them had supplementary. But
15 this didn't happen in Jammu and Kashmir. The point that I am making is My Lords, Jammu
16 and Kashmir was the only State in India, where a special dispensation was made, for reasons
17 which were domestic and reasons that were international. Which is why this whole argument,
18 that there must be uniformity, is completely bereft of the historical context. Now, principle
19 was contiguity and population. Junagadh acceded to Pakistan, acceded to Pakistan. Somnath
20 Temple was in Junagadh, very dear to all of us. So My Lords, having acceded to Pakistan, India
21 wanted to invade and take over Junagadh. Mountbatten said, you can't do it. He has acceded
22 to Pakistan, this is foreign territory for you. So ultimately My Lords, infiltrators were sent.

23
24 And they took over and there was no resistance. Then negotiations took place and Pakistan
25 agreed to a plebiscite. A referendum. Knowing full well that such a referendum would happen
26 in Kashmir also. The same thing happened in Hyderabad. The ruler was Muslim, the people
27 wanted to join India but he did not join Pakistan. He wanted to be independent. He didn't
28 accede to Pakistan. There was a General, 1, 1, 1. This happens nowadays also. There was a free...
29 freelancer My Lords who promised the ruler of Hyderabad, that I will get you arms. You give
30 me so much money. So they piled up a lot of arms to resist any invasion. Ultimately, My Lords,
31 that man Mr. Cotton left him and the invasion took place and he was occupied. Now you're left
32 with Jammu and Kashmir. Go with Kashmir the population was Hindu... was Muslim,
33 majority and the ruler was Dogra. It is in this historical context that you must view what
34 happened in Jammu and Kashmir was only to ensure that Jammu and Kashmir becomes an
35 integral part of India. There can be no question about it. My Lords, I'll come to that. There can
36 be no plebiscite in Jammu and Kashmir. That is our position. We stand with India. Now My
37 Lords, having signed the Instrument of Accession by 15th of August and some of them

1 Standstill Agreements, the question then was they had to merge because none of them had any
2 administrative units in place. You had to have local self-government, and Your Lordship
3 knows that point in time we wanted India to be a Democratic Nation. So then Sardar Patel and
4 Menon persuaded all of them to please have Merger Agreement, so that we can treat you in
5 the same way as other provinces. So all of them signed Merger Agreements, not Jammu and
6 Kashmir. Nor was Jammu and Kashmir asked to sign a Merger Agreement. Never.

7

8 **CHIEF JUSTICE DY CHANDRACHUD:** How many Merger Agreements were there
9 actually?

10

11 **KAPIL SIBAL:** I'll give you the number My Lords. I think we have them. I will give Your
12 Lordships the number.

13

14 **CHIEF JUSTICE DY CHANDRACHUD:** Because everybody who signed an Instrument of
15 Accession didn't necessarily sign a Merger Agreement.

16

17 **KAPIL SIBAL:** No, no but what happened was, many of them...

18

19 **CHIEF JUSTICE DY CHANDRACHUD:** Many of them had formed unions with existing
20 states like Kathiawar or Saurashtra.

21

22 **KAPIL SIBAL:** Yes, that's right. That's right. You'll have that...

23

24 [INAUDIBLE]

25

26 That's not an issue. So My Lords, that didn't happen in Jammu and Kashmir. So when the
27 infiltrators came, when the infiltrators came and he couldn't defend himself and he went away
28 from Srinagar. He ran away from Srinagar. And we helped him My Lords by going there. The
29 issue arose, we had no communication systems in place. No communication system in place
30 and we didn't know the topography...Our army. Because we had never been there. The army
31 represented that if you want to deal with the infiltrators, the source of it is Pakistan. So we'll
32 have to target Pakistan, to which Mountbatten said that will declare war. If you do that, it will
33 be war. You cannot be allowed to do that. So we were not allowed to do that. So the result was,
34 that in that situation, kindly My Lords, referendum is not the only place that we are talking
35 about in Jammu Kashmir, there should be no referendum. There can't be a referendum, in any
36 case. But referendum happened in the northwest provinces. We had the Congress Government
37 in the Northwest Frontier Province. Referendum happened there and they went to Pakistan.

1 Referendum happened in Junagarh. So, it is not as if this was alien to the concept of how
2 people express their will. But in our case, what happened was, the Government of India, said,
3 let the Constituent Assembly, namely the people of Jammu and Kashmir, represented in the
4 Constituent Assembly express the will of the people. That's how 370 was came in. There was
5 no other way to express the will of the people. Certainly not through a referendum. Nobody
6 wanted it, especially after the first year. Because in 1953, Sheikh Abdullah was arrested by
7 Nehru, because he raised the slogan that we want to be autonomous. Sheikh Abdullah was
8 arrested. By Nehru himself. Nobody wanted a referendum. Nobody would have allowed a
9 referendum. But the way out was, in that context, draft a provision in 370 by which the will of
10 the people of Jammu and Kashmir can be expressed through the Constituent Assembly.

11 That's the historical lay of the land My Lords. In the context of which you have to read Article
12 370 of the Constitution. Now, let me disabuse, Your Lordships here, some of the myths that
13 have been portrayed here.

14 Number one, that Parliament has plenary powers under 370. Just the contrary. The power of
15 Parliament to make laws is limited by 370. Nobody has read it. Just look at 370, My Lord, with
16 me. Just read 370 with me.

17

18 **CHIEF JUSTICE DY CHANDRACHUD:** I know, there limitations in Parliament's
19 lawmaking power. Because....

20

21 **KAPIL SIBAL:** No, no. Not that. I'm not saying that. I'm saying something different. Just
22 read 370 with me. I'll read it with you. 'Notwithstanding anything in this Constitution, the
23 provisions of 238 shall not apply, and the power of Parliament to make laws for the said State
24 shall be limited.'

25

26 **CHIEF JUSTICE DY CHANDRACHUD:** What we are reading, which...?

27

28 **KAPIL SIBAL:** Article 370.

29

30 **CHIEF JUSTICE DY CHANDRACHUD:** 370.

31

32 **KAPIL SIBAL:** It is a limitation on the Parliament to make laws. Yes, 1(b), to matters in the
33 Union List. To matters in the State in the concurrent list. It stares you in the face. And you're
34 talking about plenary power. Where is that plenary power? If you want to pass any law or if
35 you want to extend the provisions of the Constitution of India, forget about 370 (b)(1) and (2),
36 look at (d). If you want to extend the Constitution of India in respect of matters which are in
37 the Instrument of Accession, outside of those matters you have to take, you have to consult.

1 Otherwise you have to take concurrence. And how does the President of India act on the aid
2 and advice of the Council of Minister? President is not acting, in his individual capacity. It is
3 the Council of Ministers which will decide, not Parliament. The Governor, as he acts on the aid
4 and advice of the Council of Ministers. It is the Council of Ministers at the other end, which
5 will decide, not the legislature. It was to ensure, that there is slow integration of Jammu and
6 Kashmir into India, through a process that is easy. Through a process, that will allow the
7 executives communicating with each other, to make sure that the Constitution of India, as
8 applied to the Constitution of Jammu and Kashmir is put into effect, which is why the C.O. in
9 52, in 54, that's the background. Once we decided on the list, that this is the entry in the list
10 on which a law can be made, and through executives agreed on it, the law is made and to be
11 applied. That's the procedure My Lords, nothing to do with how they have interpreted the
12 Constitution. And that's how it happened all the time. Which is why, if Your Lordships, will
13 remember at the outset, I said, these are....this is an exercise of executive power. It is not even
14 exercise of legislative power, far be it, some *quasi*, some ancillary, constituent power, doesn't
15 exist. So My Lords, I ask this one question for which, if you have an answer My Lords, I
16 certainly don't have an answer. My Lords, throughout Gopalaswami Ayyangar, who was part
17 of the Drafting Committee and who introduced the Bill, understood 370, as we have argued
18 before Your Lordships. Exactly that. From 1950 to 5th of August 2018, no Member of
19 Parliament, sorry, no Member of Parliament, no individual, in the public space said otherwise.
20 Nobody said it. Every interpretation of the Constitution as reflected in the debates in
21 Legislative Assembly, and in Parliament, interpreted, the Constitution, as Ayyangar
22 interpreted it, and as we have argued before, Your Lordships. There has never been a descent.
23 When the Government of India files an affidavit in this court, it's the same thing, except they
24 say that now through this process, we have substituted the Constituent Assembly with the
25 Legislative Assembly. They have understood 370 in the same way. Now in the argument, not
26 part of their affidavit, not part of their pleadings, they say, no, no, there is some plenary power.
27 Your Lordships are not sitting here, in an advisory capacity, to tell them as to what 370 means.
28 We are My Lords, testing the action of the Union. We are not having some academic exercise,
29 of the interpretation of 370. We are just to test C.O. 272 and 273, whether it was rightly done
30 or wrongly done. Maybe rightly done, maybe wrongly done. That Your Lordship will decide.
31 But It has nothing to do with any plenary power, nor is it the case of the Union. Now, let's
32 accept their argument. Test it My Lord, how it will be. They say, this is a plenary power. Forget
33 the proviso because the Constituent Assembly is dead. There's no Constituent Assembly now.
34 There is a Constitution of Jammu and Kashmir, which is in place. And the argument is, now
35 that it is dead, I can exercise that power and abrogate it. That's always been the position. So
36 what it means is My Lord, that the Constituent Assembly and the people of Jammu and
37 Kashmir, signed their death warrant on the day the Constitution was made and the Constituent

1 Assembly was dissolved. On the next day, 370 would have been abrogated, instead of 5 August
2 2018... '19.

3

4 They would have abrogated the next day. So they were signing the death warrant, that while
5 we are there, you can't do anything about it. But the moment we have drafted the Constitution
6 of Jammu and Kashmir, then you can tomorrow, just take away. Just abrogate 370. My Lords
7 can any... any Constitutional Court can ever interpret 370 in this fashion? Can anybody even
8 think about it My Lords, that a Constituent Assembly drafting the Constitution of Jammu and
9 Kashmir, saying that they are an integral part of India, taking note of 370 in the manner in
10 which it is to be integrated to India, will say to themselves that the day we are not in place it
11 will be abrogated because there's a plenary power superior in 370, which is not there in 370,
12 but because we say so, and which is not even part of the counter affidavit of the... this is not
13 even the case of the Union. What are we? This is not some... I mean this is not even... You look
14 at it textually. You look at it contextually. There is no other conclusion you can come to. Then
15 Your Lordship asked me several times and asked others also, what's the way out? That's not
16 for Your Lordships to decide. Your Lordships are not here to tell them what the way out is, or
17 for us to tell them what the way out is. It's a political process. The way out is a political process
18 or some other process My Lords. That's for them to decide. But the way out is not this, that
19 you do something consistent with the interpretation of 370 and you argue exactly something
20 else which has nothing to do with your own counter affidavit and that's the Union. How can
21 they be allowed to do that? What does concurrence mean? It means consent, as Your Lordship
22 has been saying. If it requires the consent of the Governor of the.... Governor, acting on the aid
23 and advice of the Council of Ministers, where is that plenary power that we are talking about
24 and reading in 370? And 370 Sub-Article (2) says that if an order is... if an order is made
25 between 1950 and 1951, when the Constituent Assembly was in place. The Constituent
26 Assembly can reject it.

27

28 **CHIEF JUSTICE DY CHANDRACHUD:** Mr. Sibal, why does the proviso to Clause 3 use
29 the expression recommendation, when two other provisions in the same article use the
30 expression concurrence.

31

32 **KAPIL SIBAL:** Yes I will give Your Lordships that.

33

34 **CHIEF JUSTICE DY CHANDRACHUD:** (b)(2) uses the expression concurrence, and the
35 second proviso to (d), uses the expression concurrent.

36

1 **KAPIL SIBAL:** Absolutely. In other words, when it comes to applying the Constitution of
2 India to Jammu and Kashmir in respect of, in matters which are not with reference to the list.
3 You need the concurrence of the State Government acting on the aid and advice of the Council
4 of Minister, at least qua that there is no plenary power of Parliament. Concurrence means I
5 can say no. Means an executive can say no to what is proposed. Now, if you read 370, and I
6 will just answer My Lord's question, if you read 370 the Presidential notification cannot be
7 initiated because the expression in the proviso to 370 are two expressions. Necessary and
8 before. The timing is set before the President issued a notification, a recommendation has to
9 come. And that is necessary. And the order in which is that first the recommendation will come
10 then you would pass an order. You can't reverse that process. On a plain language, on a textual
11 reading, which I said, My Lords, I accept what Mr. Salve said. Read the text and give the
12 answer.

13

14 **CHIEF JUSTICE DY CHANDRACHUD:** Mr. Sibal is it not conceivable? I mean, I'm just
15 thinking aloud, that so long as Article 370 operated it provided modalities for, a) the
16 application of the list, the entries in the 3 Lists. Consultation in one case, and concurrence in
17 the other.

18

19 **KAPIL SIBAL:** Right.

20

21 **CHIEF JUSTICE DY CHANDRACHUD:** So long as Article 370 operated, it provided for
22 the application of the other provision of the Constitution, subject again to...

23

24 **KAPIL SIBAL:** It's a same process.

25

26 **CHIEF JUSTICE DY CHANDRACHUD:** Same formula, application and concurrence.

27

28 **KAPIL SIBAL:** Absolutely.

29

30 **CHIEF JUSTICE DY CHANDRACHUD:** You probably rightly said, that the object was to
31 bring about a slow integration.

32

33 **KAPIL SIBAL:** That's correct. Which I have been saying.

34

35 **CHIEF JUSTICE DY CHANDRACHUD:** In achieving that slow integration, the
36 Constitution framers provided for consultation, this whole formula of consultation and
37 concurrence,

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KAPIL SIBAL: Absolutely.

CHIEF JUSTICE DY CHANDRACHUD: Checks and balances at two levels of Government, the Union Government and the Government of the State. But, significantly the Constitution doesn't tell us what would happen after the Constitution of Jammu and Kashmir would be framed. It contains no express provision that, that Constitution would then be embodied or incorporated in the Indian Constitution, because the Indian Constitution by all indicators, we've seen several indicators, there's always to remain reign supreme. So, when it came to abrogation, it left in 1950 the point of abrogation to the exercise of wise statesmanship. You just said a short while ago, why didn't I do it in 1950?

KAPIL SIBAL: It is not a question to do it. They had the power to do it. I am not on that.

CHIEF JUSTICE DY CHANDRACHUD: They were right. Why they did not do it? They had the power to do it. If they had the power to do it...

KAPIL SIBAL: Because they never understood 370 in this fashion.

CHIEF JUSTICE DY CHANDRACHUD: There's an alternate, there's an alternate hypothesis. It was always presumed that, allow 370 to work out. There should be an eventual process of integration. Let that integration take place over a period of time during which you will have this two-fold procedural check of consultation and concurrence. At what time, at what point of time, the integration is deemed to be complete or that Jammu and Kashmir is ripe for an integration with the rest of India. The full and true sense of the term was not hedged in by the Constitution.

KAPIL SIBAL: I'm sorry with the greatest respect...

CHIEF JUSTICE DY CHANDRACHUD: Is that not possible...

KAPIL SIBAL: No, it's not My Lords. On a plain reading of 370...

CHIEF JUSTICE DY CHANDRACHUD: Because there are very significant silences in Article 370.

1 **KAPIL SIBAL:** You don't need expression of interest in this fashion for the simple reason
2 that the 370(3), itself gives you a clue as to what was the reason behind it.

3

4 **CHIEF JUSTICE DY CHANDRACHUD:** There are not sufficient silences in Article 370 to
5 lead to the conclusion that the framers, both when they were on that side in the state of Jammu
6 and Kashmir, and on this side in the Union of India left it to wise acts of statesmanship in
7 1950.

8

9 **KAPIL SIBAL:** I hope on both sides

10

11 **CHIEF JUSTICE DY CHANDRACHUD:** Of course.

12

13 **KAPIL SIBAL:** My Lord. It's a unilateral act. This is not a wise act. This was a unilateral act.

14

15 **JUSTICE SANJIV KHANNA:** Yes, but taking on what Chief Justice is saying, it's quite
16 apparent at that time, what was either happening with the rulers, and integration into India,
17 because that was our objective. And it was all a political move at that time. There were different
18 views expressed even with regard to J&K. If one looks at the wording with Articles, the
19 argument of the other side was, it was deliberately left very flexible and to some extent
20 contradictory.

21

22 **KAPIL SIBAL:** Yes, I don't see the flexibility here, nor do I see a contradiction. Just read (3),
23 with me My Lords. If you find My Lords, that there's a silence there about what would happen,
24 certainly. I...

25

26 **CHIEF JUSTICE DY CHANDRACHUD:** Except for the provision for permanent
27 residence, Section 6, which finds it's mirror image in Article 350..., 35(a), every other provision
28 was really a mirror image of the Indian Constitution. So what is that thing saying? What is that
29 an indicator of?

30

31 **KAPIL SIBAL:** That's an indicator of the fact that...

32

33 **CHIEF JUSTICE DY CHANDRACHUD:** Indicator of, whatever is happening there, is
34 really the incorporation of the adoption of what is happening in the Constituent Assembly of
35 the Union of India.

36

1 **KAPIL SIBAL:** I can only say this to Your Lordships, either we interpret 370, Sub-Article (3),
2 in its text and context or we find something that's not there. And as a matter of Constitutional
3 law My Lords, you have to interpret the Constitution, not find a silence in the Constitution to
4 interpret something that is express. Let's just read it My Lords.

5

6 'Notwithstanding anything in the foregoing provisions of this Article, the President may...',
7 now who is the President, acting on the aid and advice of Council of Minister, 'may by public
8 notification, declare that this Article shall cease to be operative or shall be operative only, with
9 such exceptions and modifications, and from such date as he may specify.'

10 Now just pause here. Supposing My Lords, he was not to abrogate. Who is only to modify or
11 apply with exceptions. Is that also unilateral power? Forget about abrogation for the moment.
12 That we have to interpret Constitutional provisions as we read them My Lords, not as we find
13 some element of silence, which is not there. 'Provided that the recommendation of the
14 Constitution', this is a proviso My Lords. 'There's a recommendation of the Constituent
15 Assembly of the State, referred to in Clause 2, shall be necessary', that means, to start the
16 initiation of the process, that recommendation is necessary and 'before the President issues
17 the notification.' It's a double emphasis of how that power can be exercised. Not by Parliament,
18 but on the aid and advice of the Governor. So My Lords, I...

19

20 **CHIEF JUSTICE DY CHANDRACHUD:** We will, of course have to, then to accept your
21 argument, we will have to read a further condition in the proviso, that the recommendation of
22 the Constituent Assembly has to be in the same terms of the action which is supposed to be
23 taken by the President, namely either that if you are abrogating, there must be a
24 recommendation that yes, I will abrogate.

25

26 **KAPIL SIBAL:** Yes..

27

28 **CHIEF JUSTICE DY CHANDRACHUD:** Or if you are making 370 applicable, subject to
29 such changes...

30

31 **KAPIL SIBAL:** Yes, same thing.

32

33 **CHIEF JUSTICE DY CHANDRACHUD:**...then the recommendation might be also along
34 the same.

35

36 **KAPIL SIBAL:** Yes. Absolutely.

37

1 **CHIEF JUSTICE DY CHANDRACHUD:** But it is not there in the proviso, isn't it?

2

3 **KAPIL SIBAL:** It is My Lords. It is before any of this. Kindly see, 'provided that the
4 recommendation of the referred to in Clause 2, shall be necessary.'

5

6 **JUSTICE SANJIV KHANNA:** No, this is a core argument on which you are taking one
7 stand. The other side is is taking one stand. We have to...

8

9 **CHIEF JUSTICE DY CHANDRACHUD:** That what we have to understand...

10

11 **KAPIL SIBAL:** All I'm saying My Lords, at the moment is...

12

13 **JUSTICE SANJIV KHANNA:** Their stand is, that proviso will not evaporate and write off
14 the Third Clause of Article 370, after the Constituent Assembly as..

15

16 **KAPIL SIBAL:** My Lords, at least so far...

17

18 **JUSTICE SANJIV KHANNA:** That's their stand, your stand is to contrary.

19

20 **KAPIL SIBAL:** My Lords, so far, so far, I can only go by precedent, so far the proviso has
21 never been interpreted in the fashion, that they are seeking to interpret it, in any judgment of
22 the Supreme Court since 1950.

23

24 **JUSTICE SANJIV KHANNA:** That occasion never arose, probably.

25

26 **KAPIL SIBAL:** That's not the way they acted. My Lords, kindly please appreciate what they...

27

28 **CHIEF JUSTICE DY CHANDRACHUD:** Therefore according to you, then, if the proviso
29 cannot be applied, because the Constituent Assembly has come to an end?

30

31 **KAPIL SIBAL:** No, no, no, My Lords. With respect, I say, that's not the point..

32

33 **CHIEF JUSTICE DY CHANDRACHUD:** Which was, the proviso says, the Constituent
34 Assembly referred to in Clause 2.

35

36 **KAPIL SIBAL:** Correct.

37

1 **CHIEF JUSTICE DY CHANDRACHUD:** So it is only one and one Constituent Assembly,
2 which was formed for the purpose of the framing of the Constitution of J&K.

3

4 **KAPIL SIBAL:** Correct.

5

6 **CHIEF JUSTICE DY CHANDRACHUD:** Even if you have another Constituent Assembly
7 in J&K, you can never have that Constituent Assembly, which was for the forming the
8 Constitution.

9

10 **KAPIL SIBAL:** Now My Lords, let me answer it.

11

12 **CHIEF JUSTICE DY CHANDRACHUD:** Therefore, the proviso cannot apply at all.

13

14 **KAPIL SIBAL:** Let me answer it.

15

16 **CHIEF JUSTICE DY CHANDRACHUD:** In your submission?

17

18 **KAPIL SIBAL:** Yes my answer is the following My Lords. When the Constitution of India was
19 framed in 26th of January 1950, there was no Constituent Assembly. And there was no
20 Legislative Assembly. So what did the Constitution makers provide for, in the proviso? They
21 envisaged that there would be a Constituent Assembly. They envisaged that there would be a
22 Legislature. If there was a Constituent Assembly, which would abrogate 370, there would be
23 no Jammu and Kashmir Legislation...Constitution. There would be no Jammu and Kashmir
24 Constitution. Because that's abrogation. Constituent Assembly would recommend abrogation.
25 At that point in time, those who drafted the Constitution were not aware as to what was going
26 to happen. That's why. Sorry, I'm sorry.

27

28 **JUSTICE SANJIV KHANNA:** 370, in the slide. There are two arguments. One, obviously
29 with reference that proviso will not be controlling the main part of 3, that's a core dispute
30 between the two.

31

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

33

34 **JUSTICE SANJIV KHANNA:** Provision will not be applicable is contradiction in terms.

35

36 **KAPIL SIBAL:** Now My Lords, let's put it differently. This whole process of the political
37 process. That's what Salve argued. Counsel argued. This was a political compromise. You pull

1 the plug anytime you want to pull the plug. At least 370 doesn't allow you to do that, but
2 assume that's the case. If it's a political compromise, there will be a political solution. Why are
3 Your Lordships finding some Constitutional solutions that doesn't fit into this? That's not what
4 My Lords you have to... please look at it this way My Lords. If the process was political, the
5 solution has to be political. Now, how that solution comes about is neither for Your Lordships,
6 nor for us to suggest. This is something that they have to do in collaboration.

7

8 **JUSTICE SANJIV KHANNA:** The initial part was political. Now it has to be constitutional.

9

10 **KAPIL SIBAL:** No My Lords, if that is so. Now, it's constitutional, then that means the
11 Constituent Assembly..

12

13 **JUSTICE SANJIV KHANNA:** Might, might the.... the fact that the intent behind the article
14 was temporary and transitory.

15

16 **KAPIL SIBAL:** No, that I'll come to a little later. But, the answer to the question is that the
17 Constituent Assembly was framing the Constitution of Jammu and Kashmir, knew that after
18 that task was over, it would end and was signing a death warrant under 370 Sub-Article(3),
19 that now you can abrogate the Constitution. I'm sorry My Lords on a plain reading of 370, I
20 have the greatest respect for Your Lordships.

21

22 **CHIEF JUSTICE DY CHANDRACHUD:** Therefore, the sequitur of your submission on
23 the proviso to Clause 3, is that once the Constituent Assembly has formulated the Constitution
24 of J&K, which has been adopted. The proviso ceases to have any existence.

25

26 **KAPIL SIBAL:** Yes, and 370 ceases to have...370 ceases to have effect.

27

28 **CHIEF JUSTICE DY CHANDRACHUD:** Sorry 370 also?

29

30 **KAPIL SIBAL:** Sub-Article(3) ceases to have.

31

32 **CHIEF JUSTICE DY CHANDRACHUD:** Therefore 370(3) ceases to have effect.

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34 **KAPIL SIBAL:** Yes.

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36 **CHIEF JUSTICE DY CHANDRACHUD:** In which case 370 by itself apart from 370,
37 Clause 3 assumes a permanent character.

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KAPIL SIBAL: Permanent in the sense that, whether what is left of this autonomy that we are talking about. If the argument is it is just a shell, what is it that you are trying to do? What is the argument today My Lords? I have heard it several times over. What is left is only a shell. Everything is already there.

JUSTICE SANJIV KHANNA: That there is a contradiction in their argument.

KAPIL SIBAL: I am only saying My Lords is that...

JUSTICE SANJIV KHANNA: Just one sec. That there's a contradiction in their argument. They said that make substantial part of the Constitution, including 356 is now fully applicable. But what was the main stumbling block was Section 6 and 35.

KAPIL SIBAL: As far as 35 concerned that's a separate issue.

JUSTICE SANJIV KHANNA: No I'm not interpreting [NO AUDIO]...complete adoption of the Indian Constitution in toto. In completely as in case of other States.

KAPIL SIBAL: Strike down 35(a). I don't understand where we are getting here. If this is the only stumbling block, you strike down 35(a).

JUSTICE SANJIV KHANNA: That's the judicial way.

KAPIL SIBAL: No, that can't be politically done. In any case. Because there can be reasonable restrictions and there can be classifications in terms of Article 14. It has happened in Uttarakhand, it has happened in Himachal. It has happened in other States. Why it can't happen in Kashmir? My Lords it is happening in Assam. You are by fixing a date for people who came into Assam.

JUSTICE SANJIV KHANNA: We will come to that later.

KAPIL SIBAL: I'm only trying to indicate, show the mirror to myself that if this happens in Kashmir...

JUSTICE SANJAY KISHAN KAUL: Actually, I feel the two spectrums which have to be decided here.

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KAPIL SIBAL: Yeah.

JUSTICE SANJAY KISHAN KAUL: When you use the word temporary, whether it's actually temporary in the sense they understand it or it is temporary in the sense you understand it, that, it was with the context of the Constituent Assembly. One. Number 2, how you understand Sub-Clause 3, is that once the Constitute Assembly dissolves itself, 370 in the form it exists according to is frozen in time for all times to come. Correct? This is what your argument is.

KAPIL SIBAL: 370, Sub-Article 3. The rest of it is still remain.

JUSTICE SANJAY KISHAN KAUL: Yes, I've seen 370, the remaining part is frozen as period of time because of the historical perspective.

KAPIL SIBAL: No, not remaining My Lords.. You can continue to... continue to integrate. 3 is frozen.

JUSTICE SANJAY KISHAN KAUL: Three goes to the middle part, subsidiary.

KAPIL SIBAL: Absolutely.

JUSTICE SANJAY KISHAN KAUL: They say, no 370(3) is not limited to that stage because of the manner C.O.s have been issued and can extinguish themselves. That's a fundamental issue.

KAPIL SIBAL: That C.Os have been issued, not in under 3.

JUSTICE SANJAY KISHAN KAUL: Then comes the methodology whether they could have done it or not.

KAPIL SIBAL: The C.Os have not been issued under (3). This is the problem My Lord. The C.Os can continue to be issued. All of them are under (1). So, and My Lords, I'm sorry to say this, when you talk of temporary provisions, it is not a temporary provision.

CHIEF JUSTICE DY CHANDRACHUD: Mr. Sibal, ultimately it will boil down to this, that there is in our Constitution, if we accept your submission, there is in our Constitution a

1 provision to which even the amending power, which is available in respect to the rest of the
2 Constitution, is unavailable.

3

4 **KAPIL SIBAL:** It's unavailable because it's been amended. 368 has been amended with a
5 proviso.

6

7 **CHIEF JUSTICE DY CHANDRACHUD:** And there is, in that sense, a provision of the
8 Constitution, which lies even above the basic structure of the Constitution.

9

10 **KAPIL SIBAL:** No, My Lords... I'm sorry. Why do Your Lordships... I am sorry.

11

12 **CHIEF JUSTICE DY CHANDRACHUD:** 370, you can't amend also. You can't amend 370
13 also. To amend 370, you have to take the route of 368 and 368 takes you back to 370(1), by
14 the, by the proviso. Therefore you would be then really accepting a situation. We are not saying
15 it's un-statable, that we are testing the proposition, is there a part of Constitution? The only
16 restriction we have found so far in our jurisprudence, on the power of changing and altering
17 the Constitution is a basic featured doctrine. We are now going to add one more, which is that
18 Article 370 lay even beyond Article 368 and much beyond the basic structure doctrine. Because
19 you can't touch Article 368 or 370. It assumes the character of permanence.

20

21 **KAPIL SIBAL:** This is even getting more interesting. Let me now ask myself for question.
22 Supposing, I were to file a petition tomorrow in this Court, that the proviso to 368 is
23 unconstitutional? 368(2). Supposing I were to file the petition and what if My Lord is saying
24 is upheld, is right. That how can you do that? Strike down the second proviso to 368 and amend
25 it under 368. There are hundreds of ways of doing the same thing, but we are testing the
26 proposition in the context of what they have done. What they have done.

27

28 **CHIEF JUSTICE DY CHANDRACHUD:** To postulate that a judicial annexure is a judicial
29 review...We must take the proviso as a given.

30

31 **KAPIL SIBAL:** But I am saying, yes, My Lords. It's Your Lordships that are saying there's
32 something silent in it, which I don't see, My Lord. I don't see the silence in that proviso, the
33 perpetuity of a Presidential notification can be issued at any time, even after...

34

35 **CHIEF JUSTICE DY CHANDRACHUD:** The two plain consequences of your submission
36 are, first, once 370 Clause 3 goes, out of operations for all intents and purposes, 370(1) and (2)
37 have a permanent character in the Constitution.

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KAPIL SIBAL: Two is not there My Lords.

CHIEF JUSTICE DY CHANDRACHUD: Two is not, of course after the Constitution. 370(1), has a permanent character in the Constitution. Second, you cannot amend 370 using the 368 power because of the restraint which is imposed by the proviso which again takes you back to 370. Therefore, even the power to amend 370 is within the fold of 370 and not 368.

KAPIL SIBAL: Let me answer that also straight away.

CHIEF JUSTICE DY CHANDRACHUD: So, we are carving out really a position of provision of the Constitution which lies even higher than the basic features of the Constitution.

KAPIL SIBAL: Your Lordship should not say that My Lords because that's not yet tested. That Your Lordships yet not say. That's not yet tested. Whether it's higher than the basic feature of the Constitution or not. But kindly, see this was added in the 1954 order. The proviso to 368(2) was brought in by the order as well as My Lords, the proviso to Article 3. In 1954. Who brought it My Lords? The Government of India. State of Jammu Kashmir did not. They gave its consent to it. Why did they do it? Because they did not want 370 to be tampered with. I'm not saying this My Lords. I am talking of the intent of the Government of India. When the proviso was added, both to 3 and 368. Not my intent. And Your Lordships are now saying, what is the intent of the Government of India? It was made clear that even under 368, you can't do this. Government is a continuum. Kindly My Lords appreciate that. It is not something that was done by Jammu Kashmir on their own. I understand, My Lord. Then there we go into the sentiment argument. The emotive argument, the argument that Mr. Dwivedi made, with respect. That...we appreciate the sentiments of people of Jammu and Kashmir, but there are sentiments in India. My Lords, with the greatest respect, I humbly pray, we are dealing with the Constitution. It's a sentimental thing. I have also have sentiments in a lot of things, but when we come to court, we discard our, do away with what our heart, the nature of our heart beat in, come to brass tacks My Lords, and interpret the Constitution. You can pepper it with emotive instincts My Lords, but you can't get away from the plain language. My respectful submission to Your Lordships is, a political process must have a political solution, and as I said, what is left of 370, there is no residuary power. We talk about residuary. What is the residuary power? There no residuary power with the State. When has the State ever exercised residuary power? So for all intents and purposes, it is fully integrated.

1 **CHIEF JUSTICE DY CHANDRACHUD:** In other words, according to you, there is no
2 solution to Kashmir, within the Constitution [UNCLEAR] judiciary itself is a Constitution...

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4 **KAPIL SIBAL:** No, no. Now Your Lordships are putting this to me.

5
6 **CHIEF JUSTICE DY CHANDRACHUD:** Ultimately that's your, that's the, that's the
7 hypothesis. That the solution has to be political, outside the Constitution.

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9 **KAPIL SIBAL:** It is a problem looking for a solution. And Your Lordships, don't have to
10 provide that solution is what I'm saying.

11
12 **CHIEF JUSTICE DY CHANDRACHUD:** All solutions have to be within the framework of
13 the Constitution.

14
15 **KAPIL SIBAL:** It is within the framework. It is within the framework, My Lords. Who says
16 it's not within the framework? Well, isn't 370 a classic form of federalism, unlinked to the
17 federalism that we practice? It's a classic form of federalism. There's nothing unconstitutional
18 about it.

19
20 **JUSTICE SANJIV KHANNA:** There can be a lot of arguments on the other side, let's not
21 go into all that.

22
23 **KAPIL SIBAL:** No, I'm just saying, I am just saying My Lords, it is not unheard of, it is not
24 something that is so utterly unthinkable, that a State can have a certain special status

25
26 **JUSTICE SANJIV KHANNA:** If you go by Dr. Ambedkar's adoption speech, it's quite clear
27 that he wanted a Unitary form, primarily Unitary with certain Federal features...

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29 **KAPIL SIBAL:** It is Unitary My Lord, who says it is not Unitary?

30
31 **JUSTICE SANJIV KHANNA:** I am very clear, and there is historical reasons and let's not
32 go into that conversation..

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34 **KAPIL SIBAL:** Ambedkar, said and also very important thing, qua Jammu and Kashmir. He
35 said that, just come to my mind, My Lords... No, no, no, that's not what he said. 'That equality
36 is in your mind, all people in this country are equal, some are not considered equal.' That's all.
37 That applies not just to Jammu and Kashmir, that applies to a lot of places in India. So let's

1 not go that route. My Lord, just because it's a Union doesn't mean we are not federal. We are
2 a *quasi* Federation, is what we are. And that's what Ambedkar said, that we are a *quasi*
3 Federation. But My Lords, quite apart from that, that's how all members of Parliament since
4 1950, have understood it, then why are we... that's not their case. My Lords we are trying to,
5 we are trying to find a solution, which is not the case of the Union of India.

6

7 **JUSTICE B.R. GAVAI:** Mr Sibal, Dr. Ambedkar, in his speech. Both speeches, both of
8 November 1948, as well as 25th of November 1949, he has distinguished the American
9 Federation with all Federal structure. And he has specifically stated that in America, there is a
10 citizenship of the Federation, as well as State Citizenship. And it permits two constitutions, a
11 state Constitution, as well as federal constitution.

12

13 **KAPIL SIBAL:** Correct, correct.

14

15 **JUSTICE B.R. GAVAI:** But in India, we adopted a single Constitution and single citizenship.

16

17 **KAPIL SIBAL:** Absolutely right, My Lord, but kindly look at it this way. It is this Constituent
18 Assembly that approved 370, of which Ambedkar ji was a part.

19

20 **JUSTICE B.R. GAVAI:** Therefore, the question will be, whether it was..[UNCLEAR]..

21

22 **KAPIL SIBAL:** No, This is what the constituent assembly said. This is what My Lords the
23 Cabinet said. This is what the Government said. This is what the Government has been
24 interpreting 370. This is what they have done, in the light of the interpretation of 370, as we
25 have placed it before Your Lordships. What is 272... To replace the Constituent Assembly with
26 the Legislative Assembly that is trying to implement through the proviso, no? They have used
27 the proviso. Now they are arguing just to the contrary. How can Your Lordships even admit...
28 allow them to do that? We are testing...we are testing the process. We are not testing the power.
29 We're testing the process. And the process is opted by them is the 370 Sub-Article(3) process.
30 They have substituted Constituent Assembly to Legislative Assembly. Then they have imposed
31 356 and Parliament has become the Legislative Assembly and given consent to itself.

32 [NO AUDIO]

33 Plenary power or any silence in 370, which allows them to do what they wanted to do. That's
34 not their case. So we are now adjudicating a case which they have not pleaded before Your
35 Lordships. If it's a private certain [UNCLEAR] were to do that, would Your Lordship ever allow
36 it?

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1 **JUSTICE SANJAY KISHAN KAUL:** Mr. Sibal, you are saying 370(3) doesn't exist,
2 practically. Correct? That's your argument. Their argument is 370(3) exists and we have taken
3 that.

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5 **KAPIL SIBAL:** No, they say 370...

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7 **JUSTICE SANJAY KISHAN KAUL:** That's the second part. Whether the process applied
8 by them under 370(3) if it exists is the proper process. As per 370(3) you are not, is the second
9 limb of the...

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11 **KAPIL SIBAL:** But I'm saying something else to Your Lordships. They proceed on the basis
12 that 370 exists.

13

14 **JUSTICE SANJAY KISHAN KAUL:** Correct.

15

16 **KAPIL SIBAL:** Therefore, they are not saying that 370 doesn't exist after the Constituent
17 Assembly was drafted and nothing else happened and there's no Constituent Assembly. It's
18 not their case. We are now My Lords putting a... we are now adjudicating upon a case which is
19 not the case of the Union of India before Your Lordships.

20

21 **JUSTICE SANJAY KISHAN KAUL:** Many things have been said Mr. Sibal from both sides,
22 which are really not in our view, prima facie to Jammu and Kashmir. The main issue is this of
23 370 as you say, one side of the argument that with the Constituent Assembly going away,
24 370(3) really did not subsist. Only 370(1) survives. Their view is that 370(3) subsists and that's
25 the route we have adopted. Second limb arises if 370(3) exists and the routes they've adopted
26 versus the correct route permissible or not.

27

28 **KAPIL SIBAL:** But that's what I'm arguing. My Lords when I opened, I only argue argued
29 on the route. If Your Lordships will remember.

30

31 **JUSTICE SANJAY KISHAN KAUL:** Correct.

32

33 **KAPIL SIBAL:** I never went into any political argument, any historical context.

34

35 **JUSTICE SANJAY KISHAN KAUL:** That is your argument...

36

1 **KAPIL SIBAL:** I never talked about lack of sovereignty. I never talked about federalism. I
2 never talked of any of that. I said, this is the process they have adopted, and this process is
3 unconstitutional.

4

5 **JUSTICE SANJAY KISHAN KAUL:** I remember you also said that it's not for us to or for
6 you to suggest what is the alternative.

7

8 **KAPIL SIBAL:** Exactly.

9

10 **JUSTICE SANJAY KISHAN KAUL:** When alternative route is followed, it will be tested in
11 its own way.

12

13 **KAPIL SIBAL:** Correct.

14

15 **JUSTICE SANJAY KISHAN KAUL:** And this is they have adopted it. It has not taken a
16 368 route. It has taken a 370(3) route.

17

18 **KAPIL SIBAL:** So the first question that Your Lordships have to answer is, is 272 valid or
19 not?

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21 **JUSTICE B.R. GAVAI:** Then you have to decide

22

23 **KAPIL SIBAL:** Yes and that can't be decided. That can't be decided because that they have
24 followed the route of 370 proviso My lords. It is their case.

25

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

27

28 **KAPIL SIBAL:** So the problem there with the argument is that 370 can't be decided in the
29 context of the argument now raised, that, after the Constituent Assembly is not there, we can
30 do what we like, but that's not what their case before the court is. Their case is that they have
31 applied the proviso and substituted Constitute Assembly for Legislative Assembly.

32

33 **JUSTICE SANJAY KISHAN KAUL:** That's what the C.O. says.

34

35 **KAPIL SIBAL:** That's right. So you have to test only that which is what I argued. I didn't
36 argue anything else.

37

1 **JUSTICE SANJAY KISHAN KAUL:** We are not arguing, we are asking you to argue
2 beyond it.

3

4 **KAPIL SIBAL:** No, no. They have forced me to argue beyond it. They forced me to argue
5 beyond it. My Lords let me go back.

6

7 **CHIEF JUSTICE DY CHANDRACHUD:** We were assuming that they have followed the
8 route of the proviso to 370(3). I don't think we can prevent them from sustaining the exercise
9 of power on the ground that even independent of that they are entitled to.

10

11 **KAPIL SIBAL:** That's not in their counter. I'm sorry, My Lord. That's not their case. I'm sorry
12 you read your counter.

13

14 [NO AUDIO]

15

16 **KAPIL SIBAL:** As to what they say...

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18 **CHIEF JUSTICE DY CHANDRACHUD:** They meant 367?

19

20 **KAPIL SIBAL:** No My Lords, in exercise of the powers on the Clause 1 of 370.

21

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

23

24 **KAPIL SIBAL:** They are saying that. And then they say, the proviso...

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26 **JUSTICE SANJIV KHANNA:** That was for incorporating the proviso.

27

28 **KAPIL SIBAL:** But I'm only saying...

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30 **JUSTICE SANJIV KHANNA:** Sorry, 367. To the, that was for the amendment.

31

32 **KAPIL SIBAL:** That's what I'm saying.

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34 **JUSTICE SANJIV KHANNA:** But ultimately, when they revoked the power in the 370,
35 Clause 3.

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37 **KAPIL SIBAL:** With the proviso.

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JUSTICE SANJIV KHANNA: Yes, with the proviso.

KAPIL SIBAL: That's all I am saying. I'm saying nothing more than that.

JUSTICE SANJIV KHANNA: We have understood your argument on that.

KAPIL SIBAL: I am just saying...

JUSTICE SANJIV KHANNA: in fact, we had put that question to the Attorney General also.

KAPIL SIBAL: Also, could you also give us the answer. This is a *sui generis* provision of the Constitution, must be interpreted in its own terms. That's all that I'm saying. Kindly read their counter.

CHIEF JUSTICE DY CHANDRACHUD: This part, I think we've now conceptualized, we put our doubts to you, you have conceptualized...

KAPIL SIBAL: Giving life to 370(30, through Article 367. That's their counter. And that's all that we are testing. That's done, that's done. I am done with that. Now My Lords, kindly go back to..... No. Now, kindly go back to the list of dates. Just orally My Lords, I'll mention to Your Lordships. 20th of June, in 2018. 19th of June, BJP withdrew support. 20th of June, Governor puts the assembly in suspended animation.

CHIEF JUSTICE DY CHANDRACHUD: Now the latter part. Now, you are going into the....

KAPIL SIBAL: I'm going to test 356.

CHIEF JUSTICE DY CHANDRACHUD: 356.

KAPIL SIBAL: 356 . Right, and the dissolution of the Assembly on 19th of December, on 21st of November, 2018. The normal process is, the Governor has the power to keep the Assembly under suspended animation without the aid and advice of the Council of Ministers. That power is given under 92, of the Jammu Kashmir Constitution. Which he did.

1 **CHIEF JUSTICE DY CHANDRACHUD:** Which?

2

3 **KAPIL SIBAL:** Which he did My Lords. On 20th of June, 2018. Now My Lords, the Jammu
4 Kashmir Constitution also says that this will last only for six months. That such a decision of
5 the Governor will last only for six months. That is set out in Article 92, Sub-Clause 3. Sorry.
6 Section 92, Sub-Clause 3. Such an order will last only for six months. Now, which means by
7 19th of December, there should have been revival of the Assembly, because the Assembly was
8 not dissolved. See the political motives and the illegality in the whole process. He can't, this
9 can't go beyond six months, beyond 19th December. So he has to revive the Assembly. There's
10 no dissolution. So, 19th December he dissolved the Assembly. On 21st, sorry, 21st November
11 he dissolved the Assembly. Now, dissolution can't take place without the aid and advice of
12 Council of Ministers. Section 53, of the Jammu and Kashmir Constitution. Section 36, 38, and
13 92 are the only exceptions under the Jammu Kashmir Constitution. I mentioned it earlier also,
14 where the Governor can act on his own. But 53 is not. 35, 38, and 93. So My Lords, he could
15 not have dissolved. And after dissolution, 356 can't be imposed.

16

17 **CHIEF JUSTICE DY CHANDRACHUD:** After?

18

19 **KAPIL SIBAL:** After dissolution My Lords, Article 356 cannot be imposed. These are
20 Constitution Bench judgments of this court. Now Your Lordship asked me the question last
21 time also, you've been asking other Counsel also, why did you not challenge it? Now My Lords,
22 we could not challenge as far as the Governor's Order of 20th of June is concerned, because
23 under the Constitution of Jammu Kashmir, he had to put the government back in place within
24 six months. Where was the occasion to challenge it? Council of Ministers would have been
25 back in place.

26

27 **JUSTICE B.R. GAVAI:** What would happen if there's no major, no conceivable government
28 formation for service?

29

30 **KAPIL SIBAL:** No My Lord, he can't do it.

31

32 **JUSTICE SANJIV KHANNA:** Mr Sibal, That's to do, saying that because it was tenure of
33 six months, I can't challenge it, is wrong.

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35 **KAPIL SIBAL:** No, I haven't challenged it.

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37 **JUSTICE SANJIV KHANNA:** You can challenge it.

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KAPIL SIBAL: I said I haven't challenged it. When I said I can't, we knew, we knew My Lords that...

JUSTICE SANJIV KHANNA: You can certainly challenge it, people do challenge.

KAPIL SIBAL: They do, but the Government was to come back in place, was to be put back in place My Lord.

JUSTICE SANJIV KHANNA: That can be...

KAPIL SIBAL: The Government was to be put back in place within six months.

JUSTICE SANJAY KISHAN KAUL: My only question is, how if in six months, no government is feasible, possible, then the necessity would require a resolution. Would it not?

KAPIL SIBAL: I am sorry?

JUSTICE SANJIV KHANNA: Let us say there is no government possible then whom will he put back in? What kind of Governor...?

KAPIL SIBAL: So My Lords, what you do is, you impose 356, then you dissolve, with the process of under 356 My Lords. I've explained it last time also. That you keep the assembly under suspend in animation. You see if you can form a government or not, because 356 is a temporary provision, to restore democracy. If you find that there is no possibility after imposing 356, you dissolve and hold elections. That's the process.

CHIEF JUSTICE DY CHANDRACHUD: So then the dissolution should have taken place under the rubric of Article 356?

KAPIL SIBAL: That's correct. That's correct. And that's a Constitutional Bench judgment. I show that Your Lordships straight away. Just keep that judgement, Document, Volume 19. Sorry. Case Law compilation, PDF 232. This is My Lords, the Constitutional Bench judgment, in the matter of special reference.

JUSTICE SANJAY KISHAN KAUL: Please give the compilation?

1 **KAPIL SIBAL:** Compilation 19, Volume 19. My Lords, Case Law compilation 19.

2

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

4

5 **KAPIL SIBAL:** And the relevant part...

6

7 **JUSTICE SANJIV KHANNA:** What is the Page Mr. Sibal ?

8

9 **KAPIL SIBAL:** My Lords, it starts at 232. PDF 232. Relevant is 313. And I've been saying
10 this from day one. This was a political process, the intent was entirely political, and the means
11 were entirely unconstitutional.

12

13 **JUSTICE SANJAY KISHAN KAUL:** What's the ...?

14

15 **KAPIL SIBAL:** 313 My Lords, para. 135.

16

17 **JUSTICE SANJIV KHANNA:** Paragraph?

18

19 **KAPIL SIBAL:** 135.

20

21 **CHIEF JUSTICE DY CHANDRACHUD:** Volume 19?

22

23 **KAPIL SIBAL:** Yes. Volume 19. Case Law, Volume 19.

24

25 **CHIEF JUSTICE DY CHANDRACHUD:** *Achha, achha..*

26

27 **JUSTICE SANJAY KISHAN KAUL:** Constituent Assembly election matter?

28

29 **KAPIL SIBAL:** That's correct, para. 135.

30

31 **JUSTICE SANJAY KISHAN KAUL:** You said the page, 300 and?

32

33 **KAPIL SIBAL:** 318 it says My Lord, but the PDF is 313, running page is 318.

34

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

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37 **KAPIL SIBAL:** 313, paragraph is 135. My Lords have it?

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CHIEF JUSTICE DY CHANDRACHUD: Yes.

KAPIL SIBAL: My Lord Justice Kaul doesn't seem to have it. May I read it My Lords? 'Dissolution brings a legislative body to an end. It essentially terminates the life of such body and is followed by Constitution of a new body, Legislative Assembly, or House of people, as the case may be. Prorogation on the other hand, relates to termination of accession and thus precludes another session unless it coincides with the end of the legislative term. The basic difference is that prorogation, unlike dissolution, does not affect a legislative body's life which may continue from session to session until brought to an end by dissolution. Dissolution draws the final curtain upon the House. Once the House is dissolved, it becomes irrevocable. There is no power to recall the order of dissolution and/or revive the previous House. Consequently, effect of dissolution is absolute and irrevocable. It has been described by some learned authors the dissolution passes a sponge over the parliamentary slate. The effect of dissolution is in essence, termination of the current business of the legislative body. In its sittings and sessions there is cessation of chain of succession sitting for a dissolved legislative body and there cannot be any next session or is first sitting. With the election of the legislative body, a new chapter comes into operation till that is done. The *sine quo non* responsible government accountability is non-existent. Consequently, the time dissolute in the time dissolution is non-existent. Stipulation is non-existent. Any other interpretation would render use of the word it's in relation to the last sitting of one session, the first sitting in the next session without dissolution.' Now 319. 319, para 156. Now come to 356. What the court says on 356. PDF Page 319. Lord has 156? Justice Gavai?

JUSTICE B.R. GAVAI: Yes.

KAPIL SIBAL: 'So far as the applicability of 356 is concerned, though in the order of Election Commission has specifically dealt with the possibility of applying that situation in the written submissions of the arguments made before this Court, the view was given a go by and in our view, rightly. Mere non-compliance with Article 174 so far as the time period is concerned, does not automatically bring in Article 356. It is made clear that an order of the Election Commissioner is the foundation and not what is stated subsequently by way of an affidavit or submissions to clarify. But in view of the concession which according to us is well founded, we need not go into the question in detail. It is submitted that by some of the learned counsels that the Election Commission's Order otherwise makes out a case of applying 356.'

[NO AUDIO]

1
2 ' 356, when the requirement of 174 is not met. In *Thiru Rajgopal versus Karunanidhi*,
3 a Constitution Bench of this court, said Article 356 of the Constitution makes provisions in the
4 case of failure of constitutional machinery in the State. But when the assembly is dissolved
5 there is no failure of the constitutional machinery within 356. 'Because the Governor was ruling
6 for six months. Where is the question of 356? So you do it this way. Tell the Governor, he sort
7 of puts it in suspended animation. Less the six months almost part, when the two parties say
8 that look, we are ready to form the government but that's not proved My Lords. Then within...
9 then on 19th December, President rule is imposed after the assembly is dissolved on 21st of
10 November. Couldn't be done. Then you... if that's bad, and that has to be decided by this court,
11 because that's the basis of 272 and 273. Whether we challenged it or not, that's the very basis.

12

13 **CHIEF JUSTICE DY CHANDRACHUD:** This can happen, right? Because the Section 92
14 power is *sui generis*.

15

16 **KAPIL SIBAL:** Yes, he has to act on the aid and advice.

17

18 **CHIEF JUSTICE DY CHANDRACHUD:** Normally, when an Assembly is placed under
19 suspended animation, as we call it, that's also an exercise of the 356 power.

20

21 **KAPIL SIBAL:** Yes. that's on the recommendation of the Governor, My Lord.

22

23 **CHIEF JUSTICE DY CHANDRACHUD:** That's on the recommendation the Governor ?

24

25 **KAPIL SIBAL:** The Governor, that it can't be carried on in accordance with the preview of
26 the Constitution. Then 356 is. My Lords, that's what happened.

27

28 **CHIEF JUSTICE DY CHANDRACHUD:** And the recommendation of the Governor again
29 is on aid and advice or? That would not be, not be on aid and advice?

30

31 **KAPIL SIBAL:** No, no, it never...

32

33 **CHIEF JUSTICE DY CHANDRACHUD:** It can never be on aid and advice.

34

35 **KAPIL SIBAL:** It never is. The question doesn't arise.

36

1 **CHIEF JUSTICE DY CHANDRACHUD:** So, we are just wondering, according to you, the
2 dissolution of the Assembly on 19th of December is wrong, 19th of November is wrong, because
3 it had...

4

5 **KAPIL SIBAL:** 25th November.

6

7 **CHIEF JUSTICE DY CHANDRACHUD:** 25th of November is wrong, because there had
8 to be aid and advice. There was no aid and advice.

9

10 **KAPIL SIBAL:** Apart from that My Lords, where was the occasion for 356 at all? Because he
11 was running the administration. My Lords, he's running the administration. There cannot be
12 a constitutional failure. That happens only when the Government cannot run in accordance
13 with the provisions of the Constitution.

14

15 **CHIEF JUSTICE DY CHANDRACHUD:** But therefore, no, but we're just testing it like
16 this. Suppose, the Governor's dissolution is, according to you incorrect, the consequence
17 would be that, at the end of six months the Legislative Assembly has to be restored.

18

19 **KAPIL SIBAL:** No. No.

20

21 **JUSTICE SANJIV KHANNA:** The suspended, suspension would come to an end after six
22 months.

23

24 **KAPIL SIBAL:** Yes.

25

26 **CHIEF JUSTICE DY CHANDRACHUD:** After six months.

27

28 **KAPIL SIBAL:** Yes. Then the Council Of Ministers have to be...

29

30 **CHIEF JUSTICE DY CHANDRACHUD:** Council of Minister has to be formed.

31

32 **KAPIL SIBAL:** Correct.

33

34 **CHIEF JUSTICE DY CHANDRACHUD:** Now, taking your argument to the logical
35 conclusion that look, the dissolution was wrong, and the Governor had to necessarily at the
36 end of six months...

37

1 **KAPIL SIBAL:** Before.

2

3 **CHIEF JUSTICE DY CHANDRACHUD:** ...restore, before six months, restore the
4 Legislative Assembly, lift the suspended animation, Invite the government. In which case, can
5 the Government of India not have then exercised, the President not have exercised the power
6 under 356?

7

8 **KAPIL SIBAL:** Correct. So then, he would have had to make a recommendation that they are
9 not functioning in accordance with the provisions of the Constitution. Because, the Governor
10 was ruling for six months. Where is the occasion My Lords, for him to at that time exercise
11 that power?

12

13 **JUSTICE SANJAY KISHAN KAUL:** But, if no State Government is possible, nobody is
14 agreeing to combine together.

15

16 **KAPIL SIBAL:** But, that's fine My Lords, in which you impose 356. Don't dissolve it. My
17 Lords, that's the whole problem. You impose 356.

18

19 **CHIEF JUSTICE DY CHANDRACHUD:** And keep the Assembly in suspended animation?

20

21 **KAPIL SIBAL:** That's always the case. I'll give you several notifications. I don't have the time.
22 That's always the case, what you do is you keep the Assembly under suspended animation. You
23 try and My Lords, you have to restore democracy. So at some stage you feel that, now it's time
24 to hold elections. You dissolve the Assembly and now announce the elections. That's the
25 process followed in every 356 proclamation. You never dissolve the Assembly immediately,
26 because, then you have to hold elections. My Lords, the Democratic process can't be stultified,
27 it can't be used in this fashion, because this was, as I said, this is a political decision. It has
28 nothing to do with the Constitution. I've been saying that from day one My Lords, these are
29 political decisions. Even 272, 273 is political. Maybe I'll....

30

31 **CHIEF JUSTICE DY CHANDRACHUD:** How much more time now?

32

33 **KAPIL SIBAL:** Not too much My lords. I want to others also to argue. But I've been trying
34 to sort of not even refer to anything and just argue orally My Lords.

35

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

37

1 **KAPIL SIBAL:** We are trying to do it as quickly as possible, but Your Lordship is always very
2 kind. Let me not make any suggestion today.

3

4 **CHIEF JUSTICE DY CHANDRACHUD:** We will have to wrap up tomorrow. We don't
5 mind extending a little bit for half an hour earlier tomorrow,

6

7 **KAPIL SIBAL:** I will try and finish as quickly as possible..

8

9 **CHIEF JUSTICE DY CHANDRACHUD:** Just do make sure that everybody rations time.

10

11 **KAPIL SIBAL:** Yes, yes My Lord, that's my whole intent.

12

13

14

END OF DAY'S PROCEEDINGS