

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

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

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

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

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TRANSCRIPT OF HEARING

01-September-2023  
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**CHIEF JUSTICE DY CHANDRACHUD:** Good morning, brother Gavai.

**JUSTICE B.R. GAVAI:** Good morning. Good morning, Chief. Good morning brothers.

**S. PRASANNA:** Your Lordship, a request from Mr. Sibal, Your Lordship's indulgence. He is unable to be present today for... on account of some personal difficulty. Obligated.

**RAKESH DWIVEDI:** May I continue?

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

**RAKESH DWIVEDI:** My Lord, yesterday, I had made submission that there are five constituent powers.

**CHIEF JUSTICE DY CHANDRACHUD:** Yes.

**RAKESH DWIVEDI:** And though My Lords, they are not at par, they are not at par with the original constituent power of the framers of the Constitution, My Lord Justice Khanna had put that query, and these powers are derived from the specific provisions of the Constitution. Therefore, they cannot be that unlimited as the original. But that's not the question, My Lord. Here the question, why I drew attention to the constituent powers was this, that looking at the nature of the power under the main part of 373, the proviso ought not to be construed, therefore, that with its lapse the constituent power lapses. That was the intention, My Lords. Otherwise, yes, proviso is a limitation so long as the JKCA is alive. It's death does not mean the death of... or defunctness does not mean the defunctness of the main power. Now the other thing is, My Lord, one more reason and that is My Lord, that since the policy of the framers of the Constitution and as reflected in the Constitution of India itself is to have federalism at par for all states. That is the basic feature of the Constitution. That and that alone. Not the asymmetries or the differences or the diversities which happen on account of special conditions of that area. Any power My Lord, of difference which is founded on special conditions can never be permanent. Because the moment the conditions will change, those provisions are apt to change. So, there's no point taking us through all those provisions, relating to the Northeast, etc., or the tribal areas. Nobody claims permanence for them. They can always be amended. They came through the route of 368, they will go by the route of 368. Here the problem is 368 is barred and it says sign post is go to 370 proviso. Now this power to

1 federalize at par, therefore, is a core idea of the basic feature of federalism. So the main part  
2 itself My Lord, represents a power which is a core part of the basic feature of the Constitution.  
3 That can't disappear because some subordinate body comes to an end. Now, so far as  
4 constituent power is concerned, I will not read My Lord, Your Lordships are well aware of  
5 **Kesavananda Bharati**. May I just give the paragraphs on which I am relying. Justice  
6 Hegde's Judgment, Justice Sikri and Justice Shelat did not express any view on **Golaknath**  
7 My Lord, perhaps because they were members of **Golaknath** and ten judges overruled it.  
8 Justice Hegde, My Lord, this paragraph 640, 647 and 674.

9

10 **JUSTICE SANJAY KISHAN KAUL:** Repeat the first two paragraphs again.

11

12 **RAKESH DWIVEDI:** 640, 647, 674. And 647 is the note of the 'Objective Resolution' for  
13 arriving at... that is the additional factor. Then Justice Ray, para 783, 797, 819...

14

15 **JUSTICE B.R. GAVAI:** Can you repeat Mr. Dwivedi?

16

17 **RAKESH DWIVEDI:** Justice Ray, para 783, 797, 819. Then Justice Jagan Mohan Reddy  
18 1121 and 1124. Justice Palekar, paragraph 1231. 1231. Justice Khanna, paragraph 1378. Justice  
19 Mathew....

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21 **JUSTICE SANJAY KISHAN KAUL:** Just repeat Justice Khanna's paragraph.

22

23 **RAKESH DWIVEDI:** Justice Khanna, 1378.

24

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

26

27 **RAKESH DWIVEDI:** Then Justice Mathew 1573, 1580, 1603, 1715. Then Justice Dwivedi is  
28 1876 to 1878. That is 1876, 1877, 1878 .

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30 **CHIEF JUSTICE DY CHANDRACHUD:** Mr. Dwivedi, paras 1876 to 1878 bind you  
31 completely.

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33 **TUSHAR MEHTA:** Yes, you cannot take a different view.

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35 **RAKESH DWIVEDI:** Sir, I am not taking. And then Justice Y. V. Chandrachud.

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37 **CHIEF JUSTICE DY CHANDRACHUD:** I should have realized that was coming.

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**RAKESH DWIVEDI:** 1876. My Lords, Your Lordships noted 1904 also in Justice Dwivedi?

**CHIEF JUSTICE DY CHANDRACHUD:** 1904.

**RAKESH DWIVEDI:** And Justice Y. V. Chandrachud, 2068, para 2068.

**CHIEF JUSTICE DY CHANDRACHUD:** And what is the principle which you are relying upon?

**RAKESH DWIVEDI:** They described what is a constituent power? So the power which enables amendment of the provisions of the Constitution, be it a derived constituent power, it is the nature is constituent. The fact that it rests in Parliament, or it rests in the President being a head of the executive, will not make a difference. The nature of power, it's certainly not similar to ordinance making power. Ordinance making power is specifically expressly said to be having the force of the law made by Parliament, 123 and 213.

**CHIEF JUSTICE DY CHANDRACHUD:** In fact, the ordinance making power would support your submission, because the fact that a power is not vested in Parliament, in this case, the legislative power, the ordinance making power, is not dispositive of the nature of the power.

**RAKESH DWIVEDI:** Yes.

**CHIEF JUSTICE DY CHANDRACHUD:** It's not the institution which wields the power, but the nature of the power, which is crucial.

**RAKESH DWIVEDI:** That's right. I'm grateful My Lord. One has to consider the nature of the power, not who is wielding it.

**CHIEF JUSTICE DY CHANDRACHUD:** For instance, one of the exceptions to the doctrine of separation of powers is the legislative power which is vested in the Supreme Court to frame its own rules. It's also regarded as legislative in character.

**RAKESH DWIVEDI:** It is and it is original flowing from the Constitution, not otherwise.

1 **CHIEF JUSTICE DY CHANDRACHUD:** Likewise, Parliament has the power to punish for  
2 contempt of itself.

3

4 **RAKESH DWIVEDI:** Yes.

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6 **CHIEF JUSTICE DY CHANDRACHUD:** So that is in that sense, not a legislative power,  
7 it's a judicial power, which is wielded by Parliament. So according to...

8

9 **RAKESH DWIVEDI:** There is no access of separate.

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11 **CHIEF JUSTICE DY CHANDRACHUD:** 370 itself is a constituent power.

12

13 **RAKESH DWIVEDI:** Yes.

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15 **CHIEF JUSTICE DY CHANDRACHUD:** Because it the power to amend the application of  
16 the Constitution to Jammu and Kashmir.

17

18 **RAKESH DWIVEDI:** Then with regard to other submission which I made was about  
19 recommendation. I will not repeat that why recommendation should be considered as non-  
20 binding. But just to compare My Lord, Chief Justice had, last occasion. If Your Lordship looks  
21 at Article... money bill, of course Your Lordships saw but that's the different, that goes to Rajya  
22 Sabha expressly mentioned that Lok Sabha is not bound.

23

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

25

26 **RAKESH DWIVEDI:** So, money bill provisions are 109 and 198. Then there is a  
27 disqualification provisions, i.e. Article 101 and 192. Now please see 101, though the word is not  
28 recommendation, the word is opinion. If there is an issue of disqualification... I'm sorry, not  
29 101, 103 My Lords, 103. I apologise. 103. 103(1) makes the decision of President final but (2)  
30 says before giving any decision. I'm drawing My Lord's attention to (2). Before giving any  
31 decision on such question, the President shall obtain the opinion of the Election Commission  
32 and shall act according to such opinion. Mark this last expression. So where they want that My  
33 Lord, is some other body, whether inferior or at par or superior, is not material but, of course  
34 it is disqualification and a decision given by the Election Commission. But they wanted that  
35 the President should have no other discretion left. He has to act. Now these words are not  
36 deployed in 373. Now similarly when we come to finance bill, that is Article 117 and 207, 207  
37 is for the state.

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2 Sub-Article 1 of 117, a bill or amendment making provision for any matter specified in Clause  
3 A to F of Clause 1 of Article 110 shall not be introduced or moved except on the  
4 recommendation of the President and a bill making such provision shall not be introduced in  
5 the Council of States. Now, this is a perpetual provision, My Lords not a temporary one. And  
6 the proviso says, provided that no recommendation shall be required under this clause for  
7 moving of amendment, making provision for the reduction or abolition. Now, My Lords, very  
8 interestingly the bill is to be placed by the Cabinet, the Council of Ministers and the  
9 recommendation is to be made by the President, which is also Council of Ministers. Now this  
10 is relevant, My Lord for. Article 3. So our framers do contemplate situations where My Lord,  
11 the Council of Ministers is at both the ends. At one end it speaks to the President, the other  
12 end it's the framer of the bill and places it before the House.

13

14 **CHIEF JUSTICE DY CHANDRACHUD:** And President is acting on the advice.

15

16 **RAKESH DWIVEDI:** Advise My Lords. In a way it may appear to be superfluous, My Lords,  
17 because if the Cabinet has to place it straight away proceed, because the President, in any case  
18 has to sign it and recommend. But the situations are different. Similar is 173 a bill which if  
19 enacted and brought into operation would involve expenditure from consolidated funds, shall  
20 not be passed by either House unless the President has recommended to them.

21

22 **CHIEF JUSTICE DY CHANDRACHUD:** The reason why it was said that the President  
23 must recommend and not the Council. So, that's really what it means because under Article  
24 84 the Parliament consists of the President and the two houses of Parliament.

25

26 **RAKESH DWIVEDI:** Yes, yes.

27

28 **CHIEF JUSTICE DY CHANDRACHUD:** The Parliament doesn't consist of the Council of  
29 Ministers because the Council of Ministers are all Members of Parliament.

30

31 **RAKESH DWIVEDI:** That's right, My Lord.

32

33 **CHIEF JUSTICE DY CHANDRACHUD:** But the President is a part of Parliament.

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35 **RAKESH DWIVEDI:** But all bills don't go through the President.

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37 **CHIEF JUSTICE DY CHANDRACHUD:** They don't. Only money bills.

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**RAKESH DWIVEDI:** Only money bills. Sort of, perhaps it was intended to be an additional precaution that the President may look into it may perhaps exercise his power under Article 75, etc. To divert it and ...

**CHIEF JUSTICE DY CHANDRACHUD:** So, you don't specify the Council of Ministers because they are part of Parliament individually, they are member of Parliament.

**RAKESH DWIVEDI:** Absolutely. Correct.

**CHIEF JUSTICE DY CHANDRACHUD:** So, recommendation you have shown as 1-0...

**RAKESH DWIVEDI:** Now kindly see 146 (2). Now, this is a case, My Lords, which My Lords were referring about the rules, power of the Court.

**CHIEF JUSTICE DY CHANDRACHUD:** Yes.

**RAKESH DWIVEDI:** Now, this is not from a superior to an inferior or something. Here the approval is required because of financial implications. 146(2) and for High Court, it is 229(2). Subject to the provisions of any law made by Parliament, the conditions of service of officers and servants of Supreme Court shall be such as may be prescribed by rules made by the Chief Justice of India or by some other Judge or Officer of the Court authorized by the Chief Justice of India to make rules for that purpose, provided that the rules made under this clause shall, so far as they relate to salaries, etc., require the approval of the President. It can never be argued My Lord that if this, supposing this proviso is deleted by the route of 368, to ensure greater independence in financial matters, will the main part die, My Lords. Are they rolled into one?

**CHIEF JUSTICE DY CHANDRACHUD:** Yes.

**RAKESH DWIVEDI:** So, the fact that the proviso says is, the main part says is

....and one very great argument, Mr. Gopal Sankaranarayanan had raised, drawing My Lord's attention to the 'colon'. In 373 also, it exists. Perhaps to suggest that they are rolled because there is a 'colon'. Therefore they are rolled into one. Every proviso in the Constitution of India, I have gone through. There are several provisos, in various articles. All of them My Lord, have a 'colon.' And colon in grammatically indicates only an addition. Nothing more. Every proviso

1 Lordship may see... In fact in 146(1) itself, there is a proviso... colon... nowhere Your Lordships  
 2 shall find any other... a full stop or a comma or a semicolon. It's always colon. Because it's  
 3 addition. Generally as a rider... The rider goes, the main part expands. So if the proviso goes,  
 4 My Lord, in 146(2) , then the main part, the power of this Court will expand. No need for  
 5 approval. And the last part of this section of my submission is, that so far as Parliament is  
 6 concerned, the C.O. 273 does not refer to 367, et cetera. Or 356. It only says exercising the  
 7 power under 373 and acts on the recommendation of Parliament. Now Parliament, My Lord,  
 8 can come through the route which the Union adopted. That's one part, my learned Solicitor  
 9 General has already submitted. I'll not repeat at all on that. I adopt that My Lord and nothing  
 10 which I say detracts from that submission. But an additional submission is that, the President  
 11 means Council of Minister and Council of Minister means collectively responsible to the  
 12 Parliament. So, Article 53 read with 73 and read with 75 (3), they, My Lord, Council of  
 13 Ministers can go to the Parliament any time for it's... obtaining it's views. So, the fact that  
 14 Parliament's recommendation has been obtained, Parliament is not a foreign body. The  
 15 Parliamentary rules My Lord, any issue can be brought before the Parliament, resolutions can  
 16 be passed, the views can be obtained. So, we need not go My Lord, in my respectful submission,  
 17 of course that stands...

18 But irrespective of that, independently of that, the obtaining of the recommendation is not  
 19 foreign to the exercise of power under 373. Because of these three provisions taken together.  
 20

21 **CHIEF JUSTICE DY CHANDRACHUD:** Can you re-formulate that?  
 22

23 **RAKESH DWIVEDI:** The submission is that, Parliament's opinion, recommendation or  
 24 views for exercise of power under 370, Sub-Article 3, can be obtained by the Council of  
 25 Ministers on account of the provisions of Article 53, 73 and 75 Sub-Article 3. Since Council of  
 26 Ministers is responsible to the Parliament. So, it can always go to the Parliament My Lord. In  
 27 fact, that's the best route to go to the Parliament. It's a big decision being taken, so the whole  
 28 of Parliament is being taken into confidence. Instead of rushing through any executive forum  
 29 alone. There the voice taken together, both the houses, the voice of the people of the whole  
 30 country is heard, including the Member of Parliament of Kashmir, who are also represented  
 31 in the Council of States. So, therefore C.O. 273 is sustainable on its own. One small aspect My  
 32 Lords, let's take the submission of the Petitioners at the highest. What are they trying for My  
 33 Lords? This permanence, which they are seeking, is for what? According to them **Sampat**  
 34 **Prakash** Sub-Article 2 is already defunct.  
 35

36 According to petitioner's submission, main part proviso rolled into one. Therefore, whole of 3  
 37 is defunct. A, of course 238 itself has gone, is defunct. B(1) only My Lord, and B(1) has a very



1 narrow scope. Please have B-1, once again, I have a slightly different take on B(1). B(1) is not  
2 for determining the matters irrespective of the list. What matters have been specified in the  
3 Instrument of Accession are to be determined by a reading of the Instrument of Accession  
4 itself. Nothing can be taken away from that. That is final, sealed. What B-1 is limited to  
5 discovering which of the entries are corresponding to those matters. There are matters  
6 specified in the IOA, there are matters specified in the three lists, which are corresponding. It  
7 only discovers the entries, there is no power at all to... vested in the President to act in  
8 consultation to detract from the IOA surrender. If defence has been surrendered, then it has  
9 to be exercised as per Constitution of India, wherever the power is, only the entries has to be  
10 located. And that power cannot be controlled. You take away residuary power or do whatever.  
11 Subject matter of defence is surrendered by that, and therefore, this Central... Union  
12 Government will exercise full powers with regard to communication, etc., entry or no entry.

13

14 **CHIEF JUSTICE DY CHANDRACHUD:** Because there may be more than one entry...

15

16 **RAKESH DWIVEDI:** Yes.

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18 **CHIEF JUSTICE DY CHANDRACHUD:** In the Union List or Concurrent List, which  
19 corresponds to a head in the Instrument of Accession.

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21 **RAKESH DWIVEDI:** That's right.

22

23 **CHIEF JUSTICE DY CHANDRACHUD:** The Instrument of Accession was prepared at a  
24 time when the Constitution was yet to be framed.

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26 **RAKESH DWIVEDI:** Yet to be framed.

27

28 **CHIEF JUSTICE DY CHANDRACHUD:** Therefore, it used broad expressions, defence,  
29 external affairs, communications, and it had various sub-heads, as we saw yesterday, you  
30 showed us that.

31

32 **RAKESH DWIVEDI:** Yes.

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34 **CHIEF JUSTICE DY CHANDRACHUD:** For instance, defence. Now just take one  
35 example only. Defence in the Union List covers entry 1, Defence of India. Entry 2, Naval,  
36 Military and Air forces. 3... 2A, deployment of any armed force, which given the 42nd  
37 amendment and 4, Naval Military and Airforce works. 5, Arms, Firearms, Ammunition and

1 Exposure. So, it was basically, what the President had to do was look at the entries in the list  
2 and see which of these entries corresponds to what the IOA has said would be the domain...  
3 would be the domain of the Dominion of India.

4  
5 **RAKESH DWIVEDI:** And consultation came in for a reason, historical reason because when  
6 Cabinet Mission plan was being considered, then primarily Nehru ji and the Congress itself  
7 wanted to keep it loose and they were all the time, contending that these expressions are only  
8 categories of entries, matters. It's not one matter, defence. There are a whole lot of other  
9 things, but if you want to defence, you will need finances for the defence. So, he was interested  
10 in expanding and centralizing, more power to the Centre. So, there was one thing that  
11 therefore you consult, get their views, okay. So, consultation is a weak expression, it doesn't  
12 bind the President at all. However, that's the difference which I pointed out, that this is only  
13 to discover the correspondence but it cannot detract from the surrender in the IOA. Now since  
14 that has been done, this is also defunct.

15

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

17

18 **RAKESH DWIVEDI:** So, what survives is B(2) and D proviso-2. Even the first proviso  
19 correspondence...

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21 **CHIEF JUSTICE DY CHANDRACHUD:** What survives according to you is B(2)...

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23 **RAKESH DWIVEDI:** And D proviso-2. I'm taking the case of Petitioners, not according to  
24 me, My Lords. According to them.

25

26 **CHIEF JUSTICE DY CHANDRACHUD:** No, we are testing that hypothesis.

27

28 **RAKESH DWIVEDI:** Yes, we have to test, what is it you are gaining? What are you wanting?  
29 Aiming at? You seek permanence for B(2) and D P-2. Proviso-2

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31 **CHIEF JUSTICE DY CHANDRACHUD:** Sorry, just come again. B(2), and D proviso-2?

32

33 **RAKESH DWIVEDI:** Yes. And over the course of years, almost all institutions of the Union  
34 have been applied, very little remains in B(2) and D(2). So, permanence for that. It really leads  
35 to the principle that we should avoid absurdity. It's a *reductio ad absurdum*. My Lords,  
36 the second vital question, which arises with regard to 370, is what is the status of the Jammu  
37 Kashmir Constituent Assembly, and the Constitution of Jammu Kashmir? If I may use JKCA

1 and COJK, My Lords. And there are two contending thoughts, once again, the choice is  
2 between these two. We are saying that the source for creation and disappearance of the JKCA  
3 and the COJK, Constitution of Jammu Kashmir is Article 370 itself. Whereas, the Petitioners  
4 contend that the source for these two bodies flows from the Crown of Hari Singh, that is to say,  
5 residuary sovereignty, remnant sovereignty or internal sovereignty. Three expressions have  
6 been used by three different counsels.

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8 **CHIEF JUSTICE DY CHANDRACHUD:** What are the expressions?

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10 **RAKESH DWIVEDI:** Residuary sovereignty, remnant sovereignty or internal sovereignty.

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12 **JUSTICE SANJIV KHANNA:** Shared sovereignty.

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14 **RAKESH DWIVEDI:** Shared, which my friend Nithya used, has a different connotation. We  
15 are all sharing. We are all co-sharers of sovereignty. Every individual citizen is a co-sharer. I  
16 have no problem with sharing of sovereignty.

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18 **CHIEF JUSTICE DY CHANDRACHUD:** Residuary sovereignty, remnant sovereignty and  
19 the third?

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21 **RAKESH DWIVEDI:** Internal sovereignty.

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23 **CHIEF JUSTICE DY CHANDRACHUD:** Internal sovereignty, yes. Dr. Dhavan said that.

24

25 **RAKESH DWIVEDI:** And from this idea of remaining balanced sovereignty there was a  
26 further, My Lord, concept introduced bilateralism or compact. There are two sovereigns now,  
27 one remnant and one the main sovereign. So the two sovereigns are talking to each other,  
28 whispering to each other... all that theory, My Lord and compact and bilateralism emerges. So  
29 the choice is between these two, My Lords. If you accept that some sovereignty remained after  
30 the signing of the IOA and some sovereignty remained after agreeing proclamation, My Lord,  
31 that of Yuvraj Singh that relationship between Union and the State will be defined by the  
32 Constitution of India as applicable to. Then that expression is very potent, you don't have to  
33 go out of Constitution of India. It is defined by the Constitution of India as applicable,  
34 whatever it may be applicable, but it is to be found within the terra firma of the Constitution  
35 of India. This methodology, My Lord, just let us have a look at what is the Constitution of India  
36 telling them. Note two things, My Lords, which are expressly in 370, first, the first is the  
37 explanation and the explanation applies to the whole of the Article, not only Sub-Article 1. In

1 terms it says for the purpose of this Article, the Government of the State means so and so.  
2 What is it doing, My Lords? 1, It is substituting the Maharaja for Maharaja acting on the advice  
3 of Council of Ministers. So, the monarchy is dead. The popular rule, came, My Lord, when the  
4 Maharaja came, My Lord when he was neck deep in trouble on 25 October 1946 when the war  
5 was there, everything was virtually being lost. He had virtually nothing left for sovereignty My  
6 Lord. And it is on that Crown, My Lord, which they are, the sinking Crown on which the  
7 Petitioner's submissions are banking. However that Crown also, My Lord, Nehru ji first said  
8 that you release Sheikh Abdullah and popular Government. He was released he was made the  
9 Prime Minister and on his advice, it was not simply Hari Singh, it was both the popular  
10 Government and Hari Singh, My Lord, who agreed to the accession. So the people's voice was  
11 also there. And the explanation leaves no room of doubt that the Maharaja is not to act on his  
12 own view, opinion, discretion, but act on the advice of Council of Ministers for the time being  
13 in office. 2nd, My Lord, even the Maharaja has to be recognized, that person who is recognized  
14 by the President of India. So, when Yuvraj, My Lord issues the third proclamation in 1951, that  
15 is after the Constitution of India came into force, he was acting on the advice of the popular  
16 government in terms of the explanation to convene... to constitute and convene JK Constituent  
17 Assembly. The next question, would be what is it? For what purpose are you constituting? And  
18 the purpose is spelled out by Sub-Article 2. So, the Constitution envisages that, this Assembly  
19 is for the purpose of framing the Constitution of the State. The third thing, My Lord, is in  
20 framing of the Constitution, the JKCA is not the... does not enjoy the freedom which the  
21 Constitution... the Constituent Assembly of India had. It was bound by several things. First, it  
22 was bound to frame the Constitution in a manner that this Sovereign, Democratic Republic of  
23 India... that's not adversely impacted and at the moment I'm not relying upon the Doctrine of  
24 Basic Structure, which came later. But even as it stood in 1950, 26th of January, this  
25 Constitution of JKCA could not detract from it, and has not. It had to ensure justice, liberty,  
26 equality, fraternity. The contours of law making are specified on account of the sheer  
27 accession. It was also bound by Article 1. It could not declare that we are not the federal unit  
28 of India. And it accepts in... that diktat of the Constitution of India in Section 3. That's not  
29 their own framing, that they are bound to do it. Next, My Lord, they could not therefore say  
30 that, any part of their territory will not form part of the Union Territory. That is one plea. They  
31 could not also say that, every person domiciled in the territory of India... and your Lordships  
32 have held, My Lord... I'll give that judgment where Your Lordships said there's only one  
33 domicile. Every State does not have a domicile. Nobody can say I'm domiciled in UP, or Tamil  
34 Nadu, or Bihar, etc. So, they could not say that, the people who are... that is the permanent  
35 residents of Jammu and Kashmir will not be the citizen. And they accept that, My Lord, in  
36 Section 5. That's not a gift of JKCA.

1 That's the gift of the Constitution of India and the dictation of the Constitution of India to  
2 them. The same applies to the fundamental rights. Every citizen... see the concatenation and  
3 the connection between these provisions.... 1, 5, part 3... which says, "Every citizen"... in fact,  
4 some of the fundamental rights are broader but 19, specifically citizens. So, these rights could  
5 not be denied, and therefore they rightly My Lord follow it, the diktat, My Lords and put it in  
6 Section 10. Even if it was not there, they would have enjoyed these fundamental rights under  
7 the Constitution. And neither the President acting under 370 nor the authorities, My Lord who  
8 are giving concurrence or consultation or recommendation, could say that apply 370. That's  
9 not the purpose of the recommendation, is very narrow of continuing operation, don't operate  
10 or operate with some little modification. So, therefore My Lords, these fundamental rights,  
11 etc., and they also could not say and they have wrongly gone into that, in my humble  
12 submission, when they said that Article 136, initially of the Supreme Court's power, will not  
13 apply to Supreme Court. They could not say that. Because in the Accession they have said, we  
14 accept the Governor General, which will be President now. The Federal Legislature, that is the  
15 Parliament. The Federal Court, that is the Supreme Court and other authorities who are under  
16 the Constitution, charged with certain functions. The power to fix terms does not mean that  
17 you take away the power of these authorities under the Constitution. But things have been  
18 happening, 35(A) has also come, 136 had gone. To deprive 136 to the people of Jammu  
19 Kashmir, My Lord, is a huge denial to them. So, in short, the framework of the Constitution of  
20 India, and when we look at JKCA, we find that the entire JKCA is a reflection, there's nothing  
21 peculiar in that. What is peculiar is, 147 when it says that you can't amend the Constitution.  
22 There are restrictions. Likewise, Section 5 says that whatever be the Parliament's power under  
23 the Constitution of India. So, throughout it follows the diktats and respects the Constitution  
24 of India, and there is very little in it which is different. This methodology which has been  
25 adopted by the Constitution of India, for the formation of JKCA, it's convening and its  
26 enforcement. In my humble submission, is very akin to the juristic concept of evolution of  
27 powers. Devolution of powers. The Constitution has devolved power on the Yuvraj then, acting  
28 on the advice of Council of Ministers, to convene for the purpose of framing the Constitution,  
29 in accordance with the broad format as I pointed out. It's not an independent power like the  
30 Constitution Assembly of India. I'll give to, Your Lordships the view of the time constraint and  
31 these two judgments. This concept is frequently applied In United Kingdom, Scotland,  
32 Northern Ireland, Wales, all of them are enjoying devolved powers. The Parliament of UK is  
33 considered to be supreme. That is somewhat different in the sense that the law made by UK  
34 Parliament for Scotland specifies their Parliament. So we have Scotland Parliament also,  
35 Northern Ireland Parliament also, and the Wales Parliament also. So, it doesn't matter that  
36 you call your person Sadr-e-Riyasat or Prime Minister or Chief Minister, the stature doesn't  
37 expand by these expressions. The stature will depend upon the nature of power you are

1 exercising. It doesn't equate with the power of Prime Minister of India, even if you call them  
2 Prime Minister. Yeah, psychological and emotional reasons apart. So the two cases, they are  
3 not on record, so I will not place it, My Lord, the time...bar is there. I'll just give the reference  
4 and paragraphs through Your Lordships will...

5 We did send it, My Lord. But it's not admitted. So it's up to Your Lordship..

6

7 **CHIEF JUSTICE DY CHANDRACHUD:** What are the two cases? Give us a citation.

8

9 **RAKESH DWIVEDI:** I'm giving the citation. 2002, Volume 1.

10

11 **CHIEF JUSTICE DY CHANDRACHUD:** What's the name of it?

12

13 **RAKESH DWIVEDI:** The name of the parties in re Scottish Independence Referendum Bill,  
14 in re Scottish Independence Reference Bill 2002, 2022. I'm sorry. 2022 UK SC 31.

15

16 **JUSTICE SANJAY KISHAN KAUL:** Can you repeat the citation again? Please repeat the  
17 citation, Mr. Dwivedi.

18

19 **RAKESH DWIVEDI:** 2022 UK SC Page 31. Paras 76, 77, 82, 88, and 90.

20

21 **CHIEF JUSTICE DY CHANDRACHUD:** And how... can you just sort of summarize in a  
22 sentence what the principle is?

23

24 **RAKESH DWIVEDI:** The principle was My Lord, that in this case they wanted a second  
25 referendum. Sorry, My Lord, when the Brexit was happening then they wanted to continue  
26 relations with Brexit. So, it was impinging upon the sovereignty of the Parliament, My Lord.  
27 In that context they have discussed this devolved powers. And they say that the Parliament  
28 gives the power and Parliament can take the power. It can modify the power. So, the  
29 Parliament is... so, this power is also a devolved power of a different kind of course, because  
30 it's more general it's not itself framing like other states. What they are to do is they don't have  
31 the list to... so it's a little more... so that's the departure. So, you have the psychological  
32 satisfaction of...

33

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

35

36 **RAKESH DWIVEDI:** Then the other is 2000. This is, case is UK Withdrawal from European  
37 Union 2019, 2018 UK SC.

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**JUSTICE SANJAY KISHAN KAUL:** 2019 or '18?

**RAKESH DWIVEDI:** '18 UK SC Page 64 Paragraph 12, 13, 29, 53, 61 and 63. Now, in this context, My Lords, kindly just keep my written submission open, My Lords, it's in the combined. I have tried to extract things there My Lords, so that I don't have to request Your Lordships to open the document as far as possible, My Lords. The other aspect, My Lord, Nehru ji himself says that the idea of having a Constituent Assembly for framing a Constitution for the State emanated from the Government of India and that is Your Lordship will find in para 128, page 44 of my submission.

**JUSTICE B.R. GAVAI:** Which volume ?

**RAKESH DWIVEDI:** My Lord, this is the combined compilation Volume 3. Volume 3, Written submission.

**CHIEF JUSTICE DY CHANDRACHUD:** Volume 3 is Mr Solicitor's no? Mr Tushar Mehta's?

**RAKESH DWIVEDI:** All submissions are there only.

**CHIEF JUSTICE DY CHANDRACHUD:** Right. That's in Volume 4. We got it.

**JUSTICE SURYA KANT:** Starts at Page 271.

**RAKESH DWIVEDI:** Kindly come to the last eight lines, My Lords

**CHIEF JUSTICE DY CHANDRACHUD:** Of which page?

**RAKESH DWIVEDI:** It will be, My Lords. Paragraph 128 at Page PDF might be 44, My Lords.

**CHIEF JUSTICE DY CHANDRACHUD:** Not 44.

**RAKESH DWIVEDI:** Para 128.

**CHIEF JUSTICE DY CHANDRACHUD:** Of your submissions?

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**RAKESH DWIVEDI:** Submission.

**JUSTICE SANJAY KISHAN KAUL:** Where are your submissions start from? Which page?

**CHIEF JUSTICE DY CHANDRACHUD:** It start at page 271.

**RAKESH DWIVEDI:** Yes it starts from 271.

**CHIEF JUSTICE DY CHANDRACHUD:** What is your internal page?

**RAKESH DWIVEDI:** Page 44

**CHIEF JUSTICE DY CHANDRACHUD:** That'd be about 313, I guess?

**RAKESH DWIVEDI:** PDF 316.

**JUSTICE SANJIV KHANNA:** What's the paragraph number?

**RAKESH DWIVEDI:** 128.

**CHIEF JUSTICE DY CHANDRACHUD:** Yes, it's Page 316.

**RAKESH DWIVEDI:** Towards the middle, Your Lordships will find ' Thus the monarchical power had disappeared'.... Your Lordships have got this?

**CHIEF JUSTICE DY CHANDRACHUD:** Yes.

**RAKESH DWIVEDI:** My Lord, Justice Surya Kant?...

**JUSTICE SANJAY KISHAN KAUL:** Just one second. What page is it?

**RAKESH DWIVEDI:** My Lord, Justice Gavai has got it?

**JUSTICE B.R. GAVAI:** Yes. Para 128.

**RAKESH DWIVEDI:** Yes, My Lord. I'm grateful.



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**CHIEF JUSTICE DY CHANDRACHUD:** Which one? Para 128 is from a judgment, it appears.

**RAKESH DWIVEDI:** No, no, no.

**CHIEF JUSTICE DY CHANDRACHUD:** It says Shri Naphade Learned Senior Council.

**RAKESH DWIVEDI:** That was... we are responding to the submission of Mr. Naphade.

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

**RAKESH DWIVEDI:** They were all saying that, the Maharaj has formed... how he, My Lord formed JKCA...

**CHIEF JUSTICE DY CHANDRACHUD:** Let's quickly go through that.

**RAKESH DWIVEDI:** Lordship may have the middle, My Lord... Only... Thus the monarchical power had disappeared with the advent of the Constitution of India. Maharaja Karan Singh merely...

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

**RAKESH DWIVEDI:** I'm so sorry.

**CHIEF JUSTICE DY CHANDRACHUD:** Monarchical power...

**RAKESH DWIVEDI:** Yes. Thus, the monarchical power had disappeared with the advent of the Constitution of India, Maharaja Karan Singh merely executed the mandate of the Constitution of India, embodied in Article 370. Secondly, speaking in the Lok Sabha on 26th of June 1952, soon after the proclamation of Maharaja Karan Singh, dated 01-05-1951, Prime Minister Shri Jawaharlal Nehru said, "So, the Government of India and others put it to them to the Maharaja and Sheikh Abdullah, as soon as he came out, that this matter must not be hurried. And it was our idea then that, a Constituent Assembly should be elected in Kashmir quickly and as soon as possible to decide about these and other questions. We advise them." So, in view of 370 and perhaps because of the international situation regarding Kashmir, which was developing, the Government of India wanted that it should be convened. There should be

1 a ratification of accession and all. Thus, the idea came from here. Not coming from them. What  
 2 was Maharaja Hari Singh wanting, My Lords? He contemplated a National Assembly. He was  
 3 still dreaming of independence. So, he was thinking that when the whole of the POK, etc.,  
 4 comes in, then there will be plebiscite and then we will decide whether to accede or not. And  
 5 that's the mischief which Mountbatten played when he wrote reply letter, when he said that  
 6 our... policy of our Government is... who is he to write My Lord? He is bound by the  
 7 Government of India Act and the Adaptation Order, which says that once the Governor  
 8 General accepts, that cession is complete. And Indian Armed Forces are there, driving back  
 9 the people who had come inside to grab Kashmir.  
 10 But he writes a letter... Governor General directly writing a letter... policy of our Government  
 11 is... That letter has no meaning... Mr. Sibal referred to that letter to draw some sovereignty etc.  
 12 That still looked sovereignty remained. Accession was still a dispute, still to be settled. It's not  
 13 final. So, where are we to go? To what extent? So what Hari Singh contemplated, was  
 14 completely different. What Karan Singh proclaimed was our relation will be defined by the  
 15 Constitution of India, as applicable to... two different, contrasting expressions used there.

16

17 **CHIEF JUSTICE DY CHANDRACHUD:** What remains, Mr Dwivedi?

18

19 **RAKESH DWIVEDI:** My Lords, a lot remains. My Lords, we will... some total we will not be  
 20 crossing the boundaries, but these aspects need to be placed before Your Lordships, and have  
 21 not been placed. Now, the question is, what did they refer to? Mr. Sibal started from the  
 22 Cabinet Mission plan... return of paramountcy... then when the British left, all Indian States  
 23 became independent they were free. Many felt so. From there, My Lord the sovereignty  
 24 element is being derived. What is forgotten is that Cabinet mission plan was again a British  
 25 device to frame a larger Pakistan within India. Three groups, The Central Provinces - Group  
 26 A, Northwest - Group B, Assam and Bengal, whole of it - Group C. Something which even  
 27 Muslim League did not demand, the British were framing. Because they wanted to control the  
 28 two frontiers for geopolitical reasons. They want bases at both the ends. So they came with this  
 29 Cabinet Mission plan and it was... basis was that parties are not agreeing, therefore, we are  
 30 presenting arbitrators. And what was the dispute with the first great interpretative exercise,  
 31 where the fight was is the group... are these group frozen? They provided an expression that  
 32 once each group will frame a Constitution, and once the Constitution is framed, then the  
 33 provinces which are part of the group, may decide to remain or to go out of the group. Then  
 34 the leaders who are leading our, on the side of the Congress, they said no these groups you  
 35 may form, but once it is formed, then the provinces need not wait. So, the huge fight about the  
 36 frozen character of the groups. And the other issue was parity at the centre, weak centre and  
 37 parity. Parity, Congress, Muslim League, and the Princes, three. So, who controls My Lord? As

1 we say in the *bandar baat*, the British becomes the arbitrator. There will be stalemates for  
2 every issue. Now, this creates a larger Pakistan, the option was partition. Now, this went on.  
3 Our Constituent Assembly was constituted under the plan. So, we decided to work out the plan  
4 but without being bound by the Cabinet Mission Plan and it was made very clear by our  
5 leaders, that once Constituent Assembly starts, then what it decides, is not your concern. It  
6 may choose to destroy the groups also. In fact, the leaders were called to London also, and they  
7 said it may be referred to Federal Court in case of dispute, but our acceptance will remain  
8 qualified. Now 26th... 6th of... 9th of December, 1946 our Constituent Assembly started  
9 functioning, temporary Chairman Dr. Rajendra Prasad. Then objective resolution placed on  
10 13th of December debated, accepted and adopted on 22nd January, 1947. All this is happening  
11 before 15th of August. Then they proceed to form a negotiating committee to negotiate with  
12 the States. And based on the Cabinet Mission plan, which the Princes had accepted. Please  
13 note, Section 8 of the India Independence Act, recognizes that the Constituent Assembly of  
14 India is that which began functioning on 9th of December 1946. There may have been a  
15 withdrawal of the British, legally and physically on the 15th of August, which we celebrate as  
16 our Independence Day. But our Independence is not a grant of India Independence Act, it is a  
17 result of the long drawn people's struggle. That's why the "We, the people" has come. There  
18 are some observations in Justice Beg's judgment, in *Indira Gandhi's* case, which the other  
19 side relied. But I found some other observations which say that Independence was granted by  
20 the India Independence Act. India Independence Act, what does it do? There shall be two  
21 dominions. It is partitioning and providing an interregnum arrangement, what will happen in  
22 between namely, the Government of India Act continues with adaptation, etc., and that the  
23 Constituent Assembly will also function as the Legislative Assembly. That is also provided in...  
24 So, it's a Machinery Act, a Transition Act, it's not an act which grants us. They say dominion,  
25 somewhere My Lords expressions of dominion, are still lingering in our Constitution, My  
26 Lords, the Attorney General and the Solicitor should take care that they are deleted. There are  
27 some provisions where still, My Lord, the word dominion continues. But we did not accept the  
28 dominion. Here comes the role My Lord of the objective resolution. It said, we are adopting  
29 an Independent Democratic Republic. So, the negotiation with the Indian States are based on  
30 the concept of Republic and since our Assembly continues, based on that objective resolution  
31 from 6th, 9th of December 1946. Therefore this republican character is the basis for accession.  
32 This is important for the reason, if you compare Section 5 and 6 of the Government of India  
33 Act 1935, it talks of a different kind of federalism, a federalism under the imperialism, a  
34 federalism under the Crown and a federalism, which will be triggered by the decision of His  
35 Majesty, provided more than half almost of the Princes agree then to come in. So, a different  
36 kind... accession, signing of the Instrument of Accession under the Government of India Act  
37 is different from signing of the Instrument of Accession under the Constitution of India in the

1 making or under the Government of India Act as adapted. My Lords, notice the expression  
2 Union... unity. There is some very vital document now My Lords, the British government has  
3 released several volumes of transfer of power having about a total of 13,000 pages. I was able  
4 to get this document, which is annexed to my written submission. Kindly have a look at that.  
5 It completely changes and all these documents were not present, My Lords, in the earlier  
6 exercise relating to 370. PDF page 327. Your Lordships has this?

7

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

9

10 **RAKESH DWIVEDI:** My Lord, Justice Kaul as well.

11

12 **JUSTICE SANJAY KISHAN KAUL:** This Volume 11. [UNCLEAR] Is it what you are  
13 reading Annexure-2?

14

15 **RAKESH DWIVEDI:** No, I am on the same written submission My Lords which I was  
16 reading.

17

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

19

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

21

22 **JUSTICE SANJAY KISHAN KAUL:** 11 begins with...

23

24 **RAKESH DWIVEDI:** Volume 3.

25

26 **JUSTICE SANJAY KISHAN KAUL:** Persistent relation between Britain and India.

27

28 **RAKESH DWIVEDI:** Yes, yes. May I please read? My Lord, the Chief Justice?

29

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

31

32 **RAKESH DWIVEDI:** Please read below the caption, Section 5 of the Act. A revised draft...

33

34 **CHIEF JUSTICE DY CHANDRACHUD:** Where do we...? Page 327 is the title page.

35

36 **RAKESH DWIVEDI:** Next page. Running page 70.

37

1 **CHIEF JUSTICE DY CHANDRACHUD:** That is 8th June 1947.

2

3 **JUSTICE SANJAY KISHAN KAUL:** The Letter of 8th June 1947.

4

5 **CHIEF JUSTICE DY CHANDRACHUD:** Mr. Rajagopalachari to Sir.....

6

7 **RAKESH DWIVEDI:** No, Your Lordship may go ahead. That's... I'll come to that later, My  
8 Lords. Please come to running page 73.

9

10 **CHIEF JUSTICE DY CHANDRACHUD:** Where is Mr. Kanu Agrawal?

11

12 **RAKESH DWIVEDI:** Sorry. PDF 334.

13

14 **CHIEF JUSTICE DY CHANDRACHUD:** PDF 334.

15

16 **RAKESH DWIVEDI:** I'm so sorry.

17

18 **CHIEF JUSTICE DY CHANDRACHUD:** 334 is a part of some document, I guess? What  
19 is that document that this is a part of?

20

21 **RAKESH DWIVEDI:** That's some earlier letter, My Lord.

22

23 **CHIEF JUSTICE DY CHANDRACHUD:** It's Enclosure Number 1 to Number 111, the  
24 disappearance of paramountcy, the emergence of independent sovereign states and the  
25 balkanization of India by...

26

27 **RAKESH DWIVEDI:** PDF 345.

28

29 **CHIEF JUSTICE DY CHANDRACHUD:** 345. One second, give us a moment.

30

31 **JUSTICE B.R. GAVAI:** Before my meetings of the Indian Cabinet?

32

33 **RAKESH DWIVEDI:** Yes. Meeting of the Indian Cabinet. I'm grateful. May I place that My  
34 Lords? Meeting of the Indian cabinet.

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36 **CHIEF JUSTICE DY CHANDRACHUD:** Yes. 345. Actually, this is a part of Volume 12 of  
37 the transfer of documents and now we have page 345 which is Meeting of the Indian Cabinet?

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**RAKESH DWIVEDI:** That's right. May I place it?

**CHIEF JUSTICE DY CHANDRACHUD:** Mountbatten papers. Indian Cabinet Minutes, Part 2.

**RAKESH DWIVEDI:** The Indian Province... Provincial Constitution Order 1947 was being discussed. The Hon'ble, the Vice President, recalled that in the discussions at the previous meeting of the Cabinet on the India Provisional Constitution Order 1947, two sections, namely, Section 5 and 47, had been left over for further consideration. Section 5, a revised draft attached, prepared by the Reform Secretariat in the light of the previous week's discussions in the Cabinet was handed to the honourable members. It was pointed out that there was the same fundamental objection to the draft as now revised as to the originally redrafted Section 5 of the Act considered at the previous meeting. The draft gave the impression that the Dominion was limited to British India, which was an entirely wrong conception. It was necessary to devise a formula to show clearly that the Dominion of India would comprise, a) Governor's. Provinces; b) Chief Commissioner's provinces; c) Such Indian States as acceded to the Dominion; and d) Any other areas which, by consent of the Dominion would be included in the territory of the Dominion. Now this is important. Political and psychological considerations demanded that there should not be the least doubt that all states that acceded to the Dominion would form an integral part of the Dominion. This is how My Lord the reason for changing the earlier draft and My Lord, Section 5 and 6 of the Government of India Act. So, the Cabinet of the Government of India, which had resolved already to form a Republic, Independent Sovereign Republic, is saying that the moment you accede, you become integral part of India.

Now the whole thing changes My Lord, with this backdrop. If you read the IOA which was signed, it was a formatted document. Everybody signed. So all those mergers and etc., which are being talked about, they are neither here nor there. They are just a methodology. Mergers are generally happening of small states to the next door State or Union of State, which they formed, that has nothing to do with... Now some States have accepted the Constitution of India, some may not have said so... that's... once you sign that's the last. You become integral part of India. With this Adaptation Order before the Indian States, the rulers signed the Instrument of Accession. So, therefore, every state which signed so far as it's becoming an integral part of India. And in fairness, Mr. Sibal concedes, My Lord, that JK is fully integral from that point of time. But it has consequences. So when Article 1 talked about 'merger of territory', when it talks about 'including the state', it is not just off the cuff. That's the mandate

1 flowing from the statute, accepted by everybody. Everybody is acceding on that basis. So it's  
2 an understanding... Therefore My Lord, all these States are mentioned in the schedule and  
3 their territory is incorporated. That's the integrity. And the instrument is at page that is at PDF  
4 350, which Your Lordships have seen in the other volumes, Your Lordships may just note that  
5 in the very beginning it says, Dominion of India established by the India Independence Act,  
6 shall as from 15th August, be a Union of, that's the first clause is the Amended Draft, Section  
7 5. And please see C, 5(C), Indian States acceding to the Dominion in the manner, hereinafter  
8 provided. So, if you accede in the manner under Section 6, you become part of the Union. This  
9 is also there in Volume 6, PDF 103. And 6(A) says, 'If you declare that he accedes to the  
10 dominion with the intent that the Governor General, Dominion Legislature, Federal Court,  
11 other Dominion authorities established for the purpose of dominion, shall, by virtue of  
12 instrument, but subject to the terms thereof, and for the purpose of the dominion, be vested  
13 in the order under the [UNCLEAR].' So, once you accept all these authorities, once you  
14 integrate, how do you integrate if you don't accept? And the terms, the expression, subject to  
15 terms doesn't mean that you... these are minor modifications and qualifications which may  
16 come in. But you can't say that on the one hand, that I accept the Supreme Court, I accept the  
17 President, I accept everything. But qualification, I will not accept 136. So, therefore my  
18 submission is, that our independence is not a grant of India Independence Act. We had already  
19 resolved to form a Republic, a Sovereign Independent Republic and we amended the  
20 Adaptation Orders to make it clear to all the rulers of the States that the moment you sign the  
21 Instrument, you are part of the Union, you are integral.

22

23 **CHIEF JUSTICE DY CHANDRACHUD:** So actually, if you see the Constitution, the  
24 Provisional Constitution Orders, 1947...

25

26 **RAKESH DWIVEDI:** Yes.

27

28 **CHIEF JUSTICE DY CHANDRACHUD:** ...which is a part of Mr. Arvind Datar's Second  
29 Edition of 2007.

30

31 **RAKESH DWIVEDI:** Yes.

32

33 **CHIEF JUSTICE DY CHANDRACHUD:** You will find it here at page 348, page 348.

34

35 **RAKESH DWIVEDI:** Yes, My Lords.

36

1 **CHIEF JUSTICE DY CHANDRACHUD:** And what it says is that the Indian Independent...  
2 The Government of India Act shall apply with such modifications, as are specified in the  
3 Schedule, right?

4

5 **RAKESH DWIVEDI:** Yes.

6

7 **CHIEF JUSTICE DY CHANDRACHUD:** And if you go to the Schedule now at page 350.

8

9 **RAKESH DWIVEDI:** Yes.

10

11 **CHIEF JUSTICE DY CHANDRACHUD:** There you will find the modification of Section  
12 5...

13

14 **RAKESH DWIVEDI:** That's right.

15

16 **CHIEF JUSTICE DY CHANDRACHUD:** A Domain of India established by the Indian  
17 Independence Act [UNCLEAR] from the 15 August 1947, be a Union comprising of... see, the  
18 Indian States acceding to the Dominion in the manner hereinafter provided.

19

20 **RAKESH DWIVEDI:** That expression is very important "In the manner."

21

22 **CHIEF JUSTICE DY CHANDRACHUD:** "In the manner." And now 6 says, Accession of  
23 Indian States.

24

25 **RAKESH DWIVEDI:** Yes.

26

27 **CHIEF JUSTICE DY CHANDRACHUD:** An Indian State shall be deemed to have acceded  
28 to the Dominion of the Governor, if the Governor General has signified his acceptance of an  
29 Instrument of Accession, executed by the ruler, whereby the ruler, on behalf of the state, a)  
30 Declares that he accedes to the dominion with the intent of the Governor General, the  
31 Dominion Legislature, the Federal Court...

32

33 **RAKESH DWIVEDI:** Yes.

34

35 **CHIEF JUSTICE DY CHANDRACHUD:** And any other Dominion Authority established  
36 for the purpose of the Dominion, shall, by virtue of this Instrument of Accession but subject  
37 always to the terms thereof, and for the purposes only of the Dominion exercise in relation to



1 the state, such functions, and may be vested in them by or under the [UNCLEAR] assumes the  
2 obligation of ensuring that due effect is given within the state to the provisions of this Act, so  
3 far as, they are applicable therein, by virtue of the Instrument of Accession.

4

5 **RAKESH DWIVEDI:** Now B completely destroys the argument of internal sovereignty. You  
6 have to give effect to all these authorities, the laws made, the execution done, the judgments  
7 given within the state. Reservation of some subjects My Lords, doesn't mean that some  
8 sovereignty remains. That's a distribution of powers only. So you have some more powers,  
9 which are the...

10

11 **CHIEF JUSTICE DY CHANDRACHUD:** What do you make out of that statement in the  
12 IOA, where the Maharaja said that I have retained my sovereignty for the future.

13

14 **RAKESH DWIVEDI:** You see Section 6, which is amended, does not contain any such term.  
15 Maharajas cannot, as the learned Solicitor General showed somebody's saying that we will  
16 have reservation about tax, so that's their wish. You may wish anything. But so far as the  
17 statute is concerned, as adapted. Section 6 does not contain any Clause 8. All that remains is  
18 that by supplementary instruments you can further make more concessions. You may concede  
19 more subject matters. That Clause 8 is completely beyond 6, it has no validity. But I will say  
20 you read that Clause 8 of IOA where Hari Singh says, I preserve my sovereignty. That is only  
21 meaning that he is preserving his power to legislate and do whatever My Lord with respect to  
22 the remaining subject matters.

23

24 **CHIEF JUSTICE DY CHANDRACHUD:** Right. What's the next point, Mr Dwivedi? We'll  
25 have to leave sometime today for Mr Giri. So long as all of you are within the time framework,  
26 we have no problem.

27

28 **RAKESH DWIVEDI:** Our time should be up till Monday, My Lords, at least.

29

30 **CHIEF JUSTICE DY CHANDRACHUD:** Monday afternoon, Monday lunch.

31

32 **RAKESH DWIVEDI:** So we'll try to finish by that, it won't spill.

33

34 **CHIEF JUSTICE DY CHANDRACHUD:** Monday lunch is the final time.

35

36 **RAKESH DWIVEDI:** Or may not be a spill at all, My Lords but...

37

1 **CHIEF JUSTICE DY CHANDRACHUD:** We were hoping that...

2

3 **RAKESH DWIVEDI:** The learned Counsel has agreed that I must...

4

5 **CHIEF JUSTICE DY CHANDRACHUD:** Monday afternoon we have to... so that then we  
6 can give them the rest of Monday and Tuesday to complete the rejoinder.

7

8 **RAKESH DWIVEDI:** As I said, My Lord we'll try to.

9

10 **CHIEF JUSTICE DY CHANDRACHUD:** Mr. Dwivedi Can we do this? We are at 12:05.  
11 We can give you 10 more minutes and then Mr. Giri, 45 minutes till through lunch. And we  
12 wrap up.

13

14 **RAKESH DWIVEDI:** We will finish by 12 My Lords instead of stopping Mr. Giri...

15

16 **CHIEF JUSTICE DY CHANDRACHUD:** No but, primarily now the main counsel are to  
17 follow you Mr Giri, Mr. Mahesh Jethmalani and Guru. The others, look. One second. One  
18 second. Don't interrupt. I'm in charge of the proceedings. We have to, these are the three  
19 seniors. Now, after this, we'll have a lot of interveners, etc. but what is to be said has been  
20 pretty much said. We will request all the interveners to please talk to the counsel who are  
21 following you following Mr Datar whatever they have to say to me, indicate to the Counsel who  
22 are now going to argue so that the four Counsel will cover the entire gamut. I think that would  
23 be a very fair way of doing it. And then we hear the interveners for two minutes or three  
24 minutes. So please, one second. This is now procedural... No, sorry, this is a procedural  
25 mandate now which is that all interveners who are going to follow will talk to Mr. Giri, Mr.  
26 Jethmalani and Mr. Guru, and whatever you have to say, please tell them to say it on your  
27 behalf. They will not be charging a separate set of fees and we will get conclude with that. I  
28 think that's the only way. Now tell us Mr. Dwivedi how long now?

29

30 **RAKESH DWIVEDI:** My Lord, we'll finish. Our side will finish by the lunch. Your Lordship  
31 because otherwise My Lords...

32

33 **CHIEF JUSTICE DY CHANDRACHUD:** All right. Do we take that between Mr. Giri, Mr.  
34 Jethmalani, and Guru you have bifurcated the time with Mr. Dwivedi. Do we take it so that  
35 you are finishing by a lunch on Monday.

36

37 **V. GIRI:** On Monday?

1

2 **CHIEF JUSTICE DY CHANDRACHUD:** Yes. Whatever remains, whatever remains, one  
3 second, whatever remains after Mr. Jethmalani, Mr. Giri and Mr. Guru Krishnakumar have  
4 completed. We are here to hear you until lunch but we'll not hear the Respondents after lunch.

5

6 **RESPONDENT'S COUNSEL 1:** [UNCLEAR] application on behalf of...

7

8 **CHIEF JUSTICE DY CHANDRACHUD:** Fair enough we have no difficulty, we have no  
9 difficulty. We have given you the names of people who are going to argue. After they finish if  
10 there's some time remaining before lunch on Monday, we'll hear you certainly, but after lunch,  
11 that's it. At 2 o'clock we call upon Mr. Sibal to start the rejoinder. Oh, I'm so sorry, nothing  
12 now. We have to now... we have a whole country wanting to argue here. But now we... That's  
13 all right. You sit with the seniors who are arguing after... There has to be some order. You can  
14 sit with the seniors then during the course of the weekend and you can talk to them. If  
15 somebody has a point...

16

17 **RAKESH DWIVEDI:** Let me...

18

19 **V. GIRI:** Adhering to what Your Lordships are indicating...

20

21 **CHIEF JUSTICE DY CHANDRACHUD:** Yeah. Absolutely.

22

23 **V. GIRI:** We'll try to...

24

25 **RESPONDENT'S COUNSEL 2:** My Lord, can the interveners circulate a short note?

26

27 **CHIEF JUSTICE DY CHANDRACHUD:** No difficulty. Absolutely. A page at the most.

28

29 **V. GIRI:** My Lord, just that have taken a lot of... invested a lot of time and passion

30

31 **CHIEF JUSTICE DY CHANDRACHUD:** But of course we.... we don't deny that. But then  
32 presentation has to be through... either the seniors who are arguing have to curb themselves,  
33 or then you have to just do what we have to do.

34

35 **V. GIRI:** We'll abide the timelines that Your Lordships...

36

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

1

2 **RAKESH DWIVEDI:** Kindly just note the documents I will not read because of the time  
3 constraint. Your Lordship will look into it. Just at PDF 328. This is about the paramountcy.  
4 What was the view of the leaders of... on the Indian side, when they were discussing? None of  
5 these Indian States, My Lord were independent really...

6

7 **JUSTICE SANJIV KHANNA:** Mr. Dwivedi, we have understood this argument.

8

9 **RAKESH DWIVEDI:** Yes, I'm not reading therefore. I'm just saying, Your Lordship may  
10 note... the first is the Rajagopalachari's note. The second note is at Page, PDF 331, which is  
11 Shri Alladi Krishnaswamy Iyer, My Lords, and they took lot of pains... and the last My Lord is  
12 of Pandit Nehru himself at 339 to Lord Ismay, who was the Chief of Staff of Mountbatten. All  
13 three of them... they were persisting that they have never been independent. What are you  
14 doing? This return of this paramountcy was an attempt to balkanize India. Create so many  
15 enclaves and that created so much problem. And it is thanks to Sardar Patel, that all this was  
16 [UNCLEAR] And when he left, he was wondering, My Lord, that what he was trying to  
17 negotiate on three subjects. Sardar Patel, he said that, "you have wiped out the monarchy from  
18 the map of India". So therefore, they were hardly independent. And we know from Amritsar  
19 Treaty, on the basis of an amount of money and one horse and twelve shawls, etc., which is  
20 mentioned, annexed document, I will not read it. It was transferred to Gulab Singh and that's  
21 how My Lord this.... So when were they.... earlier under Ranjit Singh and some King or the  
22 other, they were never independent. Therefore, this sovereignty flowing internal residuary...  
23 whatever.... There was no sovereignty. And whatever left, Article 1 finishes. That's the  
24 complete merger. No merger agreement is required. No supplementary Instrument of  
25 Accession is required. Now, My Lords, in re *Berubari* kindly read, I am reading only from  
26 this para 73 of my written submission, which is at page 298. Your Lordship has it?

27

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

29

30 **RAKESH DWIVEDI:** Now kindly come to pdf 299, that bold portion. Cession of National  
31 Territory in law amounts to the transfer of sovereignty over the said territory by the owner  
32 state in favour of another state. There can be no doubt that such cession is possible, and indeed  
33 history presents several examples of such transfer of sovereignty. It is true, as Oppenheim has  
34 observed that hardship is involved in the fact that in all cases of cession, the inhabitants of  
35 their territory who remain lose their old citizenship and are handed over to a new sovereign,  
36 whether they like it or not. And he has pointed out that it may be possible to mitigate this  
37 hardship by stipulating an option to emigrate with such certain period, in favour of the

1 inhabitants of ceded territory, as means of averting the charge of inhabitants are handed over  
2 to new sovereign against their will. But though from the human point of view, great hardship  
3 is inevitably involved in cession of territory by one country to another, there can be no doubt  
4 that a sovereign state can exercise its right to cede a part of its territory or foreign state. This  
5 power, it may be added, is of course, subject to limitations which the Constitution of the State  
6 may either expressly or necessary implication impose in that behalf. In other words, the  
7 question as to how treaties can be made by sovereign state in regard to cession of national  
8 territory and how treaties can, when made can be implemented, would be governed by the  
9 provisions of the Constitution. Stated broadly, the treaty making power would have to be  
10 exercised in the manner contemplated by the Constitution is subject to limitations imposed by  
11 it. Whether the treaty can be made, implemented by ordinary legislation, constitutional  
12 amendment will naturally depend on the provisions of the Constitution. Then, kindly come to  
13 the next overleaf My Lords, last few lines of this paragraph. 'We have already referred to Article  
14 13(c), and we have observed that it does not purport to confer power on India to acquire  
15 territories. It merely provides for and recognizes automatic absorption or assimilation into  
16 territory, of territories which may be acquired by India by virtue of its inherent power as a  
17 sovereign state.' So that 1(c) and 2, they are straightaway Act of State. So even Constitution  
18 can recognize by its provisions, certain powers which are in the nature of Act of State. It may  
19 circumscribe it, or it may not circumscribe it. Now kindly also have 74, **Santosh Gupta**. This  
20 was read out by Mr. Naphade, but he said, this is obiter. 'State of JK has no vestige...' This is  
21 two Judge judgment. 'State of JK has no vestige of sovereignty outside the Constitution of  
22 India and its own Constitution, which is subordinate to the COI, Constitution of India. It is  
23 therefore wholly incorrect to describe it as being sovereign in the sense of its residents,  
24 constituting a separate and distinct class for themselves. Residents of JK, we need to remind  
25 the High Court, are first and foremost citizens of India.' Now this is not obiter. I have explained  
26 in 75, My Lords will look into that. There were direct questions in the High Court judgment, it  
27 was said that JK is sovereign and therefore Their Lordships dealt with it and said that  
28 sovereignty is not there. It had lost its sovereignty. Then, I have quoted the speeches from Shri  
29 Nehru, and Dr. Ambedkar in paras 76, 77, 78. Your Lordship may just note each of them are  
30 saying, that... I may just read 76, Shri Jawaharlal Nehru said, "We accepted it and of course,  
31 the accession was complete. It was not a kind of partial accession or limited accession. The  
32 accession was complete, but we said that we will abide by the verdict of the people whenever  
33 the chance or the opportunity comes." He also said, "So Kashmir, obviously is a constituent  
34 unit of the Federation of the Union of India. But a difference has arisen, subsequently arisen,  
35 you please remember that, not originally, between Kashmir and the other States because  
36 subsequent to the earlier accession, the other States have become integrated more which  
37 Kashmir was not and could not in the circumstances, as I have tried to point out, but

1 nevertheless it is a full constituent unit of India. Various things flow from it, various  
2 consequences, consequences for instance, in regard to the President of the Republic. The  
3 President's ultimate right has to remain for a constituent unit of India." So various  
4 consequences, I already spelled out on what follows from the integration and unionization.  
5 And Dr. Ambedkar also said, this has been read by the learned Solicitor General, Your  
6 Lordships may just note. He explained what is meant by Union. And kindly turn to next page.  
7 I'm not relying so much as quoted though *Raja Ram Pal* which says destructible units and  
8 maybe some lines need to be drawn. I can't mean that all the States disappeared, and  
9 federalism disappeared. So that was Your Lordship's worry also when the learned Solicitor was  
10 arguing about Article 3. Then para 80, the *State of West Bengal versus Union*. It  
11 expressly says My Lords, that the feature of a compact or agreement between independent and  
12 sovereign units are absent in the Constitution of India. There is distribution of powers, but  
13 distribution of powers is not always an index of political sovereignty.

14

15 **CHIEF JUSTICE DY CHANDRACHUD:** Where is this? Oh yes. Para 18.

16

17 **RAKESH DWIVEDI:** I'm reading My Lord from what I have said. But this is part of the  
18 judgment Para 25 have mentioned. Your Lordship may note that and Para 80. Then kindly  
19 have My Lords Para 51 going back a little. Para 51 that is PDF 293, same written submission.  
20 Yes, My Lords, I'm sorry is this Para 25 of *State of West Bengal* is fully quoted My Lords  
21 at, beginning at PDF 291. And Your Lordships will find the relevant portion in Clause A. Kindly  
22 come to PDF 292, this is paragraph 25 from fourth line. The result was a Constitution which  
23 was not true to any traditional pattern of Federation. There is no warrant for the assumption  
24 that the provinces were sovereign autonomous units which had parted with such power as they  
25 considered reasonable or proper for [UNCLEAR] the Centre.

26

27 **JUSTICE SANJIV KHANNA:** You're on page 291

28

29 **RAKESH DWIVEDI:** PDF 292.

30

31 **JUSTICE SANJIV KHANNA:** 291. It starts.

32

33 **RAKESH DWIVEDI:** Yes, it starts in 291.

34

35 **CHIEF JUSTICE DY CHANDRACHUD:** There is no warrant for the assumption.

36

1 **RAKESH DWIVEDI:** Yes, there is no warrant for the assumption that provinces were  
2 sovereign autonomous units which had parted with such power as they considered reasonable  
3 or proper for enabling the Central Government to function for common good. The legal theory  
4 of the Constitution was based was the withdrawal of resumption of all powers of sovereignty  
5 into the people of this Country and the distribution of these powers save those withheld from  
6 both the Union and the States by reason of provisions of Part 3 between the Union and the  
7 States. A truly federal form of government, envisages a compact or agreement between the  
8 independent and sovereign States to surrender partially their authority in their common  
9 interest, and vesting it in the Union and retaining the residue of the authority in the  
10 constituent units. Ordinarily each constituent unit has its separate Constitution by which it is  
11 governed in all matters except those surrendered to the Union. And the Constitution of the  
12 Union primarily operates upon the administration of the units. Our Constitution was not the  
13 result of such compact or agreement. Units constituting a unitary state, which are non-  
14 sovereign, were transformed by application of power into a Union. Then the second  
15 characteristic is supremacy of the Constitution, which cannot be altered except by the  
16 component units. Then see distribution of powers between Union and Regional Units. Your  
17 Lordship the fourth is supreme authority of Courts to interpret the Constitution that is D.  
18 Kindly come below that, in our Constitution, characteristic D is to be found in full force. A and  
19 B are absent. There is undoubtedly distribution of powers between the Union and the States  
20 in matter, Legislative and Executive for distribution of powers is not always an index of  
21 political sovereignty. So this theory bilateralism compact and all this objective resolution was  
22 unilateral, adaptation was unilateral, Article 1 is unilateral, 370 is unilateral. So there is some  
23 exchange of thoughts and agreements to be within the fold of 370 does not make it bilateral.  
24 So bilateralism need not be introduced in 373. Kindly have para 51, next page. Even in a pre-  
25 constitution setting in **Promod Chandra Deb vs State of Orissa**, para 17, a Constitution  
26 bench of this Court held that sovereignty of erstwhile ruler ends with accession of territory.

27  
28 And then this Court said some sovereignty is retained after the execution of IOs. That was a  
29 passing reference as sovereignty was being discussed in the light of an old grant of land by  
30 ruler to son. Such grant would amount to law, which was continued post 1948. So the rights  
31 under the said grants were recognized by the new sovereign power. And in re **Berubari** also  
32 takes the same view in para 31, which I had already read. So cession of territory is a very vital...  
33 and Article 1, therefore assumes.. declares the end of.. If any doubts remain, that's the last  
34 nail in the coffin of sovereignty. And it is surprising My Lord, that my friends on the right,  
35 wedded to democracy are seeking permanence based on a Crown which is long gone. The King  
36 is dead. Long lived the King. Your Lordships Just note... in paragraph 69. Just even Ayyangar,  
37 Shri Ayyangar also says that they are fully integrated. We can't extract some paragraphs here

1 and there and assert based on two paragraphs. What is the meaning of Clause 1, 2 and 3? If  
2 Your Lordships, will come in that paragraph 68 at next page, that is 298. PDF 298. The draft  
3 Article 306(a) was placed before the Constituent Assembly on 17-10 and passed on the same  
4 day. Shri Ayyangar said, "the meaning of accession is that, at present day the State JK Unit is  
5 a unit of a federal state that is Dominion of India. Dominion is getting transformed into a  
6 Republic, which will be inaugurated on 26th. JK State therefore has to become a unit of the  
7 new Republic of India. He goes on to say that Instruments of Accession will be a thing of the  
8 past in the new Constitution. The States have been integrated with the Federal Republic in  
9 such a manner that they do not have to accede or execute a Document of Accession for the  
10 purpose of becoming units of the Republic. But they are mentioned in the Constitution itself."

11  
12 Now all this is left out. And you extract three paragraphs where he is trying to say very lightly  
13 about referring to Clause 1, 2, and 3. And he doesn't say, My Lord, what happens after the JK  
14 Constitution Assembly ceases. He could not have said My Lord, the times were so difficult.  
15 Therefore, My Lord, it is a very brief speech. But these are much more vital expressions in his  
16 speech. You don't have to accede or execute a document of accession for the purpose of  
17 becoming units. The Preamble and the Article 1 and 5 and Fundamental Rights, all they  
18 complete. That's the Republic. Without it, there is no Republic. So, My Lords that's in my  
19 respectful submission... my submission with regard to this... I don't wish to add anything about  
20 356 etc. Except to see that My Lord, in **Bommai's** case, there are two observations with regard  
21 to the width of this suspending power. Paragraph 271 and 281. I'll give it in a piece of paper,  
22 My Lord. the paragraphs without [UNCLEAR] Your Lordships. 356 invocation will be in  
23 variety of situations which cannot be.... in a variegated situations. So therefore, what will be  
24 the circumstances, emergency provision all will depend. So, I just wanted to point out to  
25 supplement those paragraphs which I'll give. And one more thing that the Constitution Review  
26 Committee was constituted under the chairmanship of Mr. Venkatachaliah.

27  
28 And 356 was an issue, whether it should be retained or he said, "This is the bulwark of the  
29 Constitution." So the concept changes with time. Initially it was thought it will never be  
30 exercised. But the review committee says and very high level committee, Justice Jeevan Reddy  
31 was also a member of that committee, and they say that it's a bulwark but yes, there has been  
32 some abuse. Therefore, the checks and balances adjudicatory powers, the judicial review is  
33 there to check it. So with this, I conclude and say that let us, buddy 370. 35A, I'll just... my  
34 friend has filed a writ petition also, it's questioning 35(a). So I just wanted to give Your  
35 Lordships, which again I'll mention in the piece of paper, the paragraphs of **IR Coelho** where  
36 Your Lordships have held that if you come out with any instrument of Law, Constitutional  
37 amendment, which.. that was in the context of 31B, **Waman Rao** and in **Minerva Mills**,



1 and all those things were considered and Your Lordships have held that all laws which are  
2 placed in 31B will be tested. And so far as certain, of course, prospective overruling etc., is  
3 different concept but here we are finding that 35A has been super added. It's a complete lock  
4 stock denial of several vital fundamental rights. So in view of *IR Coelho*, I submit that needs  
5 to be struck down. I'm grateful, My Lord.

6

7 **CHIEF JUSTICE DY CHANDRACHUD:** Thank you, Mr. Dwivedi.

8

9 **V. GIRI:** May it please Your Lordships. My Lord I beg to appear for the applicant in I.A.  
10 139743, in writ petition 1070 of 2019.

11

12 **JUSTICE SANJAY KISHAN KAUL:** Can you repeat that, Mr. Giri, I.A. number?

13

14 **V. GIRI:** The I.A. number is 139743, All India Kashmiri Samaj.

15

16 **JUSTICE SANJAY KISHAN KAUL:** In?

17

18 **V. GIRI:** In writ petition number 1070 of 2019.

19

20 **JUSTICE SANJAY KISHAN KAUL:** IO... I.A. is filed which year?

21

22 **V. GIRI:** I.A. is 139743 of 2023.

23

24 **JUSTICE SANJAY KISHAN KAUL:** '23?

25

26 **V. GIRI:** In writ petition of 1070 of 2019. My Lord I will just...

27

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

29

30 **V. GIRI:** Areas which are covered by the learned Attorney, the learned Solicitor, thereafter by  
31 Mr. Dwivedi. Lord, I'll just say what has been covered and therefore I don't have anything  
32 more to say on that but this is essentially... stressing on certain aspects, which I think would  
33 be of assistance in making out a case before Your Lordships. The Instrument of Accession My  
34 Lord, is dated 27-10-1947, and that is at PDF 9 of Volume 1. What happened in the, thereafter  
35 in chronological order, I'll be obliged if Your Lordships kindly have a look at the proclamation  
36 issued by the Yuvraj Karan Singh in Volume 3 of the written submissions. The compilation of

1 the written submissions of Respondents at PDF Page 44, part of the list of dates, My Lords, of  
2 the learned Solicitor. Page 44.

3

4 **JUSTICE SURYA KANT:** Of Volume?

5

6 **V. GIRI:** My Lord of Volume 3. The same Volume, which was being referred to by us. It was  
7 Clause 7 and date of Instrument of Accession was being relayed onto contend for the position.  
8 There was a vestige sovereignty which was retained with Yuvraj even then, even after signing  
9 the Instrument of Accession, because that is what is articulated in the Instrument of Accession  
10 as such. My Lord, on 25-11-1949 The Draft Constitution was ready and therefore My Lords the  
11 Yuvraj Karan Singh had the entirety of the Constitution, including 370 as it was incorporated  
12 in the Constitution before. Article 1 and 370. My Lords, which is incorporated, which is made  
13 as part of the Constitution, or which is made as part of the applicability of which was made as  
14 part of Article 370. All this was before him, and therefore My Lord, on 25-11-1949 if Your  
15 Lordships, have a look at PDF 44. Yuvraj Karan Singh issued.. My Lords I'm reading from the  
16 Solicitor's List updates, issued a proclamation for the State of Jammu and Kashmir, by which  
17 he declared and directed that the Constitution of India shortly to be adopted by the Constituent  
18 Assembly of India...

19

20 **JUSTICE B.R. GAVAI:** You are at PDF Page 54?

21

22 **V. GIRI:** No. PDF Page 44. Written submissions, Volume 3, My Lord this is part of the list of  
23 dates that was placed before Your Lordships by the learned Solicitor. My Lords the document  
24 is also included, but I thought this is easier, My Lord, because Your Lordships will have to keep  
25 referring to it again and again. The said proclamation is worth quoting in full.

26

27 **JUSTICE B.R. GAVAI:** Yes, I get it .

28

29 **V. GIRI:** Whereas with the inauguration of the new Constitution for the whole of India, now  
30 being framed by the Constituent Assembly of India. The Government of India Act 1935, which  
31 now governs a constitutional relationship between this State and the Dominion of India, will  
32 stand repealed. And whereas in the best interests of this State, which is closely linked with the  
33 rest of India by a community of interest in the economic, political, and other fields. It is  
34 desirable that the constitutional relationship established between the State and the Dominion  
35 of India should be continued as between the State and the contemplated Union of India and  
36 the Constitution of India, as drafted by the Constituent Assembly of India, which includes duly  
37 appointed representatives of this State provides a suitable basis for doing so. I now hereby

1 declare and direct that the Constitution of India, shortly to be adopted by the Constituent  
2 Assembly of India, shall insofar as it is applicable to the State of Jammu and Kashmir, govern  
3 the constitutional relationship between this State and the contemplated Union of India, and  
4 shall be enforced in this State by me, my heirs and successors in accordance with the tenor of  
5 its provisions, that the provisions of the said Constitution shall, as from the date of its  
6 commencement, supersede and abrogate all of the constitutional provisions inconsistent  
7 therewith, which are at present in folds in the State. So, My Lords therefore, it was understood  
8 that on the enforcement of the Constitution of India, My Lords, which took place on 26-01-  
9 1950, there is no residuary sovereignty that is retained My Lord by the Yuvraj in the State of  
10 Jammu and Kashmir. My Lord the territories comprised within the State, are therefore  
11 mentioned in the Constitution. It is treated as a Part B State. The provisions of the Constitution  
12 are made applicable to the Union of India, including the State of Jammu and Kashmir with  
13 effect from the date of enforcement that is My Lord on 26-01-1950 when the Constitution  
14 commences. It is My Lord difficult to countenance an argument My Lord and this I say so with  
15 greatest respect. That there was any sovereignty, which, whether you call it as residuary,  
16 internal, as distinguished from external sovereignty which survives My Lords, the enforcement  
17 of the Constitution of India, with effect from 26-01-1950, when after My Lord, the Yuvraj had  
18 also made it clear, and had declared that the relationship between the state and the Union will  
19 now be governed by the provisions of the Indian Constitution. Which means that we don't have  
20 anything more. We are governed by the Constitution of India. We have looked in. We have also  
21 looked into it. There were four representatives from the State of Jammu and Kashmir in the  
22 Constituent Assembly. We have gone through each clause, and we have ultimately looked at  
23 370 also, which is an integral part of the constituency, which is also a part of the Constitution.  
24 And we have therefore decided that we will abide by this. Now, My Lords, the question of... if  
25 this is the integration, therefore becomes complete My Lord on the... on enforcement of the  
26 Constitution, there is nothing residuary now. If Your Lordships kindly have a look at, My Lord,  
27 I'm sorry but then to make my submission on the question of My Lord, What therefore survives  
28 under 3. What therefore survive is My Lord, will also have to be looked into in Article 370 and  
29 373, and there is nothing more may not which can be read into it. There is nothing in the  
30 Constitution of India My Lord, which carves out an exception in the case of State of Jammu  
31 and Kashmir, both as regard as sovereign internal... any sovereignty other than My Lord  
32 Article 370 itself. And 370 in my respectful submission, does not indicate that there is any  
33 residuary sovereignty that is left with the State of Jammu and Kashmir. It becomes a part of  
34 the Union of India. My Lords, the enforcement of Article 370 also, and powers exercised by  
35 the President from time to time in issuing a Constitutional Order is also an exercise of a power  
36 that is conferred My Lord, under the Constitution of India. It is nowhere else. President doesn't  
37 go out... outside the bounds of the Constitution. And therefore if abrogation of 370 which

1 would result My Lord the effacement of any special status that is given to the State of Jammu  
2 and Kashmir is inbuilt into Article 370 and it is also within the knowledge of the sovereign in  
3 the State of Jammu and Kashmir prior to the enforcement of the Constitution, to say that, "I  
4 still retain some residuary sovereignty with me, in spite of the enforcement of the Constitution  
5 after 26-1- 1950. Not reflected in Article 370, not reflected in any other provision of the  
6 Constitution of India. My Lord, it is not a submission that would be countenance by Your  
7 Lordships. But what are the Petitioners asking for? Petitioners, My Lord say, "The 370, which  
8 is a temporary provision, must be treated as a permanent part of the Constitution." What for?  
9 If My Lords the... is it for the purpose of My Lord, claiming any... for expansion of any right?  
10 Apparently not. Now, My Lords, because, once the 370 goes and when Jammu and Kashmir,  
11 My Lord, therefore, the integration is complete, even when the enforcement of the  
12 Constitution takes place. The insignia of any sovereignty is a lawmaking power... one of the  
13 insignia is a lawmaking power. That's the lawmaking power My Lord, has been with the Union  
14 and with the States... in State in list 2 and list 3 also. Unless the Parliament by an overarching  
15 by [UNCLEAR] of the provisions of lawmaking power in the list 3 also... supersedes the  
16 legislation that is prevailing in the State. If it completely therefore applies, after article 370 is  
17 abrogated, isn't there an expansion to the right My Lord that is available to any person who  
18 sees that I am a residence in the State of Jammu and Kashmir. I therefore belong to that state.  
19 I also belong to the Union of India. But therefore, My Lord, what is the abridgment of the right  
20 that the petitioners are really concerned about? Now, My Lords, insofar as abrogation of 370  
21 is concerned, when Your Lordships would have noted that Sub-Article 3 was also therefore  
22 part of in the manner in which it was framed even before 1950. On 26-1-1950, My Lord, this is  
23 how it looked there. And that was at the point of time when the Constituent Assembly for the  
24 State was yet to be convened. It was convened later in January, 1951.

25  
26 Now, if Your Lordships kindly come to that for a moment. There are two places My Lord, where  
27 the Constituent Assembly for the State is referred to. Firstly, in Sub-Article 2, but please come  
28 to Sub-Article 3. Notwithstanding anything in the foregoing provisions of this Article, the  
29 President, may, by public notification, declared that this Article shall cease to be operative, or  
30 shall be operative only with such exceptions and modifications, and from such date as he may  
31 specify. Proviso, provided that the recommendation of the Constituent Assembly of the State  
32 referred to in Clause 2, shall be necessary before the President issues such a notification. The  
33 crucial words are ' recommendation to the Constituent Assembly of the State referred to in  
34 Clause 2.'

35  
36 My Lord, in Clause 2, the reference to the Constituent Assembly is qualified by certain words.  
37 If the concurrence of the Government of the State referred to in paragraph 2, of Sub-clause B,

1 of Clause 1 or the second proviso to Sub-clause D of that Clause be given before the Constituent  
2 Assembly, please permit me to read it slowly, 'For the purpose of framing the Constitution of  
3 the State is convened' Therefore, it was understood that the Constituent Assembly will be  
4 convened for the purpose of framing the Constitution of India, as originally contemplated in  
5 Article 370 itself. But this Constituent Assembly is only for the purpose of framing the  
6 Constitution of the state and it is a fact which is accomplished that on framing the Constitution  
7 for the state, My Lord, it dissolved itself. That it will be convened for a specific purpose, and  
8 that it will dissolve itself were also matters within the knowledge of the framers of the  
9 Constitution even then. And then, therefore in proviso when they referred to the Constituent  
10 Assembly for the state, there was a *terminus a quo* for the Constituent Assembly, which was  
11 within the knowledge of the framers and therefore that is what is referred to, in the proviso. It  
12 could not have been contemplated that the constituent.... it was... or rather let me put it this  
13 way, it was concluded or it was definitely the intention that the Constituent Assembly for the  
14 state, which is convened for the purpose of framing the Constitution of the state, will have a  
15 natural death, when the Constitution for the State is framed. But when they say the  
16 recommendation of the Constituent Assembly for the State shall be necessary before the  
17 President issues such a notification, did they not have in mind that the recommendatory  
18 powers are therefore coterminous with the tenure of the Constituent Assembly, which has to  
19 end with the framing of the Constitution for the state. It is not as if the Constitution  
20 contemplates a Constituent Assembly for any purpose other than the framing of the  
21 Constitution for the State as such. Therefore the, one of the termini which Your Lordships have  
22 a referring to, there are two *terminus a quo* insofar as the Constituent Assembly is concerned  
23 going by Sub-Article 2 and the proviso. One is the convening of the Constituent Assembly and  
24 the other is a dissolution of the Constituent Assembly. The proviso merely does not say  
25 Constituent Assembly of the State, it says Constituent Assembly of the State referred to in  
26 Clause 2. Clause 2 says Constituent Assembly for the purpose of framing the Constitution.  
27 Therefore, the tenure of the Constituent Assembly is inbuilt into Sub-Article 2 and the proviso,  
28 as well. If therefore, the triggering factor as per the proviso to Article 373, for the President to  
29 issue a public notification either abrogating it or declaring that it will be operative only with  
30 such exceptions and modifications, is a recommendation of the Constituent Assembly of the  
31 State referred to in Clause 2. It has to be inferred in my respectful submission that the  
32 triggering factor would be alive and operative only till such time as the Constituent Assembly  
33 is alive. And this is an inference which I beg to infer and which I comment for Your Lordships'  
34 acceptance, is inbuilt into Sub-Article 2 and the proviso. That's why the crucial words,  
35 Constituent Assembly of the State referred to in Clause 2, need not have bene that way. But  
36 when Sub-Article 2 says before the Constituent Assembly for the purpose of framing the  
37 Constitution of India. Therefore even originally, it was contemplated that the Constituent

1 Assembly for the state will have no function other than... or will not will be *functus officio* once  
2 a Constituent Assembly of this... Constitution of the State is convened.

3

4 Then My Lord is historically recognized fact that it actually dissolved itself in 1957 itself. That's  
5 a different matter. But the point is, My Lord for the purpose of the proviso the triggering factor  
6 My Lord is contemplated as being available coterminous with the life of the Constituent  
7 Assembly referred to in Sub-Article 2 and therefore My Lord it ceases to have any significance  
8 My Lords, once the Constituent Assembly is dissolved and once the Constitution of the State  
9 is formed. But My Lord, it cannot under any interpretative tool give fodder to a submission  
10 that Article 370 as a whole, and at any rate, Article 370, Sub-Article 3 would also cease to be  
11 operative once a proviso becomes inoperative. My Lord, ideally My Lord, the proviso could  
12 have been deleted after the dissolution of the Constituent Assembly for the State. That's a  
13 different matter. One need not get into that hypothesis at all, but it cannot be contented that  
14 the power of the President [UNCLEAR] under Article 373 would cease to be available because  
15 the proviso is no longer available to be operated upon. In my respectful submission, the  
16 proviso itself contemplates that the recommendatory power of the Constituent Assembly. My  
17 Lord, whatever is the content of the recommendatory power or not, My Lord, it's a different  
18 matter I think. Enough submissions have been made on that. But the recommendatory power  
19 of the Constituent Assembly was intended, even originally, to be coterminous with the life of  
20 the Constituent Assembly, which anyway My Lords, was dissolved after the Constitution of the  
21 State was convened. My Lord, my written submissions are at pages 400 to 411, My Lord, of  
22 Volume 3. 401 to 411 of Volume 3.

23

24 **JUSTICE B.R. GAVAI:** 411 to?

25

26 **V. GIRI:** 401 to 411 My Lords. My Lords this aspect has been dealt with My Lord, I won't  
27 therefore take up more time of Your Lordships on this aspect. My Lords, Paragraphs 1 to 4, I  
28 have dealt with. The next submission, My Lord, would be on the aspect of federalism there are  
29 two, My Lord, papers which Your Lordships may kindly have a look juxtaposed with each  
30 other. My Lords, one is the opening remarks of Dr. Ambedkar which Your Lordships will find  
31 in Volume 8 of the Compilation of Documents.

32

33 **CHIEF JUSTICE DY CHANDRACHUD:** If you are beginning a new point on federalism,  
34 should we take it up on Monday?

35

36 **V. GIRI:** Very well. My Lord, I'll still maintain the timeline.

37

1 **CHIEF JUSTICE DY CHANDRACHUD:** Mr Giri always conscious of how you are  
2 generally in the Court. So we don't expect anything different. You'll be precise and always very  
3 focussed. We expect that as usual. Thank you.

4

5 **V. GIRI:** I'm grateful. My Lord, there was one request My Lords, if Your Lordships could  
6 consider, because it fell from Your Lordships, would it be possible for Your Lordships to  
7 convene at 10:00 on Monday so that we get 3 hours.

8

9 **TUSHAR MEHTA:** My Lord, Mr. Nataraj had, My Lord, had ten minutes of submissions. A  
10 new point.

11

12 **JUSTICE SANJAY KISHAN KAUL:** There is a circumstance for today, and we have given  
13 you full half day now.

14

15 **TUSHAR MEHTA:** My Lord, Mr. Nataraj would like to have ten minutes. And two young...  
16 My Lord... two other people... I know Your Lordships would not....

17

18 **V. GIRI:** We'll come back.

19

20 **JUSTICE SANJAY KISHAN KAUL:** ...so young can divide the time period between 10.30  
21 and 1...

22

23 **CHIEF JUSTICE DY CHANDRACHUD:** 10:30 and 1:00. At the same time, I know that  
24 everybody has worked very hard. We wouldn't deprive even five minutes of time.

25

26 **TUSHAR MEHTA:** My Lord, some of them have worked since ten years. Let them have their  
27 day in the Court for some time.

28

29 **CHIEF JUSTICE DY CHANDRACHUD:** I'm sure that the seniors who precede them will  
30 give them some time so that they have that...

31

32 **TUSHAR MEHTA:** Certainly.

33

34 **V. GIRI:** No, no, we will do that. For example My Lord, Mr. Tanwani is also a research scholar.

35

36 **CHIEF JUSTICE DY CHANDRACHUD:** Who?

37

1 **V. GIRI:** Mr. Tanwani... Mr. Rahul Tanwani has been...

2

3 **TUSHAR MEHTA:** Tanwani, Mr. Rajput, they have been working since many years...

4

5 **CHIEF JUSTICE DY CHANDRACHUD:** We'll certainly give them some time.

6

7 **TUSHAR MEHTA:** So, whatever they can contribute....

8

9 **JUSTICE SANJAY KISHAN KAUL:** I'm sure, you'll be able to....

10

11 **V. GIRI:** We'll do that. We'll do that. We won't exceed the time. We'll finish by Monday 1  
12 o'clock or whatever is the time that Your Lordships are....

13

14 **JUSTICE SANJAY KISHAN KAUL:** 1 o'clock.

15

16 **CHIEF JUSTICE DY CHANDRACHUD:** So, we'll wrap it up on Monday for this side at 1  
17 o'clock And then in the afternoon we'll start the rejoinder.

18

19 **V. GIRI:** Very well.

20

21 **TUSHAR GUPTA:** Grateful.

22

23 **V. GIRI:** Grateful.

24

25

26

27

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