

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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2 **CHIEF JUSTICE DY CHANDRACHUD:** Must all we wondering how there are only four
3 chairs. I'm disclosing it with Justice Gavai's permission. My learned brother yesterday, he had
4 a... his eyes were creating problem. He has conjunctivitis. So he said that I don't want to come.
5 But he said he'll work from home. So, I took his permission on whether I can... nothing apart
6 from this conjunctivitis it is. So, he's on the screen here. He's graciously agreed not to take a
7 holiday today or take a day off. Good morning, brother Gavai.

8

9 **JUSTICE BR GAVAI:** Good morning. Good morning Chief.

10

11 **CHIEF JUSTICE DY CHANDRACHUD:** Another thing for the members of the Bar, there
12 was a problem with the mobile connectivity in the Additional Building Complex, what we call
13 as ABC in the Registry of Parliament. So we have installed boosters. So, the connectivity
14 problem for the members of the Bar in the ABC will be... has been completely resolved. And
15 finally, there's a notice which has been put up by the Registry today. There was a phishing
16 attack on our website of the Supreme Court. So please be careful in the sense, don't click on
17 that website or don't pass... Don't use that for a monetary transaction. Because that will just
18 be... there is a whole objective to get people to...

19

20 **TUSHAR MEHTA:** Share the details or something...

21

22 **KAPIL SIBAL:** [UNCLEAR] My learned friend to find out about the faculty members, My
23 Learned friend... faculty member who was suspended.

24

25 **CHIEF JUSTICE DY CHANDRACHUD:** Mr. Bhat. Mr. Attorney what is the....?

26

27 **TUSHAR MEHTA:** My Lord, some advice was given. What is the effect, My Lord, can be
28 responded to. We'll just take instructions.

29

30 **CHIEF JUSTICE DY CHANDRACHUD:** Just ask somebody there. I hope...

31

32 **TUSHAR MEHTA:** Yes. Yes. Certainly. I got it.

33

34 **ATTORNEY GENERAL R. VENKATARAMANI:** Well we thought...Justice Gavai's...we
35 can give a healing touch to Justice Gavai's....

36

1 **TUSHAR MEHTA:** My Lord, I was to answer those two questions, which I said that I will
2 give a detailed answer. 'The elections followed.'

3

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

5

6 **HARISH SALVE:** I'm sorry, My Lord, I was not unmuted. I have been very kindly allowed
7 by Mr. Dwivedi to come in after the Attorney. Because I have some personal difficulty on
8 tomorrow.

9

10 **TUSHAR MEHTA:** Yes My Lord... I... Mr. Salve had some difficulty and Mr. Dwivedi was
11 really gracious. It was really gracious My Lord...

12

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

14

15 **TUSHAR MEHTA:** Yes, yes, My Lord, he didn't object and so we are really thankful.

16

17 **CHIEF JUSTICE DY CHANDRACHUD:** So, that's the matter of internal adjustments for
18 all of you. Now, Mr. Solicitor, what you have to...

19

20 **TUSHAR MEHTA:** Yes, My Lord, on the question of Your Lordship's first question, 'When
21 the elections can be held?' The Central Government's response is, The Central Government is
22 ready for elections at any time now. Till date.... Updated, updating of the voters list was going
23 on My Lord, which is substantially over. Some part is remaining that Election Commission is
24 doing. My Lord we have...I'm sorry.

25

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

27

28 **TUSHAR MEHTA:** When would be the call taken by the State Election Commission and of
29 course, Union Election Commission together? But there, there are three elections which are
30 due.

31

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

33

34 **TUSHAR MEHTA:** But for the first time, the three tier *Panchayat Raj System* is introduced
35 after 2019. So the first election will be that of *Panchayat*. District Development Council
36 Elections have already taken place. But Panchayat Institutions, that is for the rural areas. Your
37 Lordships are aware under Chapter 9 and Chapter 9(a) of the Constitution. I informed Your

1 Lordships that the Leh part elections are over. Kargil for My Lord, The Hill Development
2 Council, election is at the end of this month. The process is on and the election is I think
3 20..12th, September this Month, 2019, 2023.

4

5 **CHIEF JUSTICE DY CHANDRACHUD:** For Kargil also you call it the Hill Development
6 Hill Development Council?

7

8 **TUSHAR MEHTA:** Hill Development Council.

9

10 **CHIEF JUSTICE DY CHANDRACHUD:** For both you call it?

11

12 **TUSHAR MEHTA:** For both Kargil and Leh. These are the only two parts in Ladakh UT.
13 This is the position as on today. And the 3rd..2nd election would be Municipality Elections.
14 And the 3rd would be Legislative Assembly elections. It's UT with Legislature. Your Lordships
15 were taken through that except one...two subjects, Law and Order and Police. My Lord, this is
16 based upon the figures which we have the terrorist initiated instances are reduced by 45.2%.
17 I'm comparing 2018 situation with 2023 situation. Infiltration which was a very major
18 problem in Jammu and Kashmir, reduced by 90.2%, nine zero. In Law and Order events My
19 Lord substantially the stone pelting and other events were reduced by 97.2%. These are all
20 figures relevant for the purpose of decision.

21

22 **JUSTICE SANJAY KISHAN KAUL:** Mr. Solicitor. This is not for our purposes very
23 relevant, the only one...

24

25 **TUSHAR MEHTA:** For the purpose of My Lord, when to hold the election. As on date this
26 is the position. That's what I'm pointing out My Lord. And these are, everything is on affidavit,
27 I'm not... And security person casualty is reduced by 65.9%. These are the factors, which
28 agencies would take into consideration. Fortunately, what affected the elections most, where
29 stone pelting incidents and regular call of '*bandh*' or '*hartals*' means hospitals, schools, every
30 institution where common man is concerned. From 2018, in 2018 the stone pelting was 1767.
31 It is nil now. Not just because of effective policing or security personnel, but because of various
32 steps like gainfully employing the youth etc. They were misled by the secessionist forces, by
33 the forces My Lord outside the country etc. And organized *bandhs*, which were in 2018, 52
34 instances, organized *bandhs*, call of *bandhs* by secessionist forces.

35

36 **CHIEF JUSTICE DY CHANDRACHUD:** How many?

37

1 **TUSHAR MEHTA:** In 18, they were 52, now it is nil. Now, My Lord, so far as statehood is
2 concerned, I have already made a statement before Your Lordships, but that apart, the
3 statement of the Hon'ble Home Minister on the floor of the House that, UT is a temporary
4 phenomenon. We are dealing with an extremely extraordinary situation. The State will have
5 to be infused with several things, so that it becomes a State so to say. Those actions, My Lord,
6 are initiated and I may give some instances how it is progressing to become a State. Because I
7 am unable to give exact...

8

9 **CHIEF JUSTICE DY CHANDRACHUD:** You can wrap up in about two minutes now.

10

11 **TUSHAR MEHTA:** I'll, I'll just My Lord, give me two minutes. Your Lordship need not write,
12 I'll place it on record. My Lord, for the purpose of ensuring, that the UT becomes complete
13 State as it should have been like any other State, the central sector scheme investment is
14 28,400 crore, the investment proposal from other than central schemes is 78,000 crores. And
15 till date the actual investment made is 2153 crores. Your Lordships need not write, I'll write it
16 down and then give it to Your Lordships. My Lords, several e-initiatives have taken place, and
17 as a result of which, the transparency has shown us that the projects have risen from... and
18 these are all statements on affidavit, I have made. 9229 in 2018 and now in 2023 it is 92,560.
19 More and more people are participating in e-tendering and several e- initiative. And therefore,
20 My Lord that is also giving a boost and the youth is gainfully employed. My Lord, the peace
21 doesn't come merely by police action. There are several schemes which are introduced, several
22 beneficial projects which are introduced. I'm just giving a bird's eye view. And out of 53
23 projects under the Prime Minister Development Package worth 58,477 crores, out of 53, 32
24 are completed. This is how progressively we are proceeding, to make it a complete State. But I
25 am unable to give, my instructions are, the exact time period right now about the complete
26 statehood. While saying, that Union Territory status is a temporary status, because of the
27 peculiar circumstances the State had passed through with repeated and consistent
28 disturbances of decades. It might take some time and we have shown the progress also. It was
29 heartening for me also to note that only in 2022, January 22 to December 22, 1.88 crores
30 tourist visited. Your Lordships are aware, the main industry so far was tourism in Jammu and
31 Kashmir. Now My Lords, industries are coming. And till date in 2023, one crore tourists. It
32 gives employment. It generates employment in various sectors. One, there is a tourism boom.
33 So these are the steps which are being taken by the Central Government, which can be taken
34 only if there is a Union Territory. And I have shown the Reorganization Act, it is having all
35 trappings of the State, but the election, the government is ready. It is for the Election
36 Commission of India and Election Commission of the State to take the call. Out of three, which
37 election to take place first and how? The updating of the voters list is complete. Some part is

1 missing, but it is yet to be over. It's in the process. It would be over in a month or so. That's
2 what I'm told. Thereafter, they will take a call considering the overall situation. [NO AUDIO]

3

4 **CHIEF JUSTICE DY CHANDRACHUD:** You will be wondering on, what the Chief Justice
5 is doing on the phone in a Court?.

6

7 **TUSHAR MEHTA:** Yes.

8

9 [NO AUDIO]

10

11 **KAPIL SIBAL:** My Lord, I just want to know whether Your Lordships are taking into account
12 these facts, because My Lord, that's extremely relevant from our point of view. Because if Your
13 Lordship had said earlier that subsequent facts will not be taken into account, we are dealing
14 with the law. We are dealing with these facts....

15

16 **CHIEF JUSTICE DY CHANDRACHUD:** Mr. Sibal, these facts on what they have said
17 would have possibly no bearing on the constitutional issue which has been argued.

18

19 **KAPIL SIBAL:** But even otherwise, we have to counter those facts.

20

21 **CHIEF JUSTICE DY CHANDRACHUD:** We had asked them a question on the roadmap
22 for holding an election.

23

24 **KAPIL SIBAL:** That's fine, My Lord...

25

26 **CHIEF JUSTICE DY CHANDRACHUD:** That's what they have responded.

27

28 **KAPIL SIBAL:** But that's what My Lord, in my argument, which met....

29

30 **CHIEF JUSTICE DY CHANDRACHUD:** But our decision on the constitutional issue has
31 to be on constitutional....

32

33 **KAPIL SIBAL:** That's what My Lord, these facts will go into the mind on the court. Because
34 they are trying to show us to how this enormous change has taken place for the benefit of the
35 people of Jammu and Kashmir. If you have 5000 people under house arrest and 144
36 throughout the State, there can be no *bandh*. Let's not, my request to Your Lordships is, please

1 don't enter into this arena. Because we will have to counter it with all kinds of facts, My Lords,
2 which I don't think is necessary for this court.

3

4 **CHIEF JUSTICE DY CHANDRACHUD:** The nature of the development work, which the
5 Government says has taken place post August 2019. This may not be of relevance to a
6 constitutional challenge, and therefore, when they respond to the constitutional challenge,
7 that has to be dealt with independent...

8

9 **TUSHAR MEHTA:** I didn't rely upon it. I am telling on merits.

10

11 **KAPIL SIBAL:** But which are the facts, if they come into parts of the record, then that has...

12

13 **CHIEF JUSTICE DY CHANDRACHUD:** I think, Mr Sibal, what the Solicitor...to be fair to
14 the Solicitor. What the Solicitor was saying is, that the roadmap to full statehood would take a
15 little time.

16

17 **KAPIL SIBAL:** That's obvious My Lord.

18

19 **CHIEF JUSTICE DY CHANDRACHUD:** Right now that they're...there is... his submission
20 is that right now development work is taking place, some stability has to be brought about.
21 This is not a permanent arrangement namely the UT status. They envisage that it will be a
22 movement from UT to statehood again. We can't give you a fixed point of time when we will
23 restore statehood, but they have told us the process which they are following and on the path
24 to fulfil.

25

26 **KAPIL SIBAL:** I have no objection. To that statement, I have no objection.

27

28 **CHIEF JUSTICE DY CHANDRACHUD:** And that's how we read it.

29

30 **KAPIL SIBAL:** Yes, My Lords. If any other facts that you bring to Your Lordship's notice has
31 no bearing, because I have to counter that.

32

33 **CHIEF JUSTICE DY CHANDRACHUD:** Mr. Solicitor, Mr. Attorney, we take it but what
34 your... what you said Mr. Solicitor a shot while back is along the lines what we've said.

35

36 **TUSHAR MEHTA:** Yes, yes.

37

1 **CHIEF JUSTICE DY CHANDRACHUD:** But...

2

3 **TUSHAR MEHTA:** Answer the election and statehood....

4

5 **CHIEF JUSTICE DY CHANDRACHUD:** ...Roadmap [UNCLEAR]

6

7 **TUSHAR MEHTA:** Were not as a justification for..

8

9 **KAPIL SIBAL:** I have no problems to that.

10

11 **CHIEF JUSTICE DY CHANDRACHUD:** Mr. Sibal also fairly says that he has no difficulty
12 about that statement.

13

14 **TUSHAR MHTA:** My Lord, my arguments are on the merits I have relied upon.

15

16 **KAPIL SIBAL:** But argument for [UNCLEAR] cannot be relied upon.

17

18 **CHIEF JUSTICE DY CHANDRACHUD:** This cannot be an answer to the constitutional
19 challenge.

20

21 **KAPIL SIBAL:** Otherwise it should also...[UNCLEAR] .My Lord, these are great things that
22 are happening because today the kind of drugs that are happening....

23

24 **ATTORNEY GENERAL R. VENKATARAMANI:** One... one second...

25

26 **KAPIL SIBAL:** ...With the youth in Jammu Kashmir is unbelievable. But I don't want to enter
27 into that consequences.

28

29 **ATTORNEY GENERAL R. VENKATARAMANI:** Can I, can I put it like this?

30

31 **KAPIL SIBAL:** The unemployment rate is enormous.

32

33 **CHIEF JUSTICE DY CHANDRACHUD:** Mr. Sibal, these are matters on which there can
34 be and should be in a democracy, policy differences. But that can't affect the constitutional
35 answer to a constitution challenge.

36

37 **KAPIL SIBAL:** Absolutely. Once you start placing these facts and whether Your Lordships...

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CHIEF JUSTICE DY CHANDRACHUD: Therefore we place those facts which he mentioned in the perspective of the roadmap to statehood, that's all. And nothing on...

TUSHAR MEHTA: This is not a justification...

CHIEF JUSTICE DY CHANDRACHUD: This is not a justification and it cannot be. From our perspective also, to the answer to the constitutional challenge, we'll have to address the constitution challenge of the {UNCLEAR}..

KAPIL SIBAL: Will Your Lordships allow me to state some counter facts to that?

JUSTICE SANJAY KISHAN KAUL: I intervene that stage also, when you are saying only for this reason that we wanted in a conspectus to understand when they look towards restoration of statehood.

KAPIL SIBAL: No problem.

JUSTICE SANJAY KISHAN KAUL: For which they've made a statement.

KAPIL SIBAL: That's no issue My Lord. They say that will take some time Your Lordships will decide on that issue.

CHIEF JUSTICE DY CHANDRACHUD: If that was confine to our answer...our question to Mr Solicitor.

ATTORNEY GENERAL R. VENKATARAMANI: [UNCLEAR].

KAPIL SIBAL: *Bandh* is reduced to zero. *Bandh*, we've made it reduced to zero...all that, with respect I say Your Lordships should not even.. those facts are not relevant for the purposes of Your Lordship's decision on this aspect.

CHIEF JUSTICE DY CHANDRACHUD: And therefore we had not taken that additional affidavit, which was sought to be filed at the inception of the Record. I don't think there has been any change in that view.

1 **ATTORNEY GENERAL R. VENKATARAMANI:** I think it's better understood like this.
2 Neither are these statements nor their refutation, if need be, will enter into the question of
3 determining the constitutional validity.

4

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

6

7 **ATTORNEY GENERAL R. VENKATARAMANI:** So therefore, paraphrasing like that,
8 you don't want to put it like that.

9

10 **TUSHAR MEHTA:** I also will not rely...

11

12 **CHIEF JUSTICE DY CHANDRACHUD:** On that Mr. Sibal, Mr. Attorney...

13

14 **ATTORNEY GENERAL R. VENKATARAMANI:** It's an entirely different purpose.

15

16 **CHIEF JUSTICE DY CHANDRACHUD:** ...And Mr. Solicitor I think there is a broad based
17 understanding on both sides. That the constitutional challenge has to be answered on
18 constitutional...

19

20 **TUSHAR MEHTA:** During my assistance on merits, I never relied upon this thing.

21

22 **KAPIL SIBAL:** The problem is the following. These are televised. All this is being televised.
23 And all of this is being recorded. So these facts come on the record. They are part of the public
24 space. And people feel what a great thing has been done by the Government. My Lord, this
25 creates a problem. That's why I...

26

27 **TUSHAR MEHTA:** Progress never creates problems. Lack of law, offence...

28

29 **KAPIL SIBAL:** I'm sorry. Please allow me, allow me.

30

31 **CHIEF JUSTICE DY CHANDRACHUD:** All right Mr. Sibal, we got your point. We got
32 your point. I think we've clarified it that the constitutional challenge will be dealt with by the
33 Supreme Court on constitutional grounds.

34

35 **KAPIL SIBAL:** That's right. And none of this should enters into the...

36

1 **CHIEF JUSTICE DY CHANDRACHUD:** And they have not argued equity in defence to
2 your constitutional challenge.

3

4 **KAPIL SIBAL:** That's all My Lord.

5

6 **ATTORNEY GENERAL R. VENKATARAMANI:** I suppose these statements are
7 otherwise in the public domain.

8

9 **KAPIL SIBAL:** It is not the public domain...

10

11 **ATTORNEY GENERAL R. VENKATARAMANI:** [INAUDIBLE]..Public assuming and
12 all...

13

14 **CHIEF JUSTICE DY CHANDRACHUD:** Mr. Attorney General, you are meeting the
15 constitutional challenge on constitutional arguments.

16

17 **TUSHAR MEHTA:** Which I did.

18

19 **CHIEF JUSTICE DY CHANDRACHUD:** You must address this mater like any other
20 constitutional matter as a Constitutional issue you have to put it like that.

21

22 **KAPIL SIBAL:** That's right. I can place a lots of facts.

23

24 **TUSHAR MEHTA:** But when I answer the question of election and the statehood, these
25 figures will go into our decision.

26

27 **KAPIL SIBAL:** That you make. That's not part of the public space.

28

29 **CHIEF JUSTICE DY CHANDRACHUD:** That Mr. Sibal has also clarified that there can't
30 be any such thing. We need to labour this issue. We're all now clear on conceptual grounds.
31 Mr. Attorney, now we will hear you please.

32

33 **ATTORNEY GENERAL R. VENKATARAMANI:** There are two things, Your Lordships.
34 One is reminded of Dworkin's, very deep engagement on the hard cases and not one single...

35

1 **TUSHAR MEHTA:** May I interrupt My Lord on the lighter side? My learned friend said, that
2 there are some people who are under house arrest and therefore there is no *bandh*. My Lord,
3 that means the right people are in the house arrest for this.

4

5 **KAPIL SIBAL:** 5000 people, let's not make up. Let's make a mockery of Democracy. 5000
6 people were under house arrest at that time. 144 was throughout the State. This Court My
7 Lord, in judgment has recognized that. My Lord, the internet was shut down and then they are
8 saying there were no *bandh*. But, how can there be *bandh*, when people can't even go to
9 hospital? People could not go to hospital because of the people died.

10

11 **ATTORNEY GENERAL R. VENKATARAMANI:** I wish, Mr. Sibal.. this dialogue
12 [UNCLEAR]

13

14 **KAPIL SIBAL:** Let's not go into all that.

15

16 **CHIEF JUSTICE DY CHANDRACHUD:** Mr. Attorney, Mr. Sibal, right from the inception
17 of the hearing, we have heard this matter in a sense of dispassionateness...

18

19 **ATTORNEY GENERAL R. VENKATARAMANI:** Absolutely.

20

21 **CHIEF JUSTICE DY CHANDRACHUD:** The sense of objectivity which must govern an
22 answer to a constitutional challenge. We request both sides. Let's maintain it at that level.

23

24 **ATTORNEY GENERAL R. VENKATARAMANI:** Absolutely, I don't think, neither the
25 Solicitor nor me, has entered into the domain to try to colour the mind of the judges. We have
26 not done that.

27

28 **KAPIL SIBAL:** I don't know about that.

29

30 **CHIEF JUSTICE DY CHANDRACHUD:** All right. Yes, Mr. Attorney?

31

32 **ATTORNEY GENERAL R. VENKATARAMANI:** A site say that, the famous principle
33 versus rules and the hard cases ceases to Dworkin. To one wonders we are not in a situation
34 like this. We are leaving, taking off from what, where he left day before yesterday. There's a
35 couple of digressions, I would like to probably wave before Your Lordships. So we talked about
36 the intent of a law. Wittgenstein, who quoted with Bertrand Russel, and is famous for i
37 investigation. He says, he talks about a sign post. How do you know what a signpost means?

1 There must be a practice of using the signpost. And an understanding will develop towards the
2 using of the signpost. Without that practice and understanding, the signpost means nothing.
3 So this principle has been used since various circumstance to bring closer. If there is an
4 understanding about a law, on the basis of a practice then interpretation follows one course,
5 one trajectory. But if there is a lack of understanding or conflicts of understanding,
6 interpretation heads in another trajectory. Therefore, we are trying to understand the intent
7 and connect with the content of Article 370. My Lords, to keep in mind what went into the
8 original authors making of 370, and what has happened over a period of time by the practice
9 of using Article 370? So it takes some time by reason of its aging and the use of the text. May
10 I demonstrate a certain practice, which we show in a slightly different direction? That's why
11 in the context of destitute, two important principles come. A disuse plus a contrary practice. I
12 won't get into the destitute topic. It's not necessary for our purpose here. I don't want to flag
13 that. Trying to understand 370 in a perspective, we have all these complexities. It's not really
14 a case of reading the text, looking at the text and the context and having arriving at a meaning.
15 We are confounded by the practice of Article 370, whether in conformity with the original
16 intent or in deviation from it? So the court is now called upon, to look at the age of the text and
17 the use of the text and how in current times the President understands both. The original and
18 text and the use of the text. And the President now understand, this what I would like to do
19 with the text. So I left day before yesterday on this proposition, when the President is not
20 precluded for what I call that taking stock of what Article 370 has done over a period of time.
21 This taking stock, is written into Article 370. So, while we do that, how the President may take
22 stock and how the court will be called upon to have a glimpse of understanding of what the
23 President intended by taking stock? I just want to play five, six propositions in the context of
24 construction against absurdity. They are all gathered from books and interpretation of
25 statutes. The presumption against absurdity will number one, avoid an impossible result.

26

27 **CHIEF JUSTICE DY CHANDRACHUD:** Presumptions?

28

29 **ATTORNEY GENERAL R. VENKATARAMANI:** It will also avoid an unworkable or
30 impracticable result. I'll put them all together and hand it to Your Lordships all that. And it
31 will also avoid an anomalous or illogical result. And connect to that is to avoid a futile or a
32 pointless result.

33

34 **JUSTICE B.R. GAVAI:** What is the third one you said, Mr. Attorney?

35

36 **ATTORNEY GENERAL R. VENKATARAMANI:** First one is, 'an impossible result'.

37

1 **JUSTICE B.R. GAVAI:** No... Third one, third one.

2

3 **ATTORNEY GENERAL R. VENKATARAMANI:** Third one, 'an inconvenient result'...
4 anomalous or illogical result. 'An anomalous or illogical result'. The final one, I said 'a futile of
5 pointless result.' All these will go into court's... Looking again, the presumption against
6 absurdity. If the court will avoid a construction, that requires a person to that will be the
7 impossible. The document is impossible, the [UNCLEAR]...but when it comes to textual
8 impossibility or constitutional text. It may stand on a different footing. That's why all these
9 principles have a certain importance in construing Article 370. I referred briefly the other day
10 about this *Presidential poll* judgment of Your Lordships, that is, 1974, 2 SCC 33. Before I
11 take Your Lordships to it, it is 143 reference in the context of holding election. Before I take
12 Your Lordships to that, let me make a few observations. It's not part of the PDF, because it's
13 not part of the compilation, Sir.

14

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

16

17 **ATTORNEY GENERAL R. VENKATARAMANI:** So we were trying to look at this proviso
18 to Clause 3 of Article 370.

19

20 **CHIEF JUSTICE DY CHANDRACHUD:** Which is the part of this judgment you want us
21 to see?

22

23 **ATTORNEY GENERAL R. VENKATARAMANI:** I'll give the paragraph to Your
24 Lordships.

25

26 **CHIEF JUSTICE DY CHANDRACHUD:** You have it opened up and you have it on the
27 screen.

28

29 **ATTORNEY GENERAL R. VENKATARAMANI:** We have paragraph...I'll just summarize
30 the proposition, why was the Presidential election had to be held? I dissolved Gujarat
31 Assembly. Therefore, the electoral college was incomplete. For the argument clause, without
32 the electoral college becoming complete, we can't hold a Presidential election. Court said, I
33 read Article 55, 54, et cetera and come to a conclusion. It's a mandate that you will hold the
34 election before the President term expires. Therefore, the lack of the electoral college being..
35 not being complete, will not come in the way. So that unless you fulfil that impossible, that the
36 court says... You must... the argument was, 'you must have the electoral college complete
37 before you hold the elections.' That was mandate for holding the elections.

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CHIEF JUSTICE DY CHANDRACHUD: You are stretching that to our case because according to the conditions for the application of the proviso to Article 370(3) are absent. And therefore the substantive part cannot be rendered into disuse. Mainly because of absence of the Constituent Assembly.

ATTORNEY GENERAL R. VENKATARAMANI: Before I come to the argument as I said currently, there is no principle...

CHIEF JUSTICE DY CHANDRACHUD: What's the para, if you may give? It's a small para. So that then we are done with this judgment.

ATTORNEY GENERAL R. VENKATARAMANI: This paragraph 5... 4, 5, 12, 13, 15, 20, 21, 29 and 47. So, there they look at the impossibility of performance.

CHIEF JUSTICE DY CHANDRACHUD: How do they formulate this? Let's see it in a minute... it's seven judges...

ATTORNEY GENERAL R. VENKATARAMANI: I'll precisely coming to that.

ATTORNEY GENERAL R. VENKATARAMANI:So we can just look at maybe that one or two sentences and how they formulate it?

ATTORNEY GENERAL R. VENKATARAMANI: Your Lordships, just see paragraphs 4 and 5. Para 4, at page 47 of the, running page 47 of the judgment. So they come to the conclusion, that the last conclusion part of paragraph 4. It shows that the time to hold an election to fill a vacancy is also mandatory in character. Then paragraph 15. That's important for our purposes.

[NO AUDIO]

I what some of this suggests. It is better in your work but wouldn't this be breaking into their argument the things have improved but we have to cut it down. What it was. People met in the 2022, which is I think that's important thank you I think you have to provide the contrasting data this is the statement of [No Audio]

1 **ATTORNEY GENERAL R. VENKATARAMANI:** Page 49, running page 49 of the
2 judgment, paragraph 14, last sentence and then thereafter paragraph 15. Para 14, the last
3 sentence, sentence beginning 'the necessity'... My Lord Justice Kaul has got that? Paragraph
4 14 the last sentence. The sentence beginning with 'the necessity for completing the elections'.
5

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

8 **ATTORNEY GENERAL R. VENKATARAMANI:** 'Before the expiration the term is
9 enjoined by the Constitution, public and state interest and to see that the governance of the
10 country is not paralyzed by noncompliance with the provision that there shall be a President
11 of India.' Next paragraph.

12 'The impossibility of the completes the election to fill the vacancy in the office of the President.
13 Before the expiration the term to office in the case of so and so as may appear from Section 7
14 and 1955, that does not rob Article 62(1) of its mandatory character. The *maxim of law*
15 *impotentia excusat legem* is intimately connected with another maxim of law *lex non cogit ad*
16 *impossibilia*. *Impotentia excusat legem* is that when there is a necessary or invincible
17 disability to perform the mandatory part of the law that *impotentia* excuses. The law does not
18 compel one to do that which one cannot possibly perform.' So I cannot possibly resurrect the
19 Constituent Assembly and say I want your opinion on this matter. So 'therefore when it
20 appears that the performance of the formalities prescribed by a statute, has been rendered
21 impossible by circumstances, over which the person is interested has no control, like the act
22 of God, circumstance will be taken as a valid excuse.' So it has two aspects. One, you are
23 relieved from performance. You are also relieved from performance the way it commands you
24 to perform.
25

26 **CHIEF JUSTICE DY CHANDRACHUD:** Yes.
27

28 **ATTORNEY GENERAL R. VENKATARAMANI:** Paragraph 21. Your Lordships have
29 paragraph 21? The interveners submitted the even if the electoral college where House of the
30 Parliament and the Legislative Assembly of the State. Jan Sangh submitted that the
31 democratic character of the Constitution demanded, that there should be elected members of
32 the Legislative Assembly. The States to be entitled to cast towards that election. It was said,
33 the states were denied the right, they would be denied representation. They also said that the
34 States would deny the right to cast to vote in the election, the parity between the States and
35 the Union would be disturbed. All that argument is considered. And kindly turn to paragraph
36 29. Again. It was said by the interviewers at Article 54, reflects the Democratic patterns of
37 participation by the States is a choice of the President, and if a State was denied it's right, it

1 will be undemocratic. [UNCLEAR] was taken to Article 368, to show the Articles 54 and 55,
2 were mentioned in the proviso to Article 368 and every amendment of Articles 54 and 55
3 required consent of States necessary. Therefore said by the interveners, in Article 54 and 55,
4 read with 368 would be a key to the interpretation of Article 62, that no election the President
5 could be held without a representation of the elected members of the Legislative Assembly of
6 the State, where the assembly has been dissolved. These submissions, on behalf of the
7 interveners, are without substance.

8

9 Then we go to paragraph 47, the conclusion. Kindly also make a note of paragraph 33. If as a
10 result of dissolution of a Legislative Assembly of a State there are no elected members of a
11 Legislative Assembly of a State, a State will not have been elected member of the State
12 Legislative Assembly, to call you for the electrical college. It may be said in the analogy or the
13 observations in the current case *supra*, there are vacancies in the electoral college by reason
14 or the fact, that no elected members of Legislative Assembly of the State, where the Legislative
15 Assembly resolved, that matter will not be a ground either for preventing the holding of the
16 election, on the expiry of the term of the President, or suggesting the election to fill the vacancy
17 caused by the expiry the term or the office of the President could be held only after the election
18 of Legislative Assembly was staged or the Legislative Assembly is brought to be held. For the
19 proposition, then kindly paragraph 47. The conclusion is drawn. Para 47, that is page 57,
20 running, page 57 of judgment.

21

22 **CHIEF JUSTICE DY CHANDRACHUD:** Yes, Mr. Attorney General, we have seen that.

23

24 **ATTORNEY GENERAL R. VENKATARAMANI:** Therefore, we are trying to find out if
25 falling back, on the proviso, is an impediment. Therefore, the President is deprived of the
26 authority under Clause 3 to go either way. Will that not do violence to the text and the intent
27 of Article 370? There is one principle in law is very clear that, no text, one enact, once enacted,
28 will efface itself out. We only know the Principle of Express or Implied Repeal. So, there is
29 nothing like I have done my duty, therefore, I exit the scene. Clause 3, still reminds us an
30 important part of reaching the exit stage. The only question is, how do you reach it? What is
31 the more fairer way of reaching that exit stage? What consideration will weigh the President
32 in exercising the power under Clause 3? One possibility is, maybe it's extreme, to say that
33 because the Constituent Assembly no longer exists. The proviso dissolves itself, along with the
34 Assembly. There is one way of looking at it. Suppose we don't want to go that route, then the
35 President could have said, I am free to exercise my power under Clause 3 to bring to a clause
36 all of Article 370, subject to whatever other considerations of the President may take into
37 account. The other way is should I try to follow your precedence, set by the President earlier

1 by recourse to Article 367? He recourse Article 370(1)(d). So extending any provision of the
2 Constitution with modification, and find out if I can possibly take the assistance of anybody
3 who can fit in within the framework of the Constituent Assembly. So in two occasions the
4 President has done that earlier, I'll come to the details. So there are larger number of
5 provisions in the Constitution which Mr. Dave also tried to point out, non-legislative functions
6 of the Legislature. You pass a resolution, you pass recommendations, these are non-legislative
7 functions. Recommendation power, a role assigned to the Constituent Assembly was a non-
8 legislative function. It is not a Legislative function at all.

9

10 [NO AUDIO]

11

12 And then we have a key in Article 356 (1)(b), where after Presidential proclamation, the
13 President can declare that the power is of the Legislature. He doesn't say the Legislative
14 function. So he talks about a Compendium of powers available to the Legislature and that the
15 President takes over.. to be... to hand over to the Parliament. Therefore, the sequence of events
16 which has been...which has contemplated in a situation like this where there is a void, there's
17 an impossibility of complying with the proviso to Clause 3 and how do I fill that void, if at all,
18 it's a void? I said, the President could have said without repose to any other course of action. I
19 could have myself taken decision on rendering Article 370 in operative subject of modification.
20 But the President does not adopt that course. She wants to be guided by a process which will
21 closely be approximating to the Non Legislative functions of a Constituent Assembly, where
22 the Legislative Assembly substitution comes in. And once it is a non-legislative power of the
23 Legislative Assembly under 356(1)(b), the Parliament can certainly say . I'll take stock of what
24 I can do. And the Parliament recommends to the President, which then we see a C.O. 273. So
25 therefore, there's a sequence in which President says, having regard to the magnitude of the
26 problem, the importance of the solution to be arrived at and the difficulties in handling these
27 momentous issues facing the nation and J&K for a long period. So all the imponderables enter
28 into the decision making process by the President. Therefore, for a particular process is sought
29 to be the best process, in order that any legal objection could be taken against that is not taken.
30 You may still find a hole in that. That's a different matter. That's how the sequence of events
31 have taken place. So I don't find therefore in the Doctrine of Impossibility, stares one on its
32 face. You are not paralyzed. So Clause... since the Article 370, the author sometimes wonder
33 poor Gopalswamy Ayyangar, we keep talking about his statements in the Constituent
34 Assembly. We have travelled far beyond what he thought was happening. Therefore, If he think
35 that Clause 3 of Article 370 was undergoing natural death, I don't find any room for that to
36 happen at all. So there are.. what happens today is because of the age of the text, the long
37 duration, maybe Article 370 has been used rightly or wrongly. We have Council for the

1 petitioner's sake. We have reasonable authors of that text of Article 370. So, on the one hand,
2 the original author, the original intent and it's practice over a period of time which can be given
3 a certain understanding in construction. On the other side, we have, we have the reasonable
4 authors of what we'll say about Article 370. With two schools of thoughts there. One which
5 says 2 and 3 will efface it's a problem. The other says, the whole of Article 370 will go because
6 after 1957 it can't serve any purpose. So this, conundrum of two reasonable authors entering
7 into a construction as against the intent of Article 370 and it's practice to be constructed on an
8 objective basis, having the regard of a purpose which Article 370 was sought to be invoked at
9 that point of time. So all that will enter into the construction of Article 370. So that's why I say
10 the President is not precluded from taking stock of all this. It's not barely writing on a clean
11 slate now. I mean, one has to take stock of what will happen over a period of time. You may
12 have so many choice of action. You may have called upon to comply with certain mandatory
13 requirements under the Constitution. You may have taken the Article 3, review of the
14 Legislature. Very important mandatory requirements in ordinary times. But when certain
15 other compelling circumstances which confronted the nation for a long period, the Parliament,
16 the President. So therefore all those variables which enter into taking a final view on Article
17 370 has been taken in this manner. That's why I started saying about Lincoln. I quote from the
18 entire [INAUDIBLE] perspective. It's not about end justifying the means. It's about taking,
19 while taking stock for a very complex situation. Do we have a mathematical formula to do it?
20 Or do you only measure it by saying there are constitutional mandates, if you disobey them,
21 you breach them then you can't follow any quotient as regards Article 370, or look at the future
22 of J&K? I do not know whether these questions can be answered on any novelty in
23 mathematical position.

24

25 In a, through a judicial scrutiny, and then weigh on various fine golden scales. Very difficult.
26 So in ***Kesavananda Bharati***, he has told now look here, don't brief fundamental speeches
27 of the Constitution, which become an impregnable part of our understanding of the
28 Constitution. Therefore, we are told to go forward, say if how, the failing features of
29 Constitution and its functioning and exercise, do not permit any deviations. Fair enough. But
30 you look at the entire Part 18 of the Constitution, 352 onwards and 352 occupies a very
31 important place in the Constitution of Part 18. External aggression, internal disturbance. So
32 how do we have a mathematical yard stick and criteria to say, this is how you will do it in the
33 context of external aggression, this how we will do it in the context of internal disturbance.
34 You will have some fair, broad standards where fundamental values are not breached. But if
35 there is something which you have to negotiate, even with the breach of some fundamental
36 values, what do you do? Is it a political question? Or is it a pure judicial question to be
37 answered in the ways of textual reading or the Constitution? My Lords, it's what is confronting

1 the court, but we are trying to assess the court and saying that you come as close as possible,
2 certain meanings which will advance the course of justice and understanding the scheme of
3 Article 370. So this, *Maxim Impotentia excusat legem*, has been applied in large number of
4 circumstances, in the field a contract in the field of legislations, so on and so forth. I'll give a
5 quick illustration later. Then we take Your Lordships to, I go beyond this judgment.
6 [INAUDIBLE] . We have a mass of..

7 [NO AUDIO]

8

9 **CHIEF JUSTICE DY CHANDRACHUD:** What else? What more now Mr. Attorney?

10

11 **ATTORNEY GENERAL R. VENKATARAMANI:** I may request Your Lordships to come
12 to my written submissions. That's Volume 4. I just want to place a few comments at this point
13 of time,

14

15 **CHIEF JUSTICE DY CHANDRACHUD:** What would be the PDF page?

16

17 **ATTORNEY GENERAL R. VENKATARAMANI:** Yes, Volume 4, there's a separate
18 volume.

19

20 **JUSTICE SANJAY KISHAN KAUL:** What you have read up to the point.

21

22 **ATTORNEY GENERAL R. VENKATARAMANI:** PDF Page 26. Couple of paragraphs
23 from the submissions I just want to make a small..

24

25 **JUSTICE SANJAY KISHAN KAUL:** Page 26?

26

27 **ATTORNEY GENERAL R. VENKATARAMANI:** The context of what I was trying to
28 communicate to the court. One looks at all those statements from *Kesavananda* onwards.
29 *Bommai* in the 1977 resolution case, the justiciability of the decision making process.
30 President, no President does not make a difference. If the justiciability will enter in the
31 decision making process. They were all cases of dissolutions of Assemblies. A very narrow
32 question of a resolution of an Assembly. But we have entered a larger canvas. Your Lordship,
33 Please.

34

35 **JUSTICE SANJAY KISHAN KAUL:** You're referring to the standstill agreement or
36 something. So that is what page 26 is about.

37

1 **CHIEF JUSTICE DY CHANDRACHUD:** Which is the Para that you are referring to Mr.
2 Attorney? That page 26 we have the standstill agreement, As Justice Kaul said.

3

4 **ATTORNEY GENERAL R. VENKATARAMANI:** Page 26, I think it should be page 27. It
5 begins at Page 27. PDF Page 27.

6

7 **CHIEF JUSTICE DY CHANDRACHUD:** Idea of Article 370, its relevance and scope.

8

9 **ATTORNEY GENERAL R. VENKATARAMANI:** That's right.

10

11 **CHIEF JUSTICE DY CHANDRACHUD:** Let's read through it. Let's see.

12

13 **ATTORNEY GENERAL R. VENKATARAMANI:** Yes, we have 27. So before I try to
14 convey this that you try to invoke the jurisprudence of *Bommai* in a context like this, that
15 could be a problem. As I said, there are the context of the resolution of an Assembly. What
16 factor go in it whether they are relevant, objectively, scrutinizable or not. But we are, as I said,
17 in a larger canvas of taking a decision which has not only an importance for the purpose of
18 looking at a part of the Constitution deserve a certain purpose over a period of time. But
19 looking at the future. So in all those cases, you're looking at an event which had a limited
20 impact at a given point of time. We are looking at events which will have far reaching important
21 forever in the future. Therefore, anything which is said in *Bommai* as conclusive in regards
22 to Judicial Review, Sovereignty, et cetera, I think may not be opposite. Let me not be taken to
23 be understood that merely because there is too many complexities involved. The importance
24 of decision to be taken and the impossibility dimension, et cetera. Certain fundamental,
25 mandatory requirements of the Constitution can be slighted. I'm not proposing that at all, but
26 we are trying to find out if without slighting them. If there is a way that has been adopted, or
27 if it's not been fundamentally breached, irreversibly breached. I'll come to that argument little
28 later. Therefore, the court will look at it very differently. Now let me try to read a few
29 paragraphs of my submission here at 370. I've been trying to say this. That in paragraph 3,
30 Article 370, envisage a scheme of Constitutional Integrations of State of J&K with the Union
31 of India and that is why established an interim system for the governance and administration
32 State of J&K Unit. A complete integration was achieved as a done in respect of other States.
33 That's why much labour was taken by Learned Solicitor to tell Your Lordships. Look at the
34 long history of what happened in the rest of the Country. We all went through, many of them
35 went through the process of Constitutional Ideas, Constituent Assemblies.

36

1 A draft Constitution, then comes [UNCLEAR] Ross Committee on a model Constitution. So all
2 that has been gone through, in the rest of the country. So it is nothing new which has happened
3 here. Only thing is having the regard to the situation obtaining then, the external issues. The
4 Parliament thought, let us tide over it. How do you tide over it? We need a mechanism to tide
5 over it. And we also probably inject into it, a constitutional integration, thought. That
6 constitutional integration thought, has a three aspect of 370, as I told Your Lordships
7 yesterday, that I have set out in paragraph, in the running sequence, under the same page 30,
8 paragraph 9. The three dimensions of Article 370. So except the third dimension, and the
9 termination, the other two dimensions, have deep relevance to the Constitution making
10 process, Constitutional integration process. So how will Parliament come and legislate, before
11 the Constituent Assembly takes a final call on what kind of a Constitution we will have, or a
12 document we will have? So it enabled the Parliament, to come in and legislate during that
13 period. And once that is done, which has now become a permanent feature of the Constitution.
14 So Constitution making process of that, we have an Article 370(1) and (2) Sub-Clause B. So
15 the other part is you extend the provisions of the Constitution, that an equal, equally important
16 part of Constitution making process. So once you extend the provisions of the Constitution,
17 then what reminds that after? So final constitutional understanding of what framework a
18 Constituent Assembly will arrive at, has to be aided and assisted by this process. Importantly,
19 a fair element was drawn in consultation and concurrence. We're not at the point whether it is
20 *Sadr-e-Riyasat*, the Governor, later, Prime Minister, all those things are probably irrelevant,
21 you're looking at the substance, not a form. If these are the three dimensions of Article 370, I
22 would very respectfully say that termination of the role of Article 370, it could have happened
23 anytime. It could have happened soon after 1957. It could have happened even after when the
24 Article 35, was introduced and somebody could challenge this, what is happening in the Article
25 370? Now that it has happened, at some point of time, and the termination, has to be brought
26 about in a particular way, which is the best and the most suitable way, the President thought,
27 in the given circumstances. That's why I said, taking stock to be an effective way of bringing it
28 to a closure. So I can't imagine anything out of thin air. I have to find out the best way available
29 within the framework or the Constitution and the precedents available to the President, where
30 Article 370(1)(d) have been invoked, substitutions have been made, that's why I'm unfazed to
31 point out, that when you talk of substitution of Constituent Assembly by Legislative Assembly,
32 we are looking at the non-legislative functions, of the Legislature as well as the Constituent
33 Assembly. if the are Constituent Assembly had recommended to the President before 1957, it
34 would have done the same job. So if it could be done by any other equally competent body.
35 Now today, if [UNCLEAR] steps in, the Legislative Assembly. And because there is a
36 President's rule, the Parliament steps in. To say that the Parliament is of a lesser paramount
37 character than the Constituent Assembly, in taking position for the nation's future. So

1 therefore, there is a weighing or a balancing will have to be a very difficult job. But my
2 submission is, so the determination of Article 370, must occur at some time notwithstanding,
3 whatever has happened over a period and if determination can occur in more than one way,
4 whichever is a way which will advance the larger interest. That's why you look at the firmament
5 of chapter 18, Part 18 of the Constitution. Yesterday I read out few parts of ***Chebrolu***
6 ***Judgement*** to show that the President... The exercise of power of President is Legislative and
7 not Executive. The Governor's powers had a 6th Schedule. Powers under 6th Schedule to
8 extend as a Parliamentary Law over the 5th Schedule earlier has been said to be a Legislative
9 Exercise. So, modification has been considered with several judgments. It's a very wide
10 amplitude. it's as good as hitting a judgment over the Parliamentary Legislation, or the
11 Constitution. President is given that power to extend the constitutional provision with
12 modifications with that supreme authority given to the President. Yesterday, I pointed out at
13 page.. PDF page 31, 33. That's part of ***Chebrolu's judgment***. The middle of that paragraph
14 where it says, Your Lordships, have that page?.. of my.. One sentence 'Applications are
15 [UNCLEAR] of it.' That's right. I just want to... then let me take Your Lordships to few aspects
16 of the recommendation. It is only to throw some light on that... Paragraph 12, at page 36. You
17 can pick up any dictionary or any precedent on this question of nature of recommendation.
18 The larger number of provisions, the Constitution of India, which uses the word expression
19 recommendation. The context would be important. Sometimes it's a recommendation which
20 can't be simply ignored or disregarded. Sometimes it can be binding. But by and large a
21 recommendation concept is to advise, to command for action. All that few illustrations I have
22 set out here in paragraph 12. I don't trouble Your Lordships by reading. May I just only
23 conclude this part of the argument by inviting Lord's attention to paragraph 18 of the
24 submissions at page, internal page 38. 'Neither the Legislature of the State, nor any residents
25 of the State, or any independent right in the continued retention of Article 370. In other words,
26 beyond the constitutional integration process of visualize to be completed, there was no other
27 purpose of Article 370. As such no person could have play in the right of permanent retention
28 of Article 370 as a permanent integration process.' Then the concluding observations are in
29 paragraph 21, beginning at pages.. begins the page 39 and ends at page 40. And the last few
30 sentences here... this is page number 40 of the PDF.

31

32 **CHIEF JUSTICE DY CHANDRACHUD:** Let's see your conclusion Mr. Attorney General,
33 and how you've sort of, sum it up?

34

35 **ATTORNEY GENERAL R. VENKATARAMANI:** We are told that Article 370 by reason
36 of its exercise over a period of time see has now opened a several interpretations. There's only
37 one solitary interpretation that it is to aid and the constitutional integration process. Whatever

1 has happened even thereafter, we have to be seen in the light of that. If anything has by way of
2 deviation occurred, well, it is open to correction by the President. So, that's precisely what's
3 happened now. The President say, as I started saying the President is not recruited from taking
4 stock. Taking stock is inherent in Article 370. So, if there is anything intrinsically which forbid
5 the President to take stock of the Article 370 and his exercise over a period of time, then one
6 can understand it. I don't think anything is available there. So therefore, I think it will be open
7 to the President to take stock of all the exercise undertaken in under Article 370 and take into
8 account the larger considerations which loom large before the Nation, particularly the State of
9 J&K.

10

11 **CHIEF JUSTICE DY CHANDRACHUD:** Yes. Mr. Attorney, anything else?

12

13 [NO AUDIO]

14

15 **ATTORNEY GENERAL R. VENKATARAMANI:** So we are confronted with.. Next
16 question we take proficient ...I'm sorry navigating the system.

17

18 **CHIEF JUSTICE DY CHANDRACHUD:** We are also navigating the time constraints Mr.
19 Attorney. I think we can wrap up now Mr. Attorney. If something remains, you can tell us after
20 lunch. If there's some thought which came to mind or something,

21

22 **ATTORNEY GENERAL R. VENKATARAMANI:** I would have done it very briefly now.

23

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

25

26 **ATTORNEY GENERAL R. VENKATARAMANI:** Some document I wanted to share with
27 the Court, I think it's missed getting into the Court system.

28

29 **CHIEF JUSTICE DY CHANDRACHUD:** Mr. Attorney, why don't we do this, we will call
30 upon the next Counsel. You can come back to us after lunch. If your junior and you can validate
31 lunch, give it two minutes. There's no difficulty. So if there is some important thoughts that
32 you have missed, we will certainly not stand on the formality of concluding the argument. We'll
33 let you again. So there's something which remains you can tell us in a minute after lunch, Mr.
34 Attorney.

35

36 **ATTORNEY GENERAL R. VENKATARAMANI:** Very well.

37

1 **CHIEF JUSTICE DY CHANDRACHUD:** Thank You, Mr. Attorney. Now, Mr. Salve will
2 be arguing after this.

3

4 **HARISH SALVE:** Yes, short, submission My Lord.

5

6 **ATTORNEY GENERAL R. VENKATARAMANI:** ...Make, before I come back on that... in
7 my... Court doesn't have it can you do it now? I prefer a document which should have been
8 shared with the quote. I think it does not want to...I thought one we wanted to share a two
9 page note with Your Lordship. I think it didn't get into the system. Let me do it.

10

11 **CHIEF JUSTICE DY CHANDRACHUD:** If there are some thought which remains, you
12 can come back to us after lunch. No. Difficulty on that. Thank you, Mr. Attorney, thank you.
13 Yes, Mr. Salve.

14

15 **ATTORNEY GENERAL R. VENKATARAMANI:** I have a few...Okay. Then I'll come
16 back...

17

18 **CHIEF JUSTICE DY CHANDRACHUD:** Yes, certainly. If there's some point here or there
19 which has been missed out, you can tell us, we will add it.

20

21 **ATTORNEY GENERAL R. VENKATARAMANI:** There are a few observations I want to
22 make on certain aspects. So let, then, can I continue thereafter?

23

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

25

26 **HARISH SALVE:** Yes, My Lord I don't want, Your Lordship has heard this matter from both
27 sides at considerable length and the Solicitor has, in great detail and with his customary
28 meticulousness, ticked all the boxes and covered all the points from our point of view.

29

30 **CHIEF JUSTICE DY CHANDRACHUD:** Who are you appearing on this matter? For the
31 sake of the record, we must make a note.

32

33 **HARISH SALVE:** Yes, My Lord. I'm appearing on behalf of the applicant in IA 9573 of 2020
34 in petition 1099 of 2019. I have My Lord, for Your Lordships' convenience made a three page
35 roadmap of what I'm going to submit. If My Lordships permit me to hand it over? So that it
36 will be easier just instead of Your Lordships noting down.

37

1 **CHIEF JUSTICE DY CHANDRACHUD:** Yes Mr. Salve. Has it been given to your Court
2 Master already?

3

4 **HARISH SALVE:** I believe so My Lord. Mr. Agarwal from... it has been sent, I believe My
5 Lord.

6

7 **CHIEF JUSTICE DY CHANDRACHUD:** We will just display it for everybody. Because
8 that's how the other side also knows what your arguments are going to be. So we have to take
9 it it's just an eight memoire or nothing more than that...

10

11 **HARISH SALVE:** It just a skeleton of submissions. It just sets out the points, which I'm
12 going to address, not what I am going to say.

13

14 **CHIEF JUSTICE DY CHANDRACHUD:** Just give us a moment. It will be uploaded. So
15 that your learned friends from the other side also simultaneously see what we have.

16

17 **HARISH SALVE:** Yes, of course.

18

19 **CHIEF JUSTICE DY CHANDRACHUD:** Mr. Sankaranarayanan, you can tell Mr. Dhavan
20 and Mr [INAUDIBLE] they'll get it on the main screen as well. But I'm sure the main screen
21 will also have it.

22

23 [NO AUDIO]

24

25 **ATTORNEY GENERAL R. VENKATARAMANI:** My Lord, interrupting my learned
26 friend, I just want to... there's some part which is missing in our... I try to upload it again...so
27 I can share with Your Lordships.

28

29 **CHIEF JUSTICE DY CHANDRACHUD:** Yes, Mr. Salve.

30

31 **HARISH SALVE:** Yes. As my note says, I'm only supplementing some of the submissions,
32 which have been made already and I've just picked up the issue. One is, My Lords, of the
33 construction of the proviso, the Sub-Article 3, of 370. The Attorney has addressed Your
34 Lordship at length, only a few points to add to what he has said. The width of power under
35 Article 370. Because that has been the subject matter of some discussion. The nature of the
36 power exercised are presented at the various Sub Articles of Article 370. I don't think there
37 was a suggestion made that this might be executive in nature. The absence of a challenger and

1 administrative law principle of abuse of power. It's necessary to get a few concepts in their
2 right perspective. The exclusion of Judicial Review beyond the question of competence,
3 questions that are political in nature and the use of power under 356 to make changes that
4 might be irreversible, and finally the violation of basic structure. Very short submission in each
5 of these headings. The first point My Lord, relates to the construction of the proviso. Your
6 Lordships have heard detailed submissions by the Solicitor and by the Attorney. And My Lord
7 I just want to put it in a frame normally these are the three aspects which one would look at
8 the textual and the contextual and the historical. We have My Lord and the Solicitor read it
9 the out to Your Lordship, the author of the provision and the list of dates given by the Solicitors
10 and so on in detail the confederations, including differences of opinion on whether there
11 should at all be a special treatment of Kashmir. Then **Gopalaswami Ayyangar's** drafts,
12 brief discussion and it's adoption by the Constituent Assembly. And one thing was clear this
13 was an element accommodating certain compromises, political compromises within the
14 Constitutional framework. Your Lordship has read all of that. I'm not going to repeat reading
15 any of that. That has been sufficiently put across. And it now stands as it does. And it's words
16 have to be given their plain meaning. So My Lord the first thing You Lordship would do in my
17 respectful submission is the textual bit. Now in the textual bit, what is of great significance in
18 this point has been put. If the idea was that the President could act only to give effect to a
19 recommendation of the Constituent Assembly, then that would have been made the
20 precondition for exercise of power. Perhaps the Article would have said, if a recommendation
21 is received from the Constituent Assembly, then the President may. And Your Lord, in fact in
22 the course of the hearing My Lord, the Chief Justice gave the example of certain other articles
23 where he says if a reference is made, or if something is done. Then, but that's not the frame in
24 which this was drawn out. One of the articles of that kind is 249. It starts by saying, if the
25 Council of States has declared by resolution, then it shall be lawful to make laws. That is a
26 precondition for the exercise of power.

27

28 **CHIEF JUSTICE DY CHANDRACHUD:** But Mr. Salve does the proviso to Article 370(3)
29 does not bring about the same result by the use of the expression shall be necessary?

30

31 **HARISH SALVE:** Yes, My Lord, shall be necessary here must then be subject to the principle
32 that if there is a Constituent Assembly, then it's recommended. First of all, word is
33 recommendation not concurrence. And Secondly, that becomes necessary. Because if there is
34 a Constituent Assembly, then you cannot act in *vacuo*. That was in my respectful submission,
35 that textually because My Lord, we must, first of all, discern legislative intent out of language
36 and from the language when the Constitution knows or the drafting of the Constitution, the
37 authors of the Constitution knew that there were part of it which says, if something is done,

1 then you may exercise a power. Is the President to act My Lord, only to give effect, to the desire
2 of the Constituent Assembly or is he to receive a recommendation from the Constituent
3 Assembly? And obviously the compromise was, he must receive a recommendation from the
4 Constituent Assembly, which obviously means if there is one, he must. Secondly My Lord, this
5 very Article, and we have all this is textual. This very Article uses, two separate expressions.
6 B(2), uses the word concurrence, I mean it's a point, which has been already made. And the
7 proviso uses 'recommendation'.
8

9 Now if My Lord, one had put concurrence here, argument would still remain, but it would have
10 been a much stronger place for the Constituent Assembly. So while My Lord, distribution of
11 the fields of legislation, in Sub-Article (b), Clause (b), of Sub-Article 1, was put as concurrence
12 of the Government of the State. At the same time, Sub-Article 3, used the word
13 recommendation. It's not an amendment. It's not this. So My Lord, one must assume and this
14 was an article which had internal dissensions and differences. And it was very carefully crafted,
15 between the within the committee and within the Assembly, there were differing points of
16 view. So My Lord, we must give meaning to every word of this article. So the difference
17 between concurrence and recommendation and it's framing as a proviso. At two places, again,
18 Sub-Article 2 says, if the concurrence. So My Lords, this is a very conscious departure from
19 the concurrence, recommendation, consultation, recommendation, concurrence. One would
20 perhaps say the difference is, if you fail to consult, it is not fatal, if you fail to obtain a
21 recommendation, if a recommendation is necessary, it is of more serious consequence. Would
22 it be fatal? I don't know. Concurrence, obviously because concurrence then your power get
23 hedged in. And this is all textual.
24

25 **CHIEF JUSTICE DY CHANDRACHUD:** So Mr. Salve, there is one countervailing
26 consideration...
27

28 **HARISH SALVE:** Yes, yes...
29

30 **CHIEF JUSTICE DY CHANDRACHUD:** ...Which we may have to bear in mind, that
31 where the change in the distribution of legislative power was envisage..
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33 **HARISH SALVE:** Yes.
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35 **CHIEF JUSTICE DY CHANDRACHUD:** ..The Provisions spoke of concurrence.
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37 **HARISH SALVE:** Yes.

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CHIEF JUSTICE DY CHANDRACHUD: Except in the area which was covered by the Instrument of Accession.

HARISH SALVE: Yes.

CHIEF JUSTICE DY CHANDRACHUD: The exercise of the power and the proviso to Clause 3, brings about a complete abrogation of status.

HARISH SALVE: Correct, My Lord.

CHIEF JUSTICE DY CHANDRACHUD: Abrogation of 370.

HARISH SALVE: Yes.

CHIEF JUSTICE DY CHANDRACHUD: In which case all the limitations which are even introduced by the earlier provisions of Clause, of Article 370, are lifted, in the concurrence on the distribution of Legislative Power, consultation.

HARISH SALVE: Yes, My Lord.

CHIEF JUSTICE DY CHANDRACHUD: Now, could it have been the intent, that you require the concurrence for altering the distribution of legislative power or for altering provision of the Constitution, but for abrogating the Article itself, nothing more than a mere recommendation is required?

HARISH SALVE: Which My Lord, drops me, I'm deeply obliged My Lord which brings me to the second, the contextual.

CHIEF JUSTICE DY CHANDRACHUD: The power under the proviso is exercised, then there is no limitation at all.

HARISH SALVE: Absolutely. And that brings me to b), the contextual. And in fact, that was the direct intent. And Your Lordship, will see it from another point of view. There's another point of view. Till the arraignment is in place, unlike other States, where the Constitution sets out Legislative parts in the 7th Schedule in absolute terms. And you need a very elaborate mechanism to tinker with those 7th Schedule. It has to keep 50% States voting, et cetera. Your

1 Lordship knows the difference. Here, there was a political agreement and the whole
2 circumstances, including as Mr Ayyangar Prasad's...the...Inspector of the United Nations,
3 which today is of course irrelevant but at that time was very relevant. The problems in the
4 State. So there was an agreement which is embodied in (b), which has concurrence. But if this
5 led to a situation which ultimately prevented the purpose of 370. The purpose of 370 was not
6 to create a permanent divide in the Constitution. Lots of material being shown to you. It was
7 a phased integration. I'm going to deal My Lord, Dr. Dhavan has raised a very interesting point
8 of 'asymmetric federalism', whether that can become part of the basic structure. I'm going to
9 separately. But the historical material available to Court. We have My Lord unlike certain other
10 courts, we have always looked at historical material, especially for articles like this. There was
11 a safety valve in Sub-Article 3. That, 'if the political compromise in Sub-Article 1 fails to achieve
12 the purpose, at any time it might become necessary to pull the plug'. And Sub-Article 3 is that
13 plug. Now, if one looks at it that way, the whole thing falls in place. We kept...The framers of
14 the Constitution, kept with the President the power to do away with this special arrangement.

15

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

17

18 **HARISH SALVE:** And history My Lords, best testimony to the foresight and wisdom of those
19 My Lord, despite the criticism at their time and the political debate which has... which must
20 in a democracy, you must always have the noise of a democracy. Mr. Bhutto used to say. Noise
21 of a democracy is the most essential element of the democracy. This has been the subject of
22 debate but Your Lordship has seen the entire history of how phase by phase this has been
23 narrowed down. The divide has been narrowed. More and more subjects are added, more and
24 more alignment was brought about. The historical perspective of 370 is very important. The
25 troubled relations. While there always was a hope that the relations of the neighbouring
26 country would be on good terms. The History of Kashmir did give rise to apprehensions. And
27 Your Lordships have seen all the material. So Border State with all its sensitivities is what
28 compelled finally the Constituent Assembly to agree to the Special arrangement. But with their
29 wisdom, they said, "While you phase it in, you have the power to pull the plug." And this is
30 what I call the contextual interpretation. So the plain language, pure text and the context.

31

32 **CHIEF JUSTICE DY CHANDRACHUD:** What is the context, Mr. Salve? How is it distinct
33 from the historical background or the plain?

34

35 **HARISH SALVE:** The historical context is that this read by itself, forget the history. This
36 read by itself shows that in Sub Article 1 there is a divide in the Legislative List based aligned
37 to not the Constitutional General 7th Schedule, but to an Instrument of Accession. Broadly,

1 the idea was aligned with the Instrument of Accession. That's how the power was achieved.
2 And a partial application of the Constitution of India, not in its entirety, but such are the
3 provisions that's the deal. That's the context with a safety valve in 3. And My Lord, the history
4 of this provision also tells us, it may be difficult to find a logic in each of these because these
5 were a political compromise. Why was the Constituent Assembly put there? That is a
6 compromise. A lot of things are done to assuage. Ruffled feathers. There were two approaches,
7 one was the Black Book saying, doesn't matter things will settle down. Don't agree to anything
8 special for Kashmir. The other was, the other extreme saying if the legitimacy of the accession
9 is being questioned and there is a popular uprising, accommodate that. This was the
10 compromise. So My Lord, one cannot search for too much logic. This was the compromise
11 form, and we must therefore My Lord, the safest thing for a Court in my very respectful
12 submission. As a matter of Constitutional Interpretation of such provisions, and such
13 provisions are essentially political. And I don't mean political in it's pejorative sense. I mean
14 politically in it's constitutional sense. The Court has always said you must give it the widest
15 possible meaning. In fact, My Lord I'll give Your Lordship that passage, Justice Pandian. I
16 think Justice Pandian, in his majority opinion, where he upheld the abolition of the Privy
17 Purse. When Your Lordships upheld the abolition of the Privy Purse. He says that our
18 Constitution is meant to be flexible in these areas. I'll give Your Lordships the exact passage.
19 The fact that the ground reality would change in Jammu and Kashmir, and 370 would have
20 accommodate, was one of the first recognized by Your Lordship in the *Maqbool Damnoo*
21 case which has been cited. The challenge brought where Mr. Garg argued that without the
22 Sadr-e-Riyasat you could not have the Preventive Detention Law. And Your Lordship said
23 State means State as it exists, from time to time. That is My Lord already there. I'll give Your
24 Lordship the passage. 72 (1) Supreme Court cases. 536

25

26 **CHIEF JUSTICE DY CHANDRACHUD:** You have given us Para 28.

27

28 **HARISH SALVE:** It's there My Lord. Its Volume 1 CLC.

29

30 **CHIEF JUSTICE DY CHANDRACHUD:** Para 28, there.

31

32 **HARISH SALVE:** Para 28. So, this is already one example of how this evolved. And that My
33 Lord, that is seen with the principle of construction the Attorney just cited. The Presidential
34 Reference case which says, well, if there is a requirement, then if there is a Constituent
35 Assembly, you must get a recommendation that, if there is no Constituent Assembly, and you
36 denuded to the power. And the presidential reference, the Attorney just give Your Lordships a
37 moment ago. The judgment, based on a passage on impossibility. And Your Lordship cited

1 with approval, Craies on legislation, The 6th edition. In the Presidential reference. The
2 Attorney just gave it you.

3

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

5

6 **HARISH SALVE:** I have My Lord, for Your Lordship's assistance given 9th edition of Craies.
7 I believe it's attached to, my submissions. There's some slight interesting change in the text
8 map. I believe it is at PDF page 37.

9

10 **JUSTICE SANJIV KHANNA:** Mr. Salve, which is your compilation of it?

11

12 **HARISH SALVE:** I believe it has been given along with my note.

13

14 **JUSTICE SANJIV KHANNA:** Along with the note itself?

15

16 **HARISH SALVE:** Yes. My Lord, this is from the 9th edition of Craies, it's called disregarding
17 the impossible. Para 8.2.9. It is appendix to the note.

18

19 **CHIEF JUSTICE DY CHANDRACHUD:** What page did you say Mr. Salve?

20

21 **HARISH SALVE:** Page 37 PDF.

22

23 **CHIEF JUSTICE DY CHANDRACHUD:** Yes, disregarding the impossible.

24

25 **HARISH SALVE:** Yes, there's a slight difference in text from what Your Lordships
26 approved, and in fact, it's even more instructive. It says one of the ancient maxim, of common
27 laws is a *Lex Non-Cogit Ad Impossibilia*, as Broom's *legal Maxims* puts it, the *maxim* or as it
28 is expressed in *Impotentia excusat legem*, must be understood in the qualified sense that
29 *impotentia excusat*, whether it is the necessary or invincible disability to perform the
30 mandatory part of law of *forebay*. It is akin to the *maxim* of the Roman law *nemo tenetur ad*
31 *impossibilia*, which derived from common sense and natural equity, has been adopted, applied
32 by the law of England and the various and dissimilar circumstances. The result of the
33 application of the *maxim*, which remains potent, is that the draftsmen need not expressly
34 excuse that compliance, which is obviously, impossible. So for example, if requiring a
35 particular communication to take the Prescribed form, the draftsmen need not generally State
36 that the requirement can be lawfully ignored, where no form has been prescribed for that
37 purpose. There may be occasions however, where the sense of the legislation makes it

1 arguable, that the primary provisions are not to operate at all, until certain mechanisms have
2 been put to place by subordinate legislation. If the draftsman thinks it is necessary to avoid a
3 suggestion of that kind, he will generally qualify a reference to the prescription by, if any [NO
4 AUDIO].

5

6 So My Lord, the principle is very interesting. In fact, we have used it in a different branch. My
7 Lord, in service law, for example, we've used it all the time. It says your promotion will be as
8 per rules. Now, if no rules, are framed, then it doesn't mean, you won't get a promotion. Can
9 you follow whatever is the general principle. But if there are rules, they must be strictly
10 followed. Or My Lord, this was the argument in this court, of course, I went through judgment,
11 didn't get to that point of deciding it. The old My Lord, Section 80, they have, Ruled 19(1)(j)(n).
12 And the argument was, for example, if it says as deduction of capital employed, if there are
13 rules to follow them, if there are no rules doesn't mean the exemption fails But, there are other
14 provisions which says, you will get such other deductions as rules may provide. That you can't
15 operate other than there are rules, so we have had My Lords these 2 formats. And that is why
16 we come back to, why did framers of the Constitution, not say that if the President receives a
17 recommendation from the Constituent Assembly, then [INAIDIBLE]... And instead say the
18 President may abrogate this Article, provided if he gets a recommendation from the
19 Constituent Assembly, which [NO AUDIO] you must get the recommendation otherwise [NO
20 AUDIO].. This was also made.

21

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

23

24 **HARISH SALVE:** I am sorry.

25

26 [NO AUDIO]

27

28 **CHIEF JUSTICE DY CHANDRACHUD:** Mr. Salve, I think perhaps... We'll just wait for a
29 second.

30 Yes. Mr. Salve... His voice is perhaps...For a moment, he was...

31

32 **HARISH SALVE:** Now My Lord...

33

34 **CHIEF JUSTICE DY CHANDRACHUD:** Yes Mr. Salve.

35

36 **HARISH SALVE:** Can Your Lordships hear me?

37

1 **CHIEF JUSTICE DY CHANDRACHUD:** Yes, we can hear you now.

2

3 **HARISH SALVE:** Finally, My Lord, look at one important nuance of this article. In Sub-
4 Clause (d), of Clause (b), such of the other provisions of this Constitution shall apply in relation
5 to that State, subject to such exceptions and modifications as the present may [UNCLEAR].
6 Article 370" So power to the President to apply or disapply provisions of the Constitution, or
7 apply them with modifications. And this does not require unlike (b)(1). That is the spread in
8 the List. The concurrence is not called for.

9

10 **CHIEF JUSTICE DY CHANDRACHUD:** Let's look at it, Mr. Salve, let's see that again.

11

12 **HARISH SALVE:** If Your Lordship sees 372(1)(b). (1)is the spread My Lord, of the List.
13 Small Sub-Clause is 1 and 2

14

15 **CHIEF JUSTICE DY CHANDRACHUD:** Corresponding to the IOA.

16

17 **HARISH SALVE:** Yes .

18

19 **CHIEF JUSTICE DY CHANDRACHUD:** That requires consultation?

20

21 **HARISH SALVE:** That requires concurrence. That comes in through the first Proviso.
22 Proviso no such order...

23

24 **CHIEF JUSTICE DY CHANDRACHUD:** It requires concurrence?

25

26 **HARISH SALVE:** (b)(1) requires concurrence, consultation.

27

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

29

30 **HARISH SALVE:** Correct My Lord, and no such order which relates to matter other than
31 those referred [UNCLEAR] in the concurrence. So this was built in. This dichotomy was built
32 in there itself. Now two things My Lord, Your Lordship will note, applying or disapplying
33 provisions of the Constitution.

34

35 **JUSTICE B.R GAVAI:** Mr. Salve, I could not get this argument.

36

1 **HARISH SALVE:** Yes. May I just restate the point My lord. Clause (d) relates to not 370
2 but other provisions of the Constitution.

3

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

5

6 **HARISH SALVE:** And they can be applied, disappplied or with such modifications as the
7 President considers appropriate and that is with the concurrence of that Government. Correct
8 My Lord? And Sub-Article 2, itself is the concurrence referred to in Paragraph 2 of B of Clause
9 1, such other matters or in the second Proviso that is My Lord, would be (d), given before the
10 Constituent Assembly for framing of the Constitution. It will be placed before the Assembly
11 for such decision as it may take thereon. So this was meant to operate much beyond the
12 Constituent Assembly also. Because that concurrence would continue forever. There would
13 always be a State Government. My Lord, State Government...What that State Government is
14 another matter. There would always be a State Government. But disapplying 370 was carved
15 out, and that can't be a provision limited in time to the existence of the Constituent Assembly
16 and that is what explains, perhaps why the recommendation rather than concurrence.

17

18 **CHIEF JUSTICE DY CHANDRACHUD:** Mr. Salve your voice was cracking just a little bit
19 when you are making this the last part of your argument. Maybe..

20

21 **HARISH SALVE:** I'll repeat it My Lord.

22

23 **CHIEF JUSTICE DY CHANDRACHUD:** If you could come again on this.

24

25 **HARISH SALVE:** Disapplying 370 itself comes under Sub Article 3.

26

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

28

29 **HARISH SALVE:** And that is why, perhaps the framers of the Constitution scaled it down
30 to recommendation instead of concurrence and that too put it in a Proviso that when there is
31 a Constituent Assembly during the life of the Constituent Assembly, if you decide to modify
32 370 or disapply 370 because the whole purpose of the Constituent Assembly was to work. To
33 try and find this area of accommodating both.

34

35 **CHIEF JUSTICE DY CHANDRACHUD:** That's fair enough, Mr. Salve we got your point
36 that this is a proviso. It uses the word recommendation, and it does not say..

37

1 **HARISH SALVE:** Yes.

2

3 **CHIEF JUSTICE DY CHANDRACHUD:** If there is a recommendation. We got that point.
4 We got that line of argument .

5

6 **HARISH SALVE:** I was just closing it by saying..

7

8 **CHIEF JUSTICE DY CHANDRACHUD:** You're making just a little while ago was that
9 you began by saying that (b)(1)...

10

11 **HARISH SALVE:** Yes.

12

13 **CHIEF JUSTICE DY CHANDRACHUD:** Requires consultation. Matters in the List other
14 than those covered by the IOA requires concurrence. That is (b)(2). Then we went to (d). And
15 (d) says, subject to such exceptions and modifications, as a President may order by order
16 specify.

17

18 **HARISH SALVE:** Yes.

19

20 **CHIEF JUSTICE DY CHANDRACHUD:** There also there is a bifurcation. Matter, which
21 refer to the Instrument of Accession, require consultation, other matters, other than those
22 governed by the Instrumental Accession, require concurrence.

23

24 **HARISH SALVE:** Correct. Now the point which I was making, that's the point which I
25 wanted to make, got lost.

26

27 **CHIEF JUSTICE DY CHANDRACHUD:** Which you wanted to just come back to again.

28

29 **HARISH SALVE:** So again, My Lord, why this subtlety of Instrument of Accession being
30 consultation and other than Instrument of Accession being concurrence, the significance
31 should not be missed. Where it comes to Instruments of Accession and Terms of Accession,
32 the last word is with the Union.

33

34 **CHIEF JUSTICE DY CHANDRACHUD:** No, where do you say that, how do you say that?

35

36 **HARISH SALVE:** Because My Lord, Instrumental Accession requires consultation, not
37 concurrence, the First Proviso.

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HARISH SALVE: Why this dichotomy in the first and second proviso My Lord? Your Lordship will have to reflect over. And that also feeds into my point therefore, that where it comes to disapplying the 370 completely, because the whole idea of 370 was accommodating, the political compromise in the accession.

CHIEF JUSTICE DY CHANDRACHUD: You know Mr. Salve?

HARISH SALVE: Yes.

CHIEF JUSTICE DY CHANDRACHUD: Clause (b) of 370, 370(1)(b) does not relate to the power to make adaptations, modifications, or exceptions at all.

HARISH SALVE: Yes.

CHIEF JUSTICE DY CHANDRACHUD: What 370(1)(b) says, is that of all the items in the three List, the President, the power to the power of Parliament to make laws will be limited by specific matters.

HARISH SALVE: Yes.

CHIEF JUSTICE DY CHANDRACHUD: So you take the matters in the List as they are, and then, you define what would be the domain of Parliament to make the law, there's no power to make exceptions or modifications in Clause (b) at all.

HARISH SALVE: No, not at all.

CHIEF JUSTICE DY CHANDRACHUD: Bifurcation, and you correctly said that, there is a bifurcation. Matters which are referable to the Instrument of Accession, are those, on which you only require consultation because these are methods clearly specified in the IOA, defence, foreign affairs and communication. Therefore, when Parliament specified, the matters on which it would make laws, if those matters were referred to in the IOA, only consultation of the state government was required.

HARISH SALVE: Yes.

1 **CHIEF JUSTICE DY CHANDRACHUD:** Because they were specified in black and white
2 in the IOA.

3

4 **HARISH SALVE:** Correct. But...

5

6 **CHIEF JUSTICE DY CHANDRACHUD:** Matter which were not specified in the IOA, but
7 are governed by the three Lists, concurrence is required

8

9 **HARISH SALVE:** And My Lord...

10

11 **CHIEF JUSTICE DY CHANDRACHUD:** Now when it comes to (d), (d) is not just
12 specification of matters. (d), is making exceptions or modifications.

13

14 **HARISH SALVE:** That's right.

15

16 **CHIEF JUSTICE DY CHANDRACHUD:** There again they had a dichotomy. You can make
17 exceptions or modifications but if it relates to matters in the IOA..

18

19 **HARISH SALVE:** Consultation.

20

21 **CHIEF JUSTICE DY CHANDRACHUD:** Only consultation. So you are really right that
22 insofar, as (d), is concerned, in regards to matter which are specified in the IOA, only
23 consultation is required.

24

25 **HARISH SALVE:** And My Lord, one cannot miss the significance, what I wanted to add of
26 the overlay of the principle, of international law, which is engrafted in 363. That these matters
27 primarily for the sovereign. Instruments of Accession and their interpretation has always been
28 a matter for sovereign. And here the accession being complete irrevocable, and irreversible
29 that is clear, 1 and 3. Article 1 and 3. Where it touched, the Instrument of Accession, the
30 President had the last word. And that philosophy is reflected in Sub-Article 3. And if you want
31 to completely disapply this political arrangement, if there is a Constituent Assembly, consult
32 them, otherwise you can do it. And there also recommendation.

33

34 **CHIEF JUSTICE DY CHANDRACHUD:** In other words, Mr. Salve, what you are trying to
35 drive at is that Clause 3 of Article 370, is absolutely on the same is on the same plane...

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37 **HARISH SALVE:** Philosophy.

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CHIEF JUSTICE DY CHANDRACHUD:...Or the same platform as Clause (b)(1) and the first proviso to (d). You are trying to equate the power and the substantive power to Clause 3....

HARISH SALVE: The underpinning is the same My Lord.

CHIEF JUSTICE DY CHANDRACHUD: The power...the first proviso to (d) and (b)(1).

HARISH SALVE: Yes. And because the underpinning is, this is where we accommodate it. Or this is where the powers that be even framing the Constitution accommodated. The political compromise in Kashmir. And unsurprisingly, unsurprisingly they reserved the power in the President instead of driving on to 368... Article 368, they reserved the power in the President to disapply this in draft. So, this is a very unusual provision My Lord. There's no other equivalent... the Executive... President is Executive Government... where the Executive Government can disapply a provision of the Constitution

CHIEF JUSTICE DY CHANDRACHUD: Only internal problem with that argument, Mr. Salve, we'll reflect on it as doing the research in the next hour, is that, where the power to do something lesser in terms of constitutional impact is hedged in the restrictions, mainly the power to make exceptions and modification. Can be subsumed with the power to have something greater which have a greater constitutional impact. Maybe the abrogation itself will be bereft of all limitations.

HARISH SALVE: My Lords, to which my respectful response is, there is a compromise. I keep in my control because the accession is complete. Let's... Whatever the understanding. It's a part of India. 1 and 3 apply. It's an Indian State. But I have a political compromise in which Sub-Article 1 as, how it will operate. That's the compromise. But Sub-Article 3 is to put the compromise to an end. And I reserve that power.

CHIEF JUSTICE DY CHANDRACHUD: Mr. Salve, we have almost at the end for the lunch. This one, may be one of your juniors can do it here, in the court as well.

HARISH SALVE: Yes.

1 **CHIEF JUSTICE DY CHANDRACHUD:** Found which were the matters governed by
2 (b)(1). And which were the matters governed by (b)(2)? (b)(1) basically covered with three
3 subjects.

4
5 **HARISH SALVE:** Yes.

6
7 **CHIEF JUSTICE DY CHANDRACHUD:** Now, which were the matters in the IOA, to
8 which the first proviso to (d) applies?

9
10 **HARISH SALVE:** We'll try and respond to that at 2 PM. I'll see that.

11
12 **CHIEF JUSTICE DY CHANDRACHUD:** That will give us some insight on what is the
13 intent of..

14
15 **HARISH SALVE:** Yes. Yes, My Lord. I'm deeply obliged. We'll do that.

16
17 **KAPIL SIBAL:** So many articles that deal with defence, which are covered by the Instrument
18 of Accession. That list is given.

19
20 **TUSHAR MEHTA:** I had in my list of dates, Your Lordships would recall, the Sub-Article
21 (a)(1) says that, "the President would demarcate which entries fall within those three areas."
22 So there was a specific order passed. Possibly the first order.

23
24 **CHIEF JUSTICE DY CHANDRACHUD:** 48 or 54?

25
26 **TUSHAR MEHTA:** Yes. 50 My Lord. Communication would have, telecommunication,
27 postal communication, etc. etc. So, three entries.

28
29 **CHIEF JUSTICE DY CHANDRACHUD:** Which were the other articles?

30
31 **HARISH SALVE:** We'll respond to that at 2:00.

32
33 **CHIEF JUSTICE DY CHANDRACHUD:** The first proviso to (d). D For Delhi, deals with
34 other articles, not the specification of matters in the list. (d)(1) sorry, not (d)(1), the first
35 proviso to Clause (d), deals with other matters which are governed by the Instrument of
36 Accession where again consultation only is required. We are just sort of understanding Mr.
37 Salve.

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KAPIL SIBAL: Communication is also in the list. That is also not other article.. articles.

HARISH SALVE: I don't think Mr Sibal has understood. I have followed Your Lordship's question. I'll respond to that at 2:00.

CHIEF JUSTICE DY CHANDRACHUD: That may have some bearing Mr. Salve, your argument on Clause 3. That's why I asked.

HARISH SALVE: I'll do it at 2:00.

CHIEF JUSTICE DY CHANDRACHUD: Interesting point. We'll also leave it here.

CHIEF JUSTICE DY CHANDRACHUD: Yes, Mr. Salve?

HARISH SALVE: Yes. In fact, I'm grateful to My Lord, the Chief Justice for this tier, if Your Lordships sees the Instrument of Accession, this is in Document 1... Volume 1, sorry, page 9. Your Lordships have it?

CHIEF JUSTICE DY CHANDRACHUD: Yes, just one second.

HARISH SALVE: My Lord, Mr. Surya Kant has it?

JUSTICE SURYA KANT: Yes.

HARISH SALVE: If Your Lordships see, this is very interesting.

CHIEF JUSTICE DY CHANDRACHUD: Page 1. Sorry. Page 9.

HARISH SALVE: Clause 1 is the accession.

CHIEF JUSTICE DY CHANDRACHUD: Yes.

HARISH SALVE: He says, 'I hereby declare I accede to the dominion with the intent of the Governor General of India [UNCLEAR] virtue of this my Instrument of Accession but subject to the terms and for the purpose of dominion, exercise such function that may be vested by them in the Government of India Act, as in the Dominion of India on the 15th day of August.

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I hereby assume the obligation of ensuring that due effect is given to the provisions, et cetera.'
Now look at 3 My Lord. 'I accept the matter specified in the Schedule as the matters with
respect to which the Dominion Legislature may make this, may make law for this state.'

CHIEF JUSTICE DY CHANDRACHUD: So this is B(1)?

HARISH SALVE: Yes.

CHIEF JUSTICE DY CHANDRACHUD: This corresponds to clause B (1)?

HARISH SALVE: Yes My Lord. And this was in a schedule, which I'll show Your Lordships
in a moment. 'I hereby declare that I accede to the Dominion of India on the assurance that if
an agreement is made between the Governor General and the Ruler of the State, whereby any
functions in relation to the administration of this State of any law of the Dominion Legislature,
shall be exercised by the Ruler of the State. Then such agreement shall be construed and have
effect accordingly.' Now My Lord, comes the most important thing in.. 6 says - 'nothing in the
Instrument will impart dominion to make any law authorizing compulsory acquisition.' Now,
this is interesting. This is a carve out from the Legislative List Principle. 'But I hereby
undertake that should the Dominion apply, et cetera.' Now, My Lord, 7 is important. 'Nothing
in the Instrument shall be deemed to commit in any way to the acceptance of any future
Constitution of fetter my discretion and nothing in the Instrument affects the continuance of
my sovereignty in and over the State, save as provided under the Instrument.' Now this was
the Instrument of Accession. But the Constitution, finally My Lord. Your Lordship now
matches this with 37.. and I'm sorry My Lord for completeness their schedule Your Lordship
will find in Volume 4, Page 176.

CHIEF JUSTICE DY CHANDRACHUD: So basically, Defence, External Affairs and
Communications?

HARISH SALVE: Correct. Now My Lord what happened, but what the spread in 370
corresponds to is very important. 370 starts by saying the Part B provision will not apply. 238
will not.

CHIEF JUSTICE DY CHANDRACHUD: Right.

1 **HARISH SALVE:** Then it says -'The power of Parliament to make law shall be limited to
2 those matters in the Union and the Concurrent List, which in the consultation of the
3 Government of the State are declared by the President to correspond to matters specified in
4 the Instrument of Accession.' So this is on the issue of the Legislative Lists and that schedule,
5 matching them with our 7th Schedule. And the President would decide how the 7th Schedule
6 is to be divided. And here it's only consultation, consistent with the philosophy that accession
7 and Instruments of Accession, these are what are in international law called political
8 documents, not political in the political sense. Political in document sense.

9
10 **CHIEF JUSTICE DY CHANDRACHUD:** I think Mr. Salve, it's very clear now. If the
11 President wanted to make any exceptions or modifications, in respect of Defence,
12 Communication or External Affairs, then only consultation was required.

13
14 **HARISH SALVE:** Correct.

15
16 **CHIEF JUSTICE DY CHANDRACHUD:** That is [UNCLEAR] of the first proviso to Clause
17 B.

18
19 **HARISH SALVE:** Correct. Now My Lord, applying other provisions of the Constitution and
20 My Lord, I don't have to give Your Lordship, say, catalogue of which are the other provisions.
21 I mean, there are so many important provisions of the Constitution. They would be phased in
22 and applied under D.

23
24 **CHIEF JUSTICE DY CHANDRACHUD:** Right.

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26 **HARISH SALVE:** And for that they said concurrence.

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28 **CHIEF JUSTICE DY CHANDRACHUD:** They would require concurrence.

29
30 **HARISH SALVE:** They would require concurrence.

31
32 **CHIEF JUSTICE DY CHANDRACHUD:** They referred to either Defence, External Affairs
33 or Communication.

34
35 **HARISH SALVE:** My Lord, Legislative Lists. Broadly, let us say the Legislative Lists are put
36 to one side, because that is really power to make laws. But My Lord institutions...Your
37 Lordship's jurisdiction under 32 for example.

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CHIEF JUSTICE DY CHANDRACHUD: Of the Constitution also. Yes.

HARISH SALVE: Your Lordship's jurisdiction under 32... should it extend or should it not extend to Jammu And Kashmir. These are... And what about Public Service Commission? What about Election Commission? So on and so forth. So all those were provisions to be applied if necessary, with adaptation. Now what is important, and I come back therefore to my point. How does this align with a complete accession? Article 3 is the answer, that this is an arrangement for the phased introduction of the Constitution. Keeping or reserving unto the President, the power to disapply this article. Now obviously for that there cannot be concurrence. So it makes sense, recommendation if there is a Constituent Assembly, otherwise the action of the President. This was the arrangement. This was the compromise. And this compromise was not just with the state of Jammu and Kashmir, the Solicitor explained before Your Lordships, the sharp differences of view even in the Congress Working Committee, they rejected this plan. First time when Mr. Gopal Ayyangar presented it. Sardar Patel's letter is cited in the Solicitor's list of dates. He said, "Sorry, I don't accept this". So there were...this was a very... a matter with more than one point of view and competing points of view. So this was the compromise formula, which is incorporated here in the Constitution, this was the workable arrangement. This is all right. Ultimately, we will decide and we will keep to ourselves the power to disapply this article. But if this works phase by phase.. introduction of the Constitution, why not? And it did work, to a large extent. So that principle, which was... which My Lord the Chief Justice was pleased to put through about lesser power and larger power who did not require greater safeguard [UNCLEAR] That's what I call the contextual argument. I am, My Lord, finished with this and I am on the clock... if there is anything more I can assist Your Lordship on this point. Otherwise let me move to my next point.

CHIEF JUSTICE DY CHANDRACHUD: I think you can move to your next point, Mr. Salve.

HARISH SALVE: Yes. Second point is My Lord, there have been some arguments about even if 370 applies, no radical change and Delhi Laws were cited. Now My Lord, some cleaning up, because some principles need to be clearly stated. The *Birla Cotton Mills* in re Delhi Laws, the power to extend laws cannot be the radical changes, that can have no application here. That principle can have no application here. Because Your Lordship has seen those cases. Your Lordships read down the power to extend and apply laws under Article 14. The argument was excessive delegation. You have conferred upon the Executive the power to change a law made by Parliament and its application. And that is why Your Lordship said we read it down, that

1 the philosophy...the basic policy of the law cannot be changed. Radical changes cannot be
2 made. 370 is a part of the Constitution itself. There is no question of excessive delegation. This
3 is a power conferred on the President. And that is why My Lord **Lakhanpal** rejects this
4 approach. But I was giving Your Lordships an answer on First Principles.

5

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

7

8 **HARISH SALVE:** The power, My Lord, under 370 is plenary in nature and this is a power
9 conferred by the Constitution.

10

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

12

13 **HARISH SALVE:** Plenary power is not subject to the principle of ...or is not amenable to a
14 challenge of excessive delegation because the Constitution has made this delegation where
15 Parliament makes a law which is subject to Article 13, where the State Legislature makes a law
16 which is subject to Article 13, then Article 14 challenge can be brought, saying this is excessive
17 delegation. And all the Delhi Laws, in re-Delhi Laws downward cases, all dealt with excessive
18 delegation in statutory provisions on the angle of Article 14. It's completely irrelevant to 370.
19 Your Lordship has already said this in **Puranlal** , but I want you to just put it on first.

20

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

22

23 **HARISH SALVE:** The second My Lord, point, is that the power exercised is Legislative in
24 character. I don't think, I need to belabour that point very hard. Applying provisions and
25 disapplying provisions, modifying provisions, of a law is Legislative in character. I don't think,
26 I need to cite authority for that My Lord. To suggest that this is an Executive Power is like
27 saying Ordinance making an Executive Power. And it is done by orders, My Lord. I'll just give
28 Your Lordships a citation. The **Meghalaya** case, in Schedule 5, for example, of the
29 Constitution, **(1972) 1 Supreme Court Cases 148**, just for reference, where Your Lordships
30 has said that, because there also the President can by order say this and by order say that,
31 [UNCLEAR] So, this is, now what follows from a plenary power and a power which is
32 legislative in character. It has a direct bearing on the next issue, of the extent of judicial review,
33 of the exercise of that power. Because that My Lord, logically takes me to my next point, that
34 the **Ajit Mills Principle**. Justice Krishna had explained in **Ajit Mills**. In the context of a
35 law made by Parliament, if you say this is abuse [UNCLEAR], it's an argument of competence,
36 not of motive. That is My Lord the **Ajit Mills principle** . Your Lordship knows. The first law
37 was made, saying if you collect it illegally, sales tax, which is not chargeable, if you collect it

1 you pay. The argument was this is colourable legislation because you are taking away. Justice
2 Krishna has answered My Lord, I'll just give the page number and para number...77 4 SCC,
3 Page 98, My Lord, this is attached to my notes. My Lord, this is attached to my notes, starting
4 from page 6... page 4 sorry. and the relevant paras..

5

6 **CHIEF JUSTICE DY CHANDRACHUD:** But Mr. Salve, even if it is a legislative power, as
7 you say it is. Probably it is, it's amenable to judicial review on the ground of Article 14. A
8 legislative power cannot be challenged on the grounds of malafide. You cannot say that
9 Parliament did something because of a malafide intent, because you don't attribute malafide
10 to the collective body of individuals. That's the reason.

11

12 **HARISH SALVE:** Correct My Lord. More than that....

13

14 **CHIEF JUSTICE DY CHANDRACHUD:** Otherwise when they reduce the age of
15 retirement, our Court said - You can't challenge that reduction in the age of retirement on the
16 grounds that Parliament was acting malafide because it's a collective body. Malafide is
17 something which you attribute to an individual.

18

19 **HARISH SALVE:** More than that My Lord, Your Lordships, have always said when it comes
20 to colourable device, supplementary and all these, as it is My Lord explained in this judgment.

21

22 **CHIEF JUSTICE DY CHANDRACHUD:** Actually they started that..

23

24 **HARISH SALVE:** It is only a competence argument.

25

26 **CHIEF JUSTICE DY CHANDRACHUD:** A colourable exercise of power in [UNCLEAR]
27 our Court said, it really means that....

28

29 **HARISH SALVE:** Competence:

30

31 **CHIEF JUSTICE DY CHANDRACHUD:** Those who are perpetuating to exercise power
32 under one entry this actually translates into another entry. So it's not really a question of
33 absence of power. Legislative [UNCLEAR]

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35 **HARISH SALVE:** It's a competence argument.

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37 **CHIEF JUSTICE DY CHANDRACHUD:** It's a competence argument.

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HARISH SALVE: And it's not Wednesbury under reasonableness.

CHIEF JUSTICE DY CHANDRACHUD: But equally Article 14 would be attracted. This would be the test of Article 14.

HARISH SALVE: My Lord, 14 can have no application to an Article 370 Sub-Article 3 situation. Of course, Legislative power you can if you make a rule which is plainly discriminatory, you can strike it down and violate it in 14.

Because if Article 13 applies, if Article 13 applies the whole panoply of fundamental rights apply. T

CHIEF JUSTICE DY CHANDRACHUD: Therefore, assuming that this is a Legislative power, it is not immune to challenge on the ground by violation of fundamental rights.

HARISH SALVE: Correct. Fundamental rights, whether 370...Sub-Article 3 disapplying Article 370 is at all amenable to fundamental rights, question mark. I address Your Lordship for a minute on that. Because this is a relationship between the Union and a unit of that Union. We are now units of that Union.

CHIEF JUSTICE DY CHANDRACHUD: They may be parts of that relationship, which creates rights in favour of individual citizens.

HARISH SALVE: My Lord, if it affects an individual...

CHIEF JUSTICE DY CHANDRACHUD: Article part of that. The provision on the right of residence. An individual for instance can say that I and people belong to my class have the exclusive right of residence in this State. By bringing in others you are affecting my right under Article 14. Whether there's substance in it or not is a different thing altogether. But it's amenable to that challenge. You can't say that the challenge is immune.

HARISH SALVE: My Lord, I would respectfully submit. Applying or disapplying the constitutional provision would not give an individual citizen a rank because I'll tell Your Lordship why. This takes us back to the basic principle of this is adjusting the accession. Now My Lord, in international law for example, a citizen can never assert that I had certain rights under an earlier legal regime and now there is an accession, those rights should be continued. Your Lordships have rejected that consistent following the principle of International law. You

1 have only such rights as are available to you, within the territory. Now in that if there is a
2 discrimination, you can challenge. Today My Lord, how which constitutional regime will apply
3 in Jammu and Kashmir, is more.. in one sense, almost a constituent part. So My Lord, Article
4 14 challenged on the ground that I was a citizen, I was living in Kashmir, nobody else was
5 allowed to enter here. Now you've taken away my rights. That argument will not be open.

6

7 **CHIEF JUSTICE DY CHANDRACHUD:** And that's wide apart from of course the
8 submission of the Solicitor that by the abrogation, you expanded the panoply of rights which
9 an individual in Jammu and Kashmir has. You have not restricted that.

10

11 **HARISH SALVE:** I am taking an extreme case. Can an individual come and say, I had a right
12 to live here, spend in isolation. You've taken away that right and now all Indians have the
13 rights, which I earlier had as a special right.

14

15 **CHIEF JUSTICE DY CHANDRACHUD:** Your contention is that the residents' right to live
16 in Jammu and Kashmir is not taken away.

17

18 **HARISH SALVE:** Nothing. Their rights are expanded by applying the whole of the Indian
19 Constitution. Nobody has a vested right in a State of governance, in that sense. And subart...
20 and My Lord 370 is a part of the Constitution, where the President has a power to disapply the
21 Constitution. If he disapplies the Constitution, how can a citizen complain, a resident of that
22 state? As much as a resident of outside Kashmir could not say - why am I made subject to
23 Parliamentary legislation when this subject in the state of Jammu and Kashmir is not ? In fact
24 we used to always remember the Late Mr. Altaf Ahmed. He used to always have this little joke,
25 he says- you people have lost the right to property, we haven't. 19(1)(f) continued... equivalent
26 continued under the Jammu and Kashmir Constitution. We got rid of property rights. Now,
27 could an Indian complain... could a person outside Kashmir, a fellow Indian, say that my fellow
28 Indian there in Jammu and Kashmir has a right to property. If you take a property, you have
29 to pay in full compensation but if I am outside Jammu and Kashmir take my property and you
30 can show me a blank piece of paper and there's nothing I can do.

31

32 **CHIEF JUSTICE DY CHANDRACHUD:** 370 now leads to the abrogation 19(1)(f) in
33 Jammu and Kashmir.

34

35 **HARISH SALVE:** It does.

36

1 **CHIEF JUSTICE DY CHANDRACHUD:** But which is not a part of the basic structure.
2 19(1)(f) has been held not [UNCLEAR].

3

4 **HARISH SALVE:** It is, My Lord, as much today, if you are creating a larger equality... the
5 Solicitor has developed this point. You created a larger equality, where is the question of
6 violating 14. And individuals, My Lord, that principle must be extended. Your Lordships have
7 dealt with this problem where the argument was there were prior leases, Your Lordship said,
8 "Sorry, post accession you have what law gave you, there is nothing else." Now if post
9 accession...

10

11 **CHIEF JUSTICE DY CHANDRACHUD:** Actually we need not really explore this line too
12 much for the reason that this might have impacts on other parts of the Constitution...

13

14 **HARISH SALVE:** And that is why My Lord I was...

15

16 **CHIEF JUSTICE DY CHANDRACHUD:** Constitution which creates rights in favour of
17 specific groups...

18

19 **HARISH SALVE:** Yeah and that is why, My Lord, I limited myself...

20

21 **CHIEF JUSTICE DY CHANDRACHUD:** whether they are based on gender, whether they
22 are based on religion, whether they are based on cast on marginalization. So to say that by
23 obliterating that right, you are not affected by a larger equality may [UNCLEAR] argument if
24 you accept it in a broad spirit.

25

26 **HARISH SALVE:** 370 operates..

27

28 **CHIEF JUSTICE DY CHANDRACHUD:** I don't know what the ramifications would be.

29

30 **HARISH SALVE:** My Lord, 370 operates in a very narrow area. Very narrow area. It operates
31 in the context of the compromise formula put in place for Jammu and Kashmir at the time of
32 accession and at the time of its integration into India, et cetera, et cetera and this power was
33 kept to disapply, this one provision, this special arrangement. Now My Lord there is no
34 equivalent in the Constitution. So we need to go...the Chief Justice is saying the danger in
35 getting into Constitutional propositions in one context, in making broader observations, we
36 don't know what you are trampling under foot for the future. My limited submission was, the

1 Principle of limiting delegation by statute which comes from Article 14 can't apply. This radical
2 change is reading down of the power to extend laws.

3

4 **CHIEF JUSTICE DY CHANDRACHUD:** That point you have made Mr. Salve [UNCLEAR]

5

6 **HARISH SALVE:** That's the only point which I was making. And the second point which I
7 was making was...

8

9 **CHIEF JUSTICE DY CHANDRACHUD:** [UNCLEAR] restricted to that level, there is no
10 difficulty. That's basic principles.

11

12 **HARISH SALVE:** That is all. And the second point which I was making that here abuse of
13 power is really a power of competence.

14

15 **CHIEF JUSTICE DY CHANDRACHUD:** And nobody's challenged the...to wield the
16 Clause 3 of Article 370, that is...

17

18 **HARISH SALVE:** Which My Lord in fact brings me

19

20 **CHIEF JUSTICE DY CHANDRACHUD:** [UNCLEAR] part of the original Constitution.

21

22 **HARISH SALVE:** In fact My Lord which brings me to my next point. And I'm going quickly
23 because Your Lordship has seen the point that this repeated reference to basic structure, quite
24 frankly, even in some of Your Lordships judgements, I find a little surprising. Basic structure
25 was not a principle as an independent, standalone constitutional right. Basic structure is the
26 limitation inherent in 368 and Constitutional amendments are tested with reference to the
27 basic structure brought.

28

29 **HARISH SALVE:** My Lords, there are some judgments which do say this law not only
30 violates 14, but violates the basic structure. Laws, strictly speaking...

31

32 **CHIEF JUSTICE DY CHANDRACHUD:** Laws don't violate the basic structure..

33

34 **HARISH SALVE:** Laws can't violate the basic structure. Laws violate part 3 or don't violate
35 part 3.

36

1 **CHIEF JUSTICE DY CHANDRACHUD:** You know, in two judgments though, we have
2 said, that a particular law, we've said, that a particular law protects the basic structure, one..

3

4 **HARISH SALVE:** My Lord, laws are aligned with the basic structure..

5

6 **CHIEF JUSTICE DY CHANDRACHUD:** In '93 *Places of Worship Act*, in Ayodhya, we
7 said, that is in pursuance of the..

8

9 **HARISH SALVE:** Correct My Lord, laws..

10

11 **CHIEF JUSTICE DY CHANDRACHUD:** The second, we said that the amendment to the
12 introduction of the amendment for Delhi, in 239AA, was in furtherance of the basic structure,
13 which is..

14

15 **HARISH SALVE:** My Lord, furtherance of basic structure..

16

17 **CHIEF JUSTICE DY CHANDRACHUD:** No, there's a little bit of..

18

19 **HARISH SALVE:** My Lords, let me try and... my very humble submission. When a law is
20 made to protect civil liberties, 21 is a part of basic structure. A law made to protect civil liberties
21 is a law aligned with Article 21 and therefore, aligned with the basic structure. Now, one may
22 in a flourish of language say, it is to further. Today if there are checks and safeguards built into
23 arrests, checks and safeguards built into criminal trials, etc etc. You may say this is to protect
24 the basic structure. The basic structure is the trilogy of rights. That is My Lord, to say that the
25 law was tested on basic structure.

26

27 **CHIEF JUSTICE DY CHANDRACHUD:** That distinction you have made. Yes, of course,
28 because as a doctrine, it was evolved to test the validity of the Constitutional Amendment.

29

30 **HARISH SALVE:** The problem is My Lord, one thing is to say something is aligned or not
31 aligned with the basic structure, but to say that if exercise of power under 370 can be tested
32 on the basic structure doctrine, I submit is a misconception. 370, itself is a part of the original
33 pristine Constitution and that confers the power to disapply the Constitution...the
34 arrangement. If I am right on competence.

35

36 **CHIEF JUSTICE DY CHANDRACHUD:** Anything else, Mr. Salve now?

37

1 **HARISH SALVE:** So My Lord, that is the basic structure point here and the point.

2

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

4

5 **HARISH SALVE:** And, the point which we have therefore already made and I close with that
6 submission. How would Your Lordship interpret this? The nature of the provision is such if it
7 confers plenary powers not in the field of civil rights. Not in the field protected by part 3, but
8 in the area of governance and in the area of constitutional adjustments, Your Lordship will
9 give [NO AUDIO] . Because the idea is never to hedging future generations, by reading the
10 Constitution narrowly. That is a well settled principle. Last point which I have to make My
11 Lord is, if we are wrong on this, 356 test. Can it change your permanence be made, when a 356
12 regime is in place? It has two answers. I'll just take two minutes on this. This is no longer res
13 integra. Your Lordships have, right from *Rajasthan and Union of India, Bommai*
14 chiselled this law and said, up to the stage where Parliament approves, don't do anything
15 which is irreversible. Thereafter you may. Because everything in one sense is irreversible.
16 What Parliament does is also irreversible. Parliament passes the budget for the States... It
17 takes over the coffers of the State. What money spent is irreversible. That money is gone. So
18 that's the way it is. The President may, My Lord, dismiss people, appoint people, create
19 institutions, remove institutions. The Governor may do, the President may do under 356.
20 Those are, for those people, irreversible actions. That is why.. that is why Your Lordship has
21 said, "356 is draconian, it should be very sparingly used." If the unfortunate circumstances, if
22 the unfortunate circumstances require that for a defined period of time the system of
23 governance is changed under 356, if those unfortunate circumstances exist and a very narrow
24 area of judicial review is permissible. It doesn't arise because there is no challenge before Your
25 Lordships. A bald prayer without the necessary averments, it's a challenge. Then My Lord one
26 has to accept the consequences of 356, but that's in the alternative. If I am right on my
27 construction My Lord is the proviso quite frankly, minus the Constituent Assembly, it fell
28 away. So you just added the State Legislature and then you acted for the State Legislature.
29 Nothing My Lord dramatic really happened. If one ignores that also, if we are right of the
30 proviso, then none of those questions arise. That My Lord is the submission unless there's
31 something else I could assist Your Lordship.

32

33 **CHIEF JUSTICE DY CHANDRACHUD:** Thank you, Mr. Salve. That would be all. Thank
34 you, Mr Salve.

35

36 **HARISH SALVE:** Much obliged.

37

1 **CHIEF JUSTICE DY CHANDRACHUD:** Yes, Mr. Attorney.

2

3 **ATTORNEY GENERAL R. VENKATARAMANI:** With the leave of my learned friends, I'll
4 try to be as plausible to conclude my submission. I don't want to eat into their time too. There
5 are a couple of things. Your Lordship will note in my written submissions. Page 41, I have, the
6 Lordships leave, I have a two page note.

7

8 **CHIEF JUSTICE DY CHANDRACHUD:** Yes, definitely, you can [UNCLEAR]

9

10 **ATTORNEY GENERAL R. VENKATARAMANI:** Which I have forwarded. It's like a
11 summary of my submissions. No. It's been given to the Court Master. Before.. let me I open.
12 Before that, there are three broad reflections I want to share with the court.

13

14 **CHIEF JUSTICE DY CHANDRACHUD:** That's what you call opening out.

15

16 **ATTORNEY GENERAL R. VENKATARAMANI:** Yeah. Before I read that, Your Lordship
17 will just make a note of three broad reflections, what they are. One is the history of President
18 Rule in J&K. In that regard, I have my submissions at Page 41 of my written submissions.
19 You'll just make a note of that. So three broad points I would like to place before the Lordship.
20 One is the history. Then under scope of 356 and then sovereignty. And finally on finding upon
21 370. So on these three aspects I request Your Lordships to just make a note of the relevant
22 pages in my written submission, at Page 41. Just briefly sketch the history of President Rule in
23 J&K. Your Lordships can make a quick note of Paragraph 2 of this... under this heading. So it
24 says, 'There is no constitutional injunction barred there during the imposition of the President
25 Rule under Article 356. Any measure under Article 370 cannot be undertaken.' So I say they
26 can be undertaken. So the following orders which I have spelt out in the Paragraph 2 are
27 examples of such exercise or measures. And thereafter, Your Lordship just make a note of two
28 or three paragraphs here. Paragraph

29

30 Paragraph 5, paragraph 6, and then paragraph 7. May I just read paragraph 7. These are at
31 page 42 of my written note. They try to point out in the forenoon that the canvas, which needs
32 to be addressed, is of such a complicated issue that it won't be put in a strait jacket. So I'll see
33 in paragraph 7, 'With all political choices a political action may not be free from this kind of
34 judicial review. This would be a qualified statement. The combination of choice of measures
35 to be undertaken by reason of the duty imposed under Article 355 and the authority always
36 available under Article 3 of the Constitution of India will all be matters of a class of decision
37 making and deliberation which will deserve deference and not scrutiny.' May I [UNCLEAR] it,

1 may I put it like that. Then... also kindly make a note of paragraphs 9 and 10 in the same
2 sequence. Particularly paragraph 10. Page 43 and that follows that extract from **Bomma**.
3 Very carefully worded provisions about the political ticket, and pursuing the political wisdom,
4 et cetera. Following that paragraphs 9 and 10. We just quickly read them. '**SR Bommai**,
5 principles on justiciability of the exercise of power by the President may not be mechanically
6 extended to circumstances of imposition of Presidents Rule, in the context of matters such as
7 external aggression and internal disturbances, and more particularly in the context of the
8 dynamics in relation to the border states.' In paragraph 10 - 'consequently C.O. 272, which can
9 be treated as a product of consolidated stock taking of decades of internal disturbance and
10 unrest in the state of J&K is a valid exchange of power with the President to achieve a larger
11 constitutional and public interest aim.' That's how that aspect ends. Then on scope of 356
12 kindly turn over to page 47 of the written note. I'll just quickly take Your Lordships through a
13 few paragraphs. Well, in paragraph 1, I talk about the Preamble and paragraph 3...

14

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

16

17 **ATTORNEY GENERAL R. VENKATARAMANI:** And thereafter, in paragraph 3, I quickly
18 read that. 'On a plain reading of Article 356 is obvious that the makers of the Constitution gave
19 [UNCLEAR] a very wide and extraordinary powers to the President in the Article 356, such
20 power the President can exercise either in the receipt of a report from the Governor of State,
21 or even otherwise. On being satisfied that a situation that is, in which the Government or the
22 State cannot be carried on in accordance with the provision of the Constitution, the procedural
23 proclaim, any and all of the following. So having a regard to the amplitude of the power,,' Then
24 kindly turn to paragraph...wait, that's why in **Badarinath**...Your Lordships will just make a
25 note of the judgment that's available in volume...volume...

26

27 **CHIEF JUSTICE DY CHANDRACHUD:** **Badarinath** was cited by the Solicitor.

28

29 **ATTORNEY GENERAL R. VENKATARAMANI:** That's right, paragraphs 25 and 26 of
30 **Badarinath**.

31

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

33

34 **ATTORNEY GENERAL R. VENKATARAMANI:** Kindly make a note of those two
35 submissions in paragraph 5 and 6 here. Also, please make a note of paragraph 8, where we
36 have set out how proviso to Article 3 has been suspended during Presidential proclamations

1 Article 356. In the following case.. we given a list of all those cases where... therefore, it is not
2 something, a departure here. It's in tune with the constitutional practice.

3 [NO AUDIO]

4

5 **CHIEF JUSTICE DY CHANDRACHUD:** The other things...*Bomma* ..and
6 *Badarinath* we've, of course seen. The Solicitor cited both the judgements...so..

7

8 **ATTORNEY GENERAL R. VENKATARAMANI:** Just make a note of both the
9 paragraphs...paras 10, 13 in this note. Then I quickly run through this, My Lord, kindly turn
10 to page, please revert back to page 16.

11

12 **JUSTICE SANJAY KISHAN KAUL:** Go back to 16?

13

14 **ATTORNEY GENERAL R. VENKATARAMANI:** Try to do...talk something about the
15 Sovereignty issue, the Division, and then you have the thesis that you have retained something
16 with you..

17

18 [NO AUDIO]

19

20 **ATTORNEY GENERAL R. VENKATARAMANI:** I don't propose to read in excess the
21 extract from the book any what we'll do is..

22

23 **CJI CHANDRACHUD:** We'll go through the submissions in the evening today. If there's
24 some further query, then we can pose it to you in the morning.

25

26 **ATTORNEY GENERAL R. VENKATARAMANI:** Can I just quickly therefore take Your
27 Lordships to that two-page note we just.. then I'll complete.

28

29 **CJI CHANDRACHUD:** This one? Yes.

30

31 **ATTORNEY GENERAL R. VENKATARAMANI:** I'll proceed to read it. 'The process of
32 constitutional integration of J&K bias, all the resemblance with the pros of constitutional
33 integration of various territories of India namely, democratization, combined with the merger
34 of small States, formation of Union State, the idea of having Constituent Assemblies, for
35 framing constitutions, et cetera. There was no distinct or special compact with Union of India
36 and J&K as far as the constitutional integration process was concerned. The political
37 compulsions which intervene in the case of J&K resulted in the formalization for the pros of

1 Integration is enacted in Article 370. This formulation of the process has no flavour of a
2 distinct special or a special compact, the object being constitutional integrations.'

3 May I proceed now? Then two - 'Whereas 3 is about Article 370 on behalf of the petitioner self-
4 serving propositions away from the text and context of the provision and the intent and
5 content of the provision. The context, namely, the deliberations required for the extension
6 application or the provision of the Constitution of India in J&K, to J&K in order to suit its
7 needs and requirements and it's ultimate constitutional integration is the object of Article 370.
8 This process is expected to be completed in the course of deliberations by the Constituent
9 Assembly at one level, having regard to all the constitutional orders issued before 1957 and
10 Section 5 of the J&K Constitution. It can be stated, the process of integration was complete. At
11 another level, taking stock or the issuance of constitutional order by the President beyond
12 1957. The majority of which is in the nature of constitutional updating. It can be stated the
13 updating has been perceived as a continuing link. We're open to the President to take a final
14 stock of the Exercising Authority under Article 371 (D) and to decide as to whether there is a
15 need of updating exercise at all or the need for any other invitation of Article 371 (D). This
16 power of the President is not limited in a condition by any practice in relation to Article 370 in
17 the past. All propositions relating to sovereignty, external or internal, divided or shared are
18 completely inappropriate in the context of J&K. There's no distinction between constitutional
19 integration and assimilation of J&K and the other parts and territories of India, which
20 integrate the Union of India. There's no basis for an artificial line drawn between internal and
21 external sovereignty. All statements about federalism appears on political practice. What
22 matters is arrangement of powers and authorities in regard to the units of the federal structure.
23 Once the arrangement is drawn in the ways of submergence, if any attribute of sovereignty,
24 it's only the arrangement to be looked into. There is no room for any subsisting elements or
25 attributes of sovereignty thereafter. Part 18 of the Constitution of India is a composite scheme
26 calling for its flexible application, having regard to the fundamental mandate of securing the
27 integrity in Unit of India. The application, the provisions of Part 18, in the case of border States
28 and the appreciation of factors to be reckoned in the regard will not be justiciable, It is open
29 to the President and the Parliament to act both under the scheme of Part 18 and the plenary
30 powers under Article 3, which is not conditioned by the provisions of Article 356. No rights in
31 relation to representative democracy have been taken away. Reorganization of States include
32 temporary or other rearrangement rights to serve the integrity of federalism and the unity and
33 integrity of the country. All rights are available for exercise only if the Unity and Integrity are
34 intact. The doctrine of necessity is flexible, long history of internal disturbance, lack of
35 availability of real measures of rights and justice of matters that can be legitimately taken into
36 account for paving the paths or due course rearrangements. No person can have a vested
37 interest in favour of a perennial state of undress and all instruments of law which have not

1 subserved peace and justice, have no inherent justice right to exist or continue. However, it's
2 submitted that all measures are taken as a due process granted and to be pressed into service
3 to act in exceptional circumstances.' That summarizes the submissions and Your Lordships ..
4 just I'll give a quick note onto my written submission to indicate which part probably will come
5 in a certain sequence. I am thankful to Your Lordship's kind indulgence.

6

7 **CJI CHANDRACHUD:** Thank you.

8

9 **RAKESH DWIVEDI:** So, let me begin with a deep breath. 14 days of wait and did some
10 hiccups finally on the pitch. However, My Lords, we are dealing with Kashmir, one goes to
11 Kashmir, 14 days are not enough. I think the first I will vouch for that. And even a month will
12 be My Lord, less. There is so much beautiful scenery and so much beautiful and nice people
13 and nice culture. So what one thing is there with this proceeding where learned counsel...when
14 you play a match on the pitch, then you don't watch the scoreboard. Forget it. So one thing is
15 clear My Lord, that the learned counsels on my right, they have very ably put forward the case
16 for the rights which the people of Kashmir or at least some of them feel vest in them and the
17 desire to see the continuance of 370. Nobody can say that the lawyers who are not from Delhi,
18 they have taken full care of the interests of those who believe in the continuance of 370. And
19 even the world who is watching should see that the emotions with regard to Kashmir are not
20 only running in the veins of people of Kashmir, but the whole of the people of India. They are
21 concerned with Kashmir. One way or the other. That's a different matter. Which way the
22 judgment goes is another matter. But we are all concerned with Kashmir. That's the stature of
23 Kashmir in the hearts of all the people, 1.40 crores. The other aside is...My Lord, that I was
24 wondering taking a cricketing analogy [UNCLEAR] aside that when we walk into the pitch the
25 opening batsman was one finds with the guards and thigh guards and elbow guards and
26 helmets nowadays. But our opening batsman, the learned Solicitor General when he walked
27 up he did not want any pads et cetera and that reminded us of the period of Sunil Gavaskar,
28 he never had wear headcaps and all that only the skullcap was there. So he didn't start by
29 saying, these Constitutional Orders had the carry the presumption of validity. These are all
30 available My Lords to the states to stand up and say which Your Lordships will of course keep
31 in mind. One, that there is a presumption of validity which they have the burden is on them to
32 show that unquestionably, undoubtedly the only conclusion is what they are canvassing for.
33 The second principle, My Lord, is that if there are two views possible.. if there are two views
34 possible with regard to 370, Sub-Article 3,

35

1 **RAKESH DWIVEDI:** Then that view should be adopted, which sustains the exercise of
2 power rather than it defeats that exercise of power. So, the burden on them is to show that
3 what they can vest for, is the only view possible.

4

5 **CHIEF JUSTICE DY CHANDRACHUD:** Mr. Dwivedi, which 'IA' are you appearing in? I
6 would just like to...

7

8 **RAKESH DWIVEDI:** I'm appearing, My Lords, in writ petition 1070 of 2019 and... I'm sorry,
9 IA Number 84479 of 2022, I apologize, in writ petition 1070 of 2019 and writ Petition number
10 1162 of 2018. My Lord, both of them are, by far the most popular PIL petitioner in the court
11 today.

12

13 **CHIEF JUSTICE DY CHANDRACHUD:** Mr. Nandlal Sharma?

14

15 **RAKESH DWIVEDI:** No, no, nowadays he is not that popular. Mr. Upadhyay, My Lords..

16

17 **JUSTICE SANJAY KISHAN KAUL:** Your arguments, Mr. Dwivedi, have to be very brief.
18 Arguments have to be very brief. Because Mr. Upadhyay feels there is a delay in justice
19 occurring, so therefore, there must be very, very [UNCLEAR] sized arguments. It's his view in
20 public domain..

21

22 **RAKESH DWIVEDI:** In fact, one question which has troubled all of us is when My Lord,
23 the Chief Justice asks how much time you will take. So My Lords, now being towards the end,
24 it won't be too long My Lord, but let me see how crisp I can be. So these are the two
25 fundamental basic principles. And in constitutional matters My Lord, it's always possible to
26 take two views. Even if the basic structure doctrine My Lords, was 7:6 My Lords. So these are
27 all always highly debatable. Ultimately, Your Lordships have to decide, which is a better
28 proposition to take place. Just as in that case, what tilted the balance was, that if an absolute
29 power is granted to amend every part of the Constitution, then many of the fundamental values
30 can suffer destruction, My Lords. So therefore, that caused the tilt. But there also Your
31 Lordships did not say - basic structure cannot be touched; It can be abridged, but not
32 destroyed. That was the concept. So coming to 370, My Lords, I have some divergence from
33 what Mr. Salve submitted. It's not in opposition to what Mr. Salve submitted, but some
34 divergence. Yes. In our camp, fortunately, there is little divergence or contrast. Unlike because
35 those who are claiming that that's the only submission while I find a lot of contradictions
36 amongst the lawyers understanding. Some saying something, some trying to say quite opposite
37 to that. But that apart. My divergence My Lords, is about the character of the power of the

1 President. Mr. Sibal said - it is Executive, President's power, Mr. Salve says - it's Legislative. I
2 say that this power is a Constituent Power, much wider than Article 368. The fact that it is
3 vested in the President, is for the special reasons which existed when it was framed. It's a
4 Constituent Power, a power, because Your Lordships and the five Judges judgment say
5 **Puranlal Lakhanpal**, 2 probably, that modify is very wide in the face. You can say even 136
6 will not apply. Ordinarily independence of judiciary ultimately touches My Lord 136. It will be
7 struck down as base, while it's in basic structure. So the power to modify and accept under (D)
8 is very wide.

9

10 [NO AUDIO]

11

12 My Lord, there are five kinds of constituent powers in the Constitution. The first was the
13 original constituent power in exercise of which the Constitution was framed. The widest term.
14 You can, could have framed anything you wanted, whatever kind of federal structure you
15 wanted. The second My Lord is, the ancillary constituent power. That is something My Lords,
16 like Article 238 was, that for a certain period of time the federal structure stands suspended.
17 The Central Government will control Part B States and develop those structures and see,
18 ensure that it comes up at level. And that's very important. It doesn't apply to Kashmir. That's
19 one thing. But the idea was that the Central Government should take steps to bring it up at par
20 in those States. Part B States. The other was 306. In the Chapter of 'Free Trade and Commerce',
21 where certain States were very much interested in continuing with the power of taxation,
22 particularly My Lord Travancore, Cochin, because being on the port their entire income was
23 found based on the export and import duties. So therefore, 306 permitted for a certain period,
24 those States to impose, levy and collect tax. The 370 is another power My Lords, of that kind.
25 All three, the purpose is to have some time period, some temp period, so that bring it to the
26 level of the normal federal level. Asymmetry, My Lord, is a completely different concept. Some
27 tribal area may be lagging behind, some state may be lagging behind, some state may have
28 some special features so you may for some time allow them certain special treatment. All these
29 detailed provisions, which I read out to Your Lordship My Lord 371G too, dealing with the
30 Northeast and Andhra Pradesh, Mizoram, etc. They have nothing to do with bringing at par.
31 That is to protect the tribals and so on. But these three articles stand on a different footing,
32 and their objective is to give a certain breather, a certain time so that in due course, of course,
33 the manner of alignments, how it will be brought in are different.

34

35 **CHIEF JUSTICE DY CHANDRACHUD:** Article 238 was not limited in time, right?

36

37 **RAKESH DWIVEDI:** No. But ultimately by '56 it was...

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CHIEF JUSTICE DY CHANDRACHUD: It was...

RAKESH DWIVEDI: It was deleted to be a permanent feature. That's what I mean to say. Under the policy documents, which I will read out to Your Lordships to the relevant portions only, would show that the idea was because there are different Indian States were in a different state of development. Some were so small they could not hardly afford to have a Legislature et cetera. So, a state structure could not be supported by them. So like even in Himachal Pradesh they had to be collected in put in one, so many Union of States had to be carved out. Many small States had to be just merged. They could not afford to have a state. And even those who formed a Union, they hardly had a Constitution there. It required a time period to build a Constitution for the United States. So for various reasons, in various phases, things developed. So finally, the federal structure, which was formed, even at that stage there were pulls and pressures. So certain compromises struck. And these three articles, therefore are ancillary constituent power. They are cont...this is very significant for example, for 370, the process which started with the framing of the Constitution. It was understood that this is to last. They don't fix a time period, though they have put it in Part 21. No specific time period is put there but it is expected that in due course as Nehruji and Gulzari Lal Nandaji said in their speeches as Prime Minister that slowly, B(1), B(2), and D will be used, and the alignment process will happen. And slowly the time will come where really nothing remains, then, but them at par and finish it off. This is meant therefore to slowly align it, bring it at par and terminate. So that continued process and that's why it's an ancillary constituent power. The third is the amendatory constituent power in 368. And in the context of 368, I will just give the paragraphs separately of the different Judges who held that the power under 368 is Constituent and that's why *Golaknath* was overruled. Though ultimately in the process what was created was the super *Golaknath*. So the limitations in *Golaknath* were only fundamental rights, but now it's a much wider domain. Essentially what I rely upon on those portions where the ordinary law and the Constituent power have been distinguished. And the distinction pointed out, is that where you are amending the Constitution, Constitutional provisions, then that power is Constituent power. Ultimately 368... So therefore and if you compare 368 and 370 located in the Constitution in proximity, the width of amendatory power at least as the law stands now, basic structure cannot be amended there. But here so far nobody has paid any heed to the basic structure. 35(a) has come in and a whole lot of things... 136 was applied much later. So Comptroller Auditor General came much later. So all the basic fundamental features were they were missing. So it's much wider than the amendatory power. It cannot be described as an ordinary executive power of the President or even a power which is Legislative in the nature of an ordinance making power.

1

2 So what Your Lordships deal with today is a constituent power. And this constituent power,
3 My Lord, is laced deeply with elements of Act of State. To illustrate Article 370 Sub-Article 3.
4 If the proviso was not there, which lasted for a few years from '51 to '57, then it is nothing but
5 an Act of State. Anytime He could have said - end to 370. So the Constitution makers instead
6 of leaving it for the State to Act, Supra-Constitutional, to annex a State, they provided a
7 particular procedure, to avoid that happening, so that it happens, as far as possible, with
8 concurrence, consultation, recommendation, and a period of time lapses when it is felt, by the
9 people as a whole, in the country, that the time is right. That's what Ayyangar said. When the
10 time is right, Jammu and Kashmir will stand at par. So who decides, My Lord, when the time
11 is right? 373 will not continue because of emotional reasons My Lord, sentimental reasons. As
12 My Lord Justice Gavai had said that this case can't be decided on sentiments. Sentiments are
13 on both the sides and of variety of kinds. So those sentiments have to be kept outside the doors.
14 It is the President, My Lords, and the President means the Council of Ministers and Ministers
15 who are collectively responsible to the Parliament

16

17 **CHIEF JUSTICE DY CHANDRACHUD:** Do you call this ancillary constituent power?
18 Because the President has the power to amend the Constitution and its application to Jammu
19 and Kashmir.

20

21 **RAKESH DWIVEDI:** I say ancillary, only for this reason that it is a continuation of the
22 process which began with the insertion of 370. In that sense, I am saying ancillary otherwise..

23

24 **CHIEF JUSTICE DY CHANDRACHUD:** It's constituent according to you, because any
25 power by which you can amend the Constitution itself. Because it says that the President can
26 determine which provisions of the Constitution shall apply with exception and modifications..

27

28 **RAKESH DWIVEDI:** Modifications..

29

30 **CHIEF JUSTICE DY CHANDRACHUD:** So, the President is vested with the authority to
31 apply or re-fashion the provisions of the Constitution, in relation to the State of Jammu and
32 Kashmir. Consent, concurrence is a separate issue. Therefore, it partakes of a constituent
33 Power, according to you..

34

35 **RAKESH DWIVEDI:** That's right. So not only what the Constitution of India will be in
36 relation to Jammu and Kashmir, because on that depends what the Constitutional ambit will
37 be of the J&K Constitution. As the Lordships head up... please, to observe based on their own

1 Constitution of Section 5, as this expands, that contracts. So therefore, this power is having a
2 direct impact on the reduction of the scope and ambit, the playfield for the J&K Constitution.
3 So it's not only an unusual power, but a power which is of a very wide scope and wide impact,
4 wide consequences, wide ramifications, for the whole of the country.

5

6 **CHIEF JUSTICE DY CHANDRACHUD:** Very significantly, any modification cannot be
7 brought about by the Legislature of J&K are under the Jammu and Kashmir Constitution.
8 Modification has to be brought about within the rubric of the Indian Constitution.

9

10 **RAKESH DWIVEDI:** Indian Constitution, that's right. And one of the proclamations, the
11 first one of the Yuvraj Karan Singh, as he then was, was that this Constitution of India will
12 define the relationship between the State and the Union. 25th November, 1949, that's very
13 important. I'm not reading it. Your Lordships have seen that. J&K Constitution was not there,
14 so this Constitution will define, that's a very potent expression My Lords. So therefore, My
15 Lords, it's not an ordinary legislative power and [UNCLEAR] I'm so sorry.

16

17 **CHIEF JUSTICE DY CHANDRACHUD:** So say if entry 82 of the Union list is applied. The
18 J&K, there's no provision in the... I just took 82 not for any reason. I picked one entry. There
19 is no provision in the J&K Constitution by which they can say that - Look, we don't want 82
20 hereafter. Because the application or non-application of provisions of the Indian Constitution
21 has to originate within the Indian Constitution.

22

23 **RAKESH DWIVEDI:** They are asking for anything is insufficient, inconclusive, of no avail.
24 Of course, I am not belittling it ,My Lord. After all two... one State and Union relationship is
25 involved. If a State is asking for something of certainly, My Lord, the Union should consider
26 and give it a thought and if possible accept. But that's a different dialogue. It's not talking and
27 speaking to each other as Mr. Gopal Subramanian, was saying. And lot of talking and speaking
28 and whispering also goes on in political sphere My Lord, in every law, when it is made.
29 Sometimes they meet outside, in the lobbies and sort it out. Or sometimes it goes to select
30 committees and so on. So talking and speaking and whispering and all that is neither here nor
31 there. That doesn't result in a compact. If something two parties go outside and sort it out and
32 then the Bill is passed with some change or without changing. What happened, My Lord, when
33 370 was being tabled? Your Lordships have seen there was hardly any discussion because the
34 Government said that do not debate too much because the advantage will be taken by the
35 warring State across the border, before UN. There was no debate. And in 1952, Mr. N.C.
36 Chatterjee said that at that time you did not allow us to speak, saying that Pakistan will take
37 advantage of it. But now in '52, when he put up questions, of course Nehruji answered it. We

1 are only, not critical of anything, that one has to place oneself in those times and where it is
2 difficult for us to go on a flashback in these cases. Difficult times. So he answered it then. But
3 those questions were not put. So one can't put reliance on the speech of Mr. Ayyangar or this
4 or that speech of Mr. Sheikh Abdullah. There were divergent interests also, clashing interests
5 also at that time in play. It doesn't detract from the stature of any of the political leaders.
6 Sheikh Abdullah was a great personality, political leader. Nehruji was a great leader. Sardar
7 Patel was a great leader. But what of that? Churchill was a very great leader. My Lord. But
8 after the Atlantic Charter was thrashed out on the seas with President Roosevelt when he was
9 posed with the question, what about India? He said, this charter doesn't apply to the India.
10 They are colonies. It's only meant for France and Poland, et cetera in Europe which lost
11 freedom, and their territory to Hitler. So they're all great leaders but they grapple with their
12 situation in the interest of their nation. And in this case when 370 was being drafted, please
13 bear this mind My Lord these circumstances which were prevailing then. And one more very
14 vital circumstance. We have been hearing My Lords that sometimes, I've read through the
15 Constitutional Assembly debates also, many books also. They all said war is going on between
16 India and Pakistan. What was that war My Lords? Somehow, My Lord, we are still, the lips are
17 pursed and we don't want to speak about the truth. Who was the Supreme Commander of the
18 Armed Forces? Auchinleck. All the three Generals of India were British. All the three generals
19 of Pakistan were British. What was this war My Lords? Churchill had designed there itself that
20 India has to be partitioned. Geopolitics. This war was a British war. They created it on both
21 sides. The raiders came from where? Northwest Frontier province. After two terms, Mr.
22 Cunningham, who had been Governor in Northwest Frontier Province, he was brought back
23 in July. Just before the election, referendum. The raiders were trained, sent on trucks with
24 weapons of Army. Pakistan Army had just been split from India. And the biggest, starkest
25 example is who was fighting My Lords. What is this POK today? Two-thirds of POK is Gilgit-
26 Baltistan. Who fought the war there? Not the raiders. It was Major Brown who was the Regent
27 there. He was posted again in July, just before that by Cunningham. And he... this is
28 a[UNCLEAR] My Lord, mutiny. He killed all the forces of Maharaja. Ansar Ahmad was posted
29 there and he was arrested and he.. in four days, he hung the flag of Pakistan and he handed
30 over to Cunningham. He sent some Mr. Alam from Pakistan Army and he took over by Gilgit-
31 Baltistan. Where is the war with Pakistan? It is British. But we close our eyes to all these. Then
32 it is the Raiders fighting across borders. Raiders could not by themselves come up to Srinagar.
33 The war had reached almost this Skardu and Kargil. To that closeness to Tibet... Sorry, Leh.
34 So it was a war of a different kind. But nobody could say it because Mountbatten was there as
35 the Governor General. Again must have the leaders, our leaders must... maybe having some
36 reason that even though Jinnah said, I will not accept any British Governor General. But the
37 party said no, we are ready to accept the Governor, you continue with Indian Governor

1 General. So what is this war, Governor General? And not only this. When the war began, what
2 they constituted a Defence Committee of the Cabinet. And Mountbatten was made the
3 Chairman of that. Excellent situation, Mountbatten is Chairman of Defence Committee.
4 Auchinleck is the Supreme Commander of Forces. All generals are British and one Britisher
5 and is mutinying. And when he returns to England, he's given the Medal of the Britain Empire,
6 so that's the position of the war. So when you read the Constitution and 370, please bear in
7 mind these things, in what circumstances, our leaders were moving through. And when we
8 were about to push them back, My Lord and back and recover the territory, they deliberately
9 stopped the war at a point of time and got the reference to the United Nations, because if we
10 had gone up to Mirpur and behind, then that connection would have been off with Gilgit-
11 Baltistan. Now these are hard facts, nobody can dispute it. It is in these circumstances My
12 Lord. And what was the United Nations, the same very power which for geopolitical reason,
13 the US and UK, which wanted to partition India, they were made the Arbiters. Fortunately for
14 us to Pakistan refused to vacate POK. So that resolution is dead. There's no need talking about
15 United Nations. But at that time look at the enormity of the situation. In which 370 has been...
16 we can't interpret it, therefore, My Lord with...a tool of... interpretative tool toolbox. Maxwell
17 cannot answer this. [UNCLEAR] cannot answer this. Grace cannot answer all this. None of the
18 judgments so far which have been delivered in this court are helpful at all to reach a conclusion
19 except ***Sampath Prakash***, which dealt with to some extent with the situation after the
20 expiry of the dissolution of the Constituent Assembly of Kashmir, that in that alone. Rest are
21 all in different contexts, principles we can help, take help of, but this situation if lost sight of,
22 creates problems at both ends.

23

24 You accept their contention. Then this becomes permanent. There is a proviso under 368. We
25 can't amend it. Go by the root of 370 and 370 is permanent. And therefore, My Lord, we are
26 left at the mercy of the local vested interest, which does not always coincide with people's
27 interests there. So you...therefore, look at the consequences of both sides. On one side, if you
28 accept our submission, the right of the people of Jammu and Kashmir gets expanded and they
29 don't suffer, My Lord. Right to property is a matter of the rich and the neo rich, My Lord. The
30 poor people there hardly are..19(1)(F). They are hardly concerned. But even those smaller
31 people, who have small houses, etc.,. So certainly it has meaning. But then 300A is there, which
32 virtually subsumes. Now it's a human right, under the Constitution. So nothing is lost. Not
33 even 19(1)(F). Nobody can confiscate because of 300A. So, 31... and may not be exactly at par
34 with 31, but substantially it is there. So nothing is lost. They are put at par. The basic structure
35 of federalism is protected. I don't know how the submissions were made that 'Federalism', is
36 affected. So keep it in mind. This is 'Federalizing', at par.

37

1 **CHIEF JUSTICE DY CHANDRACHUD:** According to them, federalism is affected
2 because you reduce from a State to a Union Territory.

3

4 **RAKESH DWIVEDI:** Unless you accept asymmetry is basic structure, then they are affected.
5 Asymmetry is never a basic structure. They are for special conditions. A symmetrical dealing
6 with a state..

7

8 **CHIEF JUSTICE DY CHANDRACHUD:** Mr. Dwivedi, this matter apart, the existence of
9 a State is a very vital element in the federal.

10

11 **RAKESH DWIVEDI:** I am not on the..

12

13 **CHIEF JUSTICE DY CHANDRACHUD:** The existence of a State, the continued existence
14 of State is integral to federalism in India.

15

16 **RAKESH DWIVEDI:** My Lordships, I will humbly request Your Lordships. I'm dealing with
17 C.O. 273. 272, which deals with 356, some of that has been answered by the Solicitor General
18 or whatever. Your Lordships will consider that. Supposing My Lords, for a moment, for my
19 submission, please assume that 272, and the Act is not there. Because it's my case, what I am
20 canvassing for is, irrespective of 356 invocation and Article 3 invocation, 273 is sustainable on
21 the angle of 370 main part itself. It says that Parliament is recommended and we are passing
22 it. Obtaining the recommendation of...

23

24 [NO AUDIO]

25

26 **RAKESH DWIVEDI:** So far as involvement of Parliament is concerned, it comes in two
27 ways. One is the.....

28

29 **CHIEF JUSTICE DY CHANDRACHUD:** Mr. Dwivedi, just to sort of break a little bit. You
30 spoke of, there were five constituent powers.

31

32 **RAKESH DWIVEDI:** Yeah. The fifth one I have mentioned.

33

34 **CHIEF JUSTICE DY CHANDRACHUD:** We got third. We have the original constituent
35 power by which the constitution came. Second was ancillary constituent power. The third was
36 amendatory constituent power. That was the third.

37

1 **RAKESH DWIVEDI:** The fourth My Lord is like the provisions, like Article 3 and 4, where
2 amendment of schedules relating to states and their structure, et cetera, Article 3 and 4, they
3 can be altered and by a law of Parliament, and it is provided that they are not to be treated as
4 Amendment under Article 368.

5

6 **CHIEF JUSTICE DY CHANDRACHUD:** Then can that be treated as a constituent power
7 at all if it's not an amendment to the Constitution?

8

9 **RAKESH DWIVEDI:** No. If they are amending the schedule to the Constitution. Their levels
10 are different.

11

12 **CHIEF JUSTICE DY CHANDRACHUD:** But the Constitution tells that it's not really an
13 amendatory power.

14

15 **RAKESH DWIVEDI:** So therefore, I'm saying that these are the five different ways in which
16 the power is being conferred. This is one another way...

17

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

19

20 **RAKESH DWIVEDI:** Where they say that you can make a change in the Constitution...
21 because my postulate is that every change in the Constitution itself if brought about is a
22 constituent power.

23

24 **CHIEF JUSTICE DY CHANDRACHUD:** Alright. That's the fourth?

25

26 **RAKESH DWIVEDI:** And the fifth is My Lords, Article 1(C), where this court has held that
27 if you acquire some other territory then it says...no, I'm sorry. Article 2, My Lords. two.

28

29 **CHIEF JUSTICE DY CHANDRACHUD:** Two, two.

30

31 **RAKESH DWIVEDI:** I'm sorry My Lord, Article 2.

32

33 **CHIEF JUSTICE DY CHANDRACHUD:** Parliament may, by law.

34

35 **RAKESH DWIVEDI:** Yes, admit new States on such terms and conditions that it thinks fit.
36 Again, My Lord, very wide. So while admitting the A,B or C country let's say My Lord, some
37 bordering city of China My Lord. They are very interested in naming our cities My Lord. If that

1 is admitted just aside My Lord. [UNCLEAR]. So if it is admitted, then My Lord the terms and
2 conditions can be fixed.

3

4 **CHIEF JUSTICE DY CHANDRACHUD:** Therefore, your argument is that the exercise of
5 the power in the Article 370 (3) is a constituent power exercised by the President.

6

7 **RAKESH DWIVEDI:** So Your Lordship's judicial review has to be on that basis. And when
8 the Lordships expound 370, it has to be with that in mind, My Lord.

9

10 **CHIEF JUSTICE DY CHANDRACHUD:** The level of deference would be much higher
11 than even the level of deference to an ordinary piece of legislation.

12

13 **RAKESH DWIVEDI:** Ordinary piece of legislation. Executive Order, then Wednesbury
14 Principles and every, all those things will come in, whether Your Lordship will bear judicial
15 restraint, that's on the other side of it.

16

17 **CHIEF JUSTICE DY CHANDRACHUD:** That's the exercise.

18

19 **RAKESH DWIVEDI:** Yes. If it is legislative. And as Your Lordship put Article 14. How it will
20 come, whether it will succeed or not is quite another thing. But amenable if Your Lordship
21 [UNCLEAR] But if it is constituent power, My Lord, which is continuing and is part of the
22 Constitution making, part of federalizing. This is part of Constitution making, part of
23 federalizing Jammu and Kashmir at par with other states. I will read two State policies one by
24 one place similar before the Constituent Assembly by the State Department and the other the
25 speech of Sardar Patel, where they spelt out the policy. This was a departure from that policy.
26 And departures, My Lords, are not permanent. They can never be permanent. The policy is,
27 states, that is the Indian States and the British Provinces under the Government of India Act
28 should be brought at par, at equal level, that was the policy. And placed in October and
29 November 49, just before the adoption of 370.

30

31 So 370 was a departure being made because of circumstances, political pulls and pressures
32 and the circumstances which I narrated. So therefore, you have to therefore, consider this as
33 a continuing process which was meant to be terminated and 75 years is a pretty long time for
34 federalizing Jammu Kashmir at par with other States. That means that the power was rightly
35 vested in the President and was properly exercised by them. It was not that in 1957, one may
36 ask that if my contention is accepted, that immediately after dissolution of JKCA the President
37 could have terminated. Yes, he could. It's a high political policy. It's an Act of State. There were

1 some States where forces were sent. That can't be questioned that how Hyderabad was
2 brought, how Junagarh was brought in. How a referendum was done. All those things are in
3 the past and they were Act of State. Mr. Sibal said - had there been another route

4

5 **CHIEF JUSTICE DY CHANDRACHUD:** Act of State is Executive, right?

6

7 **RAKESH DWIVEDI:** So Executive.. nothing prevents the Constituent Assembly from
8 putting a power in the Constitution itself. So that it is...what was expected was that the
9 Constituent Assembly when it sits, it might well take a decision that please align us at par, the
10 recommendation part of it. The proviso was merely to enable the JKCA to look at the
11 advantages of the Federation.

12

13 **JUSTICE KHANNA:** Mr. Dwivedi, What was pointed out by the other side was...

14

15 **RAKESH DWIVEDI:** Yes.

16

17 **JUSTICE KHANNA:** When you frame the Constitution, when you enact the Constitution
18 then it's probably exercising Constituent Power. What happens thereafter will be either in the
19 realm of Legislative Power or the Executive Power, if you go by this...

20

21 **RAKESH DWIVEDI:** That's not right. And that's my contention. They are not correct in
22 that. It's not always that 368 is not purely Legislative and Executive.

23

24 **JUSTICE KHANNA:** You are equating 368 also to constituent power, yes? By saying that it
25 is also a constituent power. That way it is. Whenever you will be amending the Constitution,
26 you'll be making changes in the Constitution. But that exercise cannot be equated with the
27 Constituent Power for the simple reason, constituent power has the power to go from a scratch
28 from zero point.

29

30 **RAKESH DWIVEDI:** Not necessary. Amendatory Power is Constituent.

31

32 **JUSTICE KHANNA:** Yes, amendatory power is certainly there.

33

34 **RAKESH DWIVEDI:** This is amendatory, My Lord, you can...much wider.

35

36 **JUSTICE KHANNA:** No, the question is not that. The question is, can the amendatory
37 power under 368 be taken to the level of constituent power as to both...

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RAKESH DWIVEDI: I never said that, My Lord.

JUSTICE KHANNA: You're not saying that?

RAKESH DWIVEDI: No.

JUSTICE KHANNA: So what you are saying...therefore, they're really speaking is jurisprudentially there won't be any difference.

RAKESH DWIVEDI: There won't be My Lords. The nature of power is completely different that just to be realized, an Executive Power of the President... for example, he recommends financial bills should be passed. That's a different kind of power.

JUSTICE KHANNA: That's correct.

RAKESH DWIVEDI: So, the President has a whole lot of role to play under the Constitution. All roles are not at par. For high policy reason this was given. This proviso to 368 is because the Government of India did not want to go through the route of 368 every now and then. So if you want to do away with 370, go to 368, then two-thirds majority and then maybe somebody will say State is affected, so ratification by majority of States. So an easier... because the policy was to put at par. Therefore, it was since the policy is given, alignment is the question. Alignment may take such time as the circumstances permit. Nobody can predict how much time it will take. So this was provided here. Keep also one more aspect in mind. The framers of the Constitution knew that a President of India is a continuing office. It will not lapse after any point of time. Whether it is part of basic structure or not. But even if it is not, nobody expected that the President of India Office, high office, in which the Executive Power vests will vanish. So it was a continuing power. They also knew that Jammu and Kashmir Constituent Assembly is an ephemeral institution. So they had two institutions, one permanent, one ephemeral. They are being brought in into a relationship in 373 with a not-withstanding. So, now My Lord, ephemeral ...expiry of an ephemeral institution impacts the permanent institution of the President. That can never happen. If that were the intention, what was so difficult in 370 for to add a few words that with the expiry of the JKCA, if I may use this short, JK Constituent Assembly, then My Lord, the main power will also lapse. The farmers are very well aware of cessation of certain exercise of power after certain period, be it 356, 352, ordinance making power....place in six months, if you don't place, it will lapse. My Lords have dealt with in *Krishna Kumar Singh*. Even 249. So there are so many situations, they are

1 aware. They are casting the languages of different provisions with this expression, that it will
2 seize, for different reasons in different cases. Why is it that they are refraining here? Certainly
3 it could not have been in their mind, My Lords, that this will remain for all times to come My
4 Lord, till eternity, the relationship of Jammu and Kashmir State, as a federal unit with India,
5 will remain different for no reason whatsoever. And as My Lords had put a query to them, if I
6 may just adopt that, supposing My Lords, through the route of, with concurrence and
7 consultation, everything has been adopted. So, why do we want to keep this relief? For
8 sentiments My Lords? So it has to go someday, My Lord, somewhere. And what is it that
9 remains? Today it may not be a shell, but close to a shell. And my learned friend Zaffar Shah
10 said - we have sentiments. Yes, we understand that. If I live for too long, a lot with a particular
11 provision, there will be sentiments, My Lords. No difficulty, My Lords. We appreciate that, we
12 honour that, we respect that sentiment. But equally, just a human life, My Lord, a time comes
13 when you have to bury it. We have emotions, we have sentiments, but we have to bury, we have
14 to cremate. So that's what is in mind, My Lord. Then, please, therefore, Your Lordships, are
15 acting as a part of a Constitution-making process. This adjudication, is not apart from... the
16 completely disjointed and disregarding that process. Most of other things Your Lordships have
17 already noted, My Lord, this 'temporary here', 'temporary that' heard. They say marginal note.
18 Somebody says, temporary is only object, not the time period. This is not the way My Lords.
19 Your Lordships in **Bommai** have construed. Sometimes Your Lordships take help of the
20 marginal note, sometimes Your Lordships doesn't My Lord. But here My Lord, the
21 conglomeration of 370, along with all other provisions originally there. I am excluding the
22 special provisions. All the provisions were temporary. Somewhere time period was fixed,
23 somewhere time is not fixed, but all intended to lapse. There are temporary provisions
24 elsewhere also, like 306. So they are meant to go. Don't hang on it. Nobody hangs on My Lord,
25 a body which is just a shell. It causes only... My Lord, I can understand people with good
26 intention, they respect that emotion. There will be a host of other people who will take
27 advantage of that. And in Kashmir, they have taken it. There have been time and time again
28 calls for plebiscites, independence. In fact, in 1964, just before his death, the Prime Minister
29 Nehru, he had sent Sheikh Abdullah, brought him back as Statesman, sent him to Pakistan
30 with a message that you be a bridge between India and Pakistan, and he was going to be POK,
31 when Nehruji unfortunately expired. So he had to return from there. So, I mean that emotion
32 which is created at that time in '52, '53. Why will a person be kept in a jail for 18 years long.
33 He suffered. Yes. He contributed to India, but he stood also with his own emotions. We all
34 respect all those emotions My Lord. Nobody condemns an emotion in human life, in a nation's
35 life, in a state's life. These emotions arise and die. So for emotional reason, My Lord, 370, I
36 think it's time to bury and that's what was intended when the framers brought in 370 and that's
37 how it is, 373. Therefore, C.O. has to be upheld My Lords. Now look at it once more, My Lord.

1 We are like seven men and the blind men and the elephant My Lord. So we are all putting our
2 perspectives with Your Lordships, My Lord. So Your Lordship will kindly receive that and find
3 out what is the whole integrated whole. 7 is a small question. Your Lordships have been putting
4 the question, My Lord. So far as JK Constituent Assembly is concerned, there are only two
5 provisions - 372 and 373 proviso. In one, JKCA doesn't come. As My Lord Justice Khanna has
6 pointed out, it is between executive and exec, the President and the Government of State. Now
7 kindly see, why is there My Lord a difference between the language of 2 and 3? The first point
8 My Lord is that the proviso refers, when it refers to Constituent Assembly of the State, it refers
9 to Clause 2. Recommendation of the constituent assembly of the State referred to in Clause 2,
10 shall be necessary. Now **Sampath Prakash** has very positively held that, that is dissolved,
11 matter ends, power continues. Now it is the same Constituent Assembly which is contemplated
12 in the proviso. Not different. So on a parity of logic that judgment, the reasoning of that
13 judgment, of course, they were dealing only with 2, not 3, so in that sense it is different. But
14 the logic on parity is available, and therefore I submit that that concludes the matter virtually.
15 Sub-Article 2 is dead. Defunct. But Sub-Article 1 continues, that is **Sampath Prakash**.
16 Likewise, proviso is defunct. The main part continues. And My Lord Justice Kaul, has in that
17 **Shah Faesal** case applied Stare Decisis. The doctrine of Stare Decisis, of course, is not an
18 absolute principle, but in this case, an attempt was made without success. Now that apart, My
19 Lord, Kindly see while 2 says - 'If the concurrence of the Government of the State referred to
20 in 1(B)(2), or second proviso be given before the Constituent Assembly for the purpose of
21 framing the Constitution of India as convened, it shall be placed for such decision.' The word
22 is 'decision' here. Why it is 'decision' there and 'recommendation' here? Perhaps, My Lord,
23 there is one reason which I wish to place. And if it commends to Your Lordship, it is a decision
24 here because what is being considered by the Assembly is the concurrence given by the
25 Government of State.

26

27 Concurrence, if Your Lordship comes back to the first B(2)- 'Such other matters in lists with
28 the concurrence of the Government of the State.' The concurrences of the Government of the
29 State and the decision is to be given with regard to the concurrence, no decision has to be given
30 with regard to the order passed by the President. The Presidential Order, whether it collapses
31 because of the decision, is a question which is not arising...hypothetical question... but the
32 decision is, JKCA is a superior body to the Government of the State. Therefore, the word
33 'decision' has been used. When an order passed by a subordinate goes before the higher
34 authority, then it is either a decision or an approval. The concurrence of the Government of
35 State of JK goes before the Pres... the JKCA. Therefore, the expression used is 'decision'. But
36 when it comes to the proviso to 3, the President is not subordinate to the JKCA. He exercises
37 the Sovereign Democratic power of the Republic of India. Which is constituent in nature.

1 There are two constituent powers in play. One superior, one subordinate. Therefore, the
2 expression is used is 'recommendation'. A recommendation of an inferior authority when it
3 goes before a superior authority can never be binding. [NO AUDIO]Even if the Constitution
4 says there's a prerequisite. [NO AUDIO] That also if the body is a temporary body.

5

6 **CHIEF JUSTICE DY CHANDRACHUD:** So according to you, the word 'recommendation'
7 in the proviso refers to the existence of a recommendation and not the nature or the content
8 of the recommendation?

9

10 **RAKESH DWIVEDI:** That's right. I'm putting a question to myself. Supposing the JKCA
11 had recommended a particular provision, a particular structure for the Executive or for the
12 Legislature of the State or let's say, suspension of fundamental rights. Will it be open to the
13 President or not as a Constituent Body to say 'no'? How can it be forced upon him? And he
14 said you will suspend, delete Part 3 for Kashmir. Hypothetical. Part 3.

15

16 **CHIEF JUSTICE DY CHANDRACHUD:** Hello for about a little while. There's a matter
17 before Justice Kaul, sitting in a three-judge Bench that won't take very long. And thereafter,
18 we'll resume immediately, As soon as...

19

20 **JUSTICE KAUL:** That will hardly take 5-10 minutes.

21

22 **RAKESH DWIVEDI:** We'll be here...

23

24 **CHIEF JUSTICE DY CHANDRACHUD:** As soon as that bench is over, we will continue.

25

26 **JUSTICE KAUL:** How much time would you take more?

27

28 **RAKESH DWIVEDI:** My Lord?

29

30 **JUSTICE KAUL:** How much time more?

31

32 **RAKESH DWIVEDI:** That's what I said in the beginning My Lord[UNCLEAR].

33

34 **JUSTICE KAUL:** [UNCLEAR]

35

36 **RAKESH DWIVEDI:** I would say, stop me when I'm repeating.

37

1 **CHIEF JUSTICE DY CHANDRACHUD:** No, Mr. Dwivedi, don't put that burden on us. I
2 can't ever exercise that. We leave it to the conscience of the lawyers to be satisfied that you
3 have made your points in given time.

4

5 **RAKESH DWIVEDI:** I will not take...I'll try to be My Lords...and our batsmen are very few
6 My Lord, so we will con...

7

8 **CHIEF JUSTICE DY CHANDRACHUD:** None of your batsman are tail-enders, they are
9 all top order batsmen; you see.

10

11 **RAKESH DWIVEDI:** Except me, My Lord.

12

13 **RESPONDENT'S COUNSEL:** We'd like to believe, especially when it comes from Your
14 Lordship at 4pm.

15

16 **CHIEF JUSTICE DY CHANDRACHUD:** After Mr. Dwivedi, it will be Mr. Giri. And then
17 Mr. Jethmalani, Don't say how much time, we'll just...

18

19 **PETITIONER'S COUNSEL:** This is what My Lords. We are for those... we are four
20 petitioners who have filed..

21

22 **CHIEF JUSTICE DY CHANDRACHUD:** So please do adjust time, so that... by lunch... by
23 lunch tomorrow we'll be done with this side.

24

25 **RAKESH DWIVEDI:** My Lord, that's not possible.

26

27 **PETITIONER'S COUNSEL:** My Lord, I'll take one hour because I'm appearing in one writ
28 petition.

29

30 **CHIEF JUSTICE DY CHANDRACHUD:** Sorry. Not possible..

31

32 **PETITIONER'S COUNSEL:** My Lord, I'll take half an hour..

33

34 **CHIEF JUSTICE DY CHANDRACHUD:** So you just come down from 1 hour to half an
35 hour... in 5 seconds..

36

1 **RAKESH DWIVEDI:** My Lords, we are dealing with an argument spreading ten days My
2 Lords..

3
4 **MR. GIRI:** Could it be possible... we, of course, My Lords curtail our time tomorrow, but Your
5 Lordships are giving us time till 1 pm, there are some persons My Lords...

6
7 **RAKESH DWIVEDI:** We have taken only four days, My Lords. The Learned Attorney
8 General Says doctrine of proportionality should be...

9
10 **HARISH MEHTA:** They took 9 days.

11
12 **RAKESH DWIVEDI:** 10 days.

13
14 (CHATTER)

15
16 **CHIEF JUSTICE DY CHANDRACHUD:** So what we can do is that Mr. Dwivedi, we will
17 give you half an hour tomorrow. Then Mr. Giri, Mr. Jethmalani, and Mr. Guru Krishna
18 Kumar... 20 minutes each...so 1 hour between the three of you, half an hour for Mr. Dwivedi...

19
20 **MR GIRI:** My Lord, give us at least half an hour and we want to stick to a timeline. It is
21 not[UNCLEAR]

22
23 **Mr. JEHTMALANI:** Please don't curtail us now. If Your Lordships feel that we are repeating
24 anything.

25
26 **CHIEF JUSTICE DY CHANDRACHUD:** We are never doubting your ability to make
27 points for even a couple of hours thereafter. We're not saying that, but... we now have to bring
28 it down to a close now.

29
30 **MR. GIRI:** Between 30 to 45 minutes. Definitely not beyond that. And this, My Lords,
31 systematically over the last one week, we have been pruning our submissions so that it stays
32 within the time frame.

33
34 **CHIEF JUSTICE DY CHANDRACHUD:** All right, please continue tomorrow morning.

35
36 **JUSTICE KAUL:** 30 minutes extending to 45 minutes is a [UNCLEAR]

37

1 **RESPONDENT'S COUNSEL:** [UNCLEAR] 20 minutes.

2

3 **MR. GIRI:** Personally, I won't exceed 30 minutes.

4

5 **CHIEF JUSTICE DY CHANDRACHUD:** When you start with the assumption of 20, you
6 ought to be [UNCLEAR]

7

8 **RAKESH DWIVEDI:** Their tailender took 2 hours, My Lord.

9

10 **JUSTICE SANJAY KISHAN KAUL:** That's fine. That much we will give, no problem.

11

12 **MR. GIRI:** Could Your Lordship kindly give us half day on Monday? Then My Lords may
13 hand over [UNCLEAR]

14

15 **CHIEF JUSTICE DY CHANDRACHUD:** We'll see.

16

17

18

END OF DAY'S PROCEEDINGS