

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

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

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

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

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TRANSCRIPT OF HEARING

03-August-2023  
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**CHIEF JUSTICE DY CHANDRACHUD:** Sorry for the delay. Yes.

**KAPIL SIBAL:** There's a nuanced My Lords interpretation of 370 that... would My Lords be kind enough to turn to Documents, Volume 3, PDF page 13. Let me, My Lords, preface my submission by saying this that there were substantive provisions of the Constitution of India that were to be made applicable to Jammu and Kashmir. The directive principles of state policy, or even 356. These were all done through the application order. So that's the power under D, with consent, with concurrence. Take fundamental rights. That's nothing to do with the lists My Lord. 371(d)(1), and two tops of the lists by law, particular lists, Instrument of Accession only those four items, that's B(1). B(2) other lists. That only refers to lists. That's 370. Then you come to My Lords, the application of Constitutional Orders to Jammu and Kashmir. Now qua any law passed under the lists, if it relates to, My Lords Instrument of Accession, consultation. If it relates to other things, concurrence. But substantive provisions of the Constitution were made applicable My Lords, that also with concurrence. And this was being done between 1951 and 1957 when the Constitution came into force. Then the Constitution took over.

**CHIEF JUSTICE DY CHANDRACHUD:** This was between 1951 and 1957?

**KAPIL SIBAL:** After that also there were application orders. Because 371(d) My Lords, continued in operation. So that's why I want to show you the 1954 Constitutional Order which superseded the 1950 Order. And it'll show My Lords what was done. So nothing was ever done without concurrence, except My Lords, for those four items. Never, till date. So now kindly see page 13, PDF 13, Volume 3. Documents My Lords, Volume 3, PDF 13.

**JUSTICE SANJIV KHANNA:** Page number?

**KAPIL SIBAL:** Page 13, PDF page 13. Running page 406 My Lords.

**JUSTICE SANJIV KHANNA:** 14th May notification?

**KAPIL SIBAL:** Yes My Lords, yes. Now kindly see My Lords, by this time the Constitution is not in place. But they have superseded the 1950 Order. So all orders hereafter were with respect to 1954 Constitutional Order. Because 1950 was superseded by 1954. So every other

1 order was under 54. Now let me just show that to Your Lordships. The following order made  
2 by the President is published for general information. The Constitutional...

3

4 **CHIEF JUSTICE DY CHANDRACHUD:** Just one second. I just need only one minute to  
5 get back.

6

7 **KAPIL SIBAL:** I am sorry.

8

9 **CHIEF JUSTICE DY CHANDRACHUD:** I was focusing on something in the Constitution.  
10 Which volume were you?

11

12 **KAPIL SIBAL:** Documents, Volume 3, PDF page 13 My Lords, 13.

13

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

15

16 **KAPIL SIBAL:** Says the Constitution Applications to Jammu Kashmir Order, 1954 in  
17 exercise of the powers conferred by Clause 1 of Article 370 of the Constitution, the President,  
18 with the concurrence of the Government of the State of Jammu and Kashmir is pleased to  
19 make the following order. The Order may be called the Constitution Application to Jammu  
20 Kashmir Order, 1954. It shall come into force on the 14th of May 1954 and shall thereupon  
21 supersede the Constitution application to Jammu Kashmir Order, 1950. Now, see what  
22 happens thereafter. The provisions of the Constitution, which, in addition to Article 1 and  
23 Article 370, because that's Clause C, My Lords, shall apply in relation to the State of Jammu  
24 and Kashmir, and the exceptions and modifications subject to which they shall apply shall be  
25 as follows. Now preamble. That's the power under D, in this concurrence.

26

27 So, My Lords, you see part 1 to Article 3, there shall be added the following further proviso,  
28 provided further that no bill providing for increasing or diminishing the area of the State of  
29 Jammu and Kashmir or altering the name of boundary of that state shall be introduced in  
30 Parliament without the consent of the legislature of that state. Now, this is passed by the  
31 Constitutional Order applicable to Jammu and Kashmir. That's the solemn promise, My  
32 Lords, that has been made, that you will not change the boundaries. And that's with  
33 concurrence. And that's exactly what they did, without concurrence.

34

35 **CHIEF JUSTICE DY CHANDRACHUD:** Mr Sibal, why is it that... what is the distinction  
36 between the consultation with the Government of the State, which is referred to in the first  
37 proviso to D and in Clause 1 of B? Because Clause 1 of B also refers to consultation with the

1 government of the state and the first proviso to D also refers to consultation with the  
2 government of the state.

3

4 So it shouldn't be a surplusage. There has to be a meaning for why there are two separate  
5 provisions in relation to the same....

6

7 **KAPIL SIBAL:** I must explain that. I must explain that, because if you look at My Lords, B(1),  
8 it says, make law. It's not in relation to the same thing. So it says make law with respect. So it  
9 only deals with the lists. If it comes to Instrument of Accession, those four items.

10

11 **CHIEF JUSTICE DY CHANDRACHUD:** Actually, I was looking at it this way possibly. I  
12 mean, just thinking aloud, maybe wrong. Correct me if I'm wrong. B(1) refers to the  
13 specifications, of specification of matters on which... which are covered by the Instrument of  
14 Accession in respect to which Parliament can make laws. That is B(1).

15

16 **KAPIL SIBAL:** Correct.

17

18 **CHIEF JUSTICE DY CHANDRACHUD:** Here it refers only to the specification of matters  
19 in the union list, which are covered by the Instrument of Accession and which Parliament  
20 would have the law or law making authority. That is B(1).

21

22 **KAPIL SIBAL:** Absolutely.

23

24 **CHIEF JUSTICE DY CHANDRACHUD:** Now the first proviso to D would obviously not  
25 cover that category. Otherwise there's no need to put the first proviso there.

26

27 **KAPIL SIBAL:** My Lords, those only...

28

29 **CHIEF JUSTICE DY CHANDRACHUD:** Just see, just one second. See, the first proviso  
30 also says, provided that no such order which relates to the matter specified in the Instrument  
31 of Accession of the state referred to in para 1 of Sub Clause B, shall be issued except in  
32 consultation to the Government of the State. So the first proviso also refers to the matters  
33 covered in Clause 1 of B. It also refers to consultation, and B(1) also refers to consultation.  
34 Now, possibly the meaning which can be attributed to the proviso to D is this. D says, such of  
35 the other provisions of this Constitution shall apply in relation to that state, subject to such  
36 exceptions and modifications as a President may make. So, where the President is making an  
37 exception or modification to another provision of the Constitution, then the President has

1 been given the power. But what the proviso says is, the first proviso says that if the President  
2 is making a modification or reduction, adaptation in respect of a matter which is referred to in  
3 Clause 1 of B, namely something covered by the Instrument of Accession, then you require  
4 consultation. The second proviso, then, says that no such order which relates to matters other  
5 than those referred to in the last paragraph will be made except with the concurrence. I was  
6 wondering, just thinking aloud, what D says is that, if the President is making an adaptation,  
7 sorry, exception or modification in the application of any provision of the Constitution to the  
8 State of Jammu and Kashmir, then you require either a consultation, first proviso, or a  
9 concurrence in terms of the second proviso. Right? Now, what happens if the President is not  
10 making any exception or modification at all? Does that require either a consultation or a  
11 concurrence?

12

13 **KAPIL SIBAL:** Yes, My Lord. According to me, yes, But, let me explain.

14

15 **CHIEF JUSTICE DY CHANDRACHUD:** Because this adaptation order which you showed  
16 us, for instance, of 1954, makes modifications. Preamble will apply subject to these exceptions,  
17 Directive Principles will apply subject to these exceptions. But what happens if the President  
18 is not making any exception or modification at all? Then, do you require a consultation or  
19 modification in terms of Clause D?

20

21 **KAPIL SIBAL:** May I My Lords, since Your Lordships...

22

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

24

25 **KAPIL SIBAL:** My Lords, kindly look at B(1) first for a minute. It says the power of  
26 Parliament to make laws for the said State shall be limited to matters in the union list and in  
27 the concurrent list. It doesn't say anything more than that. It specifies the lists under which  
28 they can make laws.

29

30 **CHIEF JUSTICE DY CHANDRACHUD:** Which?

31

32 **KAPIL SIBAL:** [UNCLEAR] law. That's right. They are not... the law has not yet been made.  
33 This only the power.

34

35 **CHIEF JUSTICE DY CHANDRACHUD:** Declared by the Instrument of Accession.

36

1 **KAPIL SIBAL:** So only My Lords, this communication. I'm not talking about, the law has not  
2 yet been made.

3

4 **CHIEF JUSTICE DY CHANDRACHUD:** No, no.

5

6 **KAPIL SIBAL:** So they are correlating the making of the law to the items in the lists. When  
7 it comes to the Instrument of Accession, it has those four items. When it comes to other  
8 matters, it is in the concurrent list, not in the state list, but they are not setting out for the...

9

10 **CHIEF JUSTICE DY CHANDRACHUD:** One very important thing is that Clause B does  
11 not confer the power upon Parliament to enact law for the State of Jammu and Kashmir. It  
12 limits it in certain respects. The power of Parliament to enact law is under 245 and 246.

13

14 **KAPIL SIBAL:** 246 will not apply My Lords.

15

16 **CHIEF JUSTICE DY CHANDRACHUD:** No, but the power is somewhere else apart from  
17 B. B recognizes the power of Parliament to enact a law, because it says the power of Parliament  
18 to make laws for the state shall be limited. It's a limitation.

19

20 **KAPIL SIBAL:** No, it's a limitation...

21

22 **CHIEF JUSTICE DY CHANDRACHUD:** Justice Kaul also says, it's a limiting clause.

23

24 **KAPIL SIBAL:** Yes, qua that list only means qua that list.

25

26 **CHIEF JUSTICE DY CHANDRACHUD:** So, if it were limiting clause, the power of  
27 Parliament to enact the law is traceable elsewhere.

28

29 **KAPIL SIBAL:** No, no, no My Lords. May I now My Lords...

30

31 **CHIEF JUSTICE DY CHANDRACHUD:** Can we say that 370(b) gives power to  
32 Parliament to enact law? No. It limits the power of Parliament to enact a law to a certain extent.

33

34 **KAPIL SIBAL:** I was trying to explain what Your Lord put to me My Lords.

35

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

37

1 **KAPIL SIBAL:** Please allow me.

2

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

4

5 **KAPIL SIBAL:** What I was trying to say was that here what the clause says is that qua the  
6 lists in the instrument of Accession, right, Parliament may make a law, but that will be in  
7 consultation.

8

9 **JUSTICE SANJAY KISHAN KAUL:** It's a double limitation, Mr. Sibal. See, the first  
10 limitation is the Chief mentioned, the <UNCLEAR> of Parliament to make laws for the State  
11 can be limited to. What is it limited to? To matters in the union list and concurrent list. So,  
12 first part is matters in union and concurrent list,

13

14 **KAPIL SIBAL:** Correct. Correct.

15

16 **JUSTICE SANJAY KISHAN KAUL:** But second qualification which in consultation with  
17 the Government or State. There also, you are right, to that extent you are right. It is in  
18 consultation with Government or State, are declared by President to correspond to matters  
19 specified in the Instrument of Accession.

20

21 **KAPIL SIBAL:** Correct.

22

23 **JUSTICE SANJAY KISHAN KAUL:** Governing the accession of State.

24

25 **KAPIL SIBAL:** Correct.

26

27 **JUSTICE SANJAY KISHAN KAUL:** So such parts of union list and concurrent list, which  
28 form a part of the Instrument of Accession because everything else doesn't form a part of  
29 Instrument of Accession. The whole list doesn't. To that extent, Parliament can enact,  
30 Parliament is limited to enacting laws in respect thereof, in consultation with the Government  
31 of State.

32

33 **KAPIL SIBAL:** Absolutely right. That's what I'm saying, too. But they are not, at that moment  
34 the law is not made. They are only saying the contours under which Parliament will enact a  
35 law. The contours with respect to Instrument of Accession are those five, four items,  
36 Communications, Defence, External Affairs, and Ancillary, which I showed to Your Lordship,  
37 the schedule. When it comes to B(2) the contours again of the items in the concurrent list of

1 Parliament may make laws. Again. It doesn't say that law is made. It's only delineates the  
2 contours. Therefore, I'm going to now distinguish it from D, My Lords. That's how I'm going  
3 to...

4

5 **CHIEF JUSTICE DY CHANDRACHUD:** Let's come to D. How would you..?

6

7 **KAPIL SIBAL:** I'm just coming. Then you come to see the provisions of 1 and of this article  
8 shall reply in relation to that State. That's not covered, that's not covered.

9

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

11

12 **KAPIL SIBAL:** So that My Lords, one is integration into India and My Lords, the other is  
13 Article 370. Now come to D, such of the other provisions of this Constitution. Now we are not  
14 talking about lists. Now we are not talking about lists. We're talking about Preamble. We're  
15 talking about 356. We were talking about Fundamental Rights. Each of those orders require  
16 the concurrence of the state. Now I'll show that Your Lordship. Here it is such of the other  
17 provisions of this Constitution. 371(b) doesn't talk of any other provisions of this Constitution.  
18 It talks of the Instrument of Accession and the concurrent list, the contours of the power.

19

20 When you come to other provisions of the Constitution, these may be made applicable. That's  
21 why the order. Now let's read it further. Such of the other provisions of this Constitution shall  
22 apply in relation to the State, subject to such exceptions and modifications as are present in  
23 my order set specified, not referred to 371(b). There's no order, no question of order there. It's  
24 only the contour of the power. Now read, "provided that no such order," that is no such a  
25 relating to D, which means provisions of the Constitution of India to apply to Jammu and  
26 Kashmir. "No such order which relates to matters specified in the Instrument of Accession  
27 referred to in sub paragraph 1 of Clause shall be issued. Kindly note the word issued. That's  
28 the difference between 371(b) and 371(d). Because no orders are issued under 371(b).

29

30 **CHIEF JUSTICE DY CHANDRACHUD:** That's the power to make law.

31

32 **KAPIL SIBAL:** It's only the contours of the power. Your Lordship asked me the difference  
33 between the two. I'm just trying to advance an argument with respect to the difference.  
34 Entirely different.

35

36 **CHIEF JUSTICE DY CHANDRACHUD:** Just one second. According to Attorney General,  
37 there are two... constitutional practice is one thing. We are now looking at just the text of the



1 provision. There are two possible constructions of Clause D. Constitutional practice may seem  
2 to support what Mr. Sibal is saying. One is that D refers to the fact that other provisions of the  
3 Constitution may apply such...

4

5 **KAPIL SIBAL:** Other than 1 and...

6

7 **CHIEF JUSTICE DY CHANDRACHUD:** Other than 1 and 2, such as the other provisions  
8 of this Constitution shall apply in relation to that state, subject to such exceptions and  
9 modifications that the President by order may specify. In other words, if you are making  
10 exceptions or modifications, that's one construction, that if the President is making exceptions  
11 or modifications then if it relates to a B(1) subject, then you require consultation with the state.  
12 If it relates to something other than a B(1) subject, you require consultation, concurrence of  
13 the state. Alright? So, it is only where you are making exceptions or modifications in the  
14 Constitution that it requires either consultation or concurrence. The other interpretation is,  
15 that even if you are not making any exception or modification but you are making some  
16 provision of the Constitution applicable to the State of Jammu and Kashmir, you still require  
17 either consultation or concurrence. Even if you are just bodily lifting it and making it  
18 applicable without exception or modification. That's the second construction of B.

19

20 **KAPIL SIBAL:** That's correct.

21

22 **CHIEF JUSTICE DY CHANDRACHUD:** Now the question is, really which is a more  
23 plausible construction?

24

25 **KAPIL SIBAL:** Actually, if Your Lordships look at the 1950 order itself, it will give an  
26 indication of what was meant. Kindly just leave 54...

27

28 **JUSTICE SANJIV KHANNA:** That's why, Mr. Sibal, the Chief Justice said constitutional  
29 practice does support this view, but there are two plausible constructions which can be made.  
30 One is that the entire Constitution has been adopted in terms of Clause D. What that... if you  
31 require modification or changes in the part, that part, then you require a Presidential Order,  
32 which shall be issued in consultation, not in consultation, with concurrence of the state.

33

34 **KAPIL SIBAL:** I appreciate that, but that will render 3 otiose completely. C will become  
35 otiose. Provisions of the Constitution.

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37 **JUSTICE SANJIV KHANNA:** Yes. C. is something different. C dilutes the article itself.

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**KAPIL SIBAL:** I am on C My Lords. I am not on anything else. When you see other provisions of the Constitution, except for 1 and the 370, you can't touch 370, but let's move forward My Lords. I'll be able to show that to Your Lordships.

**JUSTICE SANJAY KISHAN KAUL:** B is 370 and C is Article 1.

**KAPIL SIBAL:** And 1 is My Lords Integration. So that can't be touched. Part of India can't be touched. 370 can't be touched. All other things can be touched.

**JUSTICE SANJIV KHANNA:** It doesn't say, C doesn't say it cannot be touched. C doesn't say 370 cannot be touched. In fact, Clause, Clause 3 makes it very clear it can be touched.

**KAPIL SIBAL:** By now Your Lordships have, In fact, may I tell Your Lordships something interesting? Because I looked at the original Constitution of India. Learned friend will show it to Your Lordships. It was only a marginal note. It's not the heading of 370.

**CHIEF JUSTICE DY CHANDRACHUD:** It's a marginal note. Absolutely. No doubt about it. It's a marginal note.

**KAPIL SIBAL:** It's a marginal note. And Your Lordships have held in *Kesavananda Bharati* itself, can't look at these notes.

**CHIEF JUSTICE DY CHANDRACHUD:** No, in the sense that, the marginal note doesn't control the meaning of the text.

**KAPIL SIBAL:** C and Article 3, you can't, a marginal note, can't say it is temporary, therefore I read this in this fashion. Can't be done. Anyway, let me My Lords show you. It's very fascinating.

**CHIEF JUSTICE DY CHANDRACHUD:** Yes.

**KAPIL SIBAL:** I'll take a bit of time My Lords. Kindly come to 370 Presidential Order.

**CHIEF JUSTICE DY CHANDRACHUD:** That 1954, I think?

**KAPIL SIBAL:** 1950, same volume.

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**JUSTICE SANJIV KHANNA:** 1950 or 54?

**KAPIL SIBAL:** No My Lords, I'm coming to 50 My Lords. Let me check. Volume 3, PDF page 4 My Lords.

**JUSTICE SANJAY KISHAN KAUL:** This is what you are reading as 13?

**KAPIL SIBAL:** No, I was at the 54 Order and coming back to 1950 Order which was superseded by the 54 Order.

**JUSTICE SANJAY KISHAN KAUL:** This is where?

**KAPIL SIBAL:** This is at PDF 4 in the same volume My Lords. The other one was at 13. This is at 4.

**JUSTICE SANJAY KISHAN KAUL:** This is at 4.

**KAPIL SIBAL:** Yeah.

**JUSTICE SURYA KANT:** Are you referring to CO number 10, Mr. Sibal?

**KAPIL SIBAL:** Yes, yes, absolutely . My Lords, kindly see the index of this 3 pages earlier. Yes. See what has happened My Lords. This will give you the kind of orders that have been passed from time to time. There are by this time about 54 orders. These are probably not all the orders, either.

**GOPAL SANKARANARAYANAN:** Very first page of the volume,

**KAPIL SIBAL:** Yes, yes.

**JUSTICE SANJAY KISHAN KAUL:** The first page of the volume?

**KAPIL SIBAL:** That's right.

**JUSTICE SANJAY KISHAN KAUL:** You're looking at...

1 **KAPIL SIBAL:** This whole index of all the orders.

2

3 **JUSTICE SANJAY KISHAN KAUL:** Orders issued.

4

5 **KAPIL SIBAL:** Yes.

6

7 **GOPAL SHANKARNARARYANAN:** Serial number 1 was superseded by serial number 5.

8

9 **KAPIL SIBAL:** Now read it with me. The order may be called the Constitution Application  
10 of Jammu Kashmir Order 50, which has come into force for the purposes of Subclause B(1) of  
11 Clause 1 of Article 370 of the Constitution. The matter specified in the first schedule to this  
12 order being matters in the union list, this is in consultation. Kindly read the words, in exercise  
13 of the powers of 370 in consultation with the Government or the State for the purposes of B(1)  
14 of clause 1 of 370, the matter specified in the first schedule to this order, being matters in the  
15 union list are thereby declared to correspond to matters specified in the Instrument of  
16 Accession, governing the accession of the State of Jammu Kashmir to the Dominion of India  
17 as a matter, with regard to which the Dominion Legislature may make laws for the State, and  
18 accordingly, the power of Parliament to make laws for that State shall be limited to matters  
19 specified, which Your Lordship, said is the limitation, rightly said. Now come, in addition to  
20 the provisions of Article 1 and 370, again of the Constitution the only other provisions of the  
21 Constitution which shall apply in relation to the State of Jammu and Kashmir, shall be those  
22 specified as a Second Schedule to this Order, and shall so apply subject to the exceptions and  
23 modifications specified in the said schedule and the modification that all references to the said  
24 provisions shall be construed as reference to the [UNCLEAR]. This is applicable to D. First  
25 schedule deals with entries and this deals with D, because you are not to apply. Now the  
26 provisions of the Constitution of India and they are all incorporated in the Constitution of  
27 India, as applicable to Jammu and Kashmir Order. So 356 also comes there, Part 3 comes  
28 there, Preamble comes there, Directive Principles of Policy comes there. But that's all with  
29 concurrence. Therefore, it didn't come at this stage My Lords. That happened later. Then you  
30 went, My Lords, then now kindly see the First Schedule, you have seen? These are those very  
31 entries that we were talking about. And kindly see the Second Schedule. It starts My Lords at  
32 PDF 6 page 17. I'll just for My Lords PDF 6, page 17. Kindly see, exceptions.

33

34 Article 70(1) Provisions of the Constitution applicable. So there was no doubt on this issue, My  
35 Lords. Entirety of part 5, but in part 5, 72(1)(c). 72(3), 133, 134, those are exceptions. Last  
36 column is modification. So it's not just a question of application; it's a question of substantive  
37 understanding of what 370 is. Even if you want to apply a provision without modification, you

1 need consultation with respect to or concurrence. You can't... there's no third way of doing it.  
2 Yeah, that's excluded anyway. We've given the examples. Modifications 54 and 50 shall apply  
3 subject to modifications with the reference therein to the elected members of the Houses of  
4 Parliament to each elected member of either House of Parliament, shall be deemed to include  
5 respectively, a reference to the Representatives of the State in those houses and to each such  
6 representative. So you modify 54 and 55. Then if 247 you modify, 246 shall apply, subject to  
7 the [UNCLEAR] of paragraph 2 of this order, and Clauses 2 and 3 of 246 shall not apply. So  
8 you can't pass a law.

9

10 **CHIEF JUSTICE DY CHANDRACHUD:** So what's the effect of Clause 2 and 3 of Articles  
11 246 not applying in relation to the State?

12

13 **KAPIL SIBAL:** Because residuary powers is with the State.

14

15 **CHIEF JUSTICE DY CHANDRACHUD:** No but 246(2) says, refers to the power of  
16 Parliament and the State to enact laws in the concurrent list.

17

18 **KAPIL SIBAL:** That's fine.

19

20 **CHIEF JUSTICE DY CHANDRACHUD:** No, but if 2 is not applicable, then neither the  
21 State nor the Parliament can enact a law in the concurrent list.

22

23 **KAPIL SIBAL:** Because of 1(b) My Lords. It only tells you the methodology My Lords, that's  
24 all. The point is what My Lord is putting to me is, the President can exercise powers under  
25 370, *dehors* a modification, that's an exercise of plenary power. That's what My Lord is putting  
26 to me. But My Lords this clearly shows that even that exercise has to be done with concurrence.  
27 If it relates to the concurrent list and concentration relates to Instrument of Accession, can't  
28 be done any other way. So it's not a matter of practice alone. It's a substantive interpretation  
29 of 370. Kindly see the first column My Lords, all the Articles apply. Part 11, Part 12, Part 15,  
30 Part 16, Part 17, Part 19, Part 20, Part... everything applies. But in those parts, there are  
31 exceptions and there are modifications. That's set out in the third column. Nobody disputes  
32 that. The whole part applies.

33

34 **CHIEF JUSTICE DY CHANDRACHUD:** Clause 3 of the Order seems to suggest that the  
35 only provisions of the Indian Constitution which would apply to the State of Jammu and  
36 Kashmir are those which are specified in the Second Schedule, and that too with the  
37 modifications which were made.

1

2 **KAPIL SIBAL:** Absolutely, that's our submission My Lords. And then this is superseded by  
3 the 1954 Order. For example, Part 3 at this stage was not to apply. It is not in the Second  
4 Schedule.

5

6 **CHIEF JUSTICE DY CHANDRACHUD:** Let's go to the other..

7

8 **KAPIL SIBAL:** Now the 54 Order.

9

10 **CHIEF JUSTICE DY CHANDRACHUD:** 54 Order.

11

12 **KAPIL SIBAL:** That's Volume 3 again, page 13. PDF 13, yes. In exercise of the powers... Your  
13 Lordship has that? In exercise of the powers conferred by Clause 1 of 370, President with the  
14 concurrence of the Government of the State of Jammu is pleased to make the following order.  
15 The Order may be called the Constitution Application for Jammu and Kashmir Order. So My  
16 Lords, supposing the entire Constitution was to be made applicable, it would require  
17 concurrence, no? Only some are applicable, some are not yet applicable. You will see that 356  
18 comes later. 356 doesn't come at this stage. That would also require concurrence and  
19 concurrence was taken. So any provision of the Constitution of India, which relates to the  
20 concurrent list would be made applicable, subject to the concurrence of the state government.  
21 Consultation and concurrence, Instrument of Accession and concurrent list. And, Article 1 and  
22 3 are out of it . So kindly see My Lords, Clause 2, the provisions of the Constitution, which in  
23 addition to Article 1 and 370, in addition, shall apply in relation to the State of Jammu and  
24 Kashmir, and the exceptions and modifications subject to which they shall so apply, shall be  
25 as follows the same pattern.

26

27 **JUSTICE SANJIV KHANNA:** So, the exception made here is, the entire Constitution is  
28 adopted subject to the modification made. Unlike 1...

29

30 **KAPIL SIBAL:** Other than 1 and 3. Other than 1 and 3.

31

32 **JUSTICE SANJIV KHANNA:** 1 and 3 is already there. Unlike 1950 Order, which had  
33 specific, articles were made applicable. Now, the entire Constitution...

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35 **KAPIL SIBAL:** No, no, no. Because 356 was not applicable as this....

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37 **JUSTICE SANJIV KHANNA:** No. But there would be a clause in this saying 356...

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**KAPIL SIBAL:** It's part by part. Not true, My Lords. Part, see Part 1, Part 2, Part 3. It's part by part. It's not all.

**JUSTICE SANJIV KHANNA:** Is 356 specifically excluded?

**KAPIL SIBAL:** No. At this stage.

**JUSTICE SANJIV KHANNA:** At this stage?

**KAPIL SIBAL:** Excluded>

**JUSTICE SANJIV KHANNA:** It would be excluded.

**KAPIL SIBAL:** After part 5, you have part 9.

**JUSTICE SANJIV KHANNA:** Yes. Come to page 50. 356 is excluded. So, the entire Constitution was made applicable by the 1954 Order, except to the extent of exclusion.

**KAPIL SIBAL:** My Lords, this part 5 is state 11, straight away. There's no question of the entire Constitution being included.

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

**CHIEF JUSTICE DY CHANDRACHUD:** Mr. Sibal, my learned brother may be, with respect right. I will tell you another reason. I will give you another, just apropos what fell from brother Sanjiv Khanna. Just see now Part 3. First, we'll just see one small provision, a Clause 2, Clause 2 of the Order of 1954.

**KAPIL SIBAL:** Yes.

**CHIEF JUSTICE DY CHANDRACHUD:** It says the provisions of the Constitution which in addition to Article 1 and Article 370, shall apply in relation to the State of Jammu and Kashmir, and the exceptions and modifications shall be as followed. Now, one thing is very interesting. The word, only, which we found in the 1950 Order has been deleted in the 1954 Order. So, only goes. Now, let's take, go to Part 3 for a moment. Now, just to test the hypothesis. Now, just see Clause C in part 3. Right?

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**KAPIL SIBAL:** Got it My Lords.

**CHIEF JUSTICE DY CHANDRACHUD:** It says in Clause 3 of Article 16, the reference to the State shall be construed as not including a reference to the State of Jammu and Kashmir. Now, if you see Article 16(3) of the Constitution, it says nothing in this Article shall prevent Parliament from making any law prescribing in regard to a class or classes of employment or appointment to an office under the Government or in local authority within a state, or any requirement as to residence within that State or Union Territory prior to such employment or appointment. Now, if the entirety of Clause 16 were not to apply to Jammu and Kashmir, what was the reason for saying that only Clause 16(3) will apply subject to these modifications?

**KAPIL SIBAL:** Well, the simple reason that My Lords, other Clauses in respect of Clause 3 of the Constitution came into the J&K Constitution later. And I will show that to Your Lordships.

**CHIEF JUSTICE DY CHANDRACHUD:** But is it your contention therefore that...

**KAPIL SIBAL:** Entirety of 16 applies.

**CHIEF JUSTICE DY CHANDRACHUD:** ...16(1) didn't apply to the Jammu and Kashmir...

**KAPIL SIBAL:** It did apply. It applied.

**GOPAL SANKARANARAYANAN:** The Part which is mentioned...

**CHIEF JUSTICE DY CHANDRACHUD:** But how did it apply then?

**GOPAL SANKARANARAYANAN:** No, no. Part 3 applies in full when it says part. Your Lordships may see they have a serial number and then they have A,B,C below each of these parts. So when they mention the part, the part applies in full. Now in that part, A,B,C will tell you the exception or modification of the provisions of the Constitution in that part. So when the part is indicated, the part applies in full. In 1950 Order, it was columned. So, in the second...



1 **JUSTICE SANJAY KISHAN KAUL:** That's what I was saying. See, in the earlier, the  
2 manner of printing of the two notifications was slightly different.

3

4 **GOPALA SANKARANARAYANAN:** Yes, that's all, that's all.

5

6 **JUSTICE SANJAY KISHAN KAUL:** If it is an Article, then what is the exceptions....

7

8 **KAPIL SIBAL:** And the modifications.

9

10 **JUSTICE SANJAY KISHAN KAUL:** Modification exception carved out. In this, the way it  
11 is printed, as I see it, when they say part 3, it means part 3 applies, but....

12

13 **KAPIL SIBAL:** These exceptions of modifications.

14

15 **JUSTICE SANJAY KISHAN KAUL:** ...the column of modifications which were there are  
16 specified underneath it.

17

18 **KAPIL SIBAL:** That's exactly. Nothing, no difference.

19

20 **JUSTICE SURYA KANT:** Other than what has been exclusively excluded, rest of the part 3  
21 applies.

22

23 **KAPIL SIBAL:** That's correct. That's all there is.

24

25 **JUSTICE SANJIV KHANNA:** Mr. Sibal, just come to page number, internal page number,  
26 the first page, 10 of the notification. The provisions of the Constitution. This means the entire  
27 provisions of the Constitution?

28

29 **KAPIL SIBAL:** Page 10 Your Lordships, PDF page 10?

30

31 **JUSTICE SANJIV KHANNA:** Yes, that's a notification, 14 May 1954. 2, Clause 2....

32

33 **KAPIL SIBAL:** Page 30.

34

35 **JUSTICE SANJIV KHANNA:** Of page 30. Yes. Yes page 30. You are right. The provisions  
36 of the Constitution. Which in addition to Article 1 and 370, Article 370, because that is covered  
37 by 3. Now the provisions of the Constitution refers to the entire provisions of the Constitution.

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**KAPIL SIBAL:** Correct, correct.

**JUSTICE SANJIV KHANNA:** Shall apply in relation to the State of Jammu and Kashmir.  
Second...

**KAPIL SIBAL:** You left a word out, which.

**JUSTICE SANJIV KHANNA:** Yes, I'm aware of that. Then second part says, the exceptions and modifications subject to which they shall also apply shall be as follows. So thereafter the exceptions are carved out with regard to each part of the provision of the Constitution which are either not to be applicable or applicable with modification. And if you go down, it specifically says 356 is excluded. In case this was specific inclusion they need not have specified 356 is excluded, because by implication 356 if not mentioned in the schedule would have been excluded.

**KAPIL SIBAL:** My Lords, with the greatest respect when you say, kindly read it. Just see... kindly see Part 18.

**JUSTICE SANJIV KHANNA:** The very fact that some articles have been included....

**KAPIL SIBAL:** Kindly see page 18. Kindly see page 18. PDF page 18.

**JUSTICE SANJIV KHANNA:** Yes.

**KAPIL SIBAL:** Which is this.... see Part 18. 352 the following new clause shall be added, above that.

**JUSTICE SANJIV KHANNA:** Correct, correct.

**KAPIL SIBAL:** Part 18 and therefore, there are exceptions.

**JUSTICE SANJIV KHANNA:** We are then *ad idem*.

**KAPIL SIBAL:** Part applies but there are exceptions and modifications.

1 **JUSTICE SANJAY KISHAN KAUL:** Part 18 applies for example, the modification is  
2 specified below that, then small Clause B 13, Part 3. Small....

3

4 **KAPIL SIBAL:** Therefore, there is no dispute on that.

5

6 **JUSTICE SANJAY KISHAN KAUL:** [UNCLEAR] 356. So these three articles are a part  
7 [UNCLEAR].

8

9 **KAPIL SIBAL:** Kindly see, and also it says the provisions which shall apply shall be as  
10 follows. Which shall apply. They are enumerating the provision that's all, My Lords.

11

12 **JUSTICE SANJAY KISHAN KAUL:** Next after that is what are the modifications or what  
13 is omitted. So mostly the modifications. But some are omissions. For example, in Part 19, if  
14 you see.

15

16 **KAPIL SIBAL:** Yes, I have it.

17

18 **JUSTICE SANJAY KISHAN KAUL:** Article 362 and 365 are omitted.

19

20 **KAPIL SIBAL:** Yes.

21

22 **JUSTICE SANJAY KISHAN KAUL:** 366 Clause 21 will be omitted.

23

24 **KAPIL SIBAL:** Omitted. Correct.

25

26 **JUSTICE SANJAY KISHAN KAUL:** Otherwise the whole of part, other than this will  
27 apply.

28

29 **KAPIL SIBAL:** Will apply.

30

31 **GOPALA SANKARANARAYANAN:** The approach is instead of going provision by  
32 provision and enumerating 395 they went part by part, and they said this whole part applies  
33 subject to.....

34

35 **CHIEF JUSTICE DY CHANDRACHUD:** But what about those parts which are not  
36 specified as part? That is the problem. I am not sure you are right on that.

37

1 **JUSTICE SANJIV KHANNA:** You may not be right on that

2

3 **GOPALA SANKARANARAYANAN:** We have in fact, Volume 1, we have the Constitution  
4 of India, as applicable to Jammu and Kashmir, which shows that this is how it works.

5

6 **JUSTICE B.R. GAVAI:** Part 4 won't apply?

7

8 **GOPALA SANKARANARAYANAN:** No, not at this stage. Not at this stage. Part 3 did not  
9 apply till 1954. Preamble did not apply till 1954. That's exactly the way they proceeded and  
10 this is significant .....

11

12 **JUSTICE B.R. GAVAI:** I think 15?

13

14 **GOPALA SANKARANARAYANAN:** PDF 15 My Lords. The part Your Lordships are  
15 referring to is.... Yes. Yes. So Part 4, Part 4(a) is omitted at that stage. 4(a) came later anyway.  
16 But part 4.

17

18 **JUSTICE SANJIV KHANNA:** One way to look at it is Part 4 will absolutely apply of course,  
19 but without any modification. Where there is modification....

20

21 **KAPIL SIBAL:** That's not the understanding, that's not the understanding of the  
22 Government of India then, that's not the understanding of the State of Jammu and Kashmir  
23 then, that's not the understanding of any authority then. Now we are saying, no, no that was  
24 all wrong. Actually everything is....

25

26 **JUSTICE SANJIV KHANNA:** We are not saying, we are just discussing.

27

28 **KAPIL SIBAL:** And you don't need consent.

29

30 **JUSTICE SANJAY KISHAN KAUL:** Mr. Sibal, as I see it, as I see it, every order extended  
31 different parts of the Constitution to Jammu and Kashmir.

32

33 **KAPIL SIBAL:** That's right.

34

35 **JUSTICE SANJAY KISHAN KAUL:** Now if a particular provision is in modification, it  
36 says so. Now, it may be by provision wise, or it may be part wise, it may be by any method, but  
37 it keeps on extending binding orders that are passed. So first one was provision wise in a sense.

1 This one is part wise because practically the whole part was to apply with certain modification  
2 to the extent that it is not to be applied, it is excluded.

3

4 **KAPIL SIBAL:** That's right. That's the only submission That's the only... and in any case My  
5 Lords, 1 and 370 are excluded.

6

7 **JUSTICE SANJAY KISHAN KAUL:** That is from because of the first notification, separate  
8 Clause C was made. Clause C was made for Article 1.

9

10 **KAPIL SIBAL:** This argument then doesn't take us anywhere because we are dealing with  
11 370. We are not dealing with any other part of the Constitution. So we can, interpret the orders  
12 anyway, any which way you want, but it cannot touch 1 and 370.

13

14 **JUSTICE SANJAY KISHAN KAUL:** Two major points to my mind are this, 1 is your  
15 submission that Article 370 has acquired a permanent feature of the Constitution. That's the  
16 debatable issue this both sides will debate. Next is, suppose it is not permanent, then what is  
17 the manner of abrogating article[UNCLEAR]. Is that procedure followed or not.

18

19 **KAPIL SIBAL:** That's correct.

20

21 **JUSTICE SANJAY KISHAN KAUL:** These are the only two issues as I see it in the whole  
22 thing.

23

24 **KAPIL SIBAL:** I hope I'll try and convince you that it is permanent. I will try and convince  
25 you. Your Lordship says it's debatable and it is debatable. There's no doubt about it.

26

27 **JUSTICE SANJAY KISHAN KAUL:** Both things are debatable means both sides will argue  
28 this point out.

29

30 **KAPIL SIBAL:** Yes, it's really debatable. But I'll tell Your Lordships why it is permanent.  
31 Now for the moment, My Lords, because we have only dealt with the Constitution of India.

32

33 **JUSTICE SANJAY KISHAN KAUL:** Debate will also be on the second point, I look at a  
34 debate whether the procedure has been followed or not followed. They will say we followed the  
35 manner of abrogation. You will say not...

36

1 **KAPIL SIBAL:** Absolutely. Now My Lords, so far I've only referred to provisions of this  
2 Constitution. But Your Lordship will have to look at the Constitution of Jammu and Kashmir  
3 because that Constitution was framed and cleared in 1957. So My Lords, Parliament was only  
4 exercised if it takes over under 356 declares an emergency, it can only exercise the power of  
5 the Legislature. That's what Bommai has said and I take Your Lordships, you can't do anything  
6 more than that. Right? Now, let's look at the provisions of the J&K Constitution, which will  
7 give you an idea as to why it's permanent. Yeah, My Lords I'm sorry, my learned friend is right.  
8 Before we go to that, My Lords kindly see the Volume 1, PDF 132.

9

10 **JUSTICE SANJAY KISHAN KAUL:** You're wanting us to go to PDF 1 now?

11

12 **JUSTICE SURYA KANT:** Volume 1 page, Mr. Sibal?,

13

14 **KAPIL SIBAL:** Volume 1, page 131. 132 My Lords. Now My Lords, kindly see this is the  
15 Constitution of India as applicable to Jammu and Kashmir just before abrogation of 370, and  
16 you'll see...

17

18 **JUSTICE SANJIV KHANNA:** Sorry Mr. Sibal, which page?

19

20 **KAPIL SIBAL:** Page 130.. PDF 132

21

22 **JUSTICE SANJIV KHANNA:** In the same volume?

23

24 **KAPIL SIBAL:** Yes. Volume 1. Volume 1 My Lords, not 3. Now Your Lordships will see the  
25 table of contents at page 43 first.

26

27 **JUSTICE SANJAY KISHAN KAUL:** Which page? You said 132, 43. Which one?

28

29 **KAPIL SIBAL:** 43. 43 first. It's a table of contents are set out.

30

31 **JUSTICE SANJAY KISHAN KAUL:** I may take a little longer to get the page.

32

33 **KAPIL SIBAL:** Sorry My Lords. Sorry about that.

34

35 **GOPAL SANKARANARAYAN:** It's our fault, My Lords. We are prompting him My Lords.

36

37 **JUSTICE SURYA KANT:** Page 56 or?

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**GOPAL SANKARANARAYAN:** 43 sorry. By the contents, Volume 1. Looks somewhat like this.

**CHIEF JUSTICE DY CHANDRACHUD:** There is one [UNCLEAR] make in our written submissions format. In fact, I'm just in the process of issuing a standard operating procedure for filing written submissions on all matters before CB, which is that the index should be hyperlinked So it will be much easier for all the lawyers and for us also. We go to the index and just click on the hyperlink there.

**JUSTICE SANJAY KISHAN KAUL:** 43 is what you're saying?

**GOPAL SANKARANARAYAN:** Yes. The Index.

**JUSTICE SURYA KANT:** 46 is the index.

**KAPIL SIBAL:** Now kindly see My Lords.

**JUSTICE SURYA KANT:** That section starts earlier. Index starts from page 43.

**KAPIL SIBAL:** Yes. 43, 43. No, 43 Your Lordship has that?

**CHIEF JUSTICE DY CHANDRACHUD:** Part 4 doesn't figure in it at all!

**KAPIL SIBAL:** Yes and there's no order omitting it.

**JUSTICE SANJIV KHANNA:** This is which year?

**KAPIL SIBAL:** This is just before 370 was abrogated.

**GOPAL SANKARANARAYAN:** It's taken from a book of 2016, as it stood then.

**KAPIL SIBAL:** Now you see here, My Lords, after Part 6, you have Part 11.

**CHIEF JUSTICE DY CHANDRACHUD:** Part 6, what page is that, Mr. Sibal?

1 **KAPIL SIBAL:** My Lord, Part 6 is at page.... PDF 48 and the next is in.... Part 11 is page 49.  
2 Nothing is excluded. No specific provision. Therefore, the Order says provisions which shall  
3 apply, shall be as follows. That's why My Lords, the 54 Order says what it says. Provisions of  
4 the Constitution, which shall apply.

5

6 **CHIEF JUSTICE DY CHANDRACHUD:** So, notwithstanding the deletion of the word  
7 only, the word which seems to indicate that these are the provisions which will apply.

8

9 **KAPIL SIBAL:** So that's My Lords really.... Now My Lords, in this context, kindly look at the  
10 Constitution of Jammu and Kashmir as it was cleared in 1957. Passed in 1957. And remember  
11 My Lords...

12

13 **JUSTICE SURYA KANT:** We will [UNCLEAR] one more publication.

14

15 **KAPIL SIBAL:** It's not a government publication My Lords. This is not, hopefully not in  
16 dispute.

17

18 **CHIEF JUSTICE DY CHANDRACHUD:** Mr. Sibal you are right that the constitutional  
19 practice, which was followed since the Adaptation Order, proceeds on the basis that  
20 Government selectively applied provisions of the Constitution to Jammu and Kashmir. They  
21 never treated it as if all provisions apply. The Clause D is susceptible of two interpretations,  
22 that the Constitutional practice supports what you are arguing. We will of course have to hear  
23 the learned AG on that.

24

25 **KAPIL SIBAL:** Now My Lords, we move on to what happened in 1957 when the Constituent  
26 Assembly drafted this Constitution and was adopted. Right. And My Lords, remember the  
27 1954 Order came when the Constituent Assembly was there. They had a choice. They could  
28 have said no, we want...

29

30 **CHIEF JUSTICE DY CHANDRACHUD:** 57, what happens in 57. Let's see then...

31

32 **KAPIL SIBAL:** But, I'm just saying the Constituents Assembly was constituted in 1951. I  
33 think on the 10th May, if I remember correctly. And then My Lords, 54 Order was passed. They  
34 could have said, Look, no, no, no. We will abrogate 370 and be part of India without conditions,  
35 and be like any other state. They chose not to and you will see that My Lords in the Constitution  
36 itself. I'll show My Lords, it's better we look at the Constitution...

37



1 **JUSTICE SANJAY KISHAN KAUL:** There is no dispute about the proposition. 370  
2 remained under Constitution. Nobody is arguing that 370 was not there. Otherwise, where was  
3 occasion to abrogate it. Only issue is whether it requires a permanent character which cannot  
4 be touched, or whether there is a methodology right or wrong, there is a methodology by which  
5 370 can be abrogated. That's the first part of the argument as I understand. And in the  
6 alternative argument is, even if you don't accept my first part of the argument, the  
7 methodology was wrong.

8

9 **GOPAL SANKARANARAYANAN:** I am sorry to interrupt, but on this permanent  
10 statement, 370 is in three parts. The first part, our argument is, continues always. Second part  
11 is transitory because it's dealing with what happens before the Constituent Assembly comes in  
12 and Constituent Assembly has to ratify. The third part is temporary while the Constituent  
13 Assembly is there. Just putting it in a nutshell that's our argument.

14

15 **JUSTICE SANJAY KISHAN KAUL:** You are saying according to you, 370 is structured in  
16 a manner...

17

18 **GOPAL SANKARANARAYANAN:** Yes.

19

20 **JUSTICE SANJAY KISHAN KAUL:** ...whereby some part will go away or become otiose,  
21 and some part, some part becomes otiose because in 1957. Some other part becomes otiose  
22 later on. So you say, one has a permanent feature.

23

24 **GOPAL SANKARANARAYANAN:** That's our argument. Constituent Assembly effectively  
25 had a choice to exercise 3 or to allow 1 till 1957.

26

27 **JUSTICE SANJAY KISHAN KAUL:** Your argument is all the choices were available only  
28 till 1957.

29

30 **GOPALA SANKARANARAYANAN:** Yes that's all.

31

32 **JUSTICE SANJAY KISHAN KAUL:** That is your argument.

33

34 **KAPIL SIBAL:** Now let's not debate it.

35

36 **CHIEF JUSTICE DY CHANDRACHUD:** In fact that's why explanation, the explanation  
37 to B contains an exhaustive definition of what is meant by the Government of the State.

1 Government of the State does not say includes the Maharaja. It says Government of the State  
2 means the person for the time being recognized by the President of the Maharaja of Jammu  
3 and Kashmir acting on advice to the Council of Ministers for the time being. Now what  
4 happens when the Maharaja is replaced by an elected Government in Jammu and Kashmir?  
5

6 **KAPIL SIBAL:** Then the elected Government on the aid and advice of the Council of  
7 Ministers....  
8

9 **CHIEF JUSTICE DY CHANDRACHUD:** Where do you get that? Because the explanation  
10 says Government of the State may....  
11

12 **KAPIL SIBAL:** That I'll show that to your Lordship, that's also there. It is part of the  
13 Constitution My Lords. I'll show that.  
14

15 **JUSTICE SANJIV KHANNA:** This explanation was introduced in 1952.  
16

17 **DINESH DWIVEDI:** There's a difference of opinion here.  
18

19 **KAPIL SIBAL:** Leave it, leave it. Let's, you can...  
20

21 **DINESH DWIVEDI:** [INAUDIBLE]. Their case is that 2 and 3 may see post '57. But for some  
22 of us whose argument is that though the [UNCLEAR] goes if we read Clause 2 carefully. So  
23 this is that difference of opinion I want to clarify.  
24

25 **KAPIL SIBAL:** My Lord there is a Government Order of 1965, which says that Sadr-e-Riyasat  
26 will be in the Governor.  
27

28 **JUSTICE SANJIV KHANNA:** '67?  
29

30 **KAPIL SIBAL:** Yes. 1965 Order.  
31

32 **JUSTICE SANJIV KHANNA:** '65. So till '65 did the Maharaja continue to...  
33

34 **KAPIL SIBAL:** Yes, yes My Lords. Then...  
35

36 **JUSTICE SANJAY KISHAN KAUL:** There were separate powers for Sadr-e-Riyasat.  
37

1 **KAPIL SIBAL:** Yes, but My Lord ultimately...

2

3 **JUSTICE SANJAY KISHAN KAUL:** Equivalent to Chief Minister was called the Prime  
4 Minister.

5

6 **KAPIL SIBAL:** Yeah, that's correct. But in '65 he was called the Governor. There's an order  
7 to that effect. So these are My Lord, I think we are traveling a bit too far at the moment.

8

9 **DINESH DWIVEDI:** [UNCLEAR]

10

11 **KAPIL SIBAL:** Now kindly see My Lords, The preamble of the Constitution Your Lordships  
12 will find Volume 2, PDF page 16.

13

14 **CHIEF JUSTICE DY CHANDRACHUD:** Now we are looking at the J&K Constitution?

15

16 **KAPIL SIBAL:** The Constitution of India and the J&K Constitution.

17

18 **CHIEF JUSTICE DY CHANDRACHUD:** J&K Constitution.

19

20 **KAPIL SIBAL:** J&K Constitution?

21

22 **CHIEF JUSTICE DY CHANDRACHUD:** So that is volume?

23

24 **KAPIL SIBAL:** Volume two PDF page 16.

25

26 **JUSTICE SANJAY KISHAN KAUL:** Yes, yes. You want us to go to page 16 of the J&K...?

27

28 **KAPIL SIBAL:** Page 16. Yes, the entire volume is there. Your Lordship has the preamble?  
29 My Lord just find page 5, PDF page 5, Document Volume 2. This, it's the index My Lords.

30

31 **JUSTICE SURYA KANT:** So you're referring to Preamble at Page 16?

32

33 **KAPIL SIBAL:** Yes. But before that My Lords just so that you know My Lords what the  
34 Constitution was dealing with.

35

36 **JUSTICE SANJAY KISHAN KAUL:** Page 5 is Part 3 you're saying?

37

1 **KAPIL SIBAL:** Page 5.

2

3 **JUSTICE SANJIV KHANNA:** You are wanting us to read page 5?

4

5 **KAPIL SIBAL:** Contents, contents My Lords. The State, Permanent Residence, Directive  
6 Principle, State Policy. PDF 5. That's the content, My Lords. You see now, Part 1, Part 2, Part  
7 3, Part 4 and the Directive Principles of state policy now come in. Permanent residence comes  
8 in, come in. Then the State Permanent Residence, Directive Principle of State Policy,  
9 Executive, Governor, Council of Ministers, Advocate General, Contact of the Government of  
10 Business, Composition....

11

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

13

14 **KAPIL SIBAL:** Officers of the State Legislature, disqualification of members. It's really a  
15 replication of what the Constitution, our Constitution provided. Procedure for financial  
16 matters, legislative power, High Court, Subordinate Courts, finance, property, public services,  
17 elections, amendment to the Constitution. This is very important. I will show that to Your  
18 Lordships presently. And then the Schedules, Speaker, Deputy Speaker, and all that. Now,  
19 kindly come to the Preamble, PDF page 16. So, we the people of the State of Jammu and  
20 Kashmir. Now My Lords, the Constituent Assembly has exercised its powers. Drafted the  
21 Constitution, adopted. We the people of the State of Jammu and Kashmir, having solemnly  
22 resolved in pursuance of the accession of the State to India, which took place on the 26th day  
23 of October 1947 to further define, to further define, this is important. To further define the  
24 existing relationship of the State to the Union of India as an integral part thereof. That's Article  
25 1. And to secure to ourselves justice, social... socially, economic, political, liberty of thought  
26 expression, belief faith and worship, equality of status and of opportunity and to promote  
27 amongst us, among us all fraternity assuring the dignity of the individual and the unity of the  
28 nation. In our Constituent Assembly this 17th day of November, 1956 do hereby adopt and act  
29 and give to ourselves this Constitution. Now kindly see, the Definition Cause. In this  
30 Constitution unless the context otherwise requires the Constitution of India means, the  
31 Constitution of India as applicable in relation to the State. Then kindly come to My Lords,  
32 Article... section... Article 3, The State. Relationship of the State with a Union of India. The  
33 State of Jammu and Kashmir is and shall be an integral part of the Union of India. And My  
34 Lords, Sub Clause 3 says, just above that, any reference in this Constitution to the Sadr-e-  
35 Riyasat shall, unless the context otherwise requires be construed as reference to the  
36 Government. This is 1960 My Lords was asking that question. So, My Lords, this shall be an  
37 integral part of India. And then 5. Article 5. The executive and legislative power of the State

1 extends to all matters except those with respect to which Parliament has power to make laws  
 2 for the State under the provisions of the Constitution of India. Then My Lord, the issue of  
 3 permanent residence is dealt with. We're not concerned with that so much. And then you come  
 4 to 35, page 28. PDF 28. This is an important section My Lords. Important Article 35. My Lords  
 5 have that? PDF 28? Council of Ministers to aid and advise the Governor. There shall be a  
 6 Council of Ministers with the Chief Minister as the Head to aid and advise the Governor in the  
 7 exercise of its functions. All functions of the Governor, except those under Sections 36, 38 and  
 8 92 shall be exercised by him only on the advice of the Council of Ministers. So, other than 36,  
 9 38 and 92 My Lords, he will act on the aid and advice of the Council of Ministers. Now, kindly  
 10 come to 38.... 48(a), PDF page 33. This was inserted My Lords in 1975 notwithstanding  
 11 anything contained in this Constitution. If upon the completion of a census, but before the  
 12 final readjustment of territorial constituencies, the Legislative Assembly is dissolved prior to  
 13 the expiry of its duration, and the Governor is satisfied that holding of General Elections  
 14 without delay is necessary he may, after consulting the Election Commission by notification  
 15 direct with the General Election shall be held on the basis of the last preceding delimitation of  
 16 territorial constituency. Then My Lords Article 53 page 37, PDF 37

17

18 **JUSTICE SANJIV KHANNA:** Article?

19

20 **KAPIL SIBAL:** 53 My Lords at PDF 37. That's the session of the Legislature prorogation and  
 21 dissolution. The Governor shall from time to time summon each house of the legislature to  
 22 meet at such time and place as he thinks fit but six months shall not intervene. These are  
 23 provisions of the Constitution also - intervene between its last sitting in one session and the  
 24 date appointed for its first sitting in the next session. The Governor may from time to time  
 25 prorogue the Houses or either House or dissolve the Legislative Assembly. This he can only do  
 26 it on the aid and advice of the Council of Ministers. It's not an exception because the exceptions  
 27 are 36, 38 and 92. This is important because the issue will arise because My Lords there was  
 28 no Council of Ministers when he did this, which is on the 21st of November 2019... 18, 2018.  
 29 My Lord the importance of this is that he can only dissolve the Legislative Assembly on the aid  
 30 and advice of the Council of Ministers. The only exceptions that the Governor has in the terms  
 31 of his exercise of power are 36, 38 and 92, which he need not do on the aid and advice. But  
 32 under 53 he can't do it without the aid and advice, which is what he did. I will come to that  
 33 later.

34

35 Now My Lords 92, which is that exception, PDF page 59. This is a very unique power given to  
 36 the Governor of Jammu & Kashmir. I was mentioning My Lords as far as 53 is concerned that  
 37 power to dissolve the Assembly would only be exercised on the aid and advice of the Council

1 of Minister. So, when he dissolved the assembly on the 21 November 2018, he didn't do it on  
2 the aid and advice. And this Governor's power has to be exercised in that fashion. The only  
3 exceptions are 36, 38 and 92, and I'm now reading 92 for Your Lordships. This is also a unique  
4 provision. Provisions in case of failure of the constitutional machinery in the State. This is PDF  
5 My Lords 59. My Lords have that? Justice Kaul, My Lordship has that?

6  
7 **JUSTICE SANJAY KISHAN KAUL:** Page 50?

8  
9 **KAPIL SIBAL:** 59, PDF 59 Article 92. My Lords have it?

10  
11 **CHIEF JUSTICE DY CHANDRACHUD:** <UNCLEAR>

12  
13 **KAPIL SIBAL:** Now provisions in case of failure of the constitutional machinery. If at any  
14 time the Governor is satisfied that the situation has arisen in which the government of the  
15 State cannot be carried on in accordance with the provisions of this Constitution, the Governor  
16 may, by proclamation My Lords, assume to himself all or any of the functions of the  
17 Government of the State and all or any of the powers vested in or exercisable by anybody or  
18 authority of the State make such incidental and consequential provisions, as appear to the  
19 Governor, to be necessary or desirable for giving effect to the objects of the proclamation,  
20 including provisions for suspending, in whole or in part the operation of any provision of this  
21 Constitution relating to anybody, provided that nothing in this section shall authorize the  
22 Governor to assume to himself any of the powers vested in or exercisable by the High Court,  
23 we are not concerned with that. But this he can exercise without the Council of Ministers,  
24 unlike in the Constitution of India. Why? Because Jammu and Kashmir has a unique status in  
25 the context of its relationship to the Government of India. And My Lords, Clause 3 of this is  
26 important that any such proclamation, whether varied under sub-section 2 or not, shall accept  
27 where it is a proclamation revoking a previous proclamation, cease to operate on the expiration  
28 of six months from the date on which it was first issued. So the proclamation was issued on  
29 November 21st, 2018... I am sorry, on 20th of June. It was to expire in six months' time on  
30 19th December. And My Lords, he, on November 21st, he dissolved the Assembly, and without  
31 reference to the Council of Ministers. But anyway, we'll come to that a little later. Now, most  
32 important My Lords, in the context of what we've been arguing all of yesterday and today is  
33 147, PDF 87. 85 sorry. Oh, sorry.

34  
35 **CHIEF JUSTICE DY CHANDRACHUD:** Amendment to the Constitution?

36

1 **KAPIL SIBAL:** Yes. "An Amendment of this Constitution shall be initiated only by the  
2 introduction of a bill for the purpose in the Legislative Assembly, and when the bill is passed  
3 in each House by a majority of not less than two thirds of the total membership of that House,  
4 it shall be presented to the Governor for his assent, and upon such assent being given to the  
5 bill, the Constitution shall stand amended in accordance with the terms of the bill. Provided  
6 that a bill providing for the abolition of the Legislative Council that we introduced in the  
7 Legislative Council and passed by it by a majority of the total membership of the Assembly and  
8 by a majority of not less than two thirds of the members of the Assembly present and voting.  
9 Provided further, that no bill or amendment," now this is important, "provided further, that  
10 no bill or amendment seeking to make any change in this section or the provisions of Sections  
11 3 and 5 or the provisions of the Constitution of India, as applicable in relation to the state shall  
12 be introduced or moved in either house of the legislature." So, My Lords you cannot amend  
13 370 as it is made applicable of the Constitution, of the Constitutional Order made applicable  
14 to the State of Jammu and Kashmir. So no legislature can even move a bill. This is what makes  
15 it permanent. This is exactly why it is permanent. It had to be temporary, because at that time  
16 there were no Constituent Assembly. It was temporary. It had to be temporary, per force it was  
17 temporary. Even 3 cannot be amended. Section 3 cannot be amended.

18

19 **CHIEF JUSTICE DY CHANDRACHUD:** But can the permanency of Article 370 be a  
20 consequence which follows from the Constitution of Jammu and Kashmir?

21

22 **KAPIL SIBAL:** No, no, it's made applicable to Jammu and Kashmir by an Application Order.

23

24 **CHIEF JUSTICE DY CHANDRACHUD:** No, but you are saying that this provision, Article  
25 147 of the J&K Constitution makes Article 370 permanent. Can the permanency of the Indian  
26 Constitution...

27

28 **KAPIL SIBAL:** Yes, My Lords, kindly see. The 370 was made applicable to the State of  
29 Jammu and Kashmir by an Application Order. 373 My Lords, Sub Clause 3 gets passed to the  
30 Constituent Assembly, no? That Legislature doesn't have those powers. Country, My Lords  
31 what happens is when you impose Article 356, you talk about the Legislature, powers of the  
32 Legislature. Which power, under which power do they exercise that right?

33

34 **JUSTICE SURYA KANT:** Not of the Legislative Assembly.

35

36 **KAPIL SIBAL:** Yes, exactly. That's what I'm saying My Lords.

37

1 **JUSTICE SANJAY KISHAN KAUL:** Then Mr. Sibal, how....

2

3 **JUSTICE SURYA KANT:** Proviso C is applicable.

4

5 **JUSTICE SANJAY KISHAN KAUL:** How can... you are saying Article 147 gives the  
6 permanency to Article 370.

7

8 **KAPIL SIBAL:** Because the Constituent Assembly...I'm sorry, I shouldn't get....

9

10 **JUSTICE SANJAY KISHAN KAUL:** Now, can the Constitution of J&K give a permanency  
11 to Article 370 of the Constitution of India?

12

13 **KAPIL SIBAL:** Exactly. My Lords, all we are saying is that the Legislative Assembly does not  
14 have the power under 370, Subclause 3. That's all that I am saying. Nothing more than that.

15

16 **JUSTICE SANJIV KHANNA:** What you are saying is Legislative Assembly cannot exercise  
17 the power under proviso to Clause 3 of Article 370?

18

19 **KAPIL SIBAL:** Yes. So what, that's what, what they did. They converted the Legislative  
20 Assembly into the Constituent Assembly. That's what they did, My Lords. This is what is  
21 shocking.

22

23 **JUSTICE SANJAY KISHAN KAUL:** On the lighter side, the Parliament did it.

24

25 **KAPIL SIBAL:** I'm sorry?

26

27 **JUSTICE SANJAY KISHAN KAUL:** On the lighter side, the Parliament did it.

28

29 **KAPIL SIBAL:** Yes. So Parliament converted itself into the Legislature, into the Constituent  
30 Assembly of the State. I mean it's unheard of. Yes, no, no means. We'll show it. We'll  
31 demonstrate that. At the moment, all I'm saying is My Lords, you cannot exercise no... the  
32 Legislature cannot exercise powers to amend 373. Even some other party takes over those  
33 powers, then only powers can be exercised, it is the powers of the Legislature. Nothing more  
34 than that. The whole scheme of 356 is if you take over...

35

36 **JUSTICE SANJAY KISHAN KAUL:** Parliament can do it or not?

37



1 **KAPIL SIBAL:** No, My Lord Parliament exercises the powers of the Legislature under 356.  
2 It can't exercise any other power. That's the scheme of 356 which I'll come to later. That's  
3 Bommai My Lords. Now that's settled. You can't abrogate yourself a power that the Legislature  
4 doesn't have. That's why there is an interplay between the Constitution of India, the  
5 Constitution Orders applicable to the State of Jammu and Kashmir and the Constitution of  
6 Jammu and Kashmir, and 370 itself.

7

8 **JUSTICE SANJAY KISHAN KAUL:** That's what you flagged in the beginning when you...

9

10 **KAPIL SIBAL:** That's right. That's the issue.

11

12 **CHIEF JUSTICE DY CHANDRACHUD:** Actually Article 147, the second proviso to  
13 Section 147 of the J&K Constitution would seem to indicate that the provisions of the J&K  
14 Constitution are treated to be subordinate to the Indian Constitution. Which is why no  
15 amendment in the relationship of the Indian Constitution and its application to the State can  
16 be introduced in the State Legislature. The State Legislature cannot change that relationship.

17

18 **KAPIL SIBAL:** Correct. I'm not disputing that. It is the Legislature cannot introduce a bill to  
19 that effect. And what's the procedure? Only under 370. It's only under 370 My Lords.

20

21 **CHIEF JUSTICE DY CHANDRACHUD:** But it is in that sense a subordinate instrument  
22 in its application to the relationship to the Constitution of India.

23

24 **KAPIL SIBAL:** My Lords, kindly see, kindly see. One second. Kindly see, the Constituent  
25 Assembly has now framed the Constitution. The Constituent Assembly has not exercised the  
26 power that it had My Lords to abrogate 370. In that process, the Constituent Assembly, when  
27 drafting the Constitution, decided that nobody can change that status. The Legislature cannot  
28 change that status. Now, whether Parliament on its own can change that status is a separate  
29 issue. But the Legislature cannot change that status. That's the element of permanency, as far  
30 as the Legislature is concerned. Let me put it that way.

31

32 **CHIEF JUSTICE DY CHANDRACHUD:** The Legislature has no authority to change the  
33 relationship between .....

34

35 **KAPIL SIBAL:** That's correct. Why? Because this is not a temporary provision. We'll come  
36 to that. That's clear My Lords. The Legislative Assembly also can't touch the provisions of the  
37 State of Jammu and Kashmir and shall be an integral part of India. Section three. It also can't

1 touch extent of Executive and Legislative power of the State. It can't touch that. It can't touch  
2 370. So, from the point of view of the Constituent Assembly when the legislation was drafted  
3 and the Constitution was drafted, it was clear that this relationship is permanent.

4

5 **JUSTICE SANJIV KHANNA:** Just one question. The proviso to Article 147 of the J&K  
6 Constitution says that no bill or amendment seeking to make change in the provisions of the  
7 Constitution of India as applicable in relation to a state means a change in the Constitution of  
8 India whereas, whereas as per Clause 3 of Article 370 it's not the amendment which is  
9 applicable as per that it's the consent or the consultation or the...

10

11 **KAPIL SIBAL:** Recommendation. Neither consent nor consultation, it's the  
12 recommendation of the Constituent Assembly.

13

14 **JUSTICE SANJIV KHANNA:** No, let's see 373.

15

16 **KAPIL SIBAL:** Yes please, please.

17

18 **JUSTICE SANJIV KHANNA:** So really speaking under 147 may have no application as well  
19 because you're not seeking to amend 370, but enforce 370. Let's assume let's for the time being  
20 substitute the words Constituent Assembly for Legislative Assembly, on the recommendation.  
21 Let's assume so. Let's assume. So let's substitute. You're right. Recommendation.

22

23 **KAPIL SIBAL:** Correct.

24

25 **JUSTICE SANJIV KHANNA:** Let's substitute that word, provided that the  
26 recommendation of the Legislative Assembly or the State referred to shall be necessary before  
27 the President issues such notification. So really 147 will not be applicable in case the State  
28 Legislature makes that recommendation.

29

30 **KAPIL SIBAL:** Now My Lord. Kindly see the, what 147 says is the Provisions of the  
31 Constitution of India...

32

33 **JUSTICE SANJIV KHANNA:** But you are not amending ...

34

35 **KAPIL SIBAL:** As applicable in the relation to the State.

36

1 **JUSTICE SANJIV KHANNA:** One minute. You are not amending the Constitution. You're  
2 not amending this Constitution or the Constitution of India. Let's for the time being let's read  
3 as it is because what is bound in the proviso to 147 is amendment seeking to make a change in  
4 the provisions of the Constitution of India

5

6 **KAPIL SIBAL:** As applicable in relation to the State.

7

8 **JUSTICE SANJIV KHANNA:** As is applicable in relation to the State.

9

10 **KAPIL SIBAL:** Which is why 370 is incorporated My Lord in the Constitution of Jammu and  
11 Kashmir as it stood. Then, that's what, that's the Application Order. We're not talking about  
12 the Constitution of India here.

13

14 **JUSTICE SANJAY KISHAN KAUL:** But doesn't it, I'm just thinking aloud, does it not  
15 mean that the proviso, the implication is that once the provisions of the Constitution of India  
16 are made applicable by different orders,

17

18 **KAPIL SIBAL:** Yes.

19

20 **JUSTICE SANJAY KISHAN KAUL:** You through an amendment cannot deactivate it.

21

22 **KAPIL SIBAL:** That's all that we're saying. Nothing more than that.

23

24 **JUSTICE SANJAY KISHAN KAUL:** Deactivate a provision which has already been applied  
25 to the Constitution.

26

27 **KAPIL SIBAL:** Yes. That's all that we are saying. Nothing more than that. We are not  
28 amending the Constitution of India. We're amending the Constitutional order applicable to  
29 the State of Jammu and Kashmir, which makes 370 applicable. And it can't even be moved in  
30 the House. And if it can't be moved in the House, it can't even move the bill. It can't be moved  
31 in Parliament.

32

33 **JUSTICE SANJAY KISHAN KAUL:** As I see it, it's that you can't go back. Suppose after  
34 consultation, a CO has been issued, order has been issued, notification has been issued, certain  
35 provisions of the Constitution have been made applicable. Then it's not that a rethink can arise  
36 ten years later and you start...

37

1 **KAPIL SIBAL:** That's all.

2

3 **JUSTICE SANJAY KISHAN KAUL:** ... and say that look, okay, we don't want to make  
4 some of the Constitution provisions...

5

6 **KAPIL SIBAL:** Absolutely.

7

8 **JUSTICE SANJAY KISHAN KAUL:** ... already made applicable.

9

10 **KAPIL SIBAL:** So my argument is that the Constituents Assembly has exercised its choice  
11 and it's evident from the provisions of the Constitution itself. So you need to read the  
12 Constitution of India, the orders applicable, Jammu Kashmir, the Constitutions of Jammu and  
13 Kashmir and 370. So under what provision of law under the Constitution of India, can you  
14 change that, when you are doing it under 370... 356? So now, My Lords having... this is now  
15 the lay of the land as far as this is concerned. Now, I want to take Your Lordships to the  
16 Judgment of the Supreme Court, My Lords of this court in the power of the Constituent  
17 *Kesavananda* My Lords.

18

19 **JUSTICE SANJAY KISHAN KAUL:** Mr. Sibal is the factual.. whatever you have to say is  
20 over?

21

22 **KAPIL SIBAL:** No, My Lord. I'll go back because we are on the point of the Constituent  
23 Assembly and the Legislative Assembly. So that has to be clarified. My Lords you can't, a  
24 Legislative Assembly cannot be converted into a Constituent Assembly. My basic argument is  
25 that. Under what power can you convert a Legislative Assembly into a Constituent Assembly?  
26 Which is that power?

27

28 **JUSTICE B.R. GAVAI:** As a matter of fact, Praja Sabha was turned into a Constituent  
29 Assembly, 1951.

30

31 **KAPIL SIBAL:** There was a direct election, I believe at that point in time. Praja Sabha was  
32 not all directly elected, but I'll check that out. I don't want to make a statement till I'm sure of  
33 it.

34

35 **DINESH DWIVEDI:** <UNCLEAR> power with the...

36

37 **KAPIL SIBAL:** No, there was not. I don't want to give an answer, without being sure.

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**JUSTICE B.R. GAVAI:** Unless you are sure about it.

**KAPIL SIBAL:** That's right. I always hesitate to do that. My learned friends are far more articulate on those issues than I am.

**DINESH DWIVEDI:** <UNCLEAR>

**JUSTICE B.R. GAVAI:** The power of Constituent Assembly was conferred on the Praja Sabha.

**DINESH DWIVEDI:** <UNCLEAR>

**KAPIL SIBAL:** My Lords, according to me and I'll give that date. Actually I mustn't say anything. The Constituent Assembly was directly elected in Jammu and Kashmir, but I don't want to, My Lords, I must be sure of it before I say that. I know it says that Constituent Assembly consisting of representatives of people elected on the basis of adult franchise, shall be constituted forthwith for the purpose of framing a Constitution. So I was aware of it but I was not sure where it was, I just wanted to mention. Unlike us, we were indirectly elected, our Constituent Assembly. Anyway, My Lords, kindly have a look at *Kesavananda Bharati*. This is Volume 15 of Case Law compilation, PDF 236. Actually 235, I'll start with paragraph 537, Volume 15 My Lords, Volume 15, paragraph 537. Which is why I've been saying throughout my submissions, this was a political act to achieve a certain political purpose *dehors* the provisions of the Constitution. Page My Lords, 235, paragraph 537.

**CHIEF JUSTICE DY CHANDRACHUD:** We've got it on the screen.

**GOPAL SUBRAMANIAM:** Sorry. Mr Sibal. Sorry. I just wanted to answer My Lord Justice Gavai's question I just sought to be unmuted. My Lord, there was a proclamation by Yuvraj Karan Singh for constituting the Constituent Assembly on 20th April, 51. It was elected by utter suffrage. This was convened on the 31 October 1951, its first city, and My Lord, it concluded its work on the 17th November, '56, when it decided to adopt the Constitution on the 26th of January, '57.

**KAPIL SIBAL:** It's correct. My Lords. it's page, para 537 of PDF 235.

**CHIEF JUSTICE DY CHANDRACHUD:** Whose judgement is this?

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**KAPIL SIBAL:** This is My Lords, Justice Shelat and Grover My Lords. My Lords, the argument was that...

**JUSTICE SANJIV KHANNA:** Which page are you... number?

**KAPIL SIBAL:** 368 refers to procedure to amend...

**JUSTICE SANJIV KHANNA:** Which page number?

**KAPIL SIBAL:** Page 5, PDF 235.

**JUSTICE SURYA KANT:** Volume 15, Mr. Sibal?

**KAPIL SIBAL:** I'm sorry?

**JUSTICE SURYA KANT:** Volume 15?

**KAPIL SIBAL:** Volume 15. Your Lordship has that?

**CHIEF JUSTICE DY CHANDRACHUD:** We have got something else.

**KAPIL SIBAL:** Page 235.

**CHIEF JUSTICE DY CHANDRACHUD:** In case you want to see it on the screen.

**KAPIL SIBAL:** Page 537, 538 My Lords. I'll just read. 37. The argument was My Lords, that when the Constitution, in 368 talks of amendment to the Constitution, it's a procedural argument. Where does the constituent power lie? That was the argument. And that, in that context, the issue of what is a Constituent Assembly, that is discussed. It's in that context, because we're dealing with that issue. 537 if I may read. It is pointed out on behalf of... My Lords, do all My Lords have that?

**CHIEF JUSTICE DY CHANDRACHUD:** Yes.

**KAPIL SIBAL:** It is pointed out on behalf of the petitioner that the scheme of Article 368 itself contains intrinsic pieces of evidence to give a limited meaning to the word amendment.

1 Firstly, 368 refers to an amendment to the Constitution of the Constitution, and the result of  
2 the amendment is to be that the Constitution shall stand...

3

4 **CHIEF JUSTICE DY CHANDRACHUD:** One minute.

5

6 **KAPIL SIBAL:** Yes 235 My Lords. My Lords have it, My Lords? Not yet?

7

8 [AUDIO MISSING]

9

10 ...its identity. The amending power is conferred on the two Houses of Parliament whose  
11 identity is clearly established with the provisions of the Constitution. It must be the Parliament  
12 of the sovereign Democratic Republic. It is not any Parliament which has the power, but only  
13 that Parliament which has been created by the Constitution. In other words it must continue  
14 to be a Parliament of the sovereign and democratic republic. The institution of states must  
15 continue to exist in order that they may continue to be associated with the amending power in  
16 the cases falling under the proviso. If the respondents are right, the proviso can be completely  
17 deleted since Article 368 can be amended. This would be wholly contrary to the scheme of  
18 Article 368 itself... scheme of 368 because two agencies are provided for amending the  
19 provisions covered by the proviso. One agency cannot destroy the other by the very exercise of  
20 the amending power. The effect of limitless amending power in relation to amendment of  
21 Article 368 cannot be conducive to the survival of the Constitution itself.... Constitution,  
22 because the amending power can itself be taken away and the Constitution can be made  
23 literally unamendable by virtually unamendable or virtually unamendable by providing for an  
24 impossible majority. While examining the above contentions, it is necessary to consider the  
25 claim of the respondents that the amending power under 368 has the full constituent power.  
26 It has been suggested that on every occasion the procedure is followed as laid down in Article  
27 368 by the two Houses of Parliament and the assent of the President is given there is the  
28 reproduction of the functions of a Constituent Assembly. Just mark that. In other words the  
29 Parliament acts in the same capacity as a Constituent Assembly when exercising the power of  
30 Amendment under the said Article. This is fundamental to the entire argument that I made.  
31 In other words, Parliament acts in the same capacity as a Constituent Assembly when  
32 exercising the power of Amendment under the said Article. This argument does not take stock  
33 of the admission made on behalf of the respondents that the entire Constitution cannot be  
34 repealed or abrogated by the amending power. Indisputably a Constituent Assembly specially  
35 convened for the purpose would have the power to completely revise, repeal or abrogate the  
36 Constitution. That shows that the amending power under 368 cannot have the same powers  
37 as a Constituent Assembly, even assuming that there is a reference on the nature of the power

1 being enacted. Between enacting a law and making an amendment, both the powers are  
2 derived from the Constitution. The amending power has been created by the Constitution  
3 itself. It can only exercise those powers with which it has been invested. And if that power has  
4 limits, it can be exercised only within those limits. So you have a clear distinction between the  
5 exercise of constituent power and the exercise of legislative power, which is what I said in the  
6 beginning, to Your Lordships. Parliament, while enacting a law functions within the contours  
7 of the Constitution. A Constituent Assembly has no Constitution in place. It has every right to  
8 do what it likes till such time as the Constitution is framed. So at no point in time in law, can  
9 a Legislative Assembly be converted into a Constituent Assembly. As a matter of law. Luckily,  
10 we had no Maharaja exercising his powers because we had Parliament doing that.

11

12 **CHIEF JUSTICE DY CHANDRACHUD:** But Parliament, even when Parliament amends  
13 the Constitution it's not exercising powers as a Constituent Assembly. It may be exercising a  
14 constituent power. The power to amend. But because it's a power which is restricted you are  
15 subservient to the Constitution. Therefore you're bound by the provisions of the Constitution  
16 by virtue of which the power to amend the Constitution is circumscribed.

17

18 **KAPIL SIBAL:** Right. That's what I had said at the outset My Lord. That has been my  
19 submission throughout. Now the next paragraph My Lords is paragraph 620. This is that PDF  
20 page 273.

21

22 **CHIEF JUSTICE DY CHANDRACHUD:** Whose judgment is that?

23

24 **KAPIL SIBAL:** This is Justice Hegde and Justice Mukherjee.

25

26 **JUSTICE BR GAVAI:** 270?

27

28 **KAPIL SIBAL:** 273 PDF, para 620 My Lords. Otherwise see the danger of this argument.  
29 Tomorrow My Lords, Parliament says that we are the Constituent Assembly, they can do away  
30 with basic structure.

31

32 **JUSTICE BR GAVAI:** Dr. Ambedkar also spoke about it in his speech on 25th of November,  
33 1949.

34

35 **KAPIL SIBAL:** I'm sorry, I didn't get Your Lord.

36



1 **JUSTICE BR GAVAI:** Dr. Ambedkar, while presenting the final draft on 25th of November  
2 1949, also spoke about this aspect.

3

4 **KAPIL SIBAL:** Yes, yes. I think we have it. We have it I think in Volume 8, I'll just come to  
5 that. No, the point I'm making is a more fundamental point which impacts the future of our  
6 country. If you in principle say that a Parliament can invert itself into a Constituent Assembly,  
7 then where do we go from there? Forget about this case, I'm far more worried about our future.  
8 Parliament can never say that because that Constituent Assembly is a political process, which  
9 I said at the beginning. It's a political process in the context of the aspirations of all those  
10 participating in the Constituent Assembly as to what the state should be like. How do you meet  
11 the aspirations of the different segments of the community which have to be met? And what  
12 kind of provisions should be put in place? So it's My Lords, it's the Genesis of the politics of  
13 the day, which determines what kind of Constitution we want. Which is why My Lords, when  
14 we talk about diversity, when you talk about minorities, we talk about dalits, we talk.. in our  
15 Constitution, what were we faced with? In 1947, what were we faced with? We were faced with  
16 a situation where disparate communities, diverse communities, different religions, different  
17 races came together to be part of the Union of India, and their aspirations had to be met. So  
18 you had provisions qua the Dalits, you had provisions qua the minorities, you had provisions  
19 dealing with reservations, you had Scheduled Castes, the Scheduled Tribes, that's a political  
20 process. That's why our Constitution is what it is. Unlike My Lords, as I told in Europe, it was  
21 an entirely different process. Here it was in amalgamation of colours to be united as one, which  
22 is the Tiranga. That's what it is. You can't convert a Legislative Assembly into that process.

23

24 **CHIEF JUSTICE DY CHANDRACHUD:** But equally Mr. Sibal, to completely divorce the  
25 power of amendment from the political process inherent in the amending power...

26

27 **KAPIL SIBAL:** Yes, of course.

28

29 **CHIEF JUSTICE DY CHANDRACHUD:** ... would not be appropriate. Because there's no  
30 strict dichotomy In that sense between the exercise of the Constituent power itself being  
31 traceable to the political process and the power of a Constituent Assembly being entirely  
32 political in its nature. The Constituent power itself of Parliament to amend the Constitution is  
33 a political power.

34

35 **KAPIL SIBAL:** I agree entirely. Absolutely right. We're not saying you can't amend. It's not  
36 our case, you can.

37

1 **CHIEF JUSTICE DY CHANDRACHUD:** But when Parliament amends, according to you,  
2 it is not exercising the powers of a Constituent Assembly.

3

4 **KAPIL SIBAL:** That's all that I'm saying, that's all that I'm saying. It's not converting itself.  
5 And then it has to function within the Constitution of India, I'll come to that later. We are at a  
6 stage My Lords, where a CO is issued..

7

8 **CHIEF JUSTICE DY CHANDRACHUD:** A Constituent Assembly is un<UNCLEAR>.

9

10 **KAPIL SIBAL:** That's right.

11

12 **CHIEF JUSTICE DY CHANDRACHUD:** It's as if it is working on a clean slate.

13

14 **KAPIL SIBAL:** That's correct. Absolutely, absolutely My Lords. And the Judgment says so  
15 My Lords. That is not bound by anything, bound by the representatives of the Constituent  
16 Assembly who have common aspirations to draft a Constitution for the future of the people of  
17 the country. Which is why diversity, protection are fundamental to our Constitution, for this  
18 reason. This very reason. So you want to take away that, that's very dangerous. I'm not My  
19 Lords being political, but that's the worrisome part. May I read 620 My Lords? Now, coming  
20 back to Article 368, it may be noticed that it has three components. Firstly it deals with the  
21 amendment of the Constitution. Secondly, it designates the body or bodies which can amend  
22 the Constitution. And lastly, it prescribes the form and the manner in which the amendment  
23 of the Constitution can be affected. The Article does not expressly confer power to amend. The  
24 power is necessarily implied in the Article. The Article makes it clear that the amendment of  
25 the Constitution can only be made by Parliament, but in cases falling under the proviso,  
26 ratification by legislators of not less than one half of the States is also necessary. Now My  
27 Lords, if you read the proviso, if you don't have the ratification, there'll be no amendment. You  
28 can't wish away the proviso. That article stipulates various things. To start with, the  
29 amendment to the Constitution must be initiated only by the introduction of a bill for that  
30 purpose in either House of Parliament. It must then be passed in each House by a majority of  
31 the total membership of that house and by a majority of not less than two thirds of the  
32 members of that House present and voting. And if the Amendment seeks to make any change  
33 in the provisions mentioned in the proviso it must be ratified by not less than one half of the  
34 state legislature. Thereafter, it should be presented to the President for his assent. It further  
35 says that upon such assent being given to the Bill, the Constitution shall stand amended in  
36 accordance with the terms of the Bill. To restate the position, Article 368 deals with the  
37 amendment of the Constitution. The Article contains both the power and the procedure for

1 amending the Constitution. No undue importance should be attached to the marginal note,  
2 which says Procedures for Amendment of the Constitution. Marginal note plays a very little  
3 part in the construction of a statutory provision. It should have much less importance in  
4 construing a constitutional provision. So, My Lords, when Your Lordships talk about  
5 temporary My Lords, merely, you have to look at the Constitution because it had to be  
6 temporary in 1950. There were no element of permanency. It could not have been. And this is  
7 the marginal note.

8

9 **CHIEF JUSTICE DY CHANDRACHUD:** This is a marginal note. There's no question  
10 about it. It is a marginal note..

11

12 **KAPIL SIBAL:** Yes. So My Lords you can't be saying which is what Your Lordships are  
13 concerned with, but it was temporary. But that's only when you look at the marginal note. It  
14 had to be temporary because there was no other way to deal with it. You couldn't have said it  
15 is permanent.

16

17 **CHIEF JUSTICE DY CHANDRACHUD:** But, there's no doubt still about the fact that this  
18 forms a part of Part 21 of the Constitution, which still deals with temporary and [UNCLEAR]  
19 provisions.

20

21 **KAPIL SIBAL:** My Lords, I'm not disputing that, These are all different provisions My Lord.  
22 If you...

23

24 **CHIEF JUSTICE DY CHANDRACHUD:** They have all being clubbed together in Part 21.

25

26 **KAPIL SIBAL:** That's correct. But we looked at it in the context of My Lords, what was going  
27 to happen in the Northeastern regions. Gujarat and Maharashtra together, what was to happen  
28 there, Issues of Marathwada. So those councils have to be created. Boards had to be created.  
29 That's why they were temporary. Telangana. That's why they were temporary. Not for any  
30 other reason. And that's why this was also temporary. The same logic. But the fact that it is  
31 temporary doesn't mean that the Article is temporary for all time to come. You can't interpret  
32 the marginal note in that fashion. So the language of 368 to our mind is... If you look at the  
33 heading My Lord it says temporary and transitional provisions. So 2 is temporary and 3... 2 is  
34 transitional and 3 is temporary.

35

36 **CHIEF JUSTICE DY CHANDRACHUD:** It's 368 Power right?

37

1 **KAPIL SIBAL:** In this case, no. 356 power. No, it's 356 because they converted. What  
2 happened? Let me just in one sentence. They say, in one sentence I'll tell you what they did.  
3 They converted the Legislative Assembly into the Constituent Assembly. Right? They  
4 converted it into a Constituent Assembly. Then they said that now Parliament, because of 356,  
5 Parliament is exercising that power. So the Parliament is the Legislature and because it's a  
6 Constituent Assembly, Parliament of India is the Constituent Assembly. And therefore, we can  
7 do what we do. That's in one sentence, what they did. And they recommended it to themselves.  
8 So instead of clapping by two hands, they clapped by one hand because they exercised the  
9 power of the Legislature themselves. And because the Legislature's consent was necessary to  
10 give that consent to themselves and abrogated 370. Unique My Lords. Constitutionally a  
11 unique unheard of. I will not use that expression. A procedure that is unknown to law because  
12 the objective was entirely different. And I've been saying that from day one.

13

14 **CHIEF JUSTICE DY CHANDRACHUD:** That's how they brought in the...

15

16 **KAPIL SIBAL:** Then My Lords...

17

18 **CHIEF JUSTICE DY CHANDRACHUD:** To apply the proviso to Clause 3 of Article 370...

19

20 **KAPIL SIBAL:** Yes, because they understood it that way that it required the previous.

21

22 **CHIEF JUSTICE DY CHANDRACHUD:** And then what they do is they say that the  
23 Parliament exercise, exercising the powers of the Constituent Assembly by virtue of the fact  
24 that the Legislative Assembly has been dissolved. Assuming that the Legislative Assembly was  
25 not dissolved, that could have exercised the power of the Constituent Assembly. Now that it  
26 has been dissolved, under 356 Parliament has the power to make laws with all aspects of  
27 whether it's List 1, List 2 or List 3 and then they exercise the power under the proviso.

28

29 **KAPIL SIBAL:** That's right. That's right. So My Lord they actually understood. 370 Sub-  
30 article 3 in the manner in which I am stating before Your Lordship, which is their  
31 understanding right till the end. They don't understand. Which is why I want you to bring it at  
32 this stage My Lord, so that now Your Lordship knows My Lord the large, the larger picture, so  
33 to say. So we are going into interpretation of 370 Sub-article 3, which they themselves accept  
34 that the proviso applies.

35

36 **CHIEF JUSTICE DY CHANDRACHUD:** We'll come back after lunch. Mr Sibal, if you can  
37 just in a very brief while, take us through the process which was followed. You can go straight

1 to that. Now, we've understood the... anything more in *Kesavananda*, apart from these four  
2 judgments? Alright, we'll see that so that we come to the end of *Kesavananda*...

3

4 **JUSTICE BR GAVAI:** 25th November?

5

6 **GOPALA SANKARANARAYANAN:** If Your Lordships sees the facts, I think it will help.

7

8 **CHIEF JUSTICE DY CHANDRACHUD:** Where he said the entire life of contradictions  
9 on... That's how he...

10

11 **JUSTICE B.R. GAVAI:** It's about his amending powers also...

12

13 **KAPIL SIBAL:** That's right. He covers it, My Lords. He covers it...

14

15 **JUSTICE B.R. GAVAI:** ...on both the sides. It's too liberal and too rigid.

16

17 **KAPIL SIBAL:** Obligated. Deeply obliged.

18

19

20

21 <<<**LUNCH BREAK**>>>

22

23

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

25

26 **KAPIL SIBAL:** My Lord, I was speaking *Kesavananda Bharati* at paragraph 620, PDF  
27 274. Let me finish that. So they talk of the marginal notes that I was reading. The language of  
28 368 to our mind is plain and unambiguous, that paragraph, bottom of 620 My Lords. Marginal  
29 note played a very little part in the construction of a statutory provision. It should have much  
30 less importance in construing a constitutional provision. 'The language of 368 to our mind is  
31 plain and unambiguous, hence, we need not call into 8, any of the rules of construction, about  
32 which there was a great deal of debate at the hearing. There's a power to amend under the  
33 Article as it originally stood, was only implied. The marginal note rightly referred to the  
34 procedure of amendment. In reference to the procedure and the marginal note does not  
35 negative the existence of the power implied in the Article.' Then they go on to say whether you  
36 can amend every part of the Constitution. We're not concerned with that. That's the basic  
37 structure here, we are not concerned. Now kindly come to paragraph 1117. That's at PDF 424.

1 This is a judgment of Justice Jagan Mohan Reddy. Paragraph 1117, page 424, PDF 424. The  
2 reference is made to Dr. Ambedkar's speech. That's a very interesting observation.

3

4 **JUSTICE SANJAY KISHAN KAUL:** 424, you said?

5

6 **KAPIL SIBAL:** 424 PDF, paragraph 1117. The question arose in the context that when the  
7 Constituent Assembly is sitting, we are passing this in fear in this Constitution by majority  
8 vote and this is an unelected body. When you give that power of the Constitution, why do you  
9 need to search. This is that context that, My Lords, Dr. Ambedkar answers that. Your Lordship  
10 has 1117?

11

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

13

14 **KAPIL SIBAL:** My Lords, Justice Gavai, Justice Kaul? Reference may also be made to the  
15 fact that during the debates in the Constituent Assembly, it was pointed out that by many  
16 speakers that, that Assembly did not represent the people as such because it was not elected  
17 on the basis of adult franchise, and some of them even moved resolutions suggesting that the  
18 Constitution should be ratified by the people. Both the claims and demands were rejected. Dr.  
19 Ambedkar explained that and I quote: "The Constituent Assembly in making a Constitution  
20 has no parties and motives. Beyond securing a good and workable Constitution, it has no axe  
21 to grind. In considering the articles of the Constitution, it has no eye on getting through a  
22 particular measure. The future Parliament if it met as a Constituent Assembly, its members  
23 will be acting partisan, seeking to carry amendments to the Constitution to facilitate, to  
24 passing of particular measures which they have failed to get through Parliament by reason of  
25 some article of the Constitution which the Constituent Assembly has none. That is the  
26 difference between the Constituent Assembly and future Parliament. That explains why the  
27 Constituent Assembly, though elected on limited franchise, can be trusted to pass the  
28 Constitution by simple majority and by the Parliament though elected on adult suffrage,  
29 cannot be trusted with the same power to amend it."

30 How patient, My Lords, of Dr. Ambedkar. So when you are actually trying to use the Legislative  
31 power, then you do it with a partisan [UNCLEAR] because you want to get a bill passed, you  
32 want to get a particular policy through. But when you are as a Constituent Assembly, you have  
33 no such motives. So you can't convert a Legislative Assembly into a Constituent Assembly.  
34 Because as a legislature, your intent may be partisan and as the Constituent Assembly, it can't  
35 be as you are not passing any law. At the final stages of the debate, on the amending article,  
36 Dr. Ambedkar, replying to the objections at the Constituent Assembly was not a representative  
37 assembly, as it has not been elected on adult franchise. That a large mass of the people are not

1 represented and consequently, in framing the Constitution, the Assembly has no right to say  
2 that the Constitution should have the finality which Article 3 or 4 proposes to give it. Said sir,  
3 it may be true that this assembly is not a representative of Assembly in the sense that, members  
4 of the Assembly have not been elected on the basis of adult suffrage. I'm prepared to accept  
5 that argument but the further inference, which is being drawn, that if the Assembly had been  
6 elected on the basis of adult suffrage, it was then bound to possess greater wisdom and greater  
7 political knowledge is an inference which I utterly repudiate. Then, My Lords, that's enough  
8 for this part of the discussion. Now kindly come to Coelho Volume 3.

9

10 **JUSTICE SANJAY KISHAN KAUL:** On the other end the Constituent Assembly of State  
11 of Jammu And Kashmir was elected.

12

13 **KAPIL SIBAL:** Yes, yes.

14

15 **JUSTICE SANJAY KISHAN KAUL:** I am saying on the rationale it should or should not  
16 be.

17

18 **KAPIL SIBAL:** That's right.

19

20 **JUSTICE SANJIV KHANNA:** Mr. Sibal there is one slight difference between Article 370  
21 and what is stated here and what is the objective and purpose. One, there is an element of  
22 flexibility in 370. Let's not go into the facts, specific how it was done in this particular... in the  
23 form of whether it's consultation or with prior, with acceptance in corporate, and become  
24 partisan. So when we read the proviso to Clause 3 at the time when the Constitution was  
25 adopted, obviously, there was no Constitution of J&K.

26

27 **KAPIL SIBAL:** No, and no Constituent Assembly.

28

29 **JUSTICE SANJIV KHANNA:** And no Constituent Assembly, but obviously they were aware  
30 that Constituent Assembly is going to come up and going to do <UNCLEAR>. So why can't we,  
31 when we interpret the Constitution, because if we accept the argument that Clause 3 is not,  
32 was not to become dead after the Constituent Assembly had enacted or accept they had  
33 proposed the Constitution. Why can't we accept that argument that the Constituent Assembly,  
34 for the purpose of the proviso, could, in a sense, be interpreted also to include the Legislative  
35 Assembly, keeping in mind, keeping in mind the fact, keeping in mind the fact that the  
36 Parliament could have very well amended the Article 370 also?

37

1 **KAPIL SIBAL:** No.

2

3 **JUSTICE SANJIV KHANNA:** Number 2, that if the is the objective was to... was not to close  
4 or not to put Article 370 in a straitjacket, which is obviously clear, It's a flexible article, in the  
5 sense that, you could, whether it's Clause D or its B(1) or B(2), you could keep on adding up to  
6 it and the orders passed reflect that.

7

8 **KAPIL SIBAL:** That's nothing to do with 370 Sub-article 3. There's no flexibility there.  
9 Where's the flexibility?

10

11 **JUSTICE SANJIV KHANNA:** So it's incorporated in 3. If we accept it's incorporated in 3,  
12 that notwithstanding anything that did in the foregoing provisions of the Article, the President  
13 may, with public notification, declare that Article will cease to be operative or shall be  
14 operative only with such exception modifications from such date as it may specify. Yes. The  
15 proviso puts a precondition to it.

16

17 **KAPIL SIBAL:** No. It's a flexibility at the instance of the Constituent Assembly, not at the  
18 instance of Parliament. Surely My Lords.

19

20 **JUSTICE SANJIV KHANNA:** But then when we are reading the term Constituent  
21 Assembly for the purpose of the proviso, at that time when it was enacted, it was in 1949.

22

23 **KAPIL SIBAL:** But they contemplated it My Lords. They contemplated it. Why would they  
24 add the word 'Constituent Assembly' in 370 when it was not....

25

26 **JUSTICE SANJIV KHANNA:** Because at that time we didn't have any Legislative Assembly  
27 for the State of J&K.

28

29 **KAPIL SIBAL:** No no correct, but you have the orders. I don't understand. The flexibility at  
30 the instance of the Constituent Assembly, but this power is given to the Constituent Assembly,  
31 not to the Legislature. It's not flexibility at the hands of Parliament or the Legislature because  
32 147 says there's no flexibility there at all.

33

34 **JUSTICE SANJIV KHANNA:** There are two parts to it. First is whether Parliament could  
35 have done it. That's a separate argument. But when we interpret the term Constituent  
36 Assembly for the purpose of the proviso to Clause 3, can we by implication, because at the time



1 when the Constitution was enacted, at that time there was no Legislative Assembly for the  
2 State of Jammu and Kashmir. Is that factually correct? Answer is yes.

3

4 **KAPIL SIBAL:** Yes, of course.

5

6 **JUSTICE SANJIV KHANNA:** So then when we interpret the term over here, can we  
7 interpret it to include the Legislative Assembly?

8

9 **KAPIL SIBAL:** My Lord, how can you interpret a term in a Constitution which says  
10 Constituent Assembly as a Legislative Assembly? I don't understand My Lords. Under what  
11 concept of interpretation of the Constitution will you do that? There is no implied power, there  
12 is no express power. I mean you can change any definition of any <UNCLEAR> Constitution.

13

14 **JUSTICE SANJIV KHANNA:** That may not be, that will be a.... Look, the term Constituent  
15 Assembly, when it is used in the proviso to Clause 3 at that time, at that time there was no  
16 Legislative Assembly in J&K.

17

18 **KAPIL SIBAL:** It's for the purpose of framing the Constitution, that the Constituent  
19 Assembly is formed. That's not My Lord, has nothing to do with the Legislature, which is why  
20 My Lords, *Kesavananda Bharati*.

21

22 **JUSTICE SANJIV KHANNA:** See the explanation which has been enacted was afterwards,  
23 sometime in 1952. Explanation enacted and has been made part of Part 1, Clause 1 was  
24 probably in 1952, if I am not mistaken.

25

26 **KAPIL SIBAL:** It was there, My Lords.

27

28 **JUSTICE SANJIV KHANNA:** No. Initially...

29

30 **KAPIL SIBAL:** It was amended later on. It was there, but.

31

32 **JUSTICE SANJIV KHANNA:** It was there, it was amended later.

33

34 **KAPIL SIBAL:** Yes. Yes.

35

36 **JUSTICE SANJIV KHANNA:** Because, at that time, when the Legislative Assembly was  
37 brought in, Council of Ministers was brought in, because at that time there was no...

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**KAPIL SIBAL:** The Governor My Lords had to be....

**JUSTICE SANJIV KHANNA:** There was no Council of Ministers at that time.

**KAPIL SIBAL:** There was the Maharaja My Lord. But that issue doesn't arise here. We are talking about a Constituent Assembly. the power of the Constituent Assembly and you've known, there are now, the *Kesavananda Bharati*, fortunately or unfortunately, sets the law.

**CHIEF JUSTICE DY CHANDRACHUD:** Mr. Sibal, just as a.... because we were not looking at it from that perspective yesterday, where is the first reference to the Constituent Assembly? Of course the Constituent Assembly of the State finds a reference in the Constitution itself in Article 370(2).

**KAPIL SIBAL:** Yes.

**CHIEF JUSTICE DY CHANDRACHUD:** 370(2). Where is the first reference to the Constituent Assembly in the documents which you read out to us yesterday, prior to the Indian Constitution? I find that in the proclamation of the Maharaja.

**KAPIL SIBAL:** They are in the Constitution debates My Lords.

**CHIEF JUSTICE DY CHANDRACHUD:** I find that there is also a reference in the Proclamation of the Maharaja which you read out yesterday. The reason I am asking you is this...

**KAPIL SIBAL:** Probably there, yes.

**CHIEF JUSTICE DY CHANDRACHUD:** The.....sorry?

**KAPIL SIBAL:** Karan Singh's proclamation I think, My Lord.

**CHIEF JUSTICE DY CHANDRACHUD:** Yes.

**KAPIL SIBAL:** I have already mentioned that in the Constituent Assembly debates. Iyengar My Lords, Your Lordships will remember.

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**CHIEF JUSTICE DY CHANDRACHUD:** Yes.

**KAPIL SIBAL:** I quoted My Lords....

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

**KAPIL SIBAL:** They are there My Lords.

**CHIEF JUSTICE DY CHANDRACHUD:** Page 1117. Yeah, Mr. Gopalaswamy Iyengar's...

**KAPIL SIBAL:** Yes My Lords.

**CHIEF JUSTICE DY CHANDRACHUD:** No, you know when the Maharaja made the proclamation, when the Maharaja issue his proclamation on 5th of March 1948....

**KAPIL SIBAL:** It was contemplated by the Constitution and the Constitution makers that there would be a Constituent Assembly, which would come into place, which happened in 1951.

**CHIEF JUSTICE DY CHANDRACHUD:** Right.

**KAPIL SIBAL:** That's what happened.

**CHIEF JUSTICE DY CHANDRACHUD:** What happened, first was, the Maharaja made his proclamation in 1948. He spoke of a National Assembly.

**KAPIL SIBAL:** Yes, absolutely.

**CHIEF JUSTICE DY CHANDRACHUD:** Right? He said, 'My Council of Minister shall take appropriate steps as soon as restoration and normal condition are being completed, to convene a National Assembly based upon adult suffrage. Then 5), the Constitution to be framed by the National Assembly shall provide adequate safeguards for the minorities and contain appropriate provisions guaranteeing for the freedom of Constitution.' Now, what appears to happen is that before elections were held...by adult suffrage they composed the Constituent Assembly. That's how the Constituent Assembly came into existence. Now, your whole argument is of course that you know, what is to be done by a Constituent Assembly cannot surely be done by a Legislative Assembly. And therefore less so, by the central

1 government, assuming the character of a Legislative Assembly under 356. That's the...What  
2 happens then, if there is no Constituent Assembly?

3

4 **KAPIL SIBAL:** I'm sorry, My Lords?

5

6 **CHIEF JUSTICE DY CHANDRACHUD:** What happens if there is no Constituent  
7 Assembly? Do you have to create a Constituent Assembly afresh?

8

9 **KAPIL SIBAL:** My Lords that is precisely between 1948, consultations, My Lords, Your  
10 Lordships....

11

12 **CHIEF JUSTICE DY CHANDRACHUD:** Now, what would happen? Suppose there is  
13 a...keep aside the procedure which they followed. We're keeping that aside for a moment.

14

15 **KAPIL SIBAL:** Correct.

16

17 **CHIEF JUSTICE DY CHANDRACHUD:** 373 postulates where Constituent Assembly has  
18 to give its recommendation on any proposal for abrogation.

19

20 **KAPIL SIBAL:** Right.

21

22 **CHIEF JUSTICE DY CHANDRACHUD:** Suppose the Government were, the President  
23 were to move a proposal for abrogation. According to you how would that be effectuated now,  
24 say, in post 1957 India?

25

26 **KAPIL SIBAL:** Let me answer that in two parts. Number one, what My Lord is putting to  
27 me, in 1948, they contemplated a National Assembly. But Your Lordships must remember that  
28 those were years between 1948 and 1950, especially in after 1947, after the Instrument of  
29 Accession was signed, My Lords. After the Instrument of Accession was signed, those were  
30 transitional periods. And when the Constitution came to be framed, there was a dialogue  
31 between the State of Jammu and Kashmir as it then stood through the Maharaja and the  
32 Government of India. And both of them decided that we will put this into the Constitution,  
33 that is 370, use the term Constituent Assembly, and you will then set up a Constituent  
34 Assembly to frame the Constitution and decide what you want to do. You must understand the  
35 historical context in which this happened. This has not happened in an isolated fashion. My  
36 Lords, the Parliament of India, in the Constituent Assembly in India framed the Constitution,  
37 which included a provision for a Constituent Assembly of Jammu and Kashmir. My Lords,

1 surely that is not an isolated Act. This happened in Consultation and in agreement with the  
2 then Maharaja.

3

4 **CHIEF JUSTICE DY CHANDRACHUD:** And the J&K Constitution, contemplates that  
5 this Legislative Assembly will have no role in...with regards to the amendment to the provision  
6 of the Constitution relating to Article 370...

7

8 **KAPIL SIBAL:** Exactly, otherwise they would not put that faith.

9

10 **CHIEF JUSTICE DY CHANDRACHUD:** Then how would that...what was the...

11

12 **KAPIL SIBAL:** The next question is, supposing there was no Constituent Assembly...

13

14 **CHIEF JUSTICE DY CHANDRACHUD:** Then how do we...then what Constitution  
15 mechanism would be envisaged there?

16

17 **KAPIL SIBAL:** If there were no Constituent Assembly and Your Lordships were sitting in  
18 five, I would have answered that question, but luckily, we have a Constituent Assembly. I can't  
19 answer a hypothetical question as to what would you...

20

21 **CHIEF JUSTICE DY CHANDRACHUD:** How would you then... How would you then put  
22 into place the Constitutional machinery? Because there has to be machinery. It can't be that,  
23 because there is no Constituent Assembly... that because there is no Constituent Assembly,  
24 you cannot at all deliberate on a proposal for abrogation or modification of Article 370.

25

26 **KAPIL SIBAL:** Your Lordship is putting to me, supposing, the Maharaja refused to have a  
27 Constituent Assembly?

28

29 **CHIEF JUSTICE DY CHANDRACHUD:** No, take 2019.

30

31 **KAPIL SIBAL:** I'm sorry?

32

33 **CHIEF JUSTICE DY CHANDRACHUD:** Take 2019.

34

35 **KAPIL SIBAL:** Yes.

36

1 **CHIEF JUSTICE DY CHANDRACHUD:** When the Constituent Assembly has been  
2 convened. The Constituent Assembly has drafted the Constitution. Therefore it's role has come  
3 to an end. There is no Constituent Assembly.

4

5 **KAPIL SIBAL:** Correct.

6

7 **CHIEF JUSTICE DY CHANDRACHUD:** 2019, the Government wishes to...The President  
8 wishes to modify Article 370.

9

10 **KAPIL SIBAL:** Yes.

11

12 **CHIEF JUSTICE DY CHANDRACHUD:** Now we have seen the process which they  
13 followed.

14

15 **KAPIL SIBAL:** Yes.

16

17 **CHIEF JUSTICE DY CHANDRACHUD:** What according to you would have been the  
18 constitutional process to...

19

20 **KAPIL SIBAL:** No constitutional process because the Constitution of Jammu and Kashmir  
21 said, in terms in 147 that no such bill can be introduced in the legislature.

22

23 **JUSTICE B.R. GAVAI:** By them.

24

25 **CHIEF JUSTICE DY CHANDRACHUD:** By them.

26

27 **KAPIL SIBAL:** I am talking about... no, by them, qua the Constitution as it applies to the  
28 State of Jammu and Kashmir, which is part of the, part of the law applicable to Jammu and  
29 Kashmir.

30

31 **CHIEF JUSTICE DY CHANDRACHUD:** So, according to you no Constitutional  
32 procedure,...

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34 **KAPIL SIBAL:** No.

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36 **CHIEF JUSTICE DY CHANDRACHUD:** ...can be initiated for abrogation of Article 370 at  
37 all.

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**KAPIL SIBAL:** I have been saying is permanent. Why do you My Lords...I have been saying it is permanent.

**JUSTICE B.R. GAVAI:** No, the argument is that after 1957, the President ceases to have any power under article, sub-article [UNCLEAR]

**KAPIL SIBAL:** That's why it was temporary between 1951 and 1957. Where do you get that power from? You see, the point is, My Lords, at that time it was temporary because there was nothing in place.

**JUSTICE B.R. GAVAI:** From 1957, Sub Article 3 has become otiose now.

**KAPIL SIBAL:** Yes, now My Lords, it can happen as a political, as a political decision the Jammu and Kashmir Government and the legislature of the State, unanimously did what and they merged. That's another issue altogether.

**JUSTICE SANJAY KISHAN KAUL:** Mr. Sibal, according to you, neither the Assembly can do it nor the Parliament can do it?

**KAPIL SIBAL:** Yes, yes.

**JUSTICE SANJAY KISHAN KAUL:** What you are saying is, while other provisions of the Constitution may be capable of amendment through a process envisaged to the amendment, other than of course, if it is hit by basic structure, this is one provision which can never be amended.

**KAPIL SIBAL:** Let it put it differently, let me put it, under what power, under what power will this take place? Let's assume here can do it. My Lords have put the question to me, under which provision of the Constitution, can they do it?

**JUSTICE SANJAY KISHAN KAUL:** Having a permanency, the whole concept is that Constitution is also a live document. At some stage, can we say there is no mechanism whatsoever, for ever changing it, even if everybody wants to change it and it doesn't affect the basic structure? Then to say that, if suppose all of Kashmir wants it, hypothetically saying.

**KAPIL SIBAL:** In a political act can be, there can be a political act.

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**JUSTICE B.R. GAVAI:** And those negotiations...

**GOPALA SANKARANARAYANAN:** Clause 1 is the answer to this. 370 Clause 1, bit by bit modifications. exceptions, applications have come. Now, if and one important thing Your Lordship may note, is it is completely irreversible. Because it's completely irreversible, all those parts which have now been brought in, they cannot now reverse. So Part 3, for example, have come in with verification.

**CHIEF JUSTICE DY CHANDRACHUD:** Can Parliament not have amended the Constitution, exercising the 368 power to abrogate 370?

**KAPIL SIBAL:** No, no.

**CHIEF JUSTICE DY CHANDRACHUD:** Which means, therefore, that there is a provision of the Constitution apropos, what felt from Brother Justice Kaul, that according to your submission, there is a provision of the Constitution which lies even beyond the amending power of Parliament.

**KAPIL SIBAL:** That's right.

**GOPALA SANKARANARAYANAN:** Your Lordships may note that...

**CHIEF JUSTICE DY CHANDRACHUD:** We are creating then a new category apart from basic structure, that 370 belongs to that.

**KAPIL SIBAL:** It is inherent, and it's integrated into 370 itself. It's not a new category. It's a category that exists.

**GOPALA SANKARANARAYANAN:** 370 Clause 3 only provides that if you want to abrogate, there is a mechanism for abrogation, which is why it is temporary. Now, if 370 Clause 3 goes and is not brought into service, 370 Clause 1 can now be used continuing with the Legislative Assembly, with the Government of Kashmir giving its consent and the entirety of the Constitution can be made applicable to Kashmir, still under 370 Clause 1, it can still be done. So the answer is not that it can't be done.

**KAPIL SIBAL:** I am sorry.



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**JUSTICE SANJIV KHANNA:** Let's assume what your argument on Clause 3 which has been argued that Clause 3 is today etched in stone, is now, it cannot be...

**JUSTICE SANJAY KISHAN KAUL:** 371 according to you. 370 Subclause 1. It self-envisages bringing in different provisions.

**KAPIL SIBAL:** Correct.

**JUSTICE SANJAY KISHAN KAUL:** Tomorrow, through that process it is said that each and every provision of the Constitution applies to the State of J&K. Now what remains of the 370?

**GOPALA SANKARANARAYANAN:** Nothing.

**JUSTICE B.R. GAVAI:** Then the only....

**JUSTICE SANJAY KISHAN KAUL:** Then [UNCLEAR] to say, you can in a sense make it completely 370 infructuous yet it is sacrosanct where it can never be removed.

**GOPALA SANKARANARAYANAN:** Let me just explain My Lords. Clauses 1 and 2 and 3 have to be read together. 2 is transitory, 3 provided for abrogation to be temporary. So if you have a Constituent Assembly and they are giving their recommendation, then that abrogation was immediately possible. It's a shortcut and 370 comes to an end. The long way around is through 370 Clause 1 with applying provision of [UNCLEAR].

**JUSTICE SANJAY KISHAN KAUL:** I am saying therefore said that 371 according to you can mean orders have been issued from time to time.

**GOPALA SANKARANARAYANAN:** Yes.

**JUSTICE SANJAY KISHAN KAUL:** That it can say that each and every provision of the Constitution...

**GOPALA SANKARANARAYANAN:** It can, of course.

1 **JUSTICE SANJAY KISHAN KAUL:** Correct. Once we come to that yes. I am just thinking  
2 aloud, what remains in 370 after that? Which means you are saying the shell of 370 should  
3 remain, but the substratum can be...

4

5 **GOPALA SANKARANARAYANAN:** We are saying the assimilation needs to follow the  
6 correct procedure. The 370 Clause 1 procedure is still available, was what we are arguing.

7

8 **KAPIL SIBAL:** I don't know what his argument is. I certainly know what I am....

9

10 **GOPALA SANKARANARAYANAN:** It's what we have said. That may be his  
11 interpretation...

12

13 **CHIEF JUSTICE DY CHANDRACHUD:** Yes. Yes. <UNCLEAR>

14

15 **ATTORNEY GENERAL VENKATARAMANI:** <UNCLEAR>

16

17 **CHIEF JUSTICE DY CHANDRACHUD:** Let Mr. Sibal complete. Because, you know,  
18 otherwise that will... I think you know Mr. Sankaranarayanan, what will happen is, we are  
19 following a certain, we are following a certain line and link and a syntax, so I mean, I think,  
20 you know, we might be broken up in the nuance of..

21

22 **TUSHAR MEHTA:** I respect Mr Sibal, he knows the law and he also therefore, didn't jump  
23 and answer the question.

24

25 **GOPALA SANKARANARAYANAN:** I don't think I...

26

27 **JUSTICE SANJAY KISHAN KAUL:** See, the nuances are so many, as something Mr Sibal  
28 is arguing, something which you propound to do. So <UNCLEAR> is saying "No, no, this is  
29 not what I'm saying, I'm saying something different." So we'll have to see where the...

30

31 **KAPIL SIBAL:** I understand.

32

33 <UNCLEAR>

34

35 **JUSTICE SANJAY KISHAN KAUL:** This is like that you can keep the shell, but the process  
36 is to 370 and ....

37

1 **GOPALA SANKARANARAYANAN:** There is another interpretation.

2

3 **KAPIL SIBAL:** The problem is that if there's a Constitutional process to do it, it can be done.  
4 If there is no Constitutional process to do it, then it has to be a political act.

5

6 **JUSTICE SANJAY KISHAN KAUL:** You said there is a Constitutional process by which it  
7 can be done, under 371.

8

9 **KAPIL SIBAL:** No, you can't do away with 370 Subclause 3.

10

11 **JUSTICE SANJAY KISHAN KAUL:** No, suppose, after all orders have been issued from  
12 time to time, bringing different provisions of the Constitution into force.

13

14 **KAPIL SIBAL:** Right.

15

16 **JUSTICE KAUL:** Can you not say that another order be issued that it can under one, saying  
17 that all the provision of the Constitution apply, and enlist them, all of them and say all of them  
18 apply?

19

20 **KAPIL SIBAL:** The problem there is if you say all of them will apply, it applies to what? The  
21 concurrent list and the Instrument of Accession.

22

23 **JUSTICE B.R. GAVAI:** Mr. Sibal...

24

25 **KAPIL SIBAL:** It doesn't apply to the other parts.

26

27 **JUSTICE B.R. GAVAI:** Insofar as Clause B is concerned, there are no limitations.

28

29 **KAPIL SIBAL:** Yes.

30

31 **JUSTICE B.R. GAVAI:** If you read it, <UNCLEAR> of the Constitution, "shall apply  
32 relation to the State, subject to such exceptions and modifications as the President may, by  
33 order, specify."

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35 **KAPIL SIBAL:** Correct.

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37 **JUSTICE B.R. GAVAI:** Specification by second proviso.

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**KAPIL SIBAL:** Correct.

**JUSTICE B.R. GAVAI:** "Provided further, that no such <UNCLEAR> which relates to matters other than those referred to in the last preceding proviso shall be issued <UNCLEAR> with the concurrence of that Government."

**KAPIL SIBAL:** Yes.

**JUSTICE B.R. GAVAI:** <INAUDIBLE> <UNCLEAR> of accession, defence and <UNCLEAR>

**KAPIL SIBAL:** That's correct. And the lists involved.

**JUSTICE B.R. GAVAI:** And the lists involved.

**KAPIL SIBAL:** Correct.

**JUSTICE B.R. GAVAI:** So suppose if the Parliament decides to make the entire provisions of the Constitution applicable to Jammu and Kashmir <UNCLEAR> under Clause B.

**KAPIL SIBAL:** Yes, there is. That's the point I'm making My Lords. Because the structure of 370 and in the context of the Legislature of Jammu and Kashmir is that the residuary power remains with the state.

**JUSTICE B.R. GAVAI:** Because the distinction here is that insofar as those...

**KAPIL SIBAL:** Concurrent list, and Instrument of Accession are two separate things, there's no issue there. They can do it. Both under 371. No issue.

**JUSTICE B.R. GAVAI:** Insofar Instrument of Accession, those <UNCLEAR> are concerned...

**KAPIL SIBAL:** Only four <UNCLEAR>

**JUSTICE B.R. GAVAI:** Their only requirement is consultation.

1 **KAPIL SIBAL:** Consultation.

2

3 **JUSTICE B.R. GAVAI:** Consultation. Insofar as the Clause D is concerned the requirement  
4 is more stringent and concurrence is required.

5

6 **KAPIL SIBAL:** That's list 3 My Lord. That's concurrent list. Residuary power is always with  
7 the state. That's the problem. That can't be done by any process. Even under 370 Sub-article  
8 1. That's the problem. But I see the point that Your Lord is making, My Lord is making that  
9 look, once the Constituent Assembly is over, then of course, there's a status quo. It can't be  
10 changed. is what My Lord is putting to me. Yes, there is. But then we have to find the  
11 constitutional procedure through which it can be done.

12

13 **JUSTICE SANJAY KISHAN KAUL:** It would amount to equating it with the principle of  
14 basic structure itself, that it can never be done. Like you cannot, and that also through a  
15 judicial pronouncement of <UNCLEAR> basic structure.

16

17 **KAPIL SIBAL:** All right, let's not talk of 2023 My Lords. In 1950. what was the position?  
18 This was the position. That it can't be done.

19

20 **CHIEF JUSTICE DY CHANDRACHUD:** No, but prior to the basic structure doctrine  
21 itself, it could be done. Parliament...

22

23 **KAPIL SIBAL:** No.

24

25 **CHIEF JUSTICE DY CHANDRACHUD:** How can we say that Parliament could not have  
26 exercised its plenary amending power?

27

28 **KAPIL SIBAL:** This is not basic...

29

30 **CHIEF JUSTICE DY CHANDRACHUD:** To abrogate.... To abrogate370.

31

32 **KAPIL SIBAL:** This is not basic structure My Lords. This is a compact between one sovereign  
33 and another, ingrafted in our Constitution. It's a Constitutional compact. Unlike other states,  
34 where My Lords, Junagadh, he didn't agree. As a political act, you took over Junagadh. He ran  
35 away. The Maharaja ran away.

36

1 **CHIEF JUSTICE DY CHANDRACHUD:** That Mr. Sibal, there I think we are treading on  
2 thin ice. Because the moment we say that this was just a recognition, this was a recognition of  
3 a compact between one sovereign state and another which forms a part of our Constitution.  
4 When such a sovereign compact, is capable of being overwritten.

5

6 **KAPIL SIBAL:** That's all right. So then we could...

7

8 **CHIEF JUSTICE DY CHANDRACHUD:** By the sovereign of the succeeding state.

9

10 **KAPIL SIBAL:** That debate is a separate debate, which doesn't arise in this case because  
11 there's a procedure that they have followed. That debate doesn't arise here My Lords. We are  
12 not talking of that at the moment. That's not an issue. We are talking about a procedure in  
13 terms of 370 which they followed, consistent with the interpretation of 370. Having taken that  
14 position that we need the consent of the Constituent Assembly...

15

16 **CHIEF JUSTICE DY CHANDRACHUD:** Is this a Constituent Assembly, according to you?

17

18 **KAPIL SIBAL:** That's right. That's the procedure.

19

20 **CHIEF JUSTICE DY CHANDRACHUD:** That we have appreciated...of course we have  
21 appreciated that suggestion.

22

23 **KAPIL SIBAL:** We are limited, only on that.

24

25 **CHIEF JUSTICE DY CHANDRACHUD:** That process, in other words, your contention is,  
26 that the process which the Government of India followed, assumes that the proviso to Clause  
27 3 applies, that this change has to be brought in through a Constituent Assembly.

28

29 **KAPIL SIBAL:** Correct.

30

31 **CHIEF JUSTICE DY CHANDRACHUD:** But this was evidently not the Constituent  
32 Assembly, because (a), it was the Legislative Assembly that you have invoked and 2) even that  
33 Legislative Assembly was dissolved and ultimately Parliament was exercising their power in  
34 the 356.

35

36 **KAPIL SIBAL:** Now the larger question, supposing Your Lordships were to say, this is not  
37 the right procedure. Then the question will arise, can they do it through any other procedure?

1 Then what, My Lord, is putting to me may arise. We're not on that issue. We are not giving  
2 solutions to the other side that you can do it under 370. I don't know where that comes from.  
3 My Lords, there's a limited constitutional issue before you, which is the process. The power  
4 and the process. The power is in 370, Sub-article 3. The process is what they followed. Can  
5 they do it under 370, Sub-article 3 and is this process right? That's the limited issue that Your  
6 Lordships have to decide. If there are other processes available under the Constitution and  
7 they follow them, maybe My Lords that may be valid, may not be valid, but I can't answer that  
8 question in a vacuum. My Lord is right, what My Lord is putting to me. The problem is the  
9 residuary power is with the State. And I've shown Your Lordships provision after provision,  
10 right from the Delhi pact in 1952 that that's the case.

11

12 **JUSTICE B.R. GAVAI:** But then what happens to Article 363(a)?

13

14 **KAPIL SIBAL:** 350?

15

16 **JUSTICE B.R. GAVAI:** 363(a)? That also, earlier the regulation was on the basis of the pact  
17 between the various Princely States and the...

18

19 **KAPIL SIBAL:** My Lords those pacts were there. Recognitions granted to the ruler. But  
20 either they completely assimilated themselves into the Union and be part of a State, or they  
21 were taken over.

22

23 **JUSTICE B.R. GAVAI:** This was on the basis of certain agreements between the States and  
24 the...Princely States and the...

25

26 **KAPIL SIBAL:** Correct, the agreements were different from this agreement. My Lord, Your  
27 Lordship is right. If it were that kind of agreement, then Your Lordships would apply those  
28 standards, and those principles, and those judicial dictums which Your Lordships applied. We  
29 are not on that.

30

31 **JUSTICE B.R. GAVAI:** Here your argument is that, unless the views of the entire populace  
32 of the Jammu and Kashmir are taken into consideration, the abrogation of 370 can...

33

34 **KAPIL SIBAL:** Yes, then it can be done.

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36 **JUSTICE B.R. GAVAI:** But then the negotiations were not between the elected body. The  
37 negotiations will be between the Princely State and the Union.

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**KAPIL SIBAL:** Correct. And that was accepted. That very thing was accepted by the then Constitution makers. So My Lords, we can't go into...

**JUSTICE B.R. GAVAI:** No, what was accepted...in so that the other States are concerned it could be taken away by 363(a).

**KAPIL SIBAL:** Correct. But that was not the position as far as Jammu and Kashmir is concerned. I'm not saying anything. I agree with what My Lord is putting to me. But how do you change the constitutional structure? There must be some power. You can say that you can do a political act. Today you say, look, forget about all this. We take over Jammu Kashmir. Fine.

**JUSTICE B.R. GAVAI:** This is 363(a), was done under 368.

**KAPIL SIBAL:** Yeah, you can do that. The point today is, My Lord, that's not an issue before you. You are not going to answer an issue which is, with respect, greatest respect, which is not before you. You're not going to find a power for them which doesn't exist and which is not followed. I understand My Lords the difficulty. And I understand My Lord the fact that at some stage or the other, this had to be....Let's put it this way. This had to be done. Let's put it this way. Somebody said, this has to be done. Then My Lords, there must be found a constitutional way of doing it. I am not saying there are not.

**JUSTICE SANJAY KISHAN KAUL:** Not has to be done, I would say but whether it could be done or not.

**KAPIL SIBAL:** No, no, not could be.

**JUSTICE SANJAY KISHAN KAUL:** Can meet the mandate. Question is, you say it can't be done?

**KAPIL SIBAL:** No, I say this was a political act. I don't say anything more than that. This was a pure political act and you circumvented the provisions of the Constitution to reach a particular end result which you always wanted.

**JUSTICE SANJAY KISHAN KAUL:** The second part is that which you will argue of course, that the process by which they followed was...



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**KAPIL SIBAL:** Yes, yes, that's the issue before you. There's no other issue before you.

**CHIEF JUSTICE DY CHANDRACHUD:** According to you, this could have been only done, could have been only done on the recommendation of the Constituent Assembly. Absent the Constituent Assembly you cannot exercise the power to abrogate.

**KAPIL SIBAL:** Number 1. Number 2, in any case it is they who believed that this could only be done through the Constituent Assembly. Apart from the fact that I say that it could be done, they also believed that it could be done and they followed that procedure. Now, whether that procedure was right or wrong, is for Your Lordships to decide. Whether there is another way to do it, is something that they will decide. That's all that I can say. I don't want to make the argument in a hypothetical argument, conjuring up issues that don't arise in this case. And I don't want to give a helping hand, as my learned colleague wants to do, because he can do it outside the court.

**JUSTICE SANJAY KISHAN KAUL:** On the lighter side you said, if you had to do it, you would do it a different way.

**KAPIL SIBAL:** Maybe, maybe. My Lords, you can't introduce a bill in Parliament at 11 o' clock, pass a resolution without anybody knowing about it. Of course, those are internal procedures.

**JUSTICE SANJAY KISHAN KAUL:** You are the Parliament.

**KAPIL SIBAL:** I am not saying anything, I am just saying 11 o' clock nobody knows, nobody knows

**JUSTICE SANJAY KISHAN KAUL:** Larger issue as a member of Parliament, you will say, don't touch us.

**KAPIL SIBAL:** Yes, that's right. So I am not touching that process either. I am only saying that this is what you know, it sort of fits into the argument that this is a, was a political process carried through certain constitutional means which unfortunately were not available.

**JUSTICE SANJAY KISHAN KAUL:** All this is a political process Mr. Sibal. The only question is whether it is within the constitutional means or not.

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**KAPIL SIBAL:** That's right.

**JUSTICE SANJAY KISHAN KAUL:** Everything is a political process.

**KAPIL SIBAL:** No, I'll tell you how My Lords because now, let me just go through Coelho, and then I will go back to the list of data.

**JUSTICE SANJAY KISHAN KAUL:** Yes.

**KAPIL SIBAL:** Volume 3.

**JUSTICE SANJAY KISHAN KAUL:** You want us to read what now?

**KAPIL SIBAL:** Volume 3 My Lords, page, PDF 323. And the fact of the matter is My Lords, as per what my Learned Friend said, almost all the laws applicable in the Union of India were applicable in Jammu as of today. I have a list that runs into pages after pages. Everything has been adopted, apart from the, other than the residuary power. Everything is adopted. Everything.

**JUSTICE SURYA KANT:** Mr. Sibal you are referring Volume 3?

**KAPIL SIBAL:** Yes, Volume 3, PDF 323. Case Law Volume 3.

**JUSTICE B.R. GAVAI:** There is a separate volume for...

**KAPIL SIBAL:** Yes, sorry My Lords, Case Law Volume 3.

**JUSTICE B.R. GAVAI:** Coelho and *Rameshwar Prasad* are there in one volume.

**KAPIL SIBAL:** Yes, reading Coelho. Para. 54, PDF 323. 323. Running page 776 My Lords. 323 para 54. And remember this, if you use 368, you'll have to have two thirds present and voting. So you don't use 368 because you don't get present two thirds present and voting. So you go through this procedure. So the question whether 368 could have been used or not, is a separate issue. And had that been used we'd have had another argument here. But it's not an issue.

1 **CHIEF JUSTICE DY CHANDRACHUD:** Yes Mr. Sibal. Which is the para from Coelho  
2 that you would like us to see?

3

4 **KAPIL SIBAL:** Yes para 54.

5

6 **CHIEF JUSTICE DY CHANDRACHUD:** At page?

7

8 **KAPIL SIBAL:** Page 776, My Lords, PDF 323.

9

10 **CHIEF JUSTICE DY CHANDRACHUD:** Page 323?

11

12 **KAPIL SIBAL:** Yes. The distinction is drawn. My Lord has that paragraph? "By the author  
13 between the making of a Constitution by a Constituent Assembly, which is not subject to  
14 restraints by any external authority, as a plenary law making power, and a power to amend the  
15 Constitution. A derivative power derived from the Constitution and subject to the limitations  
16 imposed by the Constitution. No provision of the Constitution framed in exercise of plenary  
17 lawmaking power can be ultra vires, because there is no touchstone outside the Constitution,  
18 by which the validity of provisions of the Constitution can be adjusted. The power for  
19 amendment cannot be equated with such power of framing the Constitution. The amending  
20 power has to be within the Constitution and not outside it."

21

22 Why? Because you are subject to the constraints of the Constitution. So you want to amend?  
23 You can use 368, but then you have to follow the procedure under 368. For example, you were  
24 to say that you amend the definition and say the provision for consent of the States is not  
25 required. Approval of the States is not required. Can you do that? The answer is "No." That's  
26 a proviso, to 368. So if you want to work within the Constitution, you have to follow, then,  
27 what the Constitution obliges you to do constitutionally. If 368 were available....

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29 **CHIEF JUSTICE DY CHANDRACHUD:** Apart from Coelho which is the next?

30

31 **KAPIL SIBAL:** Yes. Next is 100 ... para 118.

32

33 **CHIEF JUSTICE DY CHANDRACHUD:** Of?

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35 **KAPIL SIBAL:** Of Coelho itself.

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37 **CHIEF JUSTICE DY CHANDRACHUD:** PDF?

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**KAPIL SIBAL:** PDF page 344. We have earlier... I'm sorry My Lords. Para 118. We have earlier noted that the power to... My Lords have that?

**JUSTICE B.R. GAVAI:** Para 118?

**KAPIL SIBAL:** Yes. "We've earlier noted that the power to amend cannot be equated with the power to frame the Constitution. The power has no limitations of constraints. It's a primary power, a real plenary power. The later former power, however, is derived from the former. It has constraints of the document, that is, the Constitution which creates it. This derivative power can be exercised within the four corners of what has been conferred on the body constituted, namely, Parliament. The question before us is not about the power to amend part C. As per *Kesavananda Bharati*, power to amend exists in Parliament, but it is subject to the limitation of the doctrine of basic structure. The fact of validation of laws based on exercise of blanket immunity eliminates Part 3 in entirety. Hence, the rights test as part of the basic structure doctrine has to apply." So My Lords, therefore, we are now left with a Parliament which seeks to amend 370. So therefore it has to work within the constraints of the Constitution. That's what we're concerned with. We're not concerned with any other interpretation of the Constitution. So now we go back My Lords, to the list of... yes Ambedkar's statement is volume... Document Volume 8, PDF page 26. Yes. Volume 8, Documents Volume 8, PDF page 26. Now, My Lords, quite frankly...

**JUSTICE B.R. GAVAI:** PDF page?

**KAPIL SIBAL:** 26. Just two paragraphs and then I am done with this issue altogether My Lords. PDF page 26, Documents Volume 8. Your Lordship has it? May I read it My Lords?

**JUSTICE B.R. GAVAI:** Page?

**KAPIL SIBAL:** Page 26, paragraph starting the provisions relating to Amendment of the Constitution. My Lords, Justice Surya Kant has it?

**JUSTICE SURYA KANT:** Yes.

**KAPIL SIBAL:** My Lords, Justice Kaul has it?

**JUSTICE SANJAY KISHAN KAUL:** Yes, I have.

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**KAPIL SIBAL:** 'The provisions relating to amendment of the Constitution have come in for a virulent attack to the hands of the critics of the draft Constitution. It is said that the provisions contained as a draft make amendment difficult. It is proposed that the Constitution should be amenable by a simple majority at least for some years. The argument is subtle and ingenious. It is said that this Constituent Assembly is not elected on adult suffrage.' My Lords I have read this, this part of it, I've read.

**CHIEF JUSTICE DY CHANDRACHUD:** Yes, you actually read it from Justice Jagan Mohan Reddy...

**KAPIL SIBAL:** Yes, I've already read that. Kindly come to the next paragraph.

**CHIEF JUSTICE DY CHANDRACHUD:** Very well.

**KAPIL SIBAL:** What is said to be the absurdity, that paragraph. Next paragraph.

**CHIEF JUSTICE DY CHANDRACHUD:** Yes.

**KAPIL SIBAL:** 'What is said to be the absurdity of the amending provision is founded upon a misconception of the position of the Constituent Assembly and of the future Parliament elected under the Constitution. The Constituent Assembly in making a Constitution...' My Lords, that also I have read. So this is the exact...

**CHIEF JUSTICE DY CHANDRACHUD:** There is only one part of the Dr. Ambedkar's statement was very [UNCLEAR]. Dr. Ambedkar postulates that the future Constituent Assembly may be a future Parliament itself.

**KAPIL SIBAL:** Yes.

**CHIEF JUSTICE DY CHANDRACHUD:** There is the future Parliament, if it may be the Constituent Assembly, it's members will be acting as partisans seeking to carry out amendments to the Constitution to facilitate the passing of party measures if they fail to get through Parliament by reason of some Article of the Constitution. It is actually an obstacle in their way.

**KAPIL SIBAL:** This is the precise argument.

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**CHIEF JUSTICE DY CHANDRACHUD:** If it is the Constituent Assembly and the future Parliament.

**KAPIL SIBAL:** This is the precise argument I'm making is what Dr. Ambedkar said, that it is the parties, partisan political measures that are carried through in the process, in the form of legislation or otherwise, which can't be done as far as... which would be constrained by the provisions of the Constitution, but the Constituents Assembly doesn't have any such fetters.

**CHIEF JUSTICE DY CHANDRACHUD:** Yes.

**KAPIL SIBAL:** So My Lords, I am done with this whole argument, My Lords. So now let's go back to the list of dates and how all this happened. The other issues. Now compilation in my written submission...

**CHIEF JUSTICE DY CHANDRACHUD:** We go to our written submissions, Volume 2.

**KAPIL SIBAL:** Written submissions Volume 2 and kindly come to...

**JUSTICE B.R. GAVAI:** Page 48.

**KAPIL SIBAL:** Page 47. Yeah.

**JUSTICE SANJAY KISHAN KAUL:** These are list of dates?

**KAPIL SIBAL:** List of dates and kindly come to PDF 47, Item 57.

**CHIEF JUSTICE DY CHANDRACHUD:** Yes.

**KAPIL SIBAL:** Item 57, PDF 47 in my list of dates, Volume 2 of the written submissions, 20th of June 2018, Section 92.

**CHIEF JUSTICE DY CHANDRACHUD:** That we saw Mr. Sibal. That we saw, you read out Section 92.

**KAPIL SIBAL:** Thats right. No My Lords, what's important, is the date. On the 19th of June, a political party in coalition with another party which was in government withdrew support.

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**CHIEF JUSTICE DY CHANDRACHUD:** That is not in the list of dates?

**KAPIL SIBAL:** Yes. Just kindly note that. It's in the proclamation,

**CHIEF JUSTICE DY CHANDRACHUD:** 19th of June 2018?

**KAPIL SIBAL:** Yes My Lords. BJP withdrew support from PDF, PDP.

**JUSTICE SANJAY KISHAN KAUL:** Before Serial number 57?

**KAPIL SIBAL:** Yes, yes. It's in the document, but I just wanted to....

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

**KAPIL SIBAL:** Now, My Lords so, he issued the Governor on the next day issues of proclamation, which is also quite curious.

**CHIEF JUSTICE DY CHANDRACHUD:** That we find it at top of page 48.

**KAPIL SIBAL:** Your Lordships may look at, My Lords, PDF page 85, Volume 3, the proclamation itself.

**CHIEF JUSTICE DY CHANDRACHUD:** Anything turns on it, I mean, in the sense to read it. You have paraphrased it, I guess.

**KAPIL SIBAL:** Yes, I have paraphrased it.

**CHIEF JUSTICE DY CHANDRACHUD:** Is there any particular....

**KAPIL SIBAL:** The provision permits the Governor by proclamation, to assume to himself all the powers and functions of the Government of the State. Such a proclamation in terms of 92(5), required concurrence of the President, and that the 92(3), which ceased to operate within six months, which I have already mentioned to Your Lordships. We need not go into it.

**CHIEF JUSTICE DY CHANDRACHUD:** This is the power corresponding to 356, which is vested in the Governor?

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**KAPIL SIBAL:** That's right. But here it's vested in the Governor My Lords, independent of the Council of the Ministers which I mentioned to Your Lordships. It's a very, very unique power. And the Council of Ministers were suspended in the process. My Lords, he didn't even wait for a day. I mean, normally speaking what would happen My Lords? A Governor would wait for other political affiliations to take place to form a government.

**JUSTICE SANJAY KISHAN KAUL:** It's also part of political process.

**KAPIL SIBAL:** I'm sorry.

**JUSTICE SANJAY KISHAN KAUL:** It's also part of political process.

**KAPIL SIBAL:** That's precisely what I am saying. Why do you think I have been saying this? Why would a Governor do this on the next day My Lords?

**CHIEF JUSTICE DY CHANDRACHUD:** Yes, then what happens?

**KAPIL SIBAL:** Then My Lords, so he does this. So six months were to expire, then My Lords, there is some controversy. And I will just tell Your Lordships orally what that controversy is. According to the PDP, and I think somebody else will argue that, I am not arguing. According to the PDP, they sent a fax to Srinagar, that they have the support of the National Conference, and they are willing to form the government. The Governor says he never received the fax, because, he says that he was in Jammu and the fax was sent to Srinagar. So My Lords, on the 21st of November, the next day, he dissolved the Assembly. Yeah on 21st November.

**CHIEF JUSTICE DY CHANDRACHUD:** The fax was [UNCLEAR] sense of Deja vu you know...

**KAPIL SIBAL:** Fax is sent on 21st. It is object on 21st. He dissolves it on 21st. The fax hasn't reached him.

**JUSTICE SANJAY KISHAN KAUL:** It is almost on the anvil of the period of expiry.

**KAPIL SIBAL:** No. That expired on 3rd of January. 19th of December.

**CHIEF JUSTICE DY CHANDRACHUD:** 19th. So about a month short of that....



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**KAPIL SIBAL:** Yes. Yes. A month short.

**TUSHAR MEHTA:** This is not under challenge anyway.

**KAPIL SIBAL:** No. No. I myself said so. I myself said that that is an issue...

**CHIEF JUSTICE DY CHANDRACHUD:** So he dissolved the Legislative Assembly....

**KAPIL SIBAL:** He dissolved the... Now My Lords, you can't dissolve without the Council of Ministers. 36, 38, and 92 are his only powers. He has already suspended the Council of Ministers. He dissolves it.

**CHIEF JUSTICE DY CHANDRACHUD:** Without the aid and advice....

**KAPIL SIBAL:** Nothing. Why do you think I've been saying continuously that this is a pure political act. The Governor and the Government were acting in tandem. They wanted to get rid of 370. Toss it out. Why would any Governor do that? Why would the Governor on 20th of June, after withdrawal support on 19th of June suspend the Assembly? Don't allow any political affiliation and parties to take place so that a new government can be formed.

**CHIEF JUSTICE DY CHANDRACHUD:** Which is the power of dissolution under the Constitution just for the...

**KAPIL SIBAL:** 53. Section 53 of the Constitution of Jammu and Kashmir gives that power of dissolution, not part of the exception given to the Governor with reference to his powers that he can exercise without the aid of the Council of Ministers.

**CHIEF JUSTICE DY CHANDRACHUD:** Yeah, so Section 35 refers to 36, 38 and 92.

**KAPIL SIBAL:** 36, 38 and 92. The process, according to me, when you are interpreting constitutional provisions, is as important as the substance, because it's a Constitutional process.

**CHIEF JUSTICE DY CHANDRACHUD:** That's what another Coelho said. But this time it is Paulo Coelho from The Alchemist.

1 **KAPIL SIBAL:** That's right. Then My Lords, on the 19th of December, the proclamation of  
2 Governor's Rule expired. A proclamation on the 356 promulgating President's Rule in the  
3 State of Jammu and Kashmir was issued on 19th of December. So, then came President Rule.  
4 So, on 3rd of January... My Lords, It is better to see the proclamation, Volume 3, PDF 92.  
5 Volume 3 of Documents, PDF 92.

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7 **JUSTICE SANJAY KISHAN KAUL:** Do you want us to look at this Mr Sibal?

8  
9 **KAPIL SIBAL:** Yes see that My Lords. It's important. Because that's a very important  
10 provision. It has huge implications as to what happened later. My Lords have PDF 92? 92 My  
11 Lords, Volume 3 of the documents. Justice Gavai, Justice Kaul? Justice Surya Kant?

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

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15 **KAPIL SIBAL:** The following proclamation by the President is published. "I so and so have  
16 received a report from the Governor of the State of Jammu and Kashmir. And after considering  
17 the report and other information received by me..." My Lords, all Governor's Rule. Kindly see  
18 My Lords. It's all Governor's Rule from 20th of June, right up to this date. There are no Council  
19 of Ministers in place, there's no Government in place, but he sends a report that the  
20 government cannot be carried out. Where is the basis for any of that? There are no  
21 negotiations, there are no communication... So, he says, 'I am satisfied that the situation has  
22 arisen where the Government of the State cannot be carried on.' Government of the State, but  
23 the Government of the State was carried on by the Governor, in accordance with the provisions  
24 of the Constitution of India, as applicable to the State and of the Constitution of Jammu and  
25 Kashmir. Now an exercise of the powers conferred by Article 356 and of all other powers  
26 enabling me in that behalf are hereby to proclaimed, kindly come to (c)...To (a), 'Assume to  
27 myself as President, all the functions of the Government of the State and all powers vested in  
28 or exercisable by the Governor in that State under the Constitution and the State Constitution.  
29 Declare that the power of the Legislature of the said State shall be exercisable by or under the  
30 authority of Parliament.'

31  
32 Now this is important My Lords. Therefore, they are exercising...Parliament is exercising the  
33 powers of the State Legislature and the State Legislature under My Lords 147, you can't move  
34 a bill. Which is what Ambedkar said, which is what Kesavananda said, that you can't do this.  
35 You have to be confined to your powers and responsibilities under the Constitution under  
36 which you're acting.

1 'Declare the legislature of that State shall be exercisable by or under the authority of  
2 Parliament. Make the following incidental and consequential provisions which appear to me  
3 to be necessary or desirable for giving effect to the objects of the proclamation. In exercise of  
4 the functions and powers assumed to myself by virtue of Clause A, of this proclamation, as  
5 aforesaid, it should be lawful for me as President of India to act to such extent as I think fit to  
6 the Governor of the said State. The operation of the following provisions.' Now this is very  
7 important. 'Of the Constitution and of the State's Constitution are hereby suspended.'

8 Under what power? So much of the first proviso to Article 3 of the Constitution as relates to  
9 the reference by the President to the Legislature of the State and the second proviso to that  
10 Article. So much of Clause 2 of Article 151 of the Constitution as it relates to laying before the  
11 Legislature of the State of the report submitted by the Governor by the Controller and Auditor  
12 General. Now My Lords, what they did was, they took away the proviso to Article 3. Under  
13 what power? You can't amend the Constitution in virtue of your power under 356.

14

15 Now, let's see what the proviso to Article 3 of the Constitution says, My Lords. Kindly have a  
16 look. Volume 1, Constitution Volume 1, Documents Volume 1, PDF page 186. Sorry, 65. PDF  
17 page 65. So PDF page 65. This is an amazing piece of handiwork. It's a mosaic of illegalities  
18 attracted enough to be junked. I don't understand how all this happened. There must have  
19 been great Constitutional advisors My Lords, who would have thought of this very complicated  
20 handiwork which found itself in our Constitution.

21

22 **KAPIL SIBAL:** So, Article 3, My Lord. Document Volume....

23

24 **CHIEF JUSTICE DY CHANDRACHUD:** So, they delete effectively the proviso to Article  
25 3. But Mr. Sibal, at the end of it all.... I mean of course, this has the optics about the way it was  
26 done... But there is no challenge to anything that was done. All this is not under challenge here.

27

28 **KAPIL SIBAL:** No My Lords, once we are challenging the emergency My Lord, the  
29 declaration of 356 is challenged. My Lords just looking at....

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31 **CHIEF JUSTICE DY CHANDRACHUD:** The frame of the petitions. Do we have a  
32 challenge?

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34 **KAPIL SIBAL:** Yes we have one challenge. But quite apart from that... You're looking at My  
35 Lords 370. Which is not...

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1 **CHIEF JUSTICE DY CHANDRACHUD:** Alright, let me just see what the frame of the  
2 challenge is. If you can just ask one of your juniors to make that little tabulation...

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4 **KAPIL SIBAL:** I will. But apart from that My Lords, this is now, before you, in all its  
5 various....

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7 **CHIEF JUSTICE DY CHANDRACHUD:** Yes, of course.

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9 **KAPIL SIBAL:** Now the question is My Lords, what is the power? And that's the other thing.  
10 What is the power under 356? The quintessential object of 356 is to restore democracy. You  
11 take over because a Government cannot be run in accordance with the provisions of the  
12 Constitution, for a temporary period for the restoration of democracy. You don't use 356 for  
13 its decimation. You can't amend the provisions of the Constitution under 356. You have to  
14 show the Constituent Assembly.

15

16 **CHIEF JUSTICE DY CHANDRACHUD:** It requires the ratification by the State  
17 Legislature. Now suppose a particular State, the Legislature, the power is being exercised  
18 under 356 and the President assumes the powers of the Legislature, the executive. Can a  
19 ratification be done under 356 in relation to that particular State Legislature?

20

21 **KAPIL SIBAL:** No My Lord. No, because he's exercising the power of the State Legislature  
22 in this sense. There's no question of ratification.

23

24 **CHIEF JUSTICE DY CHANDRACHUD:** Not in the J&K case. I'm just theoretically, I'm  
25 saying can a...

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27 **KAPIL SIBAL:** Generally what is the...My Lord is putting to me?

28

29 **CHIEF JUSTICE DY CHANDRACHUD:** Some Constitutional amendments under the  
30 proviso require a ratification.

31

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

33

34 **CHIEF JUSTICE DY CHANDRACHUD:** Now, for the purpose of computing the strength  
35 required for ratification, can the Centre fall back upon the exercise of the 356 power? Saying  
36 that, look, we have ratified it because we were exercising the power under 356.

37

1 **KAPIL SIBAL:** Tough question. What My Lord is [UNCLEAR] to me is that if Jammu and  
2 Kashmir in a 368 situation, if Jammu and Kashmir were to ratify it, then Parliament can  
3 exercise that power.

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5 **CHIEF JUSTICE DY CHANDRACHUD:** Any Indian State.

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7 **KAPIL SIBAL:** No, My Lord.

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9 **CHIEF JUSTICE DY CHANDRACHUD:** You require a certain number of States.

10

11 **KAPIL SIBAL:** Provided My Lord you are... 356 is imposed there, not otherwise.

12

13 **CHIEF JUSTICE DY CHANDRACHUD:** Haan, but if 356 is imposed then can that power  
14 to ratify the amended be exercised?

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16 **KAPIL SIBAL:** That's a tough question.

17

18 **CHIEF JUSTICE DY CHANDRACHUD:** Even that is a little...

19

20 **KAPIL SIBAL:** Yeah, I can't answer it. I'd have to think more about it, because the ratification  
21 is of the State. Therefore, there are two separate constitutional authorities. One Parliament  
22 passing the law...

23

24 **CHIEF JUSTICE DY CHANDRACHUD:** Under the State....

25

26 **KAPIL SIBAL:** And another authority ratifying it. You can't take the position, That's like, it  
27 takes two hands to clap. It's the same analogy. Therefore, you can't exercise that power yourself  
28 because that power constitutionally is provided for in another institution, in another  
29 Constitutional body.

30

31 **CHIEF JUSTICE DY CHANDRACHUD:** Here the proclamation comes under 356.

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33 **KAPIL SIBAL:** That's right.

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35 **CHIEF JUSTICE DY CHANDRACHUD:** After that what is done then?

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37 **KAPIL SIBAL:** Then My Lords, the amendments in Article 3.

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

**KAPIL SIBAL:** Yes, but the My Lord kindly see. Just read Article 3 with me for a minute. Formation of new States, alteration of areas, boundaries, or names of existing States.

**CHIEF JUSTICE DY CHANDRACHUD:** Amendment to Article 3, required as part of this whole process?

**KAPIL SIBAL:** Because they wanted to get rid of this proviso My Lords, otherwise they wouldn't have been able to...

**CHIEF JUSTICE DY CHANDRACHUD:** That's the proviso?

**KAPIL SIBAL:** Yes. Because then he has to do the reorganization act.

**CHIEF JUSTICE DY CHANDRACHUD:** The reorganisation....

**KAPIL SIBAL:** That requires...

**CHIEF JUSTICE DY CHANDRACHUD:** Converting the State into a UT...

**KAPIL SIBAL:** That's right. That's right. That's how this had to be done earlier. The second proviso is not Your Lordship's document. That will be in the other document. The second proviso relates to as applicable to the State of Jammu and Kashmir. Kindly have a look at that. Kindly just show that document. Volume 1.

**JUSTICE SANJIV KHANNA:** Order passed.

**KAPIL SIBAL:** Yes, yes, yes. There the proviso was there My Lord.

**JUSTICE SANJIV KHANNA:** There the proviso was there.

**KAPIL SIBAL:** Yes. yes.

**JUSTICE SANJIV KHANNA:** That proviso is deleted.

1 **KAPIL SIBAL:** That's correct.

2

3 **CHIEF JUSTICE DY CHANDRACHUD:** Which is that proviso, Mr. Sibal?

4

5 **KAPIL SIBAL:** I am going to show that to Your Lordships. PDF page 55... 65. Document  
6 Volume 1.

7

8 **JUSTICE SANJIV KHANNA:** That was...That must be pursuant to the Presidential Order.

9

10 **KAPIL SIBAL:** Correct. Absolutely right.

11

12 **JUSTICE SANJIV KHANNA:** So the Presidential Order was not.... Was the Presidential  
13 Order amended? No.

14

15 **KAPIL SIBAL:** No.

16

17 **GOPAL SUBRAMANIAM:** It's been superseded, My Lord.

18

19 **KAPIL SIBAL:** It deals with the second proviso. You can't even introduce the bill, forget  
20 about anything else.

21

22 **JUSTICE SURYA KANT:** Only one second proviso

23

24 **KAPIL SIBAL:** Second part of the first proviso. And the second proviso

25

26 **CHIEF JUSTICE DY CHANDRACHUD:** Where do you get this document, actually  
27 document number, document compilation?

28

29 **KAPIL SIBAL:** Documents, Volume 1, PDF 65, Constitution of India as applicable to the  
30 State of Jammu and Kashmir.

31

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

33

34 **KAPIL SIBAL:** PDF 65, running page My Lords is 65, also 65.

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36 **JUSTICE SANJAY KISHAN KAUL:** That's the Constitution of India as applicable to the  
37 State of Jammu & Kashmir.

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**KAPIL SIBAL:** That's where, the only place where the pages of the Constitution of India and the Constitution as applicable are synchronized. The rest is...

**JUSTICE SANJAY KISHAN KAUL:** I interestingly read the note below. It says when secular was inserted into the Constitution it was never inserted here.

**KAPIL SIBAL:** Never inserted, okay.

**JUSTICE SANJAY KISHAN KAUL:** Just see the note below it, note one you got it?

**KAPIL SIBAL:** Yes, I got it at the bottom. Yes. [UNCLEAR] is secular. But see My Lords, what they have done.

**CHIEF JUSTICE DY CHANDRACHUD:** Where is the proviso?

**KAPIL SIBAL:** Proviso My Lord at page 66. Next page.

**CHIEF JUSTICE DY CHANDRACHUD:** Second proviso.

**KAPIL SIBAL:** Second proviso. Let's read the whole, it would be better if we read the whole. If Your Lordships don't mind. "Formation of new States and alteration of areas, boundaries, or names of the existing states. Parliament may, by law form a new state by separation of territory from any state." My Lords, this will also be important when you deal with the reorganization. Actually, you might as well read the whole article My Lords. "Parliament may, by law form a new state, by separation of territory from any state or by uniting two or more states or parts of states, or by uniting any territory to a part of any state. Increase the area of any state, diminish the area of any state, alter the boundaries of any state, alter the name of any state, provided that no bill for the purpose shall be introduced in either House of Parliament, except on the recommendation of the President, and unless where the proposal contained in the bill affects the area, boundaries or name of any of the states, the bill had been deferred by the President to the Legislature of that state for expressing its views thereon which within such period as may be specified in the reference or within such further period as the President may allow, and the period so specified or allowed is expired." That's why My Lords, when the views of states were taken, they said, no, you haven't referred it. We said, only need to take your views, we don't have to take your consent or your concurrence. So we may not agree, even if you express your views that it should not be done we are not bound by it, which



1 is the correct constitutional provision. Then the second proviso, "Provided further, that no bill  
2 providing for increasing or diminishing the area of the State of Jammu and Kashmir, or  
3 altering the name of boundary of that State shall be introduced in Parliament without the  
4 consent of the Legislature of that State." So, you can't even introduce it. Here by 356, you do  
5 away with it.

6

7 **JUSTICE SANJAY KISHAN KAUL:** They have created a UT. Otherwise, they have not  
8 altered the territory. Have they?

9

10 **KAPIL SIBAL:** No, they have.

11

12 **JUSTICE SANJAY KISHAN KAUL:** How?

13

14 **KAPIL SIBAL:** Ladakh is not part of the state anymore.

15

16 **JUSTICE SANJAY KISHAN KAUL:** That's what, they carved out a UT and made another  
17 UT, which they say...

18

19 **KAPIL SIBAL:** Carved out a UT saying that this will become a state and the other UT will  
20 remain a UT.

21

22 **JUSTICE KAUL:** So carving out a UT is permissible, no?

23

24 **KAPIL SIBAL:** Not from a state. I'm sorry. You can't create a whole state.

25

26 **CHIEF JUSTICE DY CHANDRACHUD:** Boundaries are altered. Boundaries are also  
27 altered.

28

29 **JUSTICE SANJAY KISHAN KAUL:** To that extent yes.

30

31 **KAPIL SIBAL:** Now My Lords, this is all. And I am going to take Your Lordships through the  
32 Constitutional Assembly debates on this. Just a presently, I'll do that.

33

34 **CHIEF JUSTICE DY CHANDRACHUD:** And for J&K, consent required.

35

36 **KAPIL SIBAL:** Yes.

37

1 **CHIEF JUSTICE DY CHANDRACHUD:** Not just views, but the consent. Other States...

2

3 **KAPIL SIBAL:** No My Lords. You require the consent before you introduce it....

4

5 **CHIEF JUSTICE DY CHANDRACHUD:** Right... Right. Other states...only views have to  
6 be taken, but for J&K consent is required before you introduce the bill.

7

8 **KAPIL SIBAL:** Yes.....I'm sorry.

9

10 **JUSTICE SURYA KANT:** Is it mentioned only in 1954 Constitution Order, or is it  
11 incorporated in Article 3 also?

12

13 **KAPIL SIBAL:** It's mentioned in the 54 order and incorporated in Article 3 before the '54  
14 order.

15

16 **JUSTICE SURYA KANT:** 3, if it is incorporated, that would amount to amendment of the  
17 Constitution. Then why is it followed as per three... Article 368?

18

19 **KAPIL SIBAL:** Not in the Indian Constitution My Lord. It is only in this constitution.

20

21 **JUSTICE SURYA KANT:** This proviso... a second proviso...

22

23 **KAPIL SIBAL:** Yes.

24

25 **JUSTICE SURYA KANT:** ...you are reading...

26

27 **KAPIL SIBAL:** Yes.

28

29 **JUSTICE SURYA KANT:**...Now we are reading it in the presumption or assuming that it's  
30 a part of Article 3 of the Indian Constitution. Second proviso.

31

32 **KAPIL SIBAL:** No. It's a modification of Article 3. As applicable.... As applicable only.

33

34 **JUSTICE SURYA KANT:** So, it is only incorporated in the 1954 Order as not formally  
35 inserted in Article 3 of the Indian Constitution as a second proviso.

36

1 **KAPIL SIBAL:** Correct, correct, correct. Absolutely right, what My Lord is putting to me.  
2 Absolutely right.

3

4 **CHIEF JUSTICE DY CHANDRACHUD:** They suspended the operation.

5

6 **KAPIL SIBAL:** They suspended the operation. How do you get that power under 356? That's  
7 not the object of the proclamation. That Assembly can't power... exercise that power My Lords  
8 to suspend.

9

10 **JUSTICE SANJAY KISHAN KAUL:**... on behalf of the Assembly...

11

12 **KAPIL SIBAL:** Yes. They can't do that also. A bill cannot be introduced without the consent.  
13 Assembly is not in session. There is no Assembly. It has been dissolved. So where do you get  
14 the consent of the Assembly? So the Governor becomes the Assembly then the Assembly  
15 becomes Parliament, and then Parliament gives consent on behalf of an Assembly that does  
16 not exist.

17

18 **JUSTICE SURYA KANT:** Mr. Sibal, what was the procedure followed when different orders  
19 were issued under those Constitution? Like those about 18 orders, Constitutional orders until  
20 52...

21

22 **KAPIL SIBAL:** That was all, My Lords, with concurrence.

23

24 **JUSTICE SURYA KANT:** What was the procedure followed? Was it through Parliament  
25 process or through by the President Rule?

26

27 **KAPIL SIBAL:** No it's not through a 'Parliament process'. It's through a Presidential  
28 notification after taking the consent. Concurrence or consultation. That's right. So that's how  
29 it's made applicable through a Presidential order.

30

31 [NO AUDIO]

32

33 No. No. It's 356 an exercising powers under 3...and exercising powers under 356.

34

35 [NO AUDIO]

36

1 ...In this context before I go back to 356, it's better to Your Lordships looks at the Constituent  
2 Assembly debate on this on this. On this Article 3 and why this was... Volume 8 PDF page 289.  
3 Dr. Ambedkar, My Lords at 289, says, 'Sir, I move.' ....'Sir, I move that for the existing proviso  
4 to Article 3, the following proviso be substituted, provided that no Bill for the purpose shall be  
5 introduced in either House of Parliament, except in the recommendation of the President and  
6 unless where the proposal contained in the Bill affects the boundaries or name of any State or  
7 States for the time being specified in Part 1 of the first Schedule. The views of the Legislature  
8 of the State or as the case may be of each, of respect to the provisions thereof have been as  
9 contained by the President and the States, both with respect to the proposal to introduce the  
10 Bill and with respect to the provision thereof have been, ascertained by the President, and  
11 where such proposals affects the boundaries or name of any State of States or States for the  
12 time being specified in Part 3 of the first Schedule, the previous consent of the State, or as the  
13 case may be of each of the States to the proposal has been obtained. The Vice President, if one  
14 were to compare the amended proviso with the original proviso as it was set out in the draft  
15 Constitution, members will see that the new amendment introduces two changes. One is this,  
16 in the original draft the power to introduce the Bill was given exclusively to the Government  
17 of India. No private member of Parliament had the power under the original draft to propose  
18 any legislation of this sort. Attention of the drafting Committee was drawn to the fact that this  
19 was a somewhat severe and unnecessary containment of the right of the members of  
20 Parliament to move any motion they liked and in which they felt concerned. Consequently, we  
21 deleted this provision, giving the power exclusively to the Government of India, and gave it to  
22 the President and stated that any such Bill, whether it was brought by the Government of India  
23 or by any private member, should have the recommendation of the President.' That is one  
24 change.

25

26 The second change, which is more important is this. 'Under the original Article 3, the power  
27 of the Government of India to introduce legislation was restricted by two conditions.' which  
28 are mentioned in A(1) and (2)I. 'The conditions that... were that there must be before the  
29 initiation of any action representations made to the President by a majority of the  
30 representatives of the territory in the legislature of the State for a resolution in that behalf  
31 passed by the legislature of any State whose boundaries or name will be affected by the  
32 proposal contained in the Bill. Here again, it was represented that there might be a small  
33 minority which felt very strongly that it's position will not be safeguarded unless the boundary  
34 of the state were changed and that particular minority was permitted to join their brothers in  
35 the other state, and consequently these brothers remained there, action would be completely  
36 paralyzed. Consequently, we propose now in the amended draft to delete (1) and (2).' This is  
37 important...'to delete (1) and (2), of the (A), and also (B) of the original draft. These have been

1 split into two parts, (A) and (B). (A) deals with the reorganization of territory, insofar as it  
 2 affects the States in Part 1.' That is the dominion states. 'Part 1, that is to say, Provinces and of  
 3 the new amendment relates to what are called Indian States. The main difference between the  
 4 new Clause (A) and (B) of any amendment is this, in the case of (A), that is to say,  
 5 reorganization of territories of state falling in Part 1, all that is necessary is consultation.  
 6 Consent is not required. All that the President is called upon to do is to be satisfied before  
 7 making the recommendation that their wishes have been consulted.

8

9 With regards to (B), the provision is that there shall be consent. The distinction, as I said, is  
 10 based upon the fact that as far as (B), at present concerned, the position of the Provinces is  
 11 different from the position of the States. The States are sovereign States, and the Provinces are  
 12 not sovereign States. Consequently, the Government need not be bound to require the consent  
 13 of the Provinces to change their boundaries. While in the case of the Indian States, it's  
 14 appropriate in view of the fact that sovereignty remains with them, that their consent should  
 15 be obtained. As regards the amendment moved by Professor Shah, I do not see much  
 16 difference between my amendment as contained in Sub-clause (A), of the new proviso and this  
 17 and his. He says that the discussion shall be initiated in the States. My Sub-clause (A) of the  
 18 proviso also provides that the State shall be consulted.

19

20 I have not the least doubt about it that, the method of consulting with the President will adopt,  
 21 will be to ask either the Prime Minister or the Governor to table a resolution which may be  
 22 discussed in the particular State Legislature, which may be affected so that, ultimately the  
 23 initiation will be the local legislature and not by the Parliament at all. I therefore submit the  
 24 amendment of Professor Shah is unnecessary. Now, this was adopted My Lords. So, the views  
 25 of the people of the state were to be taken. So the second proviso, My Lords when it came in,  
 26 they said that, this will not apply to Jammu and Kashmir. You needed consent. And so  
 27 therefore no bill could be introduced. This is consistent with all the other provisions including  
 28 370, including the powers of concurrence My Lords, with respect to the concurrent list, in the  
 29 concurrent list of the Constitution, as applicable. So this is a consistent threat throughout My  
 30 Lords which is accepted by the Constitution makers. So, now My Lords, if you now go to 356,  
 31 Document Volume 3, PDF page 92. I'll read further My Lords, so they suspended this.

32

33 **JUSTICE SURYA KANT:** Document Volume 3?

34

35 **KAPIL SIBAL:** Yes, My Lords, Volume 3, PDF page 92. That's the proclamation. So, when  
 36 everybody was integrated, all States were integrated into the Union. That My Lords, didn't  
 37 need any consent. But since this was not integrated, Jammu and Kashmir, therefore, the

1 second proviso was provided. And My Lords, Your Lordships will see that the... whereas clause  
 2 says provisions of the Constitution of India as applicable to that state and of the Constitution  
 3 of Jammu and Kashmir, both. And now My Lords so much as the first proviso to Article 3, as  
 4 relates to the reference to the President of the Legislature of the State and the second proviso  
 5 to that Article so much of Clause 2 that we don't need. We don't need to read that.

6  
 7 Then My Lords kindly 3. Item 3 of the proclamation. Any reference of the Constitution and the  
 8 State Constitution to the Governor shall in relation to the said State, be construed as reference  
 9 to the President. And any reference in the Constitution and the State Constitution to the  
 10 Legislature of the State or the Houses thereof, shall insofar as it relates to the functions and  
 11 parts thereof be construed, unless the context otherwise requires, as a reference to Parliament.  
 12 So Governor functions to Parliament. Legislature functions to Parliament. So it's all My Lords,  
 13 the power is concentrated in Parliament to do what it likes. And in particular, the reference to  
 14 Section 91 of the State Constitution to the Governor and to the Legislature of the State of the  
 15 Houses thereof shall be constituted as references to the President and the Parliament or to the  
 16 Houses thereof, respectively. So My Lords, you lose the link between the centre and the state  
 17 altogether. You absorb the powers of the state with yourself as the Executive as well as  
 18 Parliament as a Legislature and you decide without reference to any other institution.  
 19 Governor means President, Legislature means Parliament. So, you can do what you like and  
 20 so you give yourself consent. You don't have to seek consent. And My Lords the people who  
 21 gave themselves this Constitution are left out of the process altogether.

22  
 23 This is essentially, according to me, a breakdown of the Constitutional structure that was  
 24 engrafted in the Constitution. It's a complete breakdown. By inhering in yourself as the Union,  
 25 the power of the State, executive power of the State, and by Parliament, the Legislative power  
 26 of the Legislature. So you do away with any representative form of government, do away with  
 27 the institutions and make it irreversible.

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

30  
 31 **KAPIL SIBAL:** Then My Lords, go back now to the list of dates. PDF 48. Written Submissions  
 32 compilation Volume 2, PDF 48. So, I'm done with the proclamation, 19-12-2018. So, item 60.  
 33 My Lords have that? A resolution approving this proclamation, issued by the President on 19-  
 34 12-2018, was passed in the Lok Sabha on 28-12 and the Rajya Sabha on 3rd of January. Then  
 35 My Lords, we don't have to read this... Jammu Kashmir Peoples... we're not concerned. Kindly  
 36 come to 60.... Item 65, PDF page 50. So, at item 65, you will find, on the 3rd of July 2019, the  
 37 President's proclamation was in terms of Article 356(4) to expire on 2nd of July. Six months

1 My Lord, because from January 3, 2019 it would be January... I mean July 3. So, it was to  
2 expire on 2nd July. Consequently, President's Rule in J&K was extended for a further period  
3 of six months with effect from 3rd of July till the 28th of June 2019, and Rajya Sabha on 1st of  
4 July. Then leave all this. Then 72, page 53. PDF page 53. This is that 11:00 AM order on the  
5 5th of August 2019.

6

7 **CHIEF JUSTICE DY CHANDRACHUD:** Mr Sibal, three minute short. We are going to the  
8 11:00 AM order now. We'll continue with this on Tuesday.

9

10 **KAPIL SIBAL:** We'll read the 11:00 AM the next day My Lords. I am deeply obliged. We  
11 appreciate Your Lordships' patience, My Lords.

12

13 **CHIEF JUSTICE DY CHANDRACHUD:** We'll come back on Tuesday.

14

15 **KAPIL SIBAL:** Yes.

16

17 **NIZAM PASHA:** Your Lordship... matter, the High Court has pronounced the order that My  
18 Lord had remanded to them. We filed an SLP against that. We sent the email as per the  
19 protocol...

20

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

22

23 **NIZAM PASHA:** Requesting for a listing because they may not proceed with the survey.

24

25 **CHIEF JUSTICE DY CHANDRACHUD:** I'll look at the email right away.

26

27 **NIZAM PASHA:** Grateful Your Honour. Grateful.

28

29

30

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