

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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1

2 **CHIEF JUSTICE DY CHANDRACHUD:** Before we begin the proceedings today, if all of
3 you have a look at the screen, the large screen, or the screen on your left and right, that's the
4 first page of our new website for online passes to advocates, visitors, interns, everybody
5 coming to the Supreme Court. So, you don't have to wait in a queue in the mornings. All passes
6 are generated online. And, this is a facility which has been made available from this morning.

7

8 **TUSHAR MEHTA:** That was a major concern, because there used to be a long line.

9

10 **CHIEF JUSTICE DY CHANDRACHUD:** Yes, big, long line. So now, one can just apply for
11 a pass the previous evening or whenever you want, and log it for that particular day. So, this is
12 the way the pass will be generated. You are seeing now on the screen of one of our staff
13 members. Somebody who wants to meet somebody in the registry also, in any registrar, will
14 also get a pass generated. And, the moment the person comes to the security counter, the entire
15 details of the pass are reflected for the CISF personnel, the personnel... CRPF personnel who
16 are guarding the establishment. So, this will be a... We have called it SuSwagatam. SU, of
17 course, for the Supreme Court, and then Swagatam. Just to tell you, I've got a small statement
18 here. SuSwagatam is a web-based and mobile-friendly application that allows users to register
19 themselves online and request for e-passes for various purposes, such as attending court
20 hearings, meeting, advocates or visiting officers or departments for the press lounge. Users
21 can choose from different validity periods, such as daily, weekly, monthly, or quarterly,
22 depending on their needs and police clearance certificates. The portal also provides role-based,
23 secure login for different types of users, such as advocates, litigants, law clerks, contractual
24 staff, third party agencies and visitors. Users can upload their proof of identity and capture
25 their live photo during the registration process. They can also receive broadcast messages for
26 important announcements or special arrangements. The e-passes are delivered to users
27 through the email and SuSwagatam portal. Users can scan the QR code on their passes at the
28 entry and exit gates of the court premises. The portal also generates statistics on the number
29 of e-passes issued and used. The SuSwagatam portal was tested as a pilot project since 25 July
30 2023, and has received positive feedback from the users. As of 9 August 2023, more than
31 10,000 e-passes have been issued through the portal as a pilot. The Supreme Court of India
32 hopes that the portal will enhance the convenience and efficiency of code, operations and
33 services. For more information about the SuSwagatam portal, one can visit the website or
34 contact the reception office, and we are also having a video tutorial. So if people still want a
35 video tutorial, they can see it. The video tutorial's presently in English. I said we must also
36 have it in Hindi and other Indian languages. And for lawyers who want some help in the first

1 time registration just for the first time registration, they can go to the facilitation, the E-Seva
2 Kendra on the one that's marked, which is at the entry point of the Supreme Court. So now
3 we'll go from...

4

5 **TUSHAR MEHTA:** The entire nation would be grateful My Lords. Why I say this, we used
6 to come when we didn't get those cards which permits us to access. We used to come at 09:00
7 to stand in queue so that by 10:30 we get the pass and we can enter some 12, 13 years back I'm
8 saying. And that continued till date.

9

10 **COUNSEL:** <UNCLEAR> Interns, after the lockdown are still not being allowed in.

11

12 **CHIEF JUSTICE DY CHANDRACHUD:** Alright, we'll see what we can do. I know, I know.

13

14 **COUNSEL:** Some limit has been placed that two interns per senior.

15

16 **CHIEF JUSTICE DY CHANDRACHUD:** I am conscious of it.

17

18 **COUNSEL:** Because they are being denied the opportunity to, My Lords, see how the court
19 works.

20

21 **CHIEF JUSTICE DY CHANDRACHUD:** I have already been in conversation with the
22 staff on this specifically.

23

24 **TUSHAR MEHTA:** That's only for Monday, Friday, not other days because of the rush on
25 these two.

26

27 **CHIEF JUSTICE DY CHANDRACHUD:** All right, let's get started now with Article 370.

28

29 **ATTORNEY GENERAL R. VENKATRAMANI:** We would like to have a lap in honour of
30 this initiative.

31

32 **CHIEF JUSTICE DY CHANDRACHUD:** Thank you. I must also inform the members of
33 the Bar that we have made efforts to ensure that the lead time between the filing of a case and
34 the first hearing is curtailed to the minimum. So I keep a watch on how many matters are
35 released for mentioning, so about 230. The figure is about 230 new matters are cleared by the
36 registry every day. But I've done one more thing, which is I've disbanded the section which
37 was dealing with transfer petitions. Now bifurcated transfer petitions to the separate sections

1 dealing with that State. Transfer petition coming from Maharashtra, before goes to the
2 Maharashtra section. UP goes to the UP section. That staff of almost 20 officers has now been
3 sent to Section 1(b), which deals with filing of fresh cases. So with 20 more hands now of our
4 officers dealing with one 1(b), I think the lead time for getting a hearing in the court will be cut
5 down even further. It was about 3 to 4 days. We'll cut it down even further and as a result of
6 this. And 1(b), we have said that this staff will be bifurcated into staff, which is dedicated
7 exclusively to e-filing, then second, for staff, which is dedicated to physical filing because we
8 are still permitting physical filing. And third, staff which does our part of the backend work,
9 namely, printing of paper books for judges who require printed paper books. So I think we'll
10 be able to reduce the lead time in the actual date of hearing from the filing of a fresh case even
11 further. Yes Mr. Zaffar Shah.

12

13 **ZAFFAR SHAH:** Only one suggestion, if My Lords could also have a watch behind the back
14 so that the advocates will also know how much time he has taken. Your Lordships are able to
15 see it there, we need a watch there as well. We can't see behind how much time is taken.

16

17 **CHIEF JUSTICE DY CHANDRACHUD:** Incidentally I got a... I don't know how mobile
18 numbers travel. I get so many WhatsApp messages from people I don't necessarily know. One
19 of the things suggestions was, why do so many lawyers have to stand behind the arguing
20 counsel? Because they said, is the arguing counsel not disturbed by so many lawyers standing
21 right behind them? So that's something which of course, is a matter of voluntary compliance
22 by the lawyers to let the space be a little open for those who are arguing. And of course, those
23 who are assisting can sit next to the counsel who is arguing.

24

25 **TUSHAR MEHTA:** On the lighter side apropos Mr. Shah's request there should be a clock
26 on the back, but My Lord, for some of us, we need a calendar on the back.

27

28 **JUSTICE B.R. GAVAI:** Including the learned SG. Including the learned SG.

29

30 **TUSHAR MEHTA:** Yes sir, I said for some of us.

31

32 **ZAFFAR SHAH:** [UNCLEAR] how long we have been arguing.

33

34 **CHIEF JUSTICE DY CHANDRACHUD:** Yes, Mr Shah.

35

36 **ZAFFAR SHAH:** The clock could be there. That is all I am saying. So may I begin My Lords?
37 Yesterday I simply stated few things which was by way of an introduction. I said that ...

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CLAIMANT'S COUNSEL: My Lord, life is changing. [UNCLEAR]

CHIEF JUSTICE DY CHANDRACHUD: I realized that I didn't say it. I realized why there is a crowd there.

ZAFFAR SHAH: Place to sit for senior counsel as well. Yesterday. I submitted that after the independence of this country, the native states all became free. They became sovereign onto themselves. I also submitted that in the matter of accession to the dominion of India, they all entered into various kinds of agreements which were as law declared by this court is an act of State between the two independent entities, the dominion of India on the one side, and the native states on the other side. I also submitted that the relationship between these native states and the dominion of India was determined, was determined by the documents which were executed. In the case of State of Jammu and Kashmir, I also submitted that it was only Instrument of Accession which was executed between two entities, the dominion of India and the State of Jammu and Kashmir. Making that as the base that would be the relationship between the dominions of India and this entity. Subsequent to this when the residuary sovereignty vested in the king, further documents were to be executed relating to this particular state. The Maharaja issues the proclamation of 1948. In that proclamation he says that we need to have a National Assembly to frame a Constitution. This is the genesis. The genesis of framing of the Constitution of Jammu and Kashmir, is rooted in the nature of Instrument of Accession, as well as, the proclamation of 1948. That's where we arrive the source as to why second Constitution for the state. Then the third thing is, that after these declarations are made and no further documents are executed, but at the same time, the Constitution of India was being made, so the problem and the issue, the question before them was, what is to be done? This is what I said yesterday. And, I also submitted that, meanwhile, some more developments had taken place, which had an external dimension, which also shaped and influenced the Constitutional Assembly of the Union of India. This is the whole scenario which existed before Article 370 was adopted. And, I also submitted that the residual power came to be subsumed by Article 370. My Lord's observation was what happened to Instrument of Accession? But subsequently, when you agree to a Constitution, you had acceded to the dominion of India, maybe partly only may not be fully; you had not integrated, I would say, because you've not executed merger agreement. So, the Article 370 subsumed this remaining power. Whether we call it sovereign power, residuary power, but it retained the power with itself. And therefore next question would be. the exercise of this power? Whereas, the power is there in terms of the Instrument of Accession, now in Article 370, how it was to be exercised? I will make a digression here. Perhaps at that point of time, it was felt, that since

1 we don't have a Maharaja any longer, we don't have any other authority to do it, who would go
2 in almost like a substitute for merger agreement? If complete integration had to take place,
3 how could this be brought about? A mechanism is evolved in 370, that will be entirely for the
4 people of Jammu and Kashmir to integrate with India. Whereas, they have done it with
5 accession, they have acceded to the Union of India, but to integrate it completely, as I said,
6 shaking hands and embracing. The embracement was left to the people of Jammu and
7 Kashmir, but in accordance with the mechanism and the procedure prescribed by Article 370.
8 Now, what kind of power the Maharaja has retained? Most important, was the power to make
9 laws, which I said yesterday. Therefore, Article 370 itself says, all other provisions of the
10 Constitution are excluded. Notwithstanding, all provisions are excluded, except the Article in
11 itself and Article 370. Everything else is excluded. Nothing else applies to the State of Jammu
12 and Kashmir. The first part as I come to that, I'm just developing this point for Your Lordships'
13 consideration... the first part of Article 370 talks of application of laws in List 1, could be List
14 2, List 3. It talks of application of laws. Now, that application of laws, subject to one condition,
15 that since I had donated some power earlier under Instrument of Accession on 26th of
16 October, like defence, communication, foreign affairs, so there was no further donation
17 required. Therefore, the word 'consultation' was mentioned. Simply consult. Consult does not
18 mean agreeing. You just have to talk to somebody in normal language also, the
19 consultation...Talk to somebody, whether he agrees or disagrees, but the dominant person
20 would go in his own way after talking to him. But, for application of it, the word 'concurrence'
21 was required. Now, there's a fundamental difference in consultation and concurrence, where
22 both have to be *ad idem*. Both have to agree. When both have to agree, they, have to agree in
23 respect of the entry under which the Parliament had the power to make laws. But at the same
24 time you cannot have an extension of a law made by the Parliament unless the relevant
25 supporting provisional Constitutional entry, main provision is also made applicable. It is not
26 conceivable that the Parliament would have a law A. But there is no supporting provision of
27 the Constitution applicable to the State of Jammu and Kashmir, which would support
28 extension of that law to the State.

29

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

31

32 **ZAFFAR SHAH:** So, there were limitations provided in 370 itself with regard to the power
33 of the Parliament to make laws for the State of Jammu and Kashmir. First limitation was, if
34 you are relating any subject to List 1 or List 3, which is not a subject covered by Instrument of
35 Accession then you need concurrence of the Government of the State. Concurrence of the
36 Government of State would mean in simple language concurrence of the people of the State
37 through Council of Ministers. Why was this needed? A more of the question of why of Article

1 370? Why so special provision for State of Jammu and Kashmir? Only for one simple reason
2 that there was no merger agreement. That is the most important fact in the whole case, and
3 therefore this autonomy had to be maintained The State found a way to maintain its
4 constitutional autonomy by restricting the power of the Parliament to make law both in respect
5 of various entries, as well as in the substantive provisions.

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

8
9 **ZAFFAR SHAH:** Even with regard to this, the substantive provision of the Constitution of
10 India which was to apply, there is further restriction in that. It again has to be done with the
11 concurrence of the Government of the State. So we had two places. 1, when you want to apply
12 any entry you need concurrence. When you want to apply any Constitutional provision you
13 need concurrence. Except in respect of what is mentioned in Instrument of Accession. I'll just
14 support my point by the very text of Article 370. Notwithstanding anything in this
15 Constitution, the provision of Article 238 shall not apply in relation to the State of Jammu and
16 Kashmir. The power of Parliament to make laws for the said state shall be limited to those
17 matters in the union list and the concurrent list, which in consultation with the Government
18 of the state, are declared by the President to correspond to matters specified in the Instrument
19 of Accession governing the accession of the State to the dominion of India as a matter with
20 respect to which the dominion legislature may make laws for that State. Now pause here. My
21 Lords, what in simple language it says is, that if what is mentioned in Instrument of Accession,
22 somebody will have to agree that the entry mentioned in Instrument of Accession corresponds
23 to any of the matters in the union list or concurrent list, and the President of India is to declare
24 that such an entry corresponds to that list, then only the dominion Legislature will have the
25 power to make the law. It is not straightway that we agree to the entry and they extend the law.
26 It has to be in consultation and the President has to almost declare it that it corresponds to the
27 matter specified in the Instrument of Accession. For that consultation, the government is
28 required. So it means it involves the President of India on the one side and second is the
29 Government of the Jammu and Kashmir, two are involved in this government of the State.
30 And then the third constitutional authority is the President who is to declare that this matter
31 specified, corresponds to the subject of Instrument of Accession. Now this is only in respect of
32 union list and concurrent list. See the second part. Such other matters in said lists, that means
33 union list and concurrent list, as with the concurrence of the government of the state, the
34 President may by orders specify. So here requirement is with the concurrence of the
35 Government of State, and the President is to specify in the order that matters other than
36 Instrument of Accession whether they can be extended. If so, only after obtaining concurrence
37 of the Government of the State. So this is another limitation with regard to the power of the

1 Parliament to make law. Why is this? What is the need of this? Parliament has the plenary
2 power, they can make any law under list 1 and deploy throughout India. Despite having
3 acceded to the Union of India, despite being a part of Union of India, the mechanism was
4 different only because it had subsumed the residuary authority which the Maharaja had. Now
5 this carves out, the space for what we are contending here. Why we are before the Lordship?
6 What is the whole case about? We're taking the Lordships' time,
7
8 Five learned judges are hearing this matter, it's only because we believe that we have
9 constitutional autonomy. Under the Constitution of India itself, certain autonomy was
10 available to the State of Jammu and Kashmir, which was taken away on 5th and 6th of August.
11 We're here, contending that you cannot take away that autonomy of the state. This is all what
12 the whole case is about. Now, I am trying to lay down the basis, where does this autonomy
13 come? This autonomy comes from three - The Instrument of Accession is one, and second
14 important thing is, Article 370 itself. It doesn't give power to the institution of Parliament to
15 make any kind of law it wishes to make for the state, unless the State Government agrees to it,
16 and both, with consultation and concurrence. For the purpose of this article, the Government
17 of the State, means the purser for the time being recognized by the President as the Maharaja
18 of Jammu and Kashmir, acting on the advice... I'll make these submissions later. But what I
19 am trying to show is this important part, D. Such of the other provisions of this Constitution,
20 shall apply in relation to that state, subject to such exceptions and modifications the President
21 may, by order specify. Now, this part relates to the Constitution itself. The earlier part relates
22 to the list, that's the power to make the law. But this Clause D does not talk of the power to
23 make law under the lists, it talks of the provisions of the Constitution of India, as such. Giving
24 power to the President, you apply the provision of Constitution. But, in order to maintain the
25 constitutional autonomy, power is also given to the Government of the State that you can
26 request the President, please apply this provision, with this modification, with this exception,
27 with this omission. How that is to be done, that is between the two governments. That's
28 between the Government of the State and the Central Government. That's between them. That
29 could be a political decision with which the court is not concerned. But constitutionally
30 speaking, constitutionally speaking, there is no power vested in Central Government or in
31 President, to make any law as they wish, as they do it in the case of other states. No consent is
32 required from the other states, no consultation is required from any other state, no
33 concurrence is required of any other state, except of one state, that is the State of Jammu and
34 Kashmir. This is the second part, which I will demonstrate to My Lords, that how the
35 constitutional autonomy of the state is embedded in Article 370. Then sir, the two provisos
36 provided that, no such order which relates to matters [UNCLEAR] instrumental state...
37 referred to paragraph, so and so... shall be accepted in consultation... The same thing as List 1

1 of List 3, you need consultation, if they conform to the Instrument of Accession. Second
 2 proviso is, provided further no such order which relates to matters other than those referred
 3 to in the last preceding proviso, shall be issued, except with the concurrence of the
 4 government. So, concurrence is need it for the application of these constitutional provisions.
 5 They may, as such, apply. It's entirely up to the two governments to agree to that. They may
 6 apply with a modification, entirely up to the two governments. They may apply with
 7 exceptions, entirely up to the two governments. Then, sir, if the concurrence of the
 8 Government of the State referred to in paragraph 1 of so and so and the second provision of so
 9 and so of the clause be given, before the Constituent Assembly for the purpose of framing the
 10 Constitution, this is again, a very important expression used, that while the Constituent
 11 Assembly of the state is framing the Constitution, and you have given this concurrence, while
 12 it is in the process of framing the Constitution, then you will have to place that concurrence
 13 before that Constituent Assembly. And with jurisdiction on the Constituent Assembly to agree
 14 or disagree with that concurrence. That is what is significant. For such decision, as it may take
 15 thereon. So, in real practical terms, up to 1957, when the state adopted its own Constitution,
 16 during that period, if at all any concurrence at any state or any consultation at this stage had
 17 been done, it was to be placed before the Constituent Assembly of the state. And what's
 18 important is, that the Constituent Assembly of the state could invalidate that concurrence or
 19 that consultation, when it says, for such decision as may take thereon.

20

21 **ZAFFAR SHAH:** Answer is the clause with which we are concerned and which has been used.
 22 I'll make this submission later, but I will just read it right now. Notwithstanding anything in
 23 the foregoing provisions of this Article the President may by public notification declare that
 24 these Articles shall cease to be operative or shall be operative only with such exceptions, and
 25 modification from as he may specify, provide that the recommendation of the Constituent
 26 Assembly of the State referred to in Clause 2, shall be necessary before the President issues
 27 such notification. When we read this Clause this is different from the Clauses which are
 28 preceding it. And this Clause carves out a position for itself when it says, notwithstanding,
 29 anything in the foregoing provisions of this article which will be the earlier the union list, the
 30 concurrent list Consultation or the provisions of the Constitution. Notwithstanding that the
 31 power is given to the President to... this is one of the issues involved in this case. Can we say
 32 he has de-operationalized it? Or has he amended it? The expression used is, declared that the
 33 Article shall cease to be operative or shall be operative only with such acceptance? So the
 34 President is given the power to de-operationalize this Article. Therefore, a distinction between
 35 Article 368 which My Lords observed that had nothing to do with 370. It's a case of de-
 36 operationalisation of Article 370, subject to the method, the mode, and the requirement of

1 Sub-Clause 3 of Article 370. I will have something more to say on that. But right now, the point
2 which I was making was that the States being free...

3

4 **CHIEF JUSTICE DY CHANDRACHUD:** So the Constitution as it applies to the State of
5 Jammu and Kashmir, which is the entry relating to Jammu and Kashmir? Because the book
6 we have now has the latest, after the 2019, they read all the, they never give you footnotes and
7 I was trying to scroll down in the.. What is the original entry when it came in? What did the
8 entry say? The entry in the First Schedule to the Constitution relating to Jammu and Kashmir?

9

10 **ZAFFAR SHAH:** In 1950?

11

12 **CHIEF JUSTICE DY CHANDRACHUD:** Or soon thereafter. How was that paraphrased
13 actually?

14

15 **ZAFFAR SHAH:** I have worked on that also. I have the copy of the original Constitution. It
16 was passed in 1949. 26th.

17

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

19

20 **ZAFFAR SHAH:** I have that. What was the situation at that point of time, one. And number
21 two, 1954.....

22

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

24

25 **ZAFFAR SHAH:** When that first order came.

26

27 **CHIEF JUSTICE DY CHANDRACHUD:** The first order.

28

29 **ZAFFAR SHAH:** There were two before, 1950 and 1952.

30

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

32

33 **ZAFFAR SHAH:** Both were superseded by 1954. I will take Your Lordship clause by clause,
34 that what was contained in that '54 order, and as well as what was contained in the original
35 Constitution when it was passed. We need to go back in time. Without that, it's not possible to
36 apply certain standards, as we understand in 2023. This is the situation which has its roots in
37 history and we have to know why, how and why of... we need to recognize and appreciate how

1 and why of Article 370. Why 370 in the first place? Simpliciter historical process? Or there
 2 were certain compulsions? There were certain constitutional issues involved? Because these
 3 were between the two states. It was in the nature of an act of State. Why this Article 370? Your
 4 Lordship needs to understand this Article 370, which is source. And that sort of a, if I am to
 5 say, some sort of a compromise. On the one hand, you said there is no merger, it's not
 6 completely integrated. This is one aspect of the matter. The other aspect of the matter is
 7 pending as it is. Third aspect is that between the two, the two governments found okay, you
 8 stay with us, you stay with us, but we will grant you some autonomy. And these are all
 9 provisions related to this autonomy. Of course in terms of '54 Constitutional Application
 10 Orders, which have been passed, right after 1957 till the last one 2019, gradually the
 11 Government of the State has been, if I use that expression, chipping the power of the State
 12 Legislature. Now, what does it mean when I'm saying so? I, my Legislature in 1950 had the
 13 total powers of making laws except three subjects. So I could make law on any subject,
 14 whatever I liked, because then the power is vested in me in 1950. But what happened
 15 subsequent to Article 370, the state government is given the power under 370. Look here, you
 16 can concur with the Union of India and request them please apply this entry. So far, so good.
 17 When you apply that entry, what are you doing and who is doing it? It is the government of
 18 the State which is doing it and taking away the power of the Legislature of the State to legislate.
 19 Otherwise that power was with me.

20

21 **JUSTICE B.R. GAVAI:** But Mr. Shah, all that must have been done with either the
 22 consultation or with the concurrence of the state Legislature or state government.

23

24 **ZAFFAR SHAH:** Sorry sir, I.....

25

26 **JUSTICE B.R. GAVAI:** No, all this must have been done either in consultation with the state
 27 government or in concurrence with the state government.

28

29 **ZAFFAR SHAH:** I'm saying so. I said it resulted in, that's what I'm saying so. '54
 30 constitutional orders which were issued, they were done in concurrence, in consultation with
 31 the government. The other flip side of it is that our state legislature continuously lost power to
 32 legislate on those subjects, whatever they agreed. I'm not sure the question of wisdom, why
 33 they agreed or why they did not. I remember, Justice Kaul's, what is left in Article 370, you
 34 have gradually donated all the power to the Union of India. That aspect is there. But I'm saying
 35 in the original intention, what was the original intention of the Constitution makers? What is
 36 the original intention?

37

1 **JUSTICE B.R. GAVAI:** Could it not be gathered from Sub-Article 3?

2

3 **ZAFFAR SHAH:** 3?

4

5 **JUSTICE B.R. GAVAI:** That the Constitution...

6

7 **ZAFFAR SHAH:** Notwithstanding, that one?

8

9 **JUSTICE B.R. GAVAI:** Sub-Article 3 of 370, that the framers of the Constitution,
10 themselves at that stage, conceptualised that one day, the provisions of...

11

12 **ZAFFAR SHAH:** Your Lordship's not audible.

13

14 **JUSTICE SANJAY KISHAN KAUL:** ... that Sub-Clause 3 envisages by a process in a given
15 situation, that Article 370 would be de-operationalized to use your phrase.

16

17 **ZAFFAR SHAH:** Yes.

18

19 **JUSTICE SANJAY KISHAN KAUL:** The process is a separate thing. Therefore, to say that
20 370 has such a permanent character in the Constitution, that it can never be amended, would
21 be ... it's a very, very difficult proposition. Suppose the state itself had said that's why it was
22 simple. But, suppose the state itself had said that... That's why to Mr. Sibal also I put that
23 question. Suppose the state itself says that we want all laws to apply in 370, then where the 370
24 go, part from the chipping issue, which has occurred over a period of time. So, then we will
25 really come back to the process. Was this the process permissible or not, that would be the
26 question. That's how I look at it.

27

28 **ZAFFAR SHAH:** We might have different perceptions of it, but let me share my perception
29 with Your Lordships. If we don't want Article 370, answer to this question will first depend on,
30 as on today, on 5th of August 2019, was it still temporary or because of the passage of time,
31 non-availability of the machinery originally contemplated by Article 370, had it become,
32 despite being in part 21 showing 'temporary,' marginal note showing 'temporary,' it had
33 become permanent. Permanent in the sense, because the machinery was not available to
34 remove it. Now I'll clear it more...

35

36 **JUSTICE SANJAY KISHAN KAUL:** So, testing this proposition, Mr. Shah, suppose that
37 machinery was to be created, can it be removed? Is that your argument that... See, when you

1 say it has acquired a permanent character, if the machinery which according to you, is the
2 appropriate machinery, and which did not exist for 370 to be abrogated...

3

4 **ZAFFAR SHAH:** Yes.

5

6 **JUSTICE SANJAY KISHAN KAUL:** ... if that machinery was to be recreated or created or
7 in existence, then 370 could be removed?

8

9 **ZAFFAR SHAH:** If that machinery was recreated, that is Constituent Assembly recreated,
10 but which Constituent Assembly? Please see Sub-section 2, just for... I am aware of
11 observations My Lords are making. Please see the Sub-Section 2. And I would seek Your
12 Lordship's consideration also on that. "If the concurrence of the Government of the State
13 referred to in paragraph 2 of Sub-Clause B of Clause 1, or in the second proviso, Sub-Clause D
14 of that Clause B, given before the Constituent Assembly for the purpose of framing the
15 Constitution". So, it is identifying which Constituent Assembly they are talking of, and please
16 go back to Sub-Clause 3. "Notwithstanding anything contained in the foregoing provisions of
17 this article, the President may by public note declare, that this article ceases to be operative,
18 or shall we operative only with such exceptions, modifications and from... provided that the
19 recommendation of the Constituent Assembly of the state referred to in Clause 2", referred to
20 in Clause 2. Today, if Your Lordships were to direct a... form a Constituent Assembly, my
21 humble submission would be...

22

23 **JUSTICE SANJAY KISHAN KAUL:** A little different. I am saying, suppose as C.O.s have
24 been issued from time to time, and according to you, by concurrence of the State government
25 or the Assembly, were there an Assembly, was there a State Government which says that all
26 the provisions of the Constitution will apply? What would be the scenario ?

27

28 **ZAFFAR SHAH:** When our State Government says all the provisions of the Constitution will
29 apply, they will say so how? Outside 370, or within 370? They have to say so, that only through
30 370. That is the root.

31

32 **JUSTICE SANJAY KISHAN KAUL:** Right, that is the root. So therefore, once they are able
33 to say so under 370, except that 370 remains in form.

34

35 **ZAFFAR SHAH:** Yeah, that it remains a form, it remains a skeleton. Very true. But the root
36 is one. What's important is, the root is one. If you take away 370. Let us say take away 370.

37

1 **JUSTICE SANJAY KISHAN KAUL:** Even now, in a sense 370 is not removed in that sense.
2 What has happened is that whatever remained of 370 inside in their wisdom or lack of it,
3 whichever you may put it, they utilized the machinery of 370 to remove whatever was left in
4 370. That is what has happened.

5

6 **ZAFFAR SHAH:** Kindly appreciate it. First of all who can remove 370 is one question. Your
7 Lordship's observation is that if the government of the State...

8

9 **JUSTICE SANJAY KISHAN KAUL:** Process we have not come to. Process is separate. You
10 have an argument on that that look this is not the process by which it could have been done.
11 That's it.

12

13 **ZAFFAR SHAH:** No, if you wanted to do it completely or if we're going back to the original
14 position, if you want to completely integrate, then we have to get rid of 370. We have to get rid
15 of Instrument of Accession which is at 3. Then we have to execute merger agreement because
16 I was an independent state. We go back to the roots?

17

18 **JUSTICE SANJAY KISHAN KAUL:** The roots, Mr. Shah, you rightly said over a passage
19 of time the merger agreement, the 370, there were developments which took place, historical
20 developments. Then after that 370 came it was to govern then over a period of time different
21 matters as you say chip by chip 370 was... the effectiveness of 370 in terms of preserving the
22 right in the States to lay down the law was chipped away over a period of time.

23

24 **ZAFFAR SHAH:** Yes.

25

26 **JUSTICE SANJAY KISHAN KAUL:** Something still remained.

27

28 **ZAFFAR SHAH:** Yes.

29

30 **JUSTICE SANJAY KISHAN KAUL:** That something which still remained, they did it by a
31 process of 370. Whether that process was right or process was wrong is the second limb of the
32 argument that they could not have done this, or they could have done this in this manner. So
33 they also left now still a 370, but effectively making all laws applicable. So my only query is
34 that doesn't it all come down to one thing, whether the process they follow to do so was flawed.

35

36 **ZAFFAR SHAH:** Leave the process aside for a minute, My Lords. I am one of the federating
37 units. I want to be with the Union of India. 370 as it is, is it in the nature of an obstacle to

1 integrate myself with Union of India. If it's an obstacle, then obviously, somebody who thinks
2 that this should not be an obstacle you must integrate fully like any other state in India that he
3 has to first constitutionally speaking, not politically, constitutionally he has to get rid of 370
4 as it is. That's at 1.

5

6 **JUSTICE SANJAY KISHAN KAUL:** If this goes contrary. Mr. Gopal Subramaniam's
7 argument was, this is a medium of interaction. 370. It's a medium of interaction. Therefore,
8 that's the process you must follow. Now, if you go back historically to say that it has to be
9 abrogated, you must go back to the original, then how does it merge with it? The only thing is
10 that under 370, which is the medium of communication between the Centre and State, which
11 was established. So we established a methodology by which slowly, if you wanted, you could
12 do it. Now once that is there, it has been done. Historically also, if we see it has been done over
13 a period of time. Something still remained as I said, on the cost of repetition. Now that what
14 remains they took away by a similar kind of processes what was being done earlier, but the
15 process is said to be flawed because there was no Assembly, there was no elected body in
16 picture. This is the only question I had.

17

18 **JUSTICE SANJIV KHANNA:** Mr Shah, Just one more thing. If one looks at Sub-Clause 2.

19

20 **ZAFFAR SHAH:** Yes.

21

22 **JUSTICE SANJIV KHANNA:** Now it says that if there is any agreement with regard to sub
23 para 2 to Subclause B to Clause 1, or in the second proviso to Clause D to Clause so and so,
24 then the Constituent Assembly will take a call on it. Correct? Now the Constitution of India if
25 one looks at Article 1, which is specifically incorporated in the Constitution of India, it says
26 India, that is Bharat shall be Union of State, States and Union Territories thereof shall be
27 specified in the first schedule. So the question of merger being complete is absolutely certain.
28 What has been given over here in Article 370 is twofold. One is with regard to the union and
29 the concurrent list, the right to make laws. They said, there could have been even earlier, a
30 situation where some articles of the concurrent list or the union list could have fallen in the
31 State list. But in this case, this case of state of J&K, which merged with the entire country
32 became part of the Indian dominion. There are certain rights given to the state Legislature to
33 make the laws, that's all.

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35 **ZAFFAR SHAH:** More laws... more rights.

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37 **JUSTICE SANJIV KHANNA:** Yes, more.

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ZAFFAR SHAH: In comparison.

JUSTICE SANJIV KHANNA: These are just the list in question. The right to make laws are given to the State Legislature, but with one stipulation, that the State Legislature as can with the concurrence of the State Legislature, those laws can, if the concurrence is given, then this central government or this Union of India can also make laws, one. Number two, with regards to the provisions of the Constitution against with the concurrence of the state in question, gradually the laws can be, or the, all the provisions of the Constitution can be made applicable, that's part one. Part 3, that is, Clause 3 deals with abrogation of Article 370, or modification or changes in that. Your case, as far as the proviso is concerned, what is the effect of a proviso is something separate? Is our understanding correct?

ZAFFAR SHAH: Yes, yes. My Lords is correct. The first part is with regard to union list making of laws, very true. The state legislature, my state legislatures gets more laws. I will show them exactly the same position. It has more laws, more power as compared to, in relation to, other states in India. And why in relation to other states of India? As I said earlier, I read one argument yesterday. I said they merged. When they merged, it is the Constitution of India, which gave power to these state legislatures. It was open. I would go to the extent of saying, it was open for the Union of India not to give any power. It could have made it totally unitary. Because they have merged. They had no personality of their own. Their statehood was lost with the merger. But government of.. The Constituent Assembly of India still agreed that under list 2, they will have the powers. That's the theory of separation of powers now, with different views of this Hon'ble Court, whether they are administrative in character, whether they are political in character, we're not going to that question. But with regard to Jammu and Kashmir, it was, as I said, concurrence, on my concurrence, he could do that. So I would give concurrence, they would make law. I would give concurrence, they would make law. This procedure would continue. Under D, procedure is the same. I will give concurrence, they would agree for constitutional provisions, with or without modification. This power is there. Doesn't it come to Your Lordship's mind that when this Article 370 was enacted by the Constituent Assembly, did they proceed on an assumption? This is what I'm importantly saying. Did they proceed on an assumption that this Constituent Assembly of the State of Jammu and Kashmir, will recommend to the Union of India to do away with 370 so that it completely integrates. It could not have otherwise. Because of the Instrument of...

JUSTICE SANJIV KHANNA: I have some reservation on the use of the word "completely integrates". Integration has taken place in terms of Article 1.

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ZAFFAR SHAH: Integration. I said "complete integra... Actually...

JUSTICE SANJIV KHANNA: No. Probably what Clause 3 says is, Articles 370, which is a special provision, can be abrogated, can be modified and all made applicable <UNCLEAR>, that's all. Integration is, as far as Article 1 is concerned, is complete.

ZAFFAR SHAH: Can we divorce it from the context? We are going simpliciter as of today, in 2023, it's easy to say so, sir, with respect that you simply say, we can get rid of this Article 370, because it is flexible in terms of one part of Clause 3. That's what My Lords are saying. But it has a context. I'm more of the context, I can't divorce it from the context. In order to appreciate and understand it.....

JUSTICE SANJIV KHANNA: Anyway, please continue.

ZAFFAR SHAH: In that context...

JUSTICE SANJIV KHANNA: We have understood.

ZAFFAR SHAH: It cannot be done. Of course, if you divorce it from the context, then of course, just like Your Lordship is saying that this is temporary. Why are My Lords saying it is temporary? Because Part 21 says it styles itself as temporary, transient, and special provisions. Therefore, it is temporary. Why did you put it in Part 21? The marginal note of Article 370 says it is temporary. So therefore on these two facts, <UNCLEAR> saying this is temporary.

CHIEF JUSTICE DY CHANDRACHUD: You know, Mr. Shah...?

ZAFFAR SHAH: Yes.

CHIEF JUSTICE DY CHANDRACHUD: One thing which is very clear is that, there was no conditional surrender of sovereignty to the dominion of India. The surrender of sovereignty was absolutely complete.

ZAFFAR SHAH: Yes.

CHIEF JUSTICE DY CHANDRACHUD: And once the sovereignty was unquestionably and fully vested with the dominion of India, then the only restraints which would apply, would

1 be on the power of Parliament to enact legislations, so on and so forth... a few restrictions
 2 which remained, which were also, then, as we have seen, subsequently modified. And, in fact,
 3 there's a... in the Constitution Application Order of 1972, which is C.O. 93, which we'll find at
 4 Volume 3, page 52, there a very interesting provision, which comes in in 1972. In '72, Article
 5 248 was amended in relation to its application to the State of Jammu and Kashmir, and 248
 6 was substituted, which provides for residuary powers of legislation, in respect of all other
 7 states. 248 reads with Entry 97. Now it says, Parliament has exclusive power to make any law
 8 with respect to prevention of activities directed towards disclaiming, questioning, or
 9 disrupting the sovereignty and territorial integrity of India. Therefore, the Order of 1972
 10 makes it now beyond the pale of doubt, that sovereignty vested exclusively in India, and
 11 therefore, no vestige of sovereignty was retained post the Instrument of Accession.

12

13 **ZAFFAR SHAH:** May I submit Your Lordships this?

14

15 **CHIEF JUSTICE DY CHANDRACHUD:** Is it correct that Article 248 now applies? 248 as
 16 it is applicable to the State of Jammu and Kashmir immediately before 5th of August 2019,
 17 contains an absolutely clear and unequivocal acceptance of the sovereignty of India?

18

19 **ZAFFAR SHAH:** [UNCLEAR] of My Lord's observation. First is, the Instrument of
 20 Accession. First, when there was Instrument of Accession, one legal question for My Lord's
 21 consideration is this. When you accede, this was the general Instrument of Accession
 22 applicable to all the states. When you accede, do you transfer your sovereignty to the Union or
 23 not? That is answered by this Court, fundamental. They said, no you have not transferred your
 24 sovereignty in terms of only Instrument of Accession. You transfer it only by way of merger
 25 agreement. My Lord, when I conclude it, I will...

26

27 **JUSTICE SANJIV KHANNA:** What is superior, the Constitution of... Sorry, what is
 28 superior? The Constitution of India?

29

30 **ZAFFAR SHAH:** Of course, it's the Constitution of India, there's no doubt about that.

31

32 **JUSTICE SANJIV KHANNA:** Constitution of India is your... the merger agreement?

33

34 **ZAFFAR SHAH:** Not merger agreement, Instrument of Accession. But with 370 in it. If it
 35 was no 370, it was different. My Lords are....

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37 **JUSTICE SANJIV KHANNA:** Ultimately...

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ZAFFAR SHAH: I understand Your Lordship's mind, that while the Constitution of India Is there, your Instrument of Accession goes, your sovereignty goes, your everything goes.

JUSTICE SANJIV KHANNA: Ultimately...

ZAFFAR SHAH: But it doesn't seem to be like that, because this is something which has been there for 69 years. This is how the governments have worked it out for 69 years, from 1950 to 2019.

CHIEF JUSTICE DY CHANDRACHUD: Now take a case of an Indian state, apart from Jammu and Kashmir.

ZAFFAR SHAH: Yes.

CHIEF JUSTICE DY CHANDRACHUD: There are restraints in the power of Parliament to enact laws with respect to anything in the state list. Even today, Parliament cannot enact a law on the state list, right?

ZAFFAR SHAH: No, I will... Your Lords....

CHIEF JUSTICE DY CHANDRACHUD: Now, the reason I mention it is, these restraints in the power of Parliament are equally consistent with sovereignty qua all the other Indian states, in any case, vesting in the dominion of India, in India.

ZAFFAR SHAH: No, no, with respect...

CHIEF JUSTICE DY CHANDRACHUD: See, the distribution of legislative powers does not affect the fact that sovereignty vests in India. So, there are certain areas where no state... the Parliament cannot touch something which relates to a particular state list item. But merely because Parliament is completely disabled from touching a state list item while enacting law, does that detract from the fact that all these states ceded sovereignty to the dominion of India? So, what I'm trying to tell you is this, that restraint on the power to enact legislation is implicit in the... is implicit in the scheme of the Constitution, the frame of the Constitution, because we do not have a unitary state. But, does that detract the fact that Parliament cannot enact a law on a state list item, does that detract from sovereignty? It does not, it's just a fetter on Parliament. But there are the other fetters on Parliament, as well. Now you have the Goods

1 and Services Tax, which is another fetter, which has been brought in by consent of the states
2 and by Parliament. These are all fetters, which don't dilute from sovereignty. Likewise, the...
3 once Article 1 has, just as Brother Justice Khanna said India shall be a Union of States and that
4 includes the State of Jammu and Kashmir, transfer of sovereignty was complete. Therefore we
5 can't really read the post Article 370 Constitution as somehow a document which retains some
6 element of sovereignty in Jammu and Kashmir.

7
8 **ZAFFAR SHAH:** I'm saying so for a simple reason. The example which My Lords give, that
9 there could be constitutional provisions with regard to other state legislatures. That they can
10 do. Parliament can make law, cannot make law with regard to that State Legislature, those
11 limitations can be in the Constitution. But looking to Article 370, when it says concurrence of
12 the Government of the State, I say I am claiming it as a right of the state, that my concurrence
13 is needed. In the case of other states when the Parliament may, as a matter of concession, say,
14 "look, here, I will not do this for you, I will not do that thing for you." That's a matter of
15 concession, not as a matter of right. I am claiming the state right. The state's right not to apply
16 any law of the Parliament unless I don't concur with that.

17
18 **CHIEF JUSTICE DY CHANDRACHUD:** You know, I'll tell you there are provisions in the
19 Constitution which apply to concurrence in the states also. See Article 249. Parliament can
20 enact a law on a matter covered in the state list and it says that concurrence is required. Just
21 see, 249. Notwithstanding anything in the foregoing provisions of this chapter, if the Council
22 of States has declared by resolution, supported by not less than two thirds of the members
23 present in voting, that is necessary or expedient in national interest, if Parliament should make
24 laws with respect to Goods and Services Tax given recently, or any matter enumerated in the
25 state list specified in the resolution. It shall be lawful for Parliament to make laws for the whole
26 or any part of the territory of India with respect to that matter, while the resolution remains
27 in force. That's how Parliament enacted a law for the Urban Land Ceiling and Regulation Act.
28 When the ULCRA came into force in 1975, it was preceded by resolutions by all the states
29 because it was a state list item. So even on other states, Parliament has been given the power
30 to enact laws on the state list, but its subject to the concurrence. Here it is the Council of States,
31 because the Council of State represents the state.

32
33 **ZAFFAR SHAH:** No concurrence required in this also.

34
35 **CHIEF JUSTICE DY CHANDRACHUD:** It requires a resolution of the Rajya Sabha.

1 **ZAFFAR SHAH:** <UNCLEAR> Resolution of the states. Choice is that of the states. Kindly
2 see this. Not for <UNCLEAR> If the Council of State has declared by resolution supported by
3 not less than two-thirds of the members present and voting that is necessary or expedient, in
4 national interest, that Parliament should make law with respect to Goods and Services Tax,
5 provided under Article 246(a) or many matters as enumerated in the state list specified in the
6 resolution. It shall be lawful for Parliament to make law for the whole or any part or territory
7 of India with respect to that matter where the resolution remains in force. Now it talks of
8 resolution, maybe it also interprets that resolution as the consent of the state, but it has to be
9 in national interest that the Parliament has to make...

10

11 **CHIEF JUSTICE DY CHANDRACHUD:** See 252 for a moment, 252.

12

13 **ZAFFAR SHAH:** 252?

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15 **CHIEF JUSTICE DY CHANDRACHUD:** If it appears to the legislatures of two or more
16 states to be desirable...

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18 **ZAFFAR SHAH:** If it appears to the legislatures of two or more states to be desirable that
19 any of the matters with respect to which Parliament has no power to make laws, but except as
20 provided in Article 249 and 250, should be regulated in such states by Parliament by law, and
21 if a resolution to that effect are passed by all the Houses of the Legislatures of those States, it
22 shall be lawful of Parliament to pass an act for regulating that matter accordingly, and any act
23 so passed shall apply to such state, and to any other state by which it is adopted afterwards by
24 resolution, passed in that behalf by the House or, where there are two Houses, by each of the
25 Houses of the Legislature of that State. Any Act so passed by Parliament may be amended or
26 repealed by an Act of Parliament passed or adopted in like manner, but shall not as respects
27 any state to which it applies be amended or repealed by an Act of the Legislature of that State.

28

29 **CHIEF JUSTICE DY CHANDRACHUD:** Therefore, though Parliament ordinarily does
30 not have a law, does not have the constitutional power to pass a law with respect to a state on
31 a matter which pertains to the state list, if two or more states come together and say that look,
32 we want Parliament to pass a law, here again, there is a concurrence required of the state, for
33 two or more states. So in that sense, concurrence is not something which is unique to only the
34 relationship with Jammu and Kashmir. There are various shades of concurrence required in
35 the Constitution. It doesn't reflect on the sovereignty of the Union. These are fetters. Now you
36 see 246(a), when it came in as a result of the Goods and Services Tax Amendment. This is a
37 classical case where the government of India or Parliament can do nothing without the

1 concurrence of the states. 246(a) has completely redefined our notions of sovereignty, in that
2 sense. Because the states have given, now been given a vital role in financial matters.
3 Parliament can do nothing unless there is a requisite majority in the Goods and Services Tax
4 Council, the GST Council. So you know, in that sense our notions of the Parliamentary
5 exclusive competence, the States' competence, that's itself been... Justice Kaul mentioned that
6 yesterday, it's been an evolving exercise. One thing is very clear, sovereignty was ceded
7 completely to the Union of India.

8

9 **ZAFFAR SHAH:** See, My Lords... May I respond to My Lord's observations? What My Lords
10 finds is that there are provisions in the Constitution.

11

12 **CHIEF JUSTICE DY CHANDRACHUD:** Yes, Mr Shah.

13

14 **ZAFFAR SHAH:** What My Lords are observing, which I understand is that there are
15 provisions in the Constitution where the States can also request the Parliament that you make
16 the law for us, even if that subject of that law may be in the list 2, where the State Register had
17 exclusive power. But if two or more states decide so by a resolution, request the Parliament,
18 the Parliament will make laws for that. So it would imply that what is contained in Article 371,
19 while it says that you will apply the law with the concurrence, it's in principle the same as there
20 are other provisions, if I understand Your Lordship. So there is nothing so sacrosanct about it.
21 I leave it for a minute. What about the constitutional provision for which concurrence is
22 required, and the President used to apply with modifications to me after that concurrence.
23 Whether such a provision also exists for the states where they can request the President of
24 India that you apply this Constitution to us with these such kind of modifications, or it is not
25 possible for the legislature so far making of ordinary laws, and so far as making of the
26 constitutional provisions, obviously qualitatively they are different. In our case concurrence is
27 required also for the constitutional provisions, whether with exceptions and modification, that
28 Your Lordship have seen. So ordinary laws may be, My Lords finds the support that there are
29 other provisions, nothing great about it. But nevertheless that will go against the text of 370
30 when it says, concurrence is required for purpose of list 1 and list 3, whereas other provisions
31 also provide that in a certain situation, not as a matter of routine, in a certain situation, the
32 states can also request the Parliament to make the law. In our case, it is not a matter of routine
33 that they could do so. For every kind of legislation which has been passed at the request of the
34 Government of the state, concurrence has been give. So this...

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36 **CHIEF JUSTICE DY CHANDRACHUD:** Got the point. You've made the point succinctly.

37

1 **ZAFFAR SHAH:** All the 54....

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3 **CHIEF JUSTICE DY CHANDRACHUD:** Fair enough. Should we go on to the next point
4 now? Because we have understood your submission.

5

6 **ZAFFAR SHAH:** ...Your Lordships, one more thing. Also that when these 54 constitutional
7 orders have been passed, what is it that is given to us? And what was that was not given to us?
8 In these 54 Constitutional Orders which have been passed with the concurrence, there are
9 some extremely important Constitutional Orders, extremely important. Now, for example,
10 take one, Article 3 provides for the alteration of the state's boundaries, which has been read.
11 I'm not dealing with that question, but I'm dealing with it in a different way. For state of
12 Jammu and Kashmir, you cannot do it. You cannot do it at all, in terms of the '54 order.

13

14 Now why can't it be done for the State of Jammu and Kashmir? The '54 Order placed an
15 embargo on it, that till the State Legislature will recommend for changing the name, for
16 changing the boundary, you cannot do so. Now, this is a modification made in the application
17 of Article 3 to us. Why was this kind of a provision made in Article 3? I cannot lose sight of the
18 situation in which this article 370(a) has come into existence. Now, I'll give one more instance,
19 which is an extremely important instance. Article 253 deals with the treaties which the
20 Government of India may have with foreign countries. But kindly have a look at the proviso to
21 Article 253. I want Your Lordships to have a look at it and say why such provisions have existed
22 in its application to us.

23

24 **CHIEF JUSTICE DY CHANDRACHUD:** Volume 1 of The documents compilation? '54
25 Order...

26

27 **JUSTICE SANJAY KISHAN KAUL:** Will it be there in Volume 2 also, the Constitution?

28

29 **CHIEF JUSTICE DY CHANDRACHUD:** Actually, since we are just midway through the
30 proceedings, if someone can just do this exercise. Some of the leading things which we are
31 going to be constantly referring to, if you can just prepare a little one-page index for us? Just
32 not everything, just on one page. Things which... now we know everybody is referring to it. So,
33 it just becomes very easy for us to...

34

35 **ZAFFAR SHAH:** ...several volumes, six volumes are there.

36

1 **CHIEF JUSTICE DY CHANDRACHUD:** But, ultimately from the six volumes, there are
2 about say 20 documents which everybody is referring to. Those if you can put down on one
3 page with the volume number, it just becomes easy for us. We can keep it on the dais and just
4 flip through it whenever.

5

6 **JUSTICE SANJAY KISHAN KAUL:** Volume 1, page number 54 PDF?

7

8 **PRASANNA S.:** Volume 1, the Constitution of India [NOT AUDIBLE]

9

10 **JUSTICE B.R. GAVAI:** No, that is at, I think, page 13.

11

12 **ZAFFAR SHAH:** Page 13, that's right.

13

14 **JUSTICE SANJAY KISHAN KAUL:** Page 13.

15

16 **CHIEF JUSTICE DY CHANDRACHUD:** *1 mein bhi hain.*

17

18 **JUSTICE SANJAY KISHAN KAUL:** Volume 3, page 60.

19

20 **JUSTICE B.R. GAVAI:** You are referring to the Constitution as applicable to the...

21

22 **ZAFFAR SHAH:** Has all the learned Judges got it or not? Your Lordship has got it?

23

24 **CHIEF JUSTICE DY CHANDRACHUD:** One is in the C.O. and the other is the
25 Constitution, it's the same.

26

27 **ZAFFAR SHAH:** Should I read it? Your Lordships got it?

28

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

30

31 **ZAFFAR SHAH:** What does it say? Now 253 deals with international treaties and
32 agreements and conventions, provided that after the commencement of the Constitution
33 (Application to Jammu and Kashmir) Order, 1954, no decision affecting the disposition of the
34 State of Jammu and Kashmir shall be made by the Government of India, without the consent
35 of the Government of that State. What is being recognized? What is being recognised here?
36 This is what I'm saying.

37

1 **CHIEF JUSTICE DY CHANDRACHUD:** What is meant by disposition, actually? I just...

2

3 **ZAFFAR SHAH:** Yes, final disposition. Which would mean, in 1954, the Government of India
4 concurs with the Government of Jammu and Kashmir, that the final disposition of the State of
5 Jammu and Kashmir has yet to take place.

6

7 **CHIEF JUSTICE DY CHANDRACHUD:** No decision... disposition of the State. What is
8 meant by disposition, actually?

9

10 **ZAFFAR SHAH:** My Lord, settlement. Disposition means settlement.

11

12 **DINESH DWIVEDI:** [NOT AUDIBLE] ...unless they agree with, we can't say. So, in that was
13 in that context. This is all old story in comparison.

14

15 **ZAFFAR SHAH:** This is my humble submission. Of course, there are different perceptions
16 of it. This is the recognition of that position which preceded in that [UNCLEAR] of Article 370.

17

18 **CHIEF JUSTICE DY CHANDRACHUD:** ... it doesn't mean that all treaties will not apply
19 to J&K. For instance, suppose the Universal Declaration of Human Rights, or the Covenant on
20 Civil and Political Rights, that would apply. Or say, the Convention on the Elimination of
21 Discrimination Against Women, that will all apply, right?

22

23 **ZAFFAR SHAH:** We're only on the point of the state's disposition.

24

25 **CHIEF JUSTICE DY CHANDRACHUD:** The state's disposition.

26

27 **ZAFFAR SHAH:** Now, when we talk of state's disposition, I have already entered into
28 Instrument of Accession. What does it mean? That the State has yet to be disposed, and will
29 be done by Government of India only with the consent of the Government of Jammu and
30 Kashmir. Where would it apply? This situation will apply where? This is concurred by both the
31 Governments. It's not unilateral action. I would submit, this is the recognition of, this
32 submission which I made yesterday that this issue has an external dimension, which is
33 recognized in this, it has an internal dimension, which is also recognized in this and both,
34 when together with Article 370, clearly carve out a position that State of Jammu and Kashmir
35 has a distinct position, pending it is disposition. Final disposition. So what I am submitting is
36 that, this State of Jammu and Kashmir, all judgements of this court...

1 So My Lords, the premises on which I am building up my case is this, that State of Jammu and
2 Kashmir as all judgments of this court show has a special and a peculiar position. It is for the
3 first time this court is called upon on a very important issue, whether the way it has been got
4 rid of, whether it could have been done like that, and that does not involve any issue of the
5 procedure involved. It also involves the issue of power. Isn't this something which is basic to
6 all the arguments raised before this Court, with regard to the power? The power of Parliament,
7 the power of President, the power of the Government of the State, the power of the Governor.
8 The common theme in all these constitutional authorities is the power. And we're examining
9 that issue, we're debating that issue, that something has been done, whether you had the power
10 to do so, this is one. Second, how did you exercise that power? And if the exercise of the power
11 is unconstitutional then even if you have that power, the action will still have to be invalidated.
12 This seems to be the theme of the whole thing. Ultimately whether 370 by itself subserves the
13 sovereignty, as I said it does. But at the same time, the sovereignty is exercised by it from time
14 to time by agreeing to all Constitutional orders passed 54 in number. How those Constitutional
15 Orders were passed? How they are passed? And what is the effect of those is also an issue.
16 Then also, what is it that we are claiming? We are only claiming constitutional autonomy,
17 which has been taken away from us on 5th of August and 6th of August. Now, how do we get
18 that constitutional autonomy back? Is by demonstrating to the court that what is that I had. If
19 I had nothing, then what am I fighting for? It would be an unrealistic litigation, unworkable
20 litigation, it will have no result at the end. Second would be, I still had the constitutional
21 autonomy, maybe little, maybe whatever it may be as Hon'ble Justice court observed, you are
22 talking of a skeleton. Maybe it was a skeleton, but somebody still felt that skeleton was
23 disturbing him. Therefore he got rid of it. If it was a skeleton, leave it as it is. The way we were
24 living prior to 4th of August 2019, that the things remain as they are. But then the thought of
25 removing the skeleton, somebody must have thought somewhere that this skeleton must also
26 go. But I am not on the question of this skeleton. I still had the power. Now, let's see what was
27 in the Constitution? What was the constitutional application? Or in particular, 1954? Why?
28 Because it is that order, which is amended from time to time. And then what was sought to be
29 protected? Can I say something more My Lords? We are protecting, let's say the individuals
30 who live in the state of Jammu and Kashmir as permanent residents. Now that is protected
31 under the Constitution as applied to us. I'm just saying that, that is protected. That was
32 protected earlier also in terms of the notification of 1927. And Interestingly at that point of
33 time, a agitation was raised by a community, My Lords, unfortunately, they left us, and we owe
34 a lot to that community because we were taught by that community.

35

36 Anyway, that apart, they agitated because they were the educated class, and the king, at that
37 time, would get people from Punjab and other areas. So, they said we need jobs. So, they

1 agitated, and that resulted in a notification of 1927, and restricted appointments to the
2 permanent residents. Then, subsequently there was a notification in 1932, that also restricted.
3 Now when that is protected, now it has protected for several reasons. One could be that look
4 here, it is meant for the job, it is meant for acquisition of the properties. Second also could be
5 that, look here, the state as it is, so the people who live there need to have some rights, some
6 privileges, as against others. So, they all... protection came, that's one. Number two, state itself.
7 Keep the state intact though we are three regions. We are Ladakh region, Kashmir region and
8 Jammu region. The Maharaja, at that point of time, thought that bring all the three regions
9 together, and then we became a state. To protect the whole state. Now what has been done? It
10 has been divided. The people are divided, the part of it is with Pakistan, the part of it is with
11 China, about 2000 kms are with China and Aksai Chin, part of it is with Pakistan, and
12 remaining part is here. We're getting sandwiched between all these forces which are applying
13 in the State of Jammu Kashmir. Now, by virtue of this, again, the people have been divided
14 now. Now, we are reduced to a union territory of only Jammu and Kashmir, and Ladakh has
15 been separated from us. Somewhere, somebody... when they say how to make a law, somebody
16 was asked, a lawyer who was involved was asked how to make? He told him, you tell me the
17 political decision, I will tell you the law. Law does not precede political decisions. First, some
18 politics comes in, then the laws come. So, looking at the laws as they have been framed,
19 somebody took these decisions to make divisions and further divisions and further divisions
20 to our state. Now, we are claiming a position which it was on 4th of August. We need to be
21 reunited with all the three regions, we need to live as we used to live. And then, of course, over
22 the passage of time, over the passage of time, as the Government of the State, as I'm not on the
23 wisdom of that rightly or wrongly... Government of the State from time to time, did agree, did
24 give its concurrence to the application of various laws, from time to time. But nevertheless,
25 there were some fundamental laws to which they have not agreed in 69 years. Now, for the
26 first time, now this proviso which is added to Article 3, this continues as it is. Now, Entry 97,
27 Your Lordships just read. Entry 97 is the residual power of the Union Parliament. If any of the
28 subject of legislation does not fall in all those 96 entries, but yet it will be covered by Entry 97.
29 It means, it is open. If any legislation does not fall either in state list or concurrent list, and is
30 made by Parliament, it will fall in Entry 97. When it is made applicable to us, it is made
31 applicable to us in a specified manner. Now what is that specified manner? In 1985, the
32 Parliament enacted Terrorist and Disruptive Activities Act, commonly known as TADA. That
33 did not apply to us. The Government, at that point of time, I still remember, 6th of June 1985,
34 it recommended to the Government of India, please apply this Entry 97, but restrict it to the
35 matters which Your Lordship read just now, questioning the integration of the State,
36 questioning the accession, so on and so forth. Please apply that entry. Accordingly, this entry
37 came to be applied. It would imply, that Entry 97, as such, with widest possible power under

1 Entry 97, does not apply to the State of Jammu and Kashmir, it applies on a specified issue of
 2 a subject matter of a legislation. They say, for example, I'm indicating another autonomy,
 3 which I have. I have the autonomy of permanent residence, I had the autonomy of alteration
 4 of my state, I had the autonomy of final disposition, I had the autonomy of Entry 97, that there
 5 are similar other entries, both in the concurrent list as well as in List 1. So I will give you a long
 6 list of the entries which applied to us with modifications, and those modifications, carve out
 7 the constitutional position, the constitutional autonomy which the state enjoyed. Now, see
 8 another important thing. My Lord, the laws of this country, obviously, give rights to the
 9 citizens of this country, that's in terms of the fundamental rights and so on and so forth, under
 10 the Constitution and under various laws. Now, these laws come into conflict with some of the
 11 laws which were applicable in the state of Jammu and Kashmir. In order to protect those laws
 12 what the President did in 1954 Order, he incorporated a new article, that is 35(a). Incorporated
 13 a new article, that is 35(a). It is not in the Constitution of India. Obviously, it cannot be in the
 14 Constitution of India. It is in the Presidential Order of 1954. He carved out this Article 35(a)
 15 with the concurrence of the two Governments, protecting the employment, the permanent
 16 residency, the scholarship, I will indicate that also to Your Lordships, he protected that as well.
 17 Now this protection, this kind of protection, Article 3, 253, Entry 97, all these do indicate I still
 18 had constitutional autonomy. It is not that I was completely reduced to a skeleton. Maybe I
 19 was on oxygen, but I still was living. I still had that constitutional autonomy, My Lords, in
 20 terms of this constitutional position. And I continued with that. Whether this was rightly done,
 21 wrongly done, nobody's questioning that wisdom. I mean that's entirely for the Government
 22 of the state and between them, but not even the Government of the state, but the Council of
 23 the state. Now see, Parliament is excluded under Article 370. State Legislature is also excluded
 24 under Article 370. It is the President, the Governor and the Council of Ministers. That is all.
 25 These three are there in Article 370. They can do, undo with the Constitution.

26

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

28

29 **ZAFFAR SHAH:** My Lords, when learned judges talk to each other is always mysterious to
 30 us. They don't share their views.... positive, negative.

31

32 **JUSTICE SANJAY KISHAN KAUL:** It is the same ways... Sometimes when lawyers talks,
 33 it's not necessarily everything is...

34

35 **ZAFFAR SHAH:** I'll just indicate to Your Lordships now the constitutional autonomy of the
 36 state which still was intact. Which is important because that's what we are striving at. That
 37 please help us to maintain this constitution of autonomy. What has happened, has happened

1 in the past. And also what kind of governments will have in future, it is for them to extend
2 these laws to us. But we need our constitutional autonomy. Now what is it that we had prior
3 to 5th of August 2019? One, Your Lordships may have a look at this 1954 order, which is the
4 basis of the order because all other orders have subsequently been amended. And I work it on
5 that and I will show the kind of amendments made under various Council orders from time to
6 time. Let me begin with 1954 order.

7

8 **JUSTICE SANJAY KISHAN KAUL:** What is the page, Mr.?

9

10 **CHIEF JUSTICE DY CHANDRACHUD:** It's Volume 3, page 13. Volume 3, Page 13.

11

12 **ZAFFAR SHAH:** Sir, I think Your Lordships also need to compare it. What is it that was
13 done, simultaneously with the Constitution of India? Yes. That the Constitution (Application
14 to Jammu and Kashmir) Order, 1954. Volume 3, page 406. General page? PDF page 13. "In
15 exercise of the powers conferred by Clause 1 of Article 370 of the Constitution, to the President
16 with the concurrence of the Government of State, pleased to make the following order. This
17 order may be called the Constitution (Application to Jammu and Kashmir) Order, 1954. It
18 shall come into force on the 14th day of May '54, and shall thereupon supersede the
19 Constitution (Application to Jammu and Kashmir) Order, 1950". But I may remind here this
20 is the stage when Constituent Assembly of the state was, in session, was making the
21 Constitution of the state. "The provisions of the Constitution, which is [UNCLEAR] in addition
22 to Article 1 and Article 370, because that is already stated in 370, shall apply in relation to the
23 State of Jammu and Kashmir, and the exceptions and modifications, subject to which they
24 shall so apply, shall be as follows. The Preamble remains as it is. Part 1 remains as it is, but to
25 Article 3, there shall be added the following further proviso". I wait here. Your Lordships may
26 just have look, what does Article 3 deal with? It deals with formation of new states and
27 alteration of areas, boundaries or names of exit. "Parliament, may by law, form a new state by
28 separation of territory from any state, or by uniting two or more states, or parts of states of a
29 Union Territory to a part of any state, increase the area of any state, diminish the area of any
30 state, alter the boundaries of any state, alter the name of any state, provided that no bill for
31 the purpose of introducing either Houses of the Parliament, except on the recommendations
32 of the President, and unless where the proposed contained in the bill affects the area,
33 boundaries or name of any of the states, the bill has been referred by the President to the
34 legislature of that state for expressing its views thereon, within such period, as may be
35 specified in the reference, or within such further period as the President may allow, and the
36 period so specified allowed has expired". Explanation. In this Article, Clause A to E, 'state'
37 includes a union territory. But, if the proviso state does not include a union territory,

1 explanation to the power conferred to Parliament, Clause A, includes, the power to form a new
 2 state or union territory by uniting a part of any state or union territory or to any other state or
 3 union territory. Now, My Lords, insofar as the order is concerned, to Article 3, there shall be
 4 added the following proviso. "Provided that... provided further, that no bill providing for
 5 increasing or diminishing the area of the State of Jammu and Kashmir, or altering the name
 6 or boundary of that state, shall be introduced in Parliament without the consent of the
 7 legislature of that state". This is the restriction imposed with regard to the power of the
 8 President and the Parliament, to do away with the boundaries, the names of the various states.
 9 Then sir, Your Lordship may kindly see 7. "Right of Citizenship of certain migrants to Pakistan.
 10 Notwithstanding anything in Article 5, and a person who is, after the first day of March, 1947,
 11 migrated from the territory of India to the territory now included in Pakistan, shall not be
 12 deemed to be a citizen of India, provided that nothing in this Article shall apply to a person
 13 who, after having so migrated to the territory, now including Pakistan, has returned to the
 14 territory of India under a permit for resettlement or permanent return issued by or under the
 15 authority of any law. And every person shall, for the purpose of Clause B of Article 6B, deemed
 16 to have migrated to the territory of India after the 19th day of July 1948". That, Your Lordships
 17 may see now what is added to it.

18

19 To Article 7 there shall be added <UNCLEAR> provided further, that nothing in this article
 20 shall apply to a permanent resident of the State of Jammu and Kashmir, who, after having so
 21 migrated to the territory now included in Pakistan returns to the territory of that state, under
 22 a permit for resettlement in that state or permanent return issued by or under the authority of
 23 any law made by Legislature of that State and every person shall be deemed to be a citizen of
 24 India. It's all together a different provision. The law, power to provide for resettlement vests
 25 in the Legislature of the state, and such person shall be deemed to be a citizen of India. This is
 26 the modification made in 7. Then Sir...

27

28 **JUSTICE SANJAY KISHAN KAUL:** Mr Zaffar Shah, is it because part of the Valley, a part
 29 of Kashmir, remained in Pakistan occupied, was that the reason for the this was the reason for
 30 this basis?

31

32 **ZAFFAR SHAH:** Sorry, I could not...

33

34 **JUSTICE SANJAY KISHAN KAUL:** Was the reason for this, as you are saying, this is
 35 different, that a part of the state remained occupied by Pakistan. So is that the basis for it?
 36 Because there may be people who will be there, there, and maybe coming here. Is that the basis
 37 for this?

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ZAFFAR SHAH: Not only that, there could be something more. During prior to 1947, there were many areas like Gilgit and other areas where the people of the state, who were working under the king were transferred. I know a case that happened to me. They were transferred. An engineer was transferred to Gilgit. Then '47 happened. What do we do with him? This provided a method that if you want to come back, originally he was a citizen of this country. If you want to come back you will do so only under the Resettlement Act, to be passed, not by Parliament. In the case which I read to Your Lordships, the Parliament, which is a power. Here, the power vests in the State Legislature, that he can come back under this resettlement, so all those people. And important thing is there shall be deemed to be citizens of India, means they have not abandoned the citizenship of this country. By dint of having been posted there or by dint of being there prior to the partition of this country, prior to the part having been taken by them. Of course that will include them also. The people who got separated, who are now with the Pak occupied Kashmir, of course, the people who still have relations with Kashmir, those are across the border they are here. Those are the practical problems faced by the Government. Social problems. People's human problems. They wanted to come back. Somebody wanted to die. I know many cases in Kashmir. This happened in the High Court. They wanted to die in Kashmir. But they could not come. This Muzaffarabad road was opened. They wanted to come. It then got discontinued for political reasons. So therefore this kind of a provision only enabled the State Legislature to make the law. If they want to come, of course, subject to the conditions of that law, whether you have voluntarily given up the citizenship of India, then you cannot come. But if you are by dint of a situation and a circumstance, you're stuck up in another place and you want to come back after the things become normal. Obviously, a person cannot come when there's a conflict. When peace is returned, you can come back. Nothing is wrong with you. That you never intended to stay there, but because of certain circumstances. So I would say this kind of an, all I am today indicating to Your Lordships, the power, what we call as constitutional autonomy, which I have. It is in that context I'm saying. Here, I have the power to make the law.

JUSTICE SANJAY KISHAN KAUL: But large number of certificates issued, just, as a matter of <UNCLEAR>.

ZAFFAR SHAH: That was, <UNCLEAR> that was made. I remember that Your Lordship, is...

JUSTICE SANJAY KISHAN KAUL: But they issued some of them?

1 **ZAFFAR SHAH:** Yes, yes. Then Sir, then My Lords may kindly see part 3 of this Order. Now
2 it talks of some of the, I will not read them with regard to Article 16, to whom it will apply for
3 a period of five years, that was important, and then 4 and 7. That is the case which went to the
4 Supreme Court in *Sampat Prakash* and other cases. In Clause 4 and 7 of Article 22, for the
5 word Parliament, the word the Legislature of the State shall be substituted. Now, see, what is
6 this 22, 4 and 7? 4 talks of no law providing the preventive detention gives authority to the
7 detention of a person for a longer period than three months unless an advisory board consider
8 persons who are or have been or qualified to be appointed judge of a High Court has reported
9 before the expiration of the said period of three months that there is in its opinion sufficient
10 cause for such detention, provided nothing in the subsection shall authorize the detention of
11 any person beyond the maximum prescribed by the law made by Parliament under Subclause
12 B of Clause 7, or such person is detained in accordance to the provisions of any law made by
13 Parliament under Subclause A and B of Clause 7. When any person is detained in pursuance
14 of an order made under any law providing for preventive detention, the authority making the
15 order shall as soon as maybe communicate to such person the grounds on which the order has
16 been made and shall afford him the earliest opportunity of making a representation against
17 the order. Nothing in Clause 5 requires the authority making any such order as is referred to
18 in that clause to disclose facts which such authority considers to be against the public interest
19 to disclose. Parliament may by law prescribe the circumstance under which any class or classes
20 of cases in which a person may be detained for a period longer than three months under any
21 law providing for preventive detention without obtaining the opinion of an advisory board in
22 accordance with the provisions of Subclause A of Clause 4, the maximum period for which any
23 person may in any class or classes of cases be detained under any law providing for preventive
24 detention and the procedure to be followed by an advisory board in an inquiry under Subclause
25 A of Clause 4. Now see sir, what it says, "In Clause 4 and 7 of Article 20, the word Parliament,
26 the words legislative of the state shall be substituted." So, the law of preventive detention can
27 be enacted only by state Legislature, not by Parliament. I must make one thing clear here sir,
28 out of some of the laws, may be in a sense, duplicate copies of the central laws. Not duplicate
29 copies, maybe full stop, commas. But what is important is the power to make the law. It may
30 be, our said legislature could make the same law as it did, as this preventive detention was
31 applicable rest of the country. But the question is on your power. We say that this power exists
32 only in the State legislature to make the law preventive detention. And that's how Public Safety
33 Act has been enacted in the State of Jammu and Kashmir. It is that power which matters.
34 Otherwise, laws may be the same. It's possible. Like we had Ranbir Penal Code, we used to call
35 it, in rest of the country they call it Indian Penal Code. The difference was in the name, but the
36 question was only a power. Our legislature could amend RPC or we normally we used to call it
37 Ranbir Penal Code. But obviously it cannot amend IPC, Indian Penal Code. Provisions may be

1 identical, provisions maybe same. But what is important to be considered is the power to make
 2 that law, the power to amend that law, the power to repeal that law. It is that power which
 3 gives us constitutional autonomy.

4

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

6

7 **ZAFFAR SHAH:** Sir, then we have this Article 31, which was in existence at that point of
 8 time. I have the copy of the original Constitution as it was adopted in 1949. Your Lordship will
 9 not have this Article 31 in the book, which now is because it stands deleted, and we are now,
 10 instead of 300(a), it ceases to be fundamental right. But I'll just read it from the original
 11 Constitution. "No person shall be deprived of his property save by authority of law. No
 12 property, movable or immovable, including any interest in, or in any company owning, any
 13 commercial or industrial undertaking, shall be taken possession of or acquired for public
 14 purposes under any law authorising the taking of such possession or such acquisition, unless
 15 the law provides for compensation for the property taken possession of or acquired and either
 16 fixes the amount of the compensation, or specifies the principles on which, and the manner in
 17 which, the compensation is to be determined and given. No such law as is referred to in clause
 18 (2) made by the Legislature of a State shall have effect unless such law, having been reserved
 19 for the consideration of the President, has received his assent. If any Bill pending at the
 20 commencement of this Constitution in the Legislature of a State has, after it has been passed
 21 by such Legislature, been reserved for the consideration of the President and has received his
 22 assent, then, notwithstanding anything in this Constitution...."

23

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

25

26 **ZAFFAR SHAH:** "If any Bill pending at the commencement of this Constitution in the
 27 Legislature of a State has, after it has been passed by such Legislature, been reserved for the
 28 consideration of the President and has received his assent, then, notwithstanding anything in
 29 this Constitution, the law so assented to shall not be called in question in any court on the
 30 ground that it contravenes the provisions of clause (2). Nothing in clause (2) shall affect—
 31 (a) The provisions of any existing law other than a law to which the provisions of clause (6)
 32 apply, or
 33 (b) The provisions of any law which the State may hereafter make—
 34 (i) for the purpose of imposing or levying any tax penalty, or
 35 (ii) for the promotion of public health or the prevention of danger to life or property,
 36 or

1 (iii) in pursuance of any agreement entered into between the Government of the
 2 Dominion of India or the Government of India and the Government of any other
 3 country, or otherwise, with respect to property declared by law to be evacuee property.
 4 Any law of the State enacted not more than eighteen months before the commencement of this
 5 Constitution may within three months from such commencement be submitted to the
 6 President for his certification; and therefore, if the President by public notification so certifies,
 7 it shall not be called in question in any court on the ground that it contravenes the provisions
 8 of Clause 2 of this Article or as contravenes the provisions of Sub-Clause 2 of Section 299 of
 9 the Government of India Act, 1935.”

10
 11 Now see sir, this Clause 5 has been substituted. Under this '54 Order it says nothing in Clause
 12 2. First is, in Article, Clause 3, 4 and 6 shall be omitted. So, we have omission with regard to
 13 the power of the Parliament, that if I pass a law, it was to be reserved for the assent of the
 14 President. I don't have to do that. Our State Legislature has not to do that. This stands deleted.

15
 16 **CHIEF JUSTICE DY CHANDRACHUD:** What you are trying to say is that under the 1954
 17 C.O, there were extensive amendments which were made to the, adaptations or modifications
 18 were made to the Indian Constitution. There are provisions which were deleted, other
 19 provisions which were applied with modifications. In fact. interestingly, Article 136 was
 20 omitted.

21
 22 **ZAFFAR SHAH:** Yes. 136 was omitted. So what I am trying to say....

23
 24 **CHIEF JUSTICE DY CHANDRACHUD:** So we get that point. What does that lead us up
 25 to actually?

26
 27 **ZAFFAR SHAH:** The argument is this that when we have a bird's eye view on 1954 Order,
 28 there are some smaller matters which are matters of internal administration, then there are
 29 some fundamental ones, like I read for example the proviso 2 Article 13, Article 3, that you
 30 cannot alter the boundaries.

31
 32 **CHIEF JUSTICE DY CHANDRACHUD:** Yes.

33
 34 **ZAFFAR SHAH:** Now, that is a fundamental concurrence between the two Governments. I
 35 read Article 7 with regard to the permanent residence, that's something fundamental in 54
 36 order. So what I am trying to show is that there are orders which go to the very root of the
 37 matter and which continue to remain as they are till date. They have not been diluted.

1 Subsequently , other provisions like 356, subsequently apply. 136 subsequently apply. But
2 there are matters between the Union and the State. But then on the broader parameters, the
3 state continued to have its autonomy. That's all I'm trying to indicate. By virtue of each and
4 every, I have noted each and every Article. It deals with what? What was the subject matter of
5 the Article in the Constitution? And how by the Order of 1954, has certain positions especially
6 for Jammu and Kashmir was carved out.

7

8 **CHIEF JUSTICE DY CHANDRACHUD:** Mr. Shah, can you just, to sort of summarize, can
9 you tell us, on the eve of the C.O. of 5th of August '19, which were the key provisions of the
10 Constitution to which an exception still existed in relation to Jammu and Kashmir?

11

12 **ZAFFAR SHAH:** Let us say 3, Article 3.

13

14 **CHIEF JUSTICE DY CHANDRACHUD:** So we can really summarize those, because that
15 will give us the net position as on the date.

16

17 **ZAFFAR SHAH:** Very true, Sir.

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19 **CHIEF JUSTICE DY CHANDRACHUD:** There's two ways of looking at it. We can look at
20 the chipping away, or we can look at it from your perspective, which is, which were the core,
21 which was still left intact, and which now the abrogation completely, you know, sort of...

22

23 **ZAFFAR SHAH:** <UNCLEAR> in a flow chart that what was the position on 4th August
24 2019. Even after application of these Constitution application orders, what was the position as
25 on that date? That's what Your Lordship wants to know?

26

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

28

29 **ZAFFAR SHAH:** This, some of the article which I read?

30

31 **CHIEF JUSTICE DY CHANDRACHUD:** Every one of those provisions which were
32 modified as on 4 August '19, if you can give us a core, to sort of buttress your argument, that
33 "Look, despite the chipping away, this core had remained intact as on 4 August 2019."

34

35 **ZAFFAR SHAH:** Very true. I can give that. We still have some autonomy. I'll give you some
36 fundamental, It's an Entry 97. You may not go that far also. I can give example of the, best
37 example, Entry 97. Who had the residuary power? Who had the residuary power to legislate?

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CHIEF JUSTICE DY CHANDRACHUD: Interestingly, both the state list and the concurrent list were deleted in application to the State of Jammu and Kashmir. You'll find that, I just saw it a little while back, part 11 C, see page 16. Page 16 of Volume 3. If you are on the same volume, it says in Article 246, "the words, brackets and figures notwithstanding anything in Clause 2 and 3 occurring and Clauses 2, 3, and 4 shall be omitted." So basically what happened was, in relation to the state of J&K, you had only the union list, which was existing, insofar as it applied to the State of J&K, the entire state list and concurrent list had been deleted.

ZAFFAR SHAH: But subsequently, Your Lordship may also see the.....

CHIEF JUSTICE DY CHANDRACHUD: There are also maybe some items in the state list were brought in. Maybe the concurrent list was also brought in.

ZAFFAR SHAH: I think Your Lordships needs to give me some time. It is also subsequently changed in C.O. 66, this 246, which was also read Clauses 2 and 3. Occurring in Clause 1 to be omitted. That was the original one. 3 and 4 is also omitted.

CHIEF JUSTICE DY CHANDRACHUD: So really speaking, we therefore take it Mr. Shah, that we don't have to go through these articles to buttress your point. But your contention is that there was a very substantial degree of autonomy, which was reserved to the State as a consequence of Article 370 that was not merely with reference to enacting laws, which we saw in Clause 1, but it was also in relation to other provisions of the Constitution, which would not apply unless there was a concurrence of the state.

ZAFFAR SHAH: I thought I would indicate it in specific in the general position of law, that there was a constitutional autonomy with you. But earlier it was if I put it in terms of quantum, if it was something like 100 grams. But even then I retain 30 grams, by the time it was 4th August.

CHIEF JUSTICE DY CHANDRACHUD: But Mr. Shah, what you can do is, maybe without us going into it right now, later on even after your argument is concluded, you can give us the core areas, which had remained for the state as on the prior... the original Constitution.

ZAFFAR SHAH: Specific areas...

1 **CHIEF JUSTICE DY CHANDRACHUD:** You can give it to us as of the 1954 Order, and
2 then you can give us what still remained with the State as on 4th of August '19. So we can have
3 a comparison. You can do it in two pages. That's all. Don't give us a very elaborate statement,
4 that will buttress your point. So we appreciate it. That's all that we...

5

6 **ZAFFAR SHAH:** I had done it my way. I had done it specific article wise. Each and every
7 article, that's what I was trying to show. But Your Lordships want me to give it writing. I will
8 give that.

9

10 **CHIEF JUSTICE DY CHANDRACHUD:** I think just on a page, one page with the position
11 as it stood in 1954. One page as the position as it stood on the eve of the abrogation. That will
12 really support your submission.

13

14 **ZAFFAR SHAH:** I will give that.

15

16 **CHIEF JUSTICE DY CHANDRACHUD:** So that we don't have to then read individual
17 articles, unless there's something key that you want us to see.

18

19 **ZAFFAR SHAH:** My Lords, what's important is this, as I said earlier. Why are we aggrieved
20 of 5th and 6th? If nothing was with us. Why are we aggrieved? Why are we before we go 22, 25
21 petitions have been filed? There was something bigger. So I was trying to show what is there
22 that was with us. Otherwise, there was nothing with us, it would not matter. It was an active
23 formality...

24

25 **JUSTICE SANJAY KISHAN KAUL:** There was something with you and there was an
26 emotional context to it.

27

28 **ZAFFAR SHAH:** Whatever little Sir, I had with me as a Constitutional autonomy, whether
29 they could take it away.

30

31 **JUSTICE SANJAY KISHAN KAUL:** That's why I said two things, emotional context and
32 something which remain actually answerable.

33

34 **ZAFFAR SHAH:** True, what I'm submitting is on.. I mean in response to Chief Justice's
35 observation, that you indicate only what kind of autonomy you had on that date, on 4th of
36 August. I will certainly indicate that.

37

1 **CHIEF JUSTICE DY CHANDRACHUD:** And even earlier, because that will support your
2 submission.

3

4 **ZAFFAR SHAH:** Just what earlier what I had in 54 are... Is Your Lordship willing to go into
5 that question? That 54 what you got and what is subsequent C.O. orders? What you lost at
6 what stage? I can take one by one, if Your Lordships want that, what I lost subsequently. But
7 ultimately it ended up on 4th.

8

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

10

11 **ZAFFAR SHAH:** If Your Lordship says on 4th August what you had, you indicate that, I will
12 do that.

13

14 **JUSTICE SANJAY KISHAN KAUL:** On 4th August..

15

16 **ZAFFAR SHAH:** <UNCLEAR>

17

18 **JUSTICE SANJAY KISHAN KAUL:** That 370 stood. What is that which were with you?
19 Which you have been denuded of by repeal of this.

20

21 **ZAFFAR SHAH:** Sir, take it or not, on the face of it I can say so just from my heart, without
22 supporting it. Let's say, I was a permanent resident of the state. I had my own law. I had own
23 privileges, own rights. Isn't that taken away? It's as simple as that, it's to Your Lordship's
24 knowledge, as simple as that. My state could not have been divided into Union Territories.
25 Isn't that taken away? My Lord, the Honourable Chief Justice says you tell me the solid ones
26 which you lost, not gather things appear to Supreme Court or otherwise. These are few of the
27 solid ones which come to one's mind. I lost that. I lost my legislature, lost the powers to make
28 the laws. In respect of those matters where it had the power. Maybe little power, but it had the
29 power. Particularly 1997, it made certain laws, it made certain changes. But now that is also
30 gone, Preventive Detention Act is also gone. Your Lordships have seen in the Detention Act,
31 how many laws have we repealed. Consequent....

32

33 **CHIEF JUSTICE DY CHANDRACHUD:** Mr. Shah, to buttress your submission, we are
34 saying something which will enhance which will further your submission. Just look at page 16
35 of Volume 3, in case, I don't know if you're using the same, we are on the same page...

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37 **ZAFFAR SHAH:** I'll just have a look.

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CHIEF JUSTICE DY CHANDRACHUD: Volume 3, page 16.

ZAFFAR SHAH: One six sir, just one...

CHIEF JUSTICE DY CHANDRACHUD: One six. Mr. Sankaranarayanan or somebody can give that.

ZAFFAR SHAH: Yes sir.

CHIEF JUSTICE DY CHANDRACHUD: So that we are on the same page.

ZAFFAR SHAH: 15 or 16.

CHIEF JUSTICE DY CHANDRACHUD: Page 16. You've got that middle of the page, part 11? Part 11. PDF page.

ZAFFAR SHAH: Yes sir.

CHIEF JUSTICE DY CHANDRACHUD: Right? So, part 11-A.

ZAFFAR SHAH: Article 246.

CHIEF JUSTICE DY CHANDRACHUD: In Article 246, the words...

ZAFFAR SHAH: ...of the Clause 2 and 3 also shall be omitted.

CHIEF JUSTICE DY CHANDRACHUD: And, Clauses 2, 3 and 4 shall be omitted.

ZAFFAR SHAH: Yes.

CHIEF JUSTICE DY CHANDRACHUD: In other words, Article 246, which recognizes the power of the State Legislature to enact law on the state list, and the power of Parliament to enact law on the concurrent list, was deleted in 1954.

ZAFFAR SHAH: Yes.

1 **CHIEF JUSTICE DY CHANDRACHUD:** Now just go to page 19. PDF page 19. Go to the
2 Seventh Schedule. Page 19, you will see entry 22, Seventh Schedule. Just give Mr. Shah the
3 page Mr. Sankaranarayanan.

4

5 **ZAFFAR SHAH:** This is C.O. 55?

6

7 **CHIEF JUSTICE DY CHANDRACHUD:** No, no, 54. We are on C.O. 54 only now.

8

9 **JUSTICE SANJAY KISHAN KAUL:** Three pages down, just turn to where the schedules
10 are listed.

11

12 **ZAFFAR SHAH:** Seventh Schedule. Yes.

13

14 **CHIEF JUSTICE DY CHANDRACHUD:** Right. Now, in the Seventh Schedule, in the
15 union list, just go a little down, item 2, where it says entries, so and so... the words 'interstate
16 migrants' and Entry 97 shall be omitted. Therefore, Entry 97 is completely omitted.

17

18 **ZAFFAR SHAH:** Yes.

19

20 **CHIEF JUSTICE DY CHANDRACHUD:** Now go to the last Clause of 22(b). The state list
21 and the concurrent list shall be omitted.

22

23 **ZAFFAR SHAH:** Yes.

24

25 **CHIEF JUSTICE DY CHANDRACHUD:** So, the net result in 1954 was, Parliament had
26 the power to enact laws with respect to some entries in the union list.

27

28 **ZAFFAR SHAH:** Union list, yes.

29

30 **CHIEF JUSTICE DY CHANDRACHUD:** Parliament... the entire legislative domain of
31 Parliament on the concurrent list was obliterated, and the state list was also deleted because
32 the entire power of legislation, the residuary power was given to the State Legislature. This is
33 the autonomy which you are saying, isn't it?

34

35 **ZAFFAR SHAH:** I could specify also what was left. My Lords, this question is extremely
36 important. What was left on 4th of August? I said...

37

1 **CHIEF JUSTICE DY CHANDRACHUD:** Now we'll go to the 4 August because that's the
2 part, that chip away.

3

4 **JUSTICE SANJAY KISHAN KAUL:** The Chief is pointing out in a larger perspective, what
5 you are saying. '54, reflects a larger conspectus. Larger conspectus is that, List 1 specified, List
6 2 omitted, List 3, because List 2 already vested with you. Thereafter, as you say, chipped away.
7 So, this gives the larger... in support of your argument, the larger context of it.

8

9 **ZAFFAR SHAH:** No. If I am satisfied... Not me, if Your Lordships are satisfied, that on 4th
10 of August there was constitutional autonomy, some constitutional autonomy, What was this
11 quantum, how much it was, is a matter of detail.

12

13 **CHIEF JUSTICE DY CHANDRACHUD:** We'll reflect at it at lunch, we're almost at the
14 stroke of lunch. One way of our doing it is, after the 1954 Order, read every order and see the
15 chipping away process. That will unnecessarily take a lot of time and it will be tedious. What
16 we were suggesting was, that you can give us a net position as it stood on the 4 August 2019,
17 so we'll realized then. We've now seen the 1954 Order, which gave a very substantial autonomy,
18 no doubt about it. That point you made. You needn't labour the points further. Now, we look
19 at what was the position on the eve of the abrogation, which is 4th of August '19. Because, your
20 argument will be that, even as on the 4th of August 2019, notwithstanding all the subsequent
21 application which took place, there was still a core left with the Jammu and Kashmir State
22 Legislative Assembly. So, you can give us... like we've now done for 1954, some three or four
23 examples, and you can put the rest on a piece of paper, just sort of putting it all together.

24

25 **ZAFFAR SHAH:** I can put it entry-wise. This entry, this entry, this entry, that I can do. That
26 I can do.

27

28 **CHIEF JUSTICE DY CHANDRACHUD:** But, just confine it to the key areas, because that
29 really... that will buttress your point, isn't it?

30

31 **CHIEF JUSTICE DY CHANDRACHUD:** That's the problem, which is a key area?

32

33 **CHIEF JUSTICE DY CHANDRACHUD:** No, I mean...

34

35 **JUSTICE SANJAY KISHAN KAUL:** That's where the rub lies.

36

1 **ZAFFAR SHAH:** States being... I mean, unified state is a key area. Who is the permanent
2 resident, is a key area. These are all key areas.

3

4 **CHIEF JUSTICE DY CHANDRACHUD:** So, can you just summarize them after lunch for
5 us, which are the key areas, so that when we can move on to the rest of the argument.

6

7 **ZAFFAR SHAH:** I'll do that. I'll do that.

8

9 **CHIEF JUSTICE DY CHANDRACHUD:** We got the drift of the argument, we just thought
10 that we should have some illustrations which are the key illustrations, that will sort of drive
11 the point home.

12

13 **ZAFFAR SHAH:** Unless Your Lordships are writing the judgement would be very specific.
14 Look here, the state still enjoyed its autonomy in respect of A, B, C, D. That is being specific.
15 Second, would be, what you would say, they did have some...

16

17 **JUSTICE SANJIV KHANNA:** What has been taken away by the....under the provisions...

18

19 **ZAFFAR SHAH:** What has been taken away and what was left is us? What would be general
20 statement making, Sir, I had, as I tried to give example, 100 grams with me. They took 70. 30
21 is still with me. But what was that 70? What was that 30? I found that I would deal with it in
22 more specific terms. This is taken a <UNCLEAR> rather than being general about it. That's
23 what I was trying to

24

25 **JUSTICE SANJAY KISHAN KAUL:** Only thing is, time, in all this, becomes a little
26 constrained. Now, yes, there was a position in 1954. We've understood your position, in 1954,
27 that at various times to time something may have been chipped away. Is there, when and how
28 is not before us, because that's a post facto situation.

29

30 **ZAFFAR SHAH:** Yes. Very true.

31

32 **JUSTICE SANJAY KISHAN KAUL:** As you also argued. Now something happened, which
33 is under challenge. A pre-challenge position for us to appreciate, what was the pre-challenge
34 situation which has been deprived in the result of what you have checked?

35

36 **ZAFFAR SHAH:** Yes. I am with Your Lordships. I am with Your Lordships.

37

1 **CHIEF JUSTICE DY CHANDRACHUD:** We have understood your broader arguments on
2 consultation and concurrence. Now we just would like to know what was the residuum, which
3 was left on the eve of the abrogation.

4

5 **ZAFFAR SHAH:** What was left of constitutional autonomy, in simple language. What was
6 left of constitutional autonomy.

7

8 **JUSTICE SANJAY KISHAN KAUL:** There was something left. What is that something is
9 the only thing we are wanting to know.

10

11 **CHIEF JUSTICE DY CHANDRACHUD:** All right. We'll just look at it after lunch. Mr.
12 Shah. Now what is a rough time estimate for you to complete?

13

14 **ZAFFAR SHAH:** I need to still argue My Lords. I have some problems. I need to argue.

15

16 **CHIEF JUSTICE DY CHANDRACHUD:** Should we give you another hour or so? Can we
17 wrap up in an hour so that?

18

19 **ZAFFAR SHAH:** No Sir, it will be more than that. It will be more than that. I would require,
20 it might spill over even because, I have some more to say.

21

22 **JUSTICE SANJAY KISHAN KAUL:** I know all of you have some things to argue, our
23 constraint is also, at some stage, things have to end.

24

25 **ZAFFAR SHAH:** Give me that little freedom.

26

27 **JUSTICE SANJAY KISHAN KAUL:** With all your ability, I'm sure you can, with all your
28 ability you can....

29

30 **ZAFFAR SHAH:** It's an important case for us.

31

32 **JUSTICE SANJAY KISHAN KAUL:** Of course. That is why we are giving too much of time.

33

34 **CHIEF JUSTICE DY CHANDRACHUD:** Of course Mr. Shah, no doubt about. Mr. Shah,
35 can you do this? Can we suggest this? After lunch, you can give us broadly the themes on which
36 you are going to argue. Just formulate the themes, so that we also have a clear picture, that
37 how you are now going to unfold the rest of the argument. Just give us the three or four themes

1 that you're going to argue and show us under that theme. Then we'll know what exactly you
2 are..

3

4 **ZAFFAR SHAH:** As Your Lordships...

5

6 **CHIEF JUSTICE DY CHANDRACHUD:** That will be better. Thank you.

7

8 **ZAFFAR SHAH:** My Lord.

9

10 **CHIEF JUSTICE DY CHANDRACHUD:** Yes. So I think now we will focus on each of these
11 themes. The first one you have actually covered I think?

12

13 **ZAFFAR SHAH:** The permanent nature of Article 370 except few sentences I would like to
14 use. One is that when it was originally enacted by the Constituent Assembly at that time, they
15 rightly termed it as temporary. Rightly, because at that point of time, the position of the state
16 of Jammu and Kashmir was totally unclear. As I said, it had an external dimension and it also
17 had an internal dimension. The external dimension was because of UN Security Council
18 Resolutions and the internal dimension was because of the letter of Governor General dated
19 27 of October 1947. So therefore the Constituent Assembly thought that the Constituent
20 Assembly of the state would recommend application of the Constitution of India directly to
21 the State of Jammu and Kashmir. That way we could have only a single Constitution. And of
22 course, throughout the 370, they proceeded on that assumption. And I am entitled to say so
23 that this was an assumption made, that the Constituent Assembly would do so.

24 [NO AUDIO]

25could not materialize, could not actualize. This is the reason I'm giving. So this continued.
26 This position continued till 1957. Since the power vested with the people as also under
27 Instrument of Accession, as also under proclamation of Maharaja, had three sources to make
28 the Constitution, therefore, the Constituent Assembly made a separate Constitution for the
29 State of Jammu and Kashmir.

30

31 **CHIEF JUSTICE DY CHANDRACHUD:** Which were the three sources you said? The
32 Instrument of Accession...

33

34 **ZAFFAR SHAH:** One was the Instrument of Accession, second was proclamation of
35 Maharaja of 1948.

36

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

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ZAFFAR SHAH: Now when it adopted...

CHIEF JUSTICE DY CHANDRACHUD: And which was the third?

ZAFFAR SHAH: One I said was letter of 27th of October 1947, of the Governor General. Now, since the fate of the State was uncertain therefore, they left it temporaneous. It could be a part of union, it could not be a part of union. But in the meanwhile, the Constitution of the State was made. Now we are again concerned. Those are the political aspects of the matter what happened at that point of time. I am not going to that question on, My Lords are not going to adjudicate those issues. But the fact of the matter is that right from 1951 till 1957, when Constitution was made so we at the end of 1957, in fact, January 1957, now we got two. One was a Constitution of India, as was applicable to us and second was our own Constitution. This is the situation in 1957, and this is the source of the Constitution of the State of the Jammu and Kashmir. Now what is contained in the Constitution of Jammu and Kashmir, could not also be contained in the Constitution of India, that there would be conflict. So therefore, all those provisions of the Constitution of India which could come into conflict with the Constitution of Jammu and Kashmir were not made applicable to the State of Jammu and Kashmir. Now a few of them, which are extremely important as we proceed ultimately to determine the constitutional validity of the action taken on 4th, My Lords, may have a look at the Constitution of Jammu and Kashmir. Your Lordship, Volume 2. My Lords in Volume 2, 232. General page. Volume 2, 232.

JUSTICE SANJAY KISHAN KAUL: PDF 232?

ZAFFAR SHAH: PDF 7. Now, this Constitution is given by the people of Jammu and Kashmir. The Constituent Assembly was constituted in terms of the notification of the then heir of the king, that is Dr. Karan Singh on 20th of April, 1951. And in terms of that notification, which is also part of My Lord's records. Elections took place on the basis of adult franchise. People's representatives were elected and they became the members of this Constituent Assembly. Now, what did the Constituent assembly do? It ensured, if I generally say it, it ensured that the state of Jammu and Kashmir shall continue to remain the integral part of India. So on that part, it is there. Second thing it ensured that the provisions of the Constitution of India will be made applicable to the Jammu and Kashmir. Three pro...two provisions there were. Section 3 and Section 5. If My Lords, would have a look at Section 3. It says, State of Jammu and Kashmir is and shall be an integral part of the Union of India. Page 18, PDF. The 4 is the territories of the state, 5 is extent of executive and legislative power of

1 the state. The executive and legislative power of the state extends to all matters except those
 2 with respect to which Parliament has power to make laws for the State under the provisions of
 3 the Constitution of India. Now, read this with Article 370. Means the State Legislature did not
 4 have any power, to make the law if Parliament of India has that power. But, where from the
 5 Parliament of India will get that power? Only with the concurrence of the government of the
 6 state under Article 370. Five, the executive legislative power of the state extends to all matter
 7 except those with respect to which Parliament has power to make laws for the state. So, laws
 8 for the state to be made by the Parliament, was dependent upon the concurrence to be given
 9 under Article 370, except those which were in the Instrument of Accession. Consultation was
 10 required there. It was dependent. So, this file we need to read with Article 370. And the power
 11 of the Parliament, which is given to it. So, all other powers which were not in respect of which
 12 no concurrence was given under Article 370, obviously, the Parliament would have no power
 13 to enact laws. And, the power would vest with the State Legislature, in terms of Section 5 itself.
 14 This is how we read out Section 5. The provision is also made of permanent residents. How
 15 does this get protected? This gets protected by the proviso to Article 7 of the Constitution of
 16 India. Then Sir...

17

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

19

20 **ZAFFAR SHAH:** 7 is construction of reference to state subjects in existing laws, legislature
 21 to define permanent residents, sufficient provisions for bills related to permanent residents.
 22 Now come to 10. The rights of the permanent residents. The permanent resident of the state
 23 shall have all the rights guaranteed to them under the Constitution of India. Now, it gave them
 24 the rights which were available under the Constitution of India. And for permanent residents,
 25 he had to be a citizen of India first. After 1954 application, he had to be a citizen of India first,
 26 then only he could be a permanent resident. During the Maharaja's time, 1927 notification and
 27 1932 notification had nothing to do with being a permanent, being a citizen of India, because
 28 at that time India as such did not exist. So therefore, they were brought, these two notifications
 29 are protected under this Constitution. They carried a condition with it that you have to be a
 30 citizen of India, then only you can be a permanent resident. And their rights would be those as
 31 are available under the Constitution. Now, look at the Directive Principles of State Policy. Now
 32 the provisions in the Constitution of India relating to Directive Principles do not apply to us,
 33 because the state Constitution has its own Directive Principles.

34

35 Now, comes the important part that is part 5, executive to the Governor. This part is extremely
 36 important in a certain perspective that I will indicate, which is one of the arguments which I
 37 propose to raise. Now, who is the head of the state? It says the head of the State shall be

1 designated as the Governor. There was a change earlier. It was first Maharaja, then *Sadr-e-*
 2 *Riyasat*, now it is Governor. The executive power of the State shall be vested in the Governor
 3 and shall be exercised by him, either directly or through officers subordinate to him in
 4 accordance with this Constitution. Nothing in this section shall be deemed to transfer to the
 5 Governor, any functions conferred by any existing law and any other authority or prevent the
 6 State legislation or conferring by law functions on any authority subordinate to the Governor.
 7 Appointment of Governor. The Governor shall be appointed by the President by warrant under
 8 his seal, hand and seal, provided that the person holding office of the *Sadr-e-Riyasat*
 9 immediately before the commencement of the Constitution for Sixth Amendment Act, shall
 10 on such commencement be the Governor and he shall subject to other provisions of this
 11 Council, continue to hold office as Governor until the remaining period of his tenure. The
 12 Governor shall hold office during the pleasure of the President. The Governor may, by in
 13 writing under his hand a letter to President, resign his office. Subject to four qua proviso of
 14 this, the Governor shall hold office for a term of five years from the date on which he enters
 15 upon his office, provided that he shall not withstand the expiry of his term continue to hold
 16 office until his successors' enters upon reference. Qualification; no person shall be leased for
 17 appointment as Governor unless he is a citizen of India and has completed the age of 30 years.
 18 Conditions of Office - The Governor shall be a member of either House of the office. The
 19 Governor, he shall be deemed to have vacated the seat on the house, in the house on the date
 20 on which he enters upon. The Governor shall not rule any office of profit. The Governor shall
 21 not be entitled....

22

23 **CHIEF JUSTICE DY CHNANDRACHUD:** Yes, we have seen that.

24

25 **ZAFFAR SHAH:** shall get to have such emoluments. Now, what is important is, in this the
 26 oath which he is required to take, that is Section 31, the Governor and every person discharging
 27 the functions of the Governor, shall before entering upon his office, make and subscribe in the
 28 presence of the Chief Justice of the High Court, or in his absence, the senior most judge of that
 29 Court available, on oath or affirming the following form, that is to say, "I so and so, that I will
 30 faithfully execute the office of Governor or discharge the functions of the Governor of Jammu
 31 and Kashmir, and will to the best of my ability, preserve, protect, and defend the Constitution
 32 and the law, and that I will devote myself to the service and well-being of the people of the
 33 state." And the Governor stabbed the people of the state in the back. He committed serious
 34 breach of the oath by making a recommendation to abrogate Article 370, which he could not
 35 do. Had he been a sitting Governor, perhaps impeachment motion could have been moved
 36 against him. He is to uphold the Constitution of Jammu and Kashmir, and he destroys it by
 37 his recommendation to the President that you apply all the provisions of the Constitution of

1 India to us, which even the Constituent Assembly did not do. He requested the President of
2 India, you change the Constituent Assembly to Legislative Assembly and the President of India
3 is pleased to accept the recommendations of the Governor when he acts in breach of the oath
4 of the Constitution of Jammu and Kashmir, which is serious Constitutional misconduct
5 committed by the Governor. And in this particular case, there is no evidence produced.
6 Nothing is stated in the counter affidavit. When was the recommendation made? Who made
7 the recommendation? At whose insistence the Governor made the recommendation. I have a
8 very serious [UNCLEAR] submit before this Hon'ble Court with regard to this role of the
9 Governor in making a recommendation when the state was under President's Rule.

10

11 Then Sir, see 35, Council of Ministers to aid and advise the Governor. Council of Minister to
12 aid and advise the Governor, Section 35. There shall be a Council of Ministers with the Chief
13 Minister at the head to aid and advise the Governor in the exercise of his functions. All
14 functions of the Governor except those under, now see this important. All functions of the
15 Governor except those under Section 36, 38 and 92 shall be exercised only on the advice of the
16 Council of Ministers, means that he had a subject to satisfaction in respect of three provisions
17 36, 38 and 92, and none else. He cannot act of his own. Under any provision of the Constitution
18 of the State, and much less he could act under Article 370 in making recommendations to the
19 President. And this Governor has been spilling beans all over the country. According to one of
20 his press statement, he was asked to sign on the dotted lines. That Your Lordships will find
21 from the records because we have no access to those records. 36, is the appointment of
22 ministers, responsibility. Then appointment of Advocate General, contacts of business. Now
23 composition of the State Legislature. We have the seats reserved for the territory which is
24 occupied by Pakistan in Section 48. Kindly see this, we have done composition of the
25 Legislative Council where Bicameral Legislature, Assembly also and Council also, that is
26 Section 50. Then see sir, 51. Qualification for membership of the Legislature. 'A person shall
27 not be qualified to be chosen to fill a seat unless he is a permanent resident of the State.' They
28 alone can be the members of the legislature.

29

30 Then sir directly kindly go to Section 92. Obviously, these provisions are not in the
31 Constitution of India. If at any time the Governor is satisfied that a situation has arisen in
32 which the government of the State, cannot be carried on in accordance with provisions of this
33 Constitution, the Governor may, by proclamation assume to himself all or any of the functions
34 of the government of the State and all or any of the powers vested in or exercisable by anybody
35 or authority in the State make such incidental and consequential provisions as appear to the
36 Governor to be necessary or desirable for giving effect to the objects of proclamation, including
37 provisions for suspending, in whole or in part the operation of any provision of this

1 Constitution relating to anybody or authority in the State. Provided that nothing, if the section
 2 shall authorize the Governor to assume to himself any of the powers vested in the High Court.
 3 Any such proclamation may be revoked or varied by such a proclamation, any such
 4 proclamation varied under Sub (2), shall except where it is a Proclamation revoking a previous
 5 Proclamation, cease to operate on the expiration of two months from the date on which it was
 6 first issued. If the Governor by a proclamation under this Section assumes to himself any of
 7 the powers or the wish to make laws, any law made by him, the exercise of that power shall
 8 subject to terms thereof, continue to have effect until two years, have elapsed from the date so
 9 and so. No proclamation under Sub-Section 1 shall be issued, except with the concurrence of
 10 the President of India. Every proclamation under this section shall accept where it is a
 11 proclamation revoking the previous proclamation be laid before each House of the Legislature
 12 as soon as it is convened.

13

14 Now what's important in this is the same thing as in Article 356, that when you cannot carry
 15 on the government in accordance with the provisions of the Constitution, that is the subject of
 16 92 and that's also the subject of Article 356. Now, the question for Your Lordships is that, on
 17 the basis of pre-existing Constitution, if the Government cannot be carried on, whether the
 18 Constitution itself should be changed or you have to see only that the government is not being
 19 carried on according to the Constitution, which was prior to any alteration or change made in
 20 the Constitution. My submission is that nothing can be done when 92 is in operation or 356 is
 21 in operation, because this subject is only that governments cannot be run according to the
 22 Constitution. But no power vests, in any authority to amend the Constitution, whether it is 92
 23 or 356. None. Just on an analogy, I just seek Your Lordships consideration to Article 34, of the
 24 Constitution of India.

25

26 **CHIEF JUSTICE DY CHANDRACHUD:** Article 34?

27

28 **ZAFFAR SHAH:** 34. Yes. Just by way of analogy. Notwithstanding anything in the foregoing
 29 provisions of this part, Parliament may by law indemnify any person in the service of the Union
 30 or of a State or any other person in respect of any act, done by him in connection with the
 31 maintenance or restoration of order in any area within the territory of India where martial law
 32 was in force or validate any sentence passed, punishment inflicted, forfeiture ordered or other
 33 act done under martial law in such area. If such a situation would arise, would this court
 34 countenance that the [UNCLEAR] martial law administrator will abrogate the Constitution of
 35 India because it would suit him? Where is the power with him? I'm trying to set an analogy
 36 that even if there would be a case of martial law, the Indian Constitution, the Constitution of
 37 Jammu and Kashmir, do not, do not contemplate, envisage, nor can be conceived of, that

1 during the operation of 92 or 356, any change in the Constitution relationship can be made.
2 That's my contention My Lords for consideration.

3

4 Then Sir, in our State Constitution is 93, that is the High Court, appointment of judges,
5 qualification of judges, all those incidental provisions are provided. And if a transfer is to be
6 made, the concurrence of the Governor of the State has also to be obtained upon a transfer of
7 a High Court judge with the High Court of Jammu and Kashmir. That was the position prior
8 to 4th August. Then, our High Court had its own power of issuing the writs under Section 103
9 and 104. Then, sir, we had our own Public Service Commission in terms of Section 123, 124
10 with all incidental provisions related to the members. Then 126, which corresponds to Article
11 311, giving protection to the government servants. That was also there. So, these were the
12 different provisions. Now, we come to the, which reference has been made, 147. Official
13 language, academy for development, protection of Governor, all those provisions are in the
14 Constitution of India.

15

16 When we see 147, an amendment of this Constitution may be initiated only by introduction of
17 a bill. For the purpose, the Legislative Assembly when the bill is passed in each House by a
18 majority of not less than two thirds of total membership of that House. It shall be presented
19 to the Governor for his assent and upon such assent being given to the bill, the Constitution
20 shall stand amended in accordance with the terms of the bill, provided that a bill providing for
21 the abolition of the Legislative Council may be introduced in the Legislative Assembly and
22 passed by it, by a majority of the total members of Assembly, and a majority of not less than
23 two thirds of the members as shall be present and voting. Provided further, the no bill or
24 amendment seeking to make any change in the word amendment is not there, but seeking to
25 make any change in this Section 147 itself. The provisions of 3 and 5, or the provisions of the
26 Constitution of India, as applicable in relation to the State. Now, this is relatable to Clause D
27 of Article 370 which provides for the application of the Constitutional provisions with or
28 without modifications. It means, it prevents this State Legislature, prevent the State
29 Legislature from making any change in that relationship.

30

31 **CHIEF JUSTICE DY CHANDRACHUD:** Argued covered. I think. Your submissions 1, 2,
32 3, 4, 5, the first five themes you have covered, I think?

33

34 **ZAFFAR SHAH:** Yes, Sir.

35

36 **CHIEF JUSTICE DY CHANDRACHUD:** Whether Article 370 has become permanent
37 with the passage of time. Two, whether the autonomy of the state is to determine not only by

1 the laws applicable to us, but also by the Constitution of J&K. Three, whether C.O. 272, is
2 constitutionally valid because the State was under President's rule and no change in the
3 constitutional relationship could be made when Presidential rule is in operation. Four,
4 because the Council of Ministers not being in place, no recommendation can be made by the
5 Governor. Five, no evidence produced with regard to the recommendation of the Council of
6 Ministers or the Governor who acted in breach of his oath and was thus liable for
7 impeachment.

8

9 **ZAFFAR SHAH:** These are the themes for Your Lordships observations. But they need to be
10 expanded.

11

12 **CHIEF JUSTICE DY CHANDRACHUD:** But you have now shown us in the last...

13

14 **ZAFFAR SHAH:** But there is something more to show Your Lordships

15

16 **CHIEF JUSTICE DY CHANDRACHUD:** Last 35 minutes you have shown us now the first
17 five themes I think.

18

19 **ZAFFAR SHAH:** In this Your Lordships, kindly have a first look at page 496, that is C.O.
20 273.

21

22 **JUSTICE SANJAY KISHAN KAUL:** Which volume? Same volume?

23

24 **ZAFFAR SHAH:** That is the second notification.

25

26 **CHIEF JUSTICE DY CHANDRACHUD:** Volume 3, page? The 6th of August, '19?

27

28 **ZAFFAR SHAH:** This is in continuation to what I am submitting. All provisions of this
29 Constitution. this is the resolution of the Parliament, sent to the President and there's a
30 declaration issued by the President. But what is done under this, is important. I am reading it
31 for that purpose. I have different arguments to make. All provisions of this Constitution as
32 amended from time to time without any modification or exceptions, shall apply to the State of
33 Jammu and Kashmir, notwithstanding anything contrary contained in, now this is important.
34 What has been taken away? Article 152, Article 308 or any other article of this Constitution or
35 any other provision of the Constitution of Jammu and Kashmir or this is any law, document,
36 judgment, ordinance, order, by law, rule, regulation, notification, custom. Something is wrong
37 with this, sir just one minute. Regulation, notified custom or usage, having the force of law in

1 the territory of India, or any other instrument, treaty or agreement as envisaged under Article
2 363 or otherwise.

3

4 **CHIEF JUSTICE DY CHANDRACHUD:** So, what would be your submission? How will
5 you formulate your submission on this aspect?

6

7 **ZAFFAR SHAH:** I'm saying this that what is sought to be done in terms of this was with me.

8

9 **CHIEF JUSTICE DY CHANDRACHUD:** Sorry?

10

11 **ZAFFAR SHAH:** They do away with my Constitution. They do away with Instrument of
12 Accession.

13

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

15

16 **ZAFFAR SHAH:** Now, so let's see once again this, my submissions with regard to this C.O.
17 272 and 273. That's very important to us, because that's why the Court is to adjudicate
18 primarily the issue. So let us take a close up of this 272 first, because in my humble submission.

19

20 **CHIEF JUSTICE DY CHANDRACHUD:** Same?

21

22 **ZAFFAR SHAH:** If 272, goes, then 273 goes, Re-organisation Act will go. We'll take a close
23 up of this. In exercise of powers, can't avoid Clause 1 of Article 3, is a constituent, the President
24 with the concurrence of the State of Jammu and Kashmir. Now I'll pause here. First it says the
25 Government of Jammu and Kashmir. I have a different meaning of the word Government of
26 Jammu and Kashmir. If Your Lordship may have a look again at Article 370? 'Explanation for
27 the purpose of this article, the Government of State means the person for the time being
28 recognized by the President on the recommendation of the Legislative Assembly, State as
29 *Sadr-e-Riyasat* and Kashmir acting on the advice of the Council of Ministers of the State for
30 the time being in office.' Now this *Sadr-e-Riyasat* gets changed into Governor by an
31 amendment not carried out in the explanation but carried out in the Constitution of Jammu
32 and Kashmir Sixth Amendment Act. What I am saying is this expression on the aid and advice
33 of the Council of Ministers. I pause here. When we're using the word Government of the State,
34 the Article 370 and its explanation defines as to what is meant by Government of the State. A
35 Government of the State can exist without Council of the Ministers also. In a normal, parlance
36 language we say there's a Government of the State. There may be a Council of Ministers or not.
37 But what 370 envisages is, a Government of the State, which is aided and advised by the

1 Council of Ministers. Not simpliciter Government of State. Government of State is there
 2 always. Emergency, no emergency. President's Rule or no President's Rule. The Government
 3 of the State is always there. But a distinction is made in Article 370, it is that Government of
 4 the States which has the benefit of the aid and advice of the Council of Ministers. And I
 5 consider this to be the extremely important part of the power to be exercised by the Governor
 6 as the head of the State in making any kind of recommendation to the President. Admittedly
 7 the State is under President's Rule. Admittedly, Section 35 of the State Constitution is
 8 suspended. But what's more important is this that in terms of the presidential notification the
 9 President of India assumes to himself the powers of the Governor not only under the
 10 Constitution of India, but also under the Constitution of Jammu and Kashmir. My Lords, I
 11 have it somewhere, the presidential...

12

13 **CHIEF JUSTICE DY CHANDRACHUD:** President assumed the powers...?

14

15 **ZAFFAR SHAH:** Under the presidential notification, the President of India assumes to
 16 himself the powers of the Governor under the Constitution of India, as well as the powers of
 17 the Governor under the Constitution of the Jammu and Kashmir. Both.Volume 3.

18

19 **JUSTICE SANJIV KHANNA:** Leads to interpretation Clause in the 367 made for the first
 20 time.

21

22 **ZAFFAR SHAH:** When was this, 367?

23

24 **JUSTICE SANJIV KHANNA:** As applicable to the State of J and...

25

26 **ZAFFAR SHAH:** [UNCLEAR] that was in '54 order.

27

28 **JUSTICE SANJIV KHANNA:** '54. Not afterwards?

29

30 **ZAFFAR SHAH:** Afterwards, there was one more occasion. I'll give My Lord, since My Lords
 31 stopped me. Otherwise, I would have given all those details. 367 has [UNCLEAR] three times.

32

33 **JUSTICE SANJIV KHANNA:** Three times.

34

35 **ZAFFAR KHAN:** 1954, thereafter one more time and lastly under 2019.

36

37 **JUSTICE SANJIV KHANNA:** No, that, that last one we know.

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ZAFFAR SHAH: Meanwhile also there is.

JUSTICE SANJIV KHANNA: In between...

ZAFFAR SHAH: Yes, I know. It is in 1966.

JUSTICE SANJIV KHANNA: '54, '66...

ZAFFAR SHAH: And 2019.

JUSTICE SANJIV KHANNA: 2019.

ZAFFAR SHAH: 2019. Now why that, though. There's a why part of it. In '54, we agreed and that stated there. What is important is '66. Prior to '66, in 1965, the *Sadr-e-Riyasat* was replaced...

JUSTICE SANJIV KHANNA: By the Governor.

ZAFFAR SHAH: ..by Governor. So obviously, the Constitution Application Order of '66 said that reference to the *Sadr-e-Riyasat* will be in reference to Governor? Why did it say so? Also because, this expression *Sadr-e-Riyasat*, had appeared in explanation. That explanation is in the Constitution, Article 370. And it said that you can amend 370 only if recommendation is made by Constituent Assembly. Since in '66, there was no Constituent Assembly, so *Sadr-e-Riyasat* got stuck up, in this explanation. In order to overcome that difficulty, they said read Governor for *Sadr-e-Riyasat*. But important fact is that First Day Amendment was carried out in the State Constitution, not without that. Therefore, it became the Chief Minister...the Prime Minister became Chief Minister. *Sadr-e-Riyasat* became Governor in '65 amendment carried out in the State Constitution.

JUSTICE SANJIV KHANNA: There was a, first was 1954.

ZAFFAR SHAH: '54, then '66, but in 2000

JUSTICE SANJIV KHANNA: 1954 was but in 1954, there was no need for that because till 1954 the Constituent Assembly was still in session.

1 **ZAFFAR SHAH:** There were Raj Pramukh, there were so many other....

2

3 **JUSTICE SANJIV KHANNA:** Just, till 1954, and therefore Clause 2 was applicable. Clause
4 2 to Article 370 was applicable, but still they made the amendment in the definition or the
5 interpretation Clause

6

7 **ZAFFAR SHAH:** No, My Lord's observation gives rise to one serious question, that is
8 whether 367 also is a source of amendment. *Kesavananda Bharati* can be, you can get rid
9 of it simply by amending General Clauses Act that the amendment shall include amendment
10 of part 3. That is end of the matter.

11

12 **JUSTICE SANJIV KHANNA:** Mr. Shah, that question need not be gone into, let's put it
13 very.....

14

15 **ZAFFAR SHAH:** I am agreeing that question need not be gone into, what I am saying is..

16

17 **JUSTICE SANJIV KHANNA:** One thing is very clear that 370 was a flexible Article. It was
18 always meant to be a flexible Article.

19

20 **ZAFFAR SHAH:** But, why not Sir saying flexible article in this sense....

21

22 **JUSTICE SANJIV KHANNA:** Yes, but with a concurrence or that your argument to that if...

23

24 **ZAFFAR SHAH:** No, it's flexible in the sense, there's a perspective. Flexible in the sense that
25 the provisions of the Constitution of India, or the Lists 1 and 3 could be made applicable to the
26 State. Of course, to that extent it was flexible, but its own self abrogation, it is suicide. Its own
27 killing whether it was possible to do by the Governor or by some external factor...

28

29 **JUSTICE SANJIV KHANNA:** But, you have argued on that.

30

31 **ZAFFAR SHAH:** No, I am still arguing on that, I am saying it.

32

33 **JUSTICE SANJIV KHANNA:** *Kesavananda* point of view also, you have argued because
34 there's another point of view.

35

36 **ZAFFAR SHAH:** Sir, whenever I said that, I have this case turns on the powers. My Lords,
37 are entrusted power of President, Governor, I am still, that is the basic theme in all of my

1 submission is, that the power I'm dealing with, the issue of power. Now see this, general page
2 485...

3

4 **CHIEF JUSTICE DY CHANDRACHUD:** Mr. Shah one second. If you want that two
5 amendments to Article 367, I found out the pages.

6

7 **JUSTICE SANJIV KHANNA:** Volume 3, page number?

8

9 **CHIEF JUSTICE DY CHANDRACHUD:** It says, 65. Volume 3, page 18, Volume 3, page
10 39, those are the two. Now, what next?

11

12 **ZAFFAR SHAH:** My Lords, will see this notification, "I so and so, so and so received a report
13 from the Governor of the State because six months had expired and under 92, the Governor's
14 vote could be only for six months and after considering other information as well I am satisfied
15 that situation has risen in which the Government of that state....

16

17 **CHIEF JUSTICE DY CHANDRACHUD:** Where is that notification?

18

19 **ZAFFAR SHAH:** Sir, I am reading 19th December 2018 notification, page...

20

21 **CHIEF JUSTICE DY CHANDRACHUD:** Page? 92 no?

22

23 **ZAFFAR SHAH:** Sir, please kindly see. Now, therefore in case of power [UNCLEAR] three
24 fixed constituents all other [UNCLEAR]. I hereby [UNCLEAR], I assume to myself, a President
25 of India. All the functions of the government of the said state and all powers vested in or
26 exercisable by the Governor of that State under the Constitution and the State Constitution."

27 I will pause here for a minute. What powers the Governor had first under the Constitution of
28 India? He is the appointee of the State government appointed by the President, but functions
29 under the Constitution of the State of Jammu and Kashmir. His qualifications, his
30 emoluments. He takes oath under the Constitution of Jammu and Kashmir.

31

32 **CHIEF JUSTICE DY CHANDRACHUD:** But holds office during the pleasure of the
33 President.

34

35 **ZAFFAR SHAH:** Very right. Now when he assumes to himself the power of the Governor of
36 the State, this is the important sentence I'm reading for purpose of 370, now who is Governor?
37 Who can make recommendation? If the President says I am the Governor, I have taken all

1 your powers then for purpose of 370, who has to make that recommendation that you do away
2 with Article 370? You apply all the provisions of the Constitution. The President himself or
3 somebody else. When the President delegates, that delegation is subject to direction, control,
4 and superintendents of the President. Means the Governor is the delegator of the President.
5 Now is it a case where an agent and a delegatory recommends and the Principal accepts. Does
6 it commend itself to our sense of justice that where the President of India has assumed himself
7 the power of the Governor? I am saying that no power vested in the Governor of the State of
8 Jammu and Kashmir, to make any kind of recommendation on the basis of which C.O. 272,
9 273, 272 was issued. No power vested because it's taken over by the President, and he could
10 not have recommended to himself, the abrogation of Article 372...370.

11

12 **CHIEF JUSTICE DY CHANDRACHUD:** Yes Mr. Shah?

13

14 **ZAFFAR SHAH:** My Lord, so, when he assumes to himself of this jurisdiction that's what
15 I'm saying this...I'm dealing with this case on the basis of the power, when he assumes to
16 himself of the jurisdiction that I am the Governor. I really fail to understand then who could
17 make the recommendation under 356. And the opening word of C.O. 272 is...Kindly have a
18 look at 272, once again sir. 'In exercise of powers [UNCLEAR] the President with the
19 concurrence of the Government of Jammu and Kashmir.' That Government of Jammu and
20 Kashmir is defined in explanation appended to Article 370 means the Government which has
21 Council of Ministers in place. Then why did the Constituent Assembly of India expressly
22 provided *Sadr-e-Riyasat* aid and advice, Governor aid and advice? It is repeatedly even out of
23 367 modified form, in reference to Governor is aid and advice. What is entrapped in this? My
24 Lords, one way of understanding the Constitution is simply by the text of it, going by the words.
25 Second is which I am submitting is for Your Lordship's consideration is, the legal value which
26 is entrapped in that provision. What is the legal value entrapped in this provision of 370?
27 Council of Ministers, if I put it, doesn't it show the political presence of the people? Doesn't it
28 show representatives of the people are present? Doesn't it...has the element of democracy that
29 people are there through Council of Ministers who alone are answerable to the Legislature? So
30 what is entrapped in Article 370, is not what is textually written but we need to interpret this
31 370 in terms of the purpose it has. I'm submitting for Your Lordship's consideration is that
32 purposive interpretation needs to be placed on Article 370.

33

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

35

36 **ZAFFAR SHAH:** So I request Your Lordships to have once again the look and look at C.O.272
37 And for the benefit of Hon'ble Justice Khanna with Article 367, as it was applied.

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CHIEF JUSTICE DY CHANDRACHUD: Mr. Shah, if you could just, so that, that will bring clarity to us. We've made our notes when you were arguing.... Can you now, in this aspect, just crystallize your submissions in 1...2...3...4? We'll take it down so that we have it in one place.

ZAFFAR SHAH: My Lord if I have to go by the

CHIEF JUSTICE DY CHANDRACHUD: So now, we have seen 272, 273. But if you can formulate it, so that will just... it will bring the structural clarity to the whole discussion.

ZAFFAR SHAH: My Lords, the first one, which I submitted to Your Lordships was that 370 is a permanent....

CHIEF JUSTICE DY CHANDRACHUD: No, you need not go that far back. Based on this aspect...

ZAFFAR SHAH: No. I am just reading what I gave earlier to Your Lordships.

CHIEF JUSTICE DY CHANDRACHUD: Oh... Okay. No, no. That we have seen. I'm not on that. What you just said about 272, there you can just formulate your submission. Whatever you covered earlier that we've got many detailed notes. This part...this part If you can just formulate.

JUSTICE SANJIV KHANNA: The challenge to 272.

CHIEF JUSTICE DY CHANDRACHUD: Right. 272.

JUSTICE SANJIV KHANNA: Challenge to 272 as an independent....

ZAFFAR SHAH: Without expanding Your Lordships giving me the pleasure of being here and hearing in detail... Challenge to 272 is first,...

CHIEF JUSTICE DY CHANDRACHUD: Yes, just a second.

ZAFFAR SHAH: ...when the Presidential Order is invoked under 356 is point number One.

CHIEF JUSTICE DY CHANDRACHUD: Sorry, can you just come again?

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ZAFFAR SHAH: 356

CHIEF JUSTICE DY CHANDRACHUD: No. Can you just start from the beginning or when the presidential....

ZAFFAR SHAH: 272 is notified issued at a stage when Presidential Order under 356 is in operation. Number Two...

CHIEF JUSTICE DY CHANDRACHUD: Yes.

ZAFFAR SHAH: That the President of India, under notification dated in 19 December 2018 had assumed to himself, the powers of the Governor of the State of Jammu and Kashmir.

CHIEF JUSTICE DY CHANDRACHUD: Yes.

ZAFFAR SHAH: Number three, the 272 is issued with the concurrence of the Government of Jammu and Kashmir which meant a Government, where Council of Ministers is in place.

CHIEF JUSTICE DY CHANDRACHUD: Yes,

ZAFFAR SHAH: Number four, in terms of this C.O. 272, all the provisions of the Constitution of India are made applicable, which could not be done....which could not be done, as it had not earlier been done by Constituent Assembly or by the Government of Jammu and Kashmir, or by the Governor at any stage in 69 years. Number 5, when it says that all the provisions of the Constitution of India will apply, it would mean Article 368, which carry the proviso with it, would go and 368 would also apply.

CHIEF JUSTICE DY CHANDRACHUD: Can you please formulate that again?

ZAFFAR SHAH: Sir, when it says all the provisions of the Constitution of India will apply...

CHIEF JUSTICE DY CHANDRACHUD: Just one second, when C.O. 272 states?

ZAFFAR SHAH: Yes, it says, all the provisions of the Constitution as amended from time to time. Constitution means Constitution of India shall apply, in relation to the State of Jammu and Kashmir except the following that is 367 modified. Who says so?

1

2 **CHIEF JUSTICE DY CHANDRACHUD:** Sorry, I got this part when C.O. 272 states that
3 the provisions of the Constitution of India is amended will apply, except Article 367 is
4 modified.

5

6 **ZAFFAR SHAH:** Yes.

7

8 **CHIEF JUSTICE DY CHANDRACHUD:** What is the sequitur?

9

10 **ZAFFAR SHAH:** It means that Article 368 would also apply which provides for amendment
11 of the Constitution.

12

13 **JUSTICE SANJIV KHANNA:** According to you then, as per 272, 370 was not, no longer
14 applicable? That's a sequitur to your argument.

15

16 **ZAFFAR SHAH:** That's a logical conclusion that can be drawn. My Lords, you can draw a
17 logical conclusion.

18

19 **JUSTICE SANJIV KHANNA:** Why are you stretching it? You are stretching it too much.

20

21 **ZAFFAR SHAH:** I am just reading English language that's all.

22

23 **JUSTICE SANJIV KHANNA:** You are stretching it.

24

25 **ZAFFAR SHAH:** I am really trying to find out what is the purpose? What is it leading to?
26 How do we know?

27

28 **JUSTICE SANJIV KHANNA:** No, it entitles to...

29

30 **ZAFFAR SHAH:** The text of it.

31

32 **CHIEF JUSTICE DY CHANDRAHUD:** Can you reformulate the last point, I mean just for
33 doctrinal clarity? Because this last time which you made is not really?

34

35 **ZAFFAR SHAH:** Kindly see Clause 2, Sir, Clause 2

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

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ZAFFAR SHAH: Of this 272

CHIEF JUSTICE DY CHANDRACHUD: Just one second.

ZAFFAR SHAH: Clause 2 Sir.

CHIEF JUSTICE DY CHANDRACHUD: Small 2, right?

ZAFFAR SHAH: You will understand it by the text of it.

CHIEF JUSTICE DY CHANDRACHUD: Small 2?

ZAFFAR SHAH: All the provisions of the Constitution, that is Indian Constitution, as amended from time to time which amendments have been carried out in the Constitution of India, shall apply in relation to the state of Jammu and Kashmir, pause here. So entire Constitution right from Article 1, rather right from Article 2 to Article 396, all would apply to us. That's all what I am saying. And in that 368 would also apply. It would also apply to us.

JUSTICE SANJIV KHANNA: And what happens to 370 then?

ZAFFAR SHAH: Sir, in any case, they have finished through 370, that is what was the intention.

JUSTICE SANJIV KHANNA: No, that's the second one. That's the truce, not 272, not 272.

ZAFFAR SHAH: Yes, they removed the form as well, removed the form. Now is the 367. Kindly see 367. What does it say in Clause C? "Reference to the government of the said state shall be construed as including references to the Governor of Jammu and Kashmir, acting on the advice of the Council of Ministers". Just see this. So under 367, advice of the Council is also provided in this 272.

CHIEF JUSTICE DY CHANDRACHUD: Yes.

ZAFFAR SHAH: Now, when Council of Ministers is not there yet the Governor makes the recommendation. Now see the last part.

1 'In proviso to Clause 3 of Article 370, of the expression Constituent Assembly of the State
2 referred in Clause 2, shall read, Legislative Assembly of the State.' We will pause here. This is
3 one of the most important, controversial part of 367. Now this is being done by the President
4 who himself was the Governor, but mentions it that with the concurrence of the Government
5 of the State he applies 367 in a modified form to us. No. This is what the learned advocates
6 have been arguing that this 367 whether this can be invoked for purposes of changing the
7 expression Constituent Assembly into Legislative Assembly. That in turn will involve another
8 question, what is this 367? Which is only one of the provisions of the Constitution relating to
9 interpretation. It says, unless the context otherwise provides, the provisions of the General
10 Clause Act would apply for interpreting the Constitution. It's a simple language, the meaning
11 of 367. Now going to the main provision of 367, where it says that if the courts have difficulty
12 in interpreting any provision of the Constitution or any word of the Constitution, then the
13 court is entitled to seek aid of General Clause Act.

14

15 **CHIEF JUSTICE DY CHANDRACHUD:** Really thinking, according to you Article 367 is
16 only an intermediate tool and what you have essentially done is by introducing a new principle
17 of interpretation, you have amended the substantive part of 370.

18

19 **ZAFFAR SHAH:** Also the first question would be, jurisdiction, whether they could do so.
20 This would come later, sir what they've actually done? Where was the question of jurisdiction
21 could the President on the recommendation of the Government of the State, where there was
22 no Council or Ministers, could he make it? I am on the question of power. This is what I'm
23 saying all the time. Second, assuming he had the jurisdiction to do so, then while exercising
24 that power, could he make an amendment in 370, Sub-Clause 3, with the aid of 367? Then the
25 second question arises. First is whether he had the power, he himself was the Governor. Have
26 you delegated the power to the Governor, but under his superintendent's control and
27 directions? It's a very peculiar situation which is done. Which is... we are not seeing such cases.
28 That is why this case involves certain issues of considerable importance because Your Lordship
29 is dealing with a federative State in a Union. We are dealing with the rights of a State, not of a
30 single individual whose fundamental rights are violated. The rights of its State are dealt with.
31 It involves about more than a crore people. It involves more than 84,000 square miles of the
32 territory. This case is extremely important not only in this country but everywhere. That how
33 this Court will respond to, what has happened on 4th and 5th of August 2019? This I would
34 submit is not run of the mill case, not an ordinary case. We are taking time. I'm grateful to
35 Your Lordships only for that. But then the case is of such nature, it involves so many
36 considerations, the historical perspective. Without that we can...no person can understand
37 370, if he doesn't, he's not aware of the history of the whole matter. Then subsequently, what

1 the governments have done, and ultimately, what you did. It's just like the Governments were
2 allowing constitutional application orders. But somebody wanted to have all the golden eggs
3 in one go. So they killed the hen on force. The governments were here for last so many years
4 giving concurrences, consenting to it. You apply this order, this order, this order, '54 in
5 number. Somebody thought we got to kill the hen and get all the golden eggs.

6

7 **CHIEF JUSTICE DY CHANDRACHUD:** All right. Now we've concluded this part now.
8 Can we move on to the next part now?

9

10 **ZAFFAR SHAH:** What I am submitting is that this was patently without the jurisdiction of
11 the President, and he is acting as the Governor.

12

13 **CHIEF JUSTICE DY CHANDRACHUD:** So, you have challenged it on both grounds.
14 Absence of power, and assuming the power did exist, he exercised the power by seeking to
15 amend Article 367.

16

17 **ZAFFAR SHAH:** Now, when it... now as a consequence of it... Why I said this is the most
18 important notification... as a consequence of it... When you change Constituent Assembly to
19 Legislative Assembly, then things become you have paved way for getting rid of it. Because
20 then now the Parliament becomes my Legislative Assembly in terms of Article 357. Because
21 under the President's Rule of 356, the Parliament has the power to make laws for me. This is
22 the whole Constitution manipulation. Now, not only that, they used 367 to get rid of 370 and
23 then they killed 367 itself. Because in terms of the second notification, the whole of the
24 Constitution is applicable to me... now without any modification, without any exception. You
25 use 367, you alter 370. you take it back and then you kill 367 itself. This is the manipulation
26 part of it. That's what we are aggrieved. It's not a bonafide action. It's not a legitimate action.
27 That is not the way you deal with the States. Whatever may have been the situation in the state.
28 Whether national security, whether it's anything else. Those are the matters of law and order.
29 What is the 370 to do with what happens on the streets of Srinagar or in Kashmir? It has
30 nothing to do with it. May I tell Your Lordships, all the laws which were applicable to us prior
31 to 2019, continue to be applicable to us. Be it Unlawful Activities Act, Prevention of Detention
32 Act, whether NIA Act.. they continue to be. The difference is what. They say stone pelters have
33 gone down, the militant activities have gone down. Those are the issues of law and order. I see
34 no connection between that and 370. You got rid of 370 itself. It is not because of 370 those
35 things were happening. There's no connection. Yes, you might have done development after
36 that, that's a different issue altogether. Done or not done. I'm not here to comment on that.
37 But 370 as a matter of fact, as a matter of law, that where a Government wants to do something,

1 but there is an obstacle, a constitutional obstacle. Therefore, the Government wants to get rid
2 of it. Just like in case of fundamental rights. Just in case of fundamental rights, If there's a
3 fundamental... does it allow the Government to pursue a certain policy, then obviously, the
4 Government has the power to amend that, saying that it cannot be done because we want to
5 have a particular policy. 370 was altogether different. It gave us constitutional autonomy. But
6 then, the law and order situation is used as a matter of national security and these two orders
7 are passed.

8

9 **CHIEF JUSTICE DY CHANDRACHUD:** Now what next? Let's cross this bridge. Now
10 we've got this point. The next point. What would that be?

11

12 **ZAFFAR SHAH:** Your Lordships wants me to conclude immediately.... I will...

13

14 **CHIEF JUSTICE DY CHANDRACHUD:** No, Mr. Shah. Please don't harbour that in the
15 least. So many years in judging in a matter like this, I will not do that unless you are satisfied
16 that you are fully.... not just that we should be satisfied that we've heard you, but you must also
17 have that satisfaction.

18

19 **ZAFFAR SHAH:** I had so many things in this matter to say.... I....Your Lordships also must
20 have noticed I have not read even a single document...

21

22 **CHIEF JUSTICE DY CHANDRACHUD:** That's because it is your mastery over this
23 subject.

24

25 **ZAFFAR SHAH:** You asked me yesterday what about Instrument of Accession? Of course, I
26 could arrange the documents about Instrument of Accession, but I told Your Lordships, please
27 see Clause 8.

28

29 **JUSTICE SANJIV KHANNA:** I saw Clause 7 also.

30

31 **ZAFFAR SHAH:** Also to read. Because reading the documents, then I would have taken
32 one week. But since Your Lordships is not going to the...

33

34 **CHIEF JUSTICE DY CHANDRACHUD:** That's why I told you to conceptualize the last
35 point, because now it brings clarity and focus. Those seven points which you made...

36

37 **ZAFFAR SHAH:** Just look at it everything is covered, nothing is left.

1

2 **CHIEF JUSTICE DY CHANDRACHUD:** Otherwise, what happens Mr Shah is that
3 typically we make notes based on the dialogue which is taking place. There is always a danger
4 that you lose some point which was made. Because the notes are made in the form of dialogue...
5 When you focus and formulate, then you're sure that... You know...

6

7 **ZAFFAR SHAH:** I saw that Your Lordships are making the notes, but sometimes it is not
8 like bullet points, as they call it. This is without jurisdiction, without... because the job of an
9 advocate here is, for example, there is no law on a point. I will have to pursue it. Persuasion
10 requires time by us. Persuasion can't be done, sir. President has no jurisdiction. Okay, sit
11 down. That is the end of the matter. I can't do that. How can I explain this? ... I can't explain
12 that the President has.....

13

14 **CHIEF JUSTICE DY CHANDRACHUD:** Mr. Shah, after you have done the persuasion,
15 you have to do the conceptualization.

16

17 **ZAFFAR SHAH:** Yes. That's what Lordships... I did that. First exercise I have done as a
18 counsel. I have.... in my own understanding, that what could be the ultimate issue, what could
19 be the result of this litigation, where such a serious issues are involved and relating to a state,
20 a federating state, how would this court respond. And not only, there is one more important
21 thing for us. This is the last forum available to the people of the state, that I would say, that
22 Your Lordship understands it. There is no one to take it back as I see the political climate in
23 the country, there's no one to take it back. It remains as it is. So, therefore, all eyes are on this
24 court, how this court will respond. And I, as a humble servant of this court, it's my duty to say
25 what people think, the place from where I come, the people think about this 370. What has
26 gone wrong? Why are they hurt? Why are they disappointed? Something will have to be Sir,
27 because this is our last resort. If assuming, I don't know what Your Lordships, ultimately when
28 Your Lordships will retire to the Chambers and dictate the decision. But ultimately, what
29 happens? Either it goes for all times to come, 370 as it is or we get back what we lost on 4th.

30

31 **JUSTICE B.R. GAVAI:** Mr Shah, we have to decide according to law or according to
32 sentiments?

33

34 **ZAFFAR SHAH:** One more thing I wanted to say...

35

36 **TUSHAR MEHTA:** People are happy because of the development, because of the
37 employment opportunities etc.

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ZAFFAR SHAH: Nobody sells the country Sir, whosoever may be in the government. This is our experience, whosoever is the government, everybody tries to do his best. All government. Nobody sells the country as such. Roads are made. Maybe you make it at a greater scale somebody made it at a smaller scale. Hospitals are built, education institutions that all government...

JUSTICE SANJIV KHANNA: You need not go into all those because...

ZAFFAR SHAH: No, My Lords, Solicitor General said so. So, therefore, I am just saying that the governments do of course, good things always happen.

CHIEF JUSTICE DY CHANDRACHUD: We are addressing a Constitutional argument, and we have to deal with a Constitutional argument.

ZAFFAR SHAH: The last one I would like to submit because as I see, this an important matter for us in that. I remember only one thing, a few things. I need Your Lordships to know that, that is sometime back, the great leader of this country, Mr. Atal Bihar Vajpayee came to Srinagar and he delivered a speech. And he said that "the issue of this Kashmir, I am going to solve within the purview of *jumuriyat* and *insaniyat*". Unfortunately, the responders killed both on 5th and 6th August. I would only pray when Your Lordships retire to the Chambers and dictate the judgment in this case, let the words of truth and justice trickle from Your Lordship's lips, that's what I would say. We are looking up to you. We have full confidence in this court. And we believe that the justice will be done to the people of the State of Jammu and Kashmir.

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

ZAFFAR SHAH: If anything is left I would...

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

ZAFFAR SHAH: There were some judgments also, which I wanted to cite for every submission which I made.

CHIEF JUSTICE DY CHANDRACHUD: Mr. Shah, can you just do one thing? On the judgments, they will all be in the compilation which have been filed. You can maybe give us

1 just two pages, a short, just a sentence or two why you are relying on the judgment just as Mr.
2 Subramaniam did. That will help us.

3

4 **ZAFFAR SHAH:** Now. I understand. Sometimes it becomes too overwhelming for the judges
5 also. You go on hearing a case all the time.

6

7 **CHIEF JUSTICE DY CHANDRACHUD:** Not really. I will tell you what happens, Mr. Shah
8 is this, that at the end of it when you know the dust and the din of the court has settled down
9 and you are left with yourself in a small office to dictate a judgment, as all of us do,
10 conceptualization always helps because that's when you really have to sit back, close
11 everything, shut yourself to everything else, but the core of the case. And that's why it helps
12 actually.

13

14 **ZAFFAR SHAH:** Obligated Your Lordships.

15

16 **CHIEF JUSTICE DY CHANDRACHUD:** Thank you very much. You have done it
17 admirably. Thank you.

18

19 **ZAFFAR SHAH:** I will have these two things done, the Constitutional autonomy as on 4th...

20

21 **CHIEF JUSTICE DY CHANDRACHUD:** Yes, please give us that.

22

23 **ZAFFAR SHAH:** And number 2, also, some few judgements, where I will indicate that
24 paragraph only to support.

25

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

27

28 **ZAFFAR SHAH:** What was the position earlier what is the position now? I am grateful to
29 you.

30

31 **CHIEF JUSTICE DY CHANDRACHUD:** Thank you, Mr. Shah.

32

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

34

35 **CHIEF JUSTICE DY CHANDRACHUD:** We will now have Dr. Dhavan? Yes Mr. Dhavan?

36

37 [NO AUDIO]

1

2 **RAJEEV DHAVAN:** I think when we start with the Constitution of India, we have to
3 recognize that India is the most diverse country in the world. If you take the whole of Europe,
4 the whole of Americas, and part of Sub Saharan Africa, you have a diversity and that diversity
5 is totally and completely unparalleled. And that diversity is reflected in this Constitution. And
6 it is not just Article 370, there are many other articles also which I will show to Your Lordships
7 presently where the legislature of the State's consent is required or concurrence is required or
8 it has a condition precedent to put in. And it is this factor Your Lordship will bear in mind
9 which will have an impact on other cases. Take, for example, the *Poudyal* case. The *Poudyal*
10 case concerned whether there should be a reservation for Bhutias and Lepchas. Now this was
11 obviously totally contrary to the Constitution which says that you cannot discriminate on
12 grounds of religion. We got a split decision, but bearing in mind the fact of the history of
13 Sikkim, and the fact that the Nepalese were considerably in power, Your Lordships then took
14 a pragmatic decision as well as a principled decision, which I'll show to Your Lordship
15 presently, to say, no, despite that particular provision we have to honour the historical
16 promises made to the people of Sikkim. And this is something Your Lordship will bear in mind
17 because our Constitution is replete with promises to the people. I mean take (3) and (4), My
18 Lord to start with. This is the Achilles' Heel of the Constitution that there is no territorial
19 integrity. It is so peculiar to the Indian Constitution that we don't find a parallel as far as this
20 is concerned, in most of the Constitutions of the world. Some joined the American Constitution
21 with reservations like Texas. Most of it. So, you have to bear in mind that (3), (4) is such an
22 important provision, and it is central to the argument that I'm going to advance before Your
23 Lordships. And as Mr. Shah has pointed out this had on the 4th of August, a proviso, that is in
24 C.O. 48. I can take Your Lordships to that, because it's important to understand. This would
25 be in Volume 3, PDF 13. I'm getting good at it, My Lord.

26

27 **CHIEF JUSTICE DY CHANDRACHUD:** You've actually started using the language. You
28 are saying PDF.

29

30 **RAJEEV DHAVAN:** Right.

31

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

33

34 **RAJEEV DHAVAN:** Anyway, I was taking the first My Lord, article that I want to show to
35 Your Lordships to demonstrate the diversity because it's not just limited to those special
36 provisions from 371(a), onwards. In fact, for Nagaland and for Mizoram, they say you need the
37 Legislature of the State to act. I'll show that to Your Lordships before you interfere with any

1 customs. Now, here is an impediment. It's very different. I'll show that to Your Lordships. Now
2 My Lord, come to (3) and (4), to begin with. I want to just show My Lord Volume 3, PDF 13.
3 This was...Yes, I'm talking of the C.O. 48 that brings in the provision into Article 3 for...

4

5 **CHIEF JUSTICE DY CHANDRACHUD:** Document 3?

6

7 **RAJEEV DHAVAN:** Document 3, I'm sorry.

8

9 **CHIEF JUSTICE DY CHANDRACHUD:** What page? PDF 13? Yes, we got it. 1954 C.O.

10

11 **RAJEEV DHAVAN:** Now, My Lord straight away at the bottom of that page you'll see in
12 Article 3, there shall be added the following further proviso, namely, 'provided further, that no
13 Bill providing for increasing or diminishing the area of State of Jammu and Kashmir or
14 altering the name or boundary of that State shall be introduced in Parliament without the
15 consent of the Legislature of the State.' Mr. Shah was referring to...

16

17 **CHIEF JUSTICE DY CHANDRACHUD:** We've read the proviso with Mr. Shah.

18

19 **RAJEEV DHAVAN:** You've read the proviso, I also wanted to read the proviso to 368 and
20 then I'll be done with C.O. 48. That's page 411, at the top. My Lord, PDF page 18. PDF 18.

21

22 **CHIEF JUSTICE DY CHANDRACHUD:** In Volume 3?

23

24 **RAJEEV DHAVAN:** Yes sir, in Volume 3.

25

26 **JUSTICE SANJAY KISHAN KAUL:** You are reading the proviso Mr Dhavan?

27

28 **RAJEEV DHAVAN:** I am going on to the bottom of the page My Lord, on part 20. Because
29 these are relevant to us. If the only way out is an amendment, then these provisions are crucial
30 both to Article 3 and 4 to 370 and a possible amendment if any. I will just read that My Lord
31 and I don't have to read the rest because much of it has been read to Your Lordships. To Article
32 368, the following proviso shall be added, namely provided further, that no such amendment
33 shall have effect in relation to the State of Jammu and Kashmir unless applied by the Order of
34 the President under Clause 1 of Article 370.

35

1 **CHIEF JUSTICE DY CHANDRACHUD:** So, once there's an amendment to the Indian
2 Constitution, that for the purpose of Article 370, is placed on the same footing as any other
3 provision, so that you have to have a specific amendment.

4

5 **RAJEEV DHAVAN:** That's right.

6

7 **CHIEF JUSTICE DY CHANDRACHUD:** By an order, Presidential Order under Article
8 371.

9

10 **RAJEEV DHAVAN:** It is a two stage process. The first is you must have an order of the
11 President under Clause 1. Before that, you can't proceed with the Amendment.

12

13 **CHIEF JUSTICE DY CHANDRACHUD:** So Clause D of... Subclause D of Clause 1 is then
14 made operational. You have to have a Presidential Order under D.

15

16 **RAJEEV DHAVAN:** That's right. That's right. My Lord, I'll come to those points a little later
17 because whether 370 could be amended at all, or 3, and 4 could be invoked during President's
18 Rule is a major point that we wish to make at some point in time. Because all the provisions
19 there relate to Governments, Governments assisted by Councils of Ministers. As far as Article
20 3 and 4 is concerned, you have to circulate the bill to the Legislature concerned. There is only
21 one judgment to the Delhi High Court, which goes the other way. But Your Lordships have
22 insisted that this is a mandatory condition. This has not been done as far as the invocation of
23 3 and 4 is concerned. So let me take My Lords to 3 and 4.

24

25 [NO AUDIO]

26 state separated....

27

28 **JUSTICE SANJIV KHANNA:** Mr. Dhavan, Dr. Dhavan which page are you on? I have
29 missed on...

30

31 **RAJEEV DHAVAN:** I'm on the Constitution My Lord.

32

33 **JUSTICE SANJAY KISHAN KAUL:** Article 3 and 4.

34

35 **RAJEEV DHAVAN:** I'm sorry My Lords, I should be more prepared in cross referencing.

36

37 **JUSTICE SANJIV KHANNA:** I was probably reading something with....

1
2 **RAJEEV DHAVAN:** No. No. I'll come to my written submission in a moment. There is
3 something elaborate on 3, 4. Once again, I have quoted from the judgments rather than
4 actually refer to them. I'll give Your Lordships the PDF numbers. Now, Parliament may by law,
5 form a new State by separation of a territory from any State, or by uniting two or more States
6 or parts of States, or by uniting any territory to a part of a State, increase the area of a state,
7 diminish the area of a state, alter the boundaries of the state, alter the name of the state. Now
8 My Lords, the proviso here, it was brought in My Lord, by the Fifth Amendment, as Your
9 Lordships will see at the bottom of the page. Provided that no bill for the purpose shall be
10 introduced in either house of Parliament, except on the recommendation of the President,
11 unless where a proposal contained in the bill affects the areas, boundaries, or name of any
12 State. The Bill has been referred by the President to the Legislature of the State, expressing its
13 views thereon, within such period as may be specified in the reference within such further
14 period as the President may allow. This, in my respectful submission is a mandatory provision.
15 The Case Law My Lord suggests, all you have to do is refer the bill. You don't have to refer
16 future amendments to the bill. But this is a mandatory provision and it will affect My Lord,
17 the JK Reorganization Act of 2019 because that is invoked My Lord, under Article 3 and 4.
18 Territories are changed, names are changed etc. The two explanations, I'll omit for the
19 moment My Lord. They were brought in after *Berubari* My Lord. *Because* there was some
20 concern as to whether you can take parts of territories and deal with them separately or not,
21 and therefore you have explanation, 1 in this Article, State includes a Union Territory, but the
22 proviso State does not include a Union Territory. Now Mr. Sibal was at pains to apply this
23 particular explanation to the Clause 1. He said there were many combination. Actually, this
24 did not, explanation 1 and 2 were not applicable to the State of Jammu and Kashmir. Then
25 comes the consequential provision 4. Any law referred to in Article 2 or Article 3. Article 2 is
26 relevant for second [UNCLEAR] because it joined the, subject to some conditions which are
27 there in Article 371, in the 371 series. Shall contain such provisions for the amendment of the
28 First Schedule and Fourth Schedule as may be necessary to give effect to the provision of the
29 law, and may also. So first My Lord, is the amendment of the First and Fourth schedule and
30 may also contain such supplemental, incidental and consequential provisions, including
31 provisions as to the representation in Parliament and in the legislature or legislatures of the
32 State or States affected by such law as the law of the Parliament may deem necessary. Now
33 these supplementary provisions are what is contained in the JK Reorganization Act. The
34 argument made is, you have represented the democracy in the Union Territory. You may not
35 have it in Ladakh, but nevertheless, the entire statute is really made under Article 4.
36

1 Now, if I may show some other provisions to Your Lordships on diversity, My Lord. This I will
 2 explore later when I show Your Lordships, the decisions on Article 3 and 4. Very strange
 3 provision My Lord on Article 164. While the special provisions My Lords on SC/ST, Your Lord
 4 ships will see, there is an entire separate chapter on it. And our affirmative action is very
 5 different from that of any affirmative action in the world. So 164, My Lord, provided that in
 6 the States of Chhattisgarh, Jharkhand, Madhya Pradesh, and Odisha, they shall be a minister
 7 in charge of tribal welfare, who may in addition be in charge of the welfare of scheduled castes
 8 and backward classes. Now, this came in My Lord by way of a small alteration for Orissa, the
 9 name was changed. But, this is an important provision which once again shows the diversity
 10 My Lord, that exists. Then My Lord, Your Lordships will come to Article 244. Sorry, My Lord,
 11 before that the Union Territories, if I may just indicate that to Your Lordships, that's part...

12

13 **CHIEF JUSTICE DY CHANDRACHUD:** 239, right? 239.

14

15 **RAJEEV DHAVAN:** Now My Lords, all the amendments by and large to create a Union
 16 Territories except for Chandigarh My Lord, have been made by Constitutional amendments.
 17 Here, we see the creation of a territory My Lord, under Article 3 and 4. So let us have a look,
 18 same as otherwise, administration of Union Territories this was put in by the Seventh
 19 Amendment. On Article 3 and 4, Mr. Chander Uday Singh, My Lord will take Your Lordships
 20 through the State Re-organization Committee report. I needn't go into that because he is going
 21 to develop that argument. Every Union Territory shall be administered by the President acting
 22 to such extent as he thinks, through an administrator, to be appointed by him when with such
 23 designation as he may specify, notwithstanding anything contained in Part 6, the President
 24 may appoint the Governor of the State as the administrator of an adjoining territory, or where
 25 the Governor is so appointed, he shall exercise his functions as such administrator,
 26 independently of the Council of Ministers. So My Lord, as soon as you become a Union
 27 Territory and Sub-Clause 2 applies, the President may appoint a Governor of a State. He may
 28 appoint somebody else. But at the end of it, it says he shall exercise his functions independent
 29 of the Council of Ministers. Now this, of course, has changed in the context of Delhi etc. But
 30 I'll come to that in a...

31

32 Then Your Lordships will see 239(a). Parliament may, by law create for the Union Territory of
 33 Puducherry, a body which is whether elected or partly nominated or partly elected, to function
 34 as a Legislature for the Union Territory or a Council of Ministers, or both with such
 35 Constitution, powers and function, functions in each case, as may be specified. Puducherry My
 36 Lord came from a Constitutional amendment. Parliament was authorized My Lord to make a
 37 statute, and it did so.

1

2 The next My Lord is provision Your Lordship is very familiar with. 239(aa). That is Delhi and
3 it contains in the amendment itself not through a circuitous route of (3) and (4), but in the
4 amendment itself, it contains the provisions for a Legislative Assembly. The division of powers
5 My Lord. Then failure of constitutional machinery. And then finally, 240 My Lord. The
6 President may make regulations for the peace, progress and good government of the Union
7 Territory of Andaman and Nicobar, Lakshadweep, Dadra and Nagar Haveli, Daman and Diu.
8 To this we can now add Ladakh, as a consequence of the changes that have been made. But of
9 course, it's not amended. It's done as a consequence of Article 3 and 4. And therefore, the
10 President completely takes over. There is no Parliamentary Government at all. No reference
11 to the people and there is a Lieutenant Governor or Governor in charge. And that is the fate of
12 many Union Territories My Lord, unless provisions are made. When you convert a State into
13 a Union Territory, and there is some doubt as to whether you can, because without
14 explanation, one, it is clear we are talking about States. And this would be the only occasion in
15 the history of India where a State has been reduced to a Union Territory. Now, when we talk
16 of Constitution, transformative constitutionalism, it is important to bear in mind what this
17 really means. As far as Ladakh is concerned, a provision similar to 240 will apply. Which is
18 there, of course, in the Reorganization Act, My Lord. And as far as Jammu and Kashmir is
19 concerned, it becomes a Union Territory with the limitations that are there in the JK
20 Reorganization Act. This is unprecedented My Lord. If for example, you wanted to make a
21 Union Territory of Delhi, the special reason you passed an amendment to the Constitution.
22 But here, by a circuitous procedure, you have converted through Article 3 and 4, two Union
23 Territories from a state, one with some representative Government, one with none.

24

25 Then, My Lord if I may take Your Lordships to 244. I'm just My Lord... on the question of
26 diversity of our Constitution which makes it very different from others and more exciting than
27 others.

28

29 **CHIEF JUSTICE DY CHANDRACHUD:** We'll continue on Wednesday. On the 16th,
30 Wednesday.

31

32 **S. PRASANNA:** There is a small housekeeping matter. The additional volumes of case law
33 and documents Mr. Dushyant Dave's team had given. In fact it appears that they had given,
34 because there was a Google form. It might have been missed out by them. So request that that
35 also be taken on record. There are about three case...

36

1 **CHIEF JUSTICE DY CHANDRACHUD:** But were they given in advance with the other
2 volumes?

3

4 **S. PRASANNA:** Yes. Yes. We had a....

5

6 **CHIEF JUSTICE DY CHANDRACHUD:** To the nodal counsel

7

8 **S. PRASANNA:** We don't seem to have the record, but it appears that they had given.... Of
9 the other volumes... Case Law. It was Case Law and documents.

10

11 **CHIEF JUSTICE DY CHANDRACHUD:** Is there any overlap with the Case Law and
12 documents already on the record ?

13

14 **S. PRASANNA:** We've done the de-duplication. There is no overlap.

15

16 **CHIEF JUSTICE DY CHANDRACHUD:** There's no duplication. All right.

17

18 **S. PRASANNA:** And there is also the Chart of Intervention Application... The Essence of
19 Intervention....

20

21 **CHIEF JUSTICE DY CHANDRACHUD:** All right. That we'll like to have so that we'll
22 glance. We'll have the

23

24 **S. PRASANNA:** Obligated.

25

26

27

28

29

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31

END OF DAY'S PROCEEDINGS