

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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CHIEF JUSTICE DY CHANDRACHUD: Wishing all the members of the bar very happy Onam.

TUSHAR MEHTA: Happy Onam to Your Lordship, All Your lordships.

SANJAY HANSARIA: My Lord, may I have your Lordships permission to mention an exceptionally urgent matter in the category, My Lord, I have sent the mail yesterday for a demolition today.

CHIEF JUSTICE DY CHANDRACHUD: Send the mail. What time did you send the mail?

SANJAY HANSARIA: 3:00 o'clock, My Lord, yesterday 3 PM.

CHIEF JUSTICE DY CHANDRACHUD: Order must have already been passed in the night because I was doing that until late in the night.

SANJAY HANSARIA: Because we are.....yesterday.....

CHIEF JUSTICE DY CHANDRACHUD: Impossible. Every mail which came there's an order. But I'll check at lunch.

SANJAY HANSARIA: I'm grateful. I'll give the details to the Court Master [UNCLEAR].

CHIEF JUSTICE DY CHANDRACHUD: *Yeh aaya tha na mail?*

SANJAY HANSARIA: I'm grateful.

TUSHAR MEHTA: May it please Your Lordships, I will cover only three points now. The interpretation of Article 370, which according to us is the correct interpretation, subject to meeting with Your Lordships approval. Second State Reorganization Act. And third what are the parameters of the power of Legislature during Article 356 is in force. There are some judgments which would render assistance to Your Lordships and I would read those judgments. My Lord, before I start with 370 Your Lordships would recall the submission made by some of the Learned Counsels My Lords on the other side was that there was an assurance given to the Princely States and... there was an assurance given to the Princely States, as a

1 result of which and according to the petitioner in lieu of which they chose to join the Union of
2 India, and therefore Article 370 is the result of that promise which the Dominion of India then
3 and subsequently Union of India made and therefore 370 is to be treated as permanent.

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

6
7 **TUSHAR MEHTA:** My Lord, I'll deal with that contention first, because then My Lord 370
8 it would be easier for me to persuade Your Lordships the view which, according to the
9 Government is the correct view of interpretation. This question arose for the first time in the
10 case of *Madhavrao Scindia*, where the Government withdrew the privy purses. And the
11 privy purses were a bargain in lieu of which the Princely State acceded to Union of India. My
12 Lord, there were two Constitutional provisions namely Article 291 and 362, which provided
13 for the privy purses but the Central Government exercised the powers under Article 366 and
14 deleted the term 'Princely States' and construed that since Princely States no longer exists,
15 there is no question of privy purses or other privileges. The definition was Princes. Your
16 Lordships are not required to go into that question right now. My Lord, this Hon'ble Court
17 allowed that petition that so long as these two provisions remain on the Constitution you
18 cannot take away the privy purses by merely changing Article 366, which is the Definition
19 Clause.

20
21 **CHIEF JUSTICE DY CHANDRACHUD:** And their contention is that this is what is being
22 done by altering Article 367 in our case.

23
24 **TUSHAR MEHTA:** Yes

25
26 **CHIEF JUSTICE DY CHANDRACHUD:** They are trying to bring in on, bring our case on
27 parity with the privy purses case one.

28
29 **TUSHAR MEHTA:** They are also... Yes, My Lord. Their main plank of the content,
30 contention is that this was, 370 was in lieu of our acceding, and therefore you could not have
31 done it. After the judgment in *Madhavrao Scindia*, the government repealed or, My Lord...

32
33 **CHIEF JUSTICE DY CHANDRACHUD:** That is a constitutional amendment.

34
35 **TUSHAR MEHTA:** Constitutional amendment, under 360. Correct. I'm saying that. Mr.
36 Sankaranarayanan. I was just about to answer that. It was a constitutional amendment. My
37 Lord, government repealed that. So the route was taken away, that is namely article 291 and

1 362. That came to be challenged before this Hon'ble Court and the matter went before the
2 constitution bench in case of *Raghunathrao Ganpatrao v. Union of India*. The
3 judgment which Your Lordships would find...

4

5 **JUSTICE B.R. GAVAI:** *Raghunathrao Ganpatrao?*

6

7 **TUSHAR MEHTA:** *Raghunathrao Ganpatrao v. Union of India*. 1994,
8 supplementary 1 SCC, 191.

9

10 **CHIEF JUSTICE DY CHANDRACHUD:** But we do not also have to look at the original
11 *Madhavrao Scindia*.

12

13 **TUSHAR MEHTA:** It is discussed here, My Lord.

14

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

16

17 **TUSHAR MEHTA:** It is discussed here and distinguished....

18

19 **CHIEF JUSTICE DY CHANDRACHUD:** Because *Madhavrao Scindia* places
20 limitations on the power of the Union Government to use the route of an interpretation or
21 definition provision to abrogate substantive constitutional rights.

22

23 **TUSHAR MEHTA:** That is absolutely a correct legal position. But for 370, which provides
24 that you can use this.

25

26 **CHIEF JUSTICE DY CHANDRACHUD:** Clause 3. That's the distinction you are making.

27

28 **TUSHAR MEHTA:** That's the distinction. But there is one more distinction.

29

30 **CHIEF JUSTICE DY CHANDRACHUD:** But you will have to then deal with the point as
31 to why was it necessary to take recourse to 367 then.

32

33 **TUSHAR MEHTA:** I'll My Lord, when I come to 370, the interpretation. I'll deal with that.
34 But here, in substance if I were to summarize the ratio of this judgment in one line, the Court
35 said that, any change in the Constitution which brings everyone at par can never be faulted
36 with. Princely states after formation of the Constitution of India lost their special status. And

1 the word fraternity used in the preamble has to be given some meaning. And this has the
2 impact of bringing all citizens at par. My Lord, kindly see. that is Volume 7...

3

4 **CHIEF JUSTICE DY CHANDRACHUD:** Where will we find that in the case law
5 compilations, Solicitor?

6

7 **TUSHAR MEHTA:** Volume 7 of case law compilation, PDF Page 537. I'll read relevant part
8 considering the time constraint. I intend to complete My Lord on this side of the lunch.

9

10 **CHIEF JUSTICE DY CHANDRACHUD:** Mr. Solicitor, we'd also, after you finish this, go
11 back to Madhavrao one,

12

13 **TUSHAR MEHTA:** Correct.

14

15 **CHIEF JUSTICE DY CHANDRACHUD:** Because if you don't go through it, then
16 obviously, there will be a front in the rejoinder that you know you've not dealt with Madhavrao
17 one.

18

19 **TUSHAR MEHTA:** Correct, but let us see how *Madhavrao* is dealt with here, My Lord,
20 first of all. But I will go to *Madhavrao* one. There is nothing because that... My Lord, kindly
21 come to page 1, so that Your Lordships have the background. The two writ petitions, Your
22 Lordships gets? It's page 543, PDF 543. Your Lordship gets that?.

23

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

25

26 **TUSHAR MEHTA:** These two writ petitions call in question the constitutional validity of
27 the Constitution Twenty-Sixth Amendment.

28

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

30

31 **TUSHAR MEHTA:** I'm sorry, My Lord. Justice Gavai and Justice Surya Kant gets? Volumes,
32 case law Volume 7 at 543. The beginning of the judgment. These two writ petitions call in
33 question the constitutional validity of the Constitution Twenty-Sixth Amendment Act inter
34 alia on the ground that it violates the basic structure an essential feature of the Constitution of
35 India, and is therefore outside the scope and ambit of constituent powers under Article 368.
36 In addition, certain directions or suitable orders are sought for declaring that petitioners
37 continue to be the rulers of the successor rulers, or the successor rulers, as the case may be,

1 and directing the Respondent, Union of India, to continue to recognize their personal rights,
2 amenities, privileges as rulers of their erstwhile state and also continue to pay privy purses.
3 Your Lordships may kindly come to the bottom of the para, which starts with 'by the said
4 instrument, the petitioner accepted the matter specified.' Does Your Lordships get? Some 10th
5 para from the bottom. My Lord Justice Gvai and...? 'By the said instrument, the petitioner
6 accepted the matter specified in schedule thereto as matters with respect to which the
7 dominion legislature may make laws for the state and declared his intent that, the Governor
8 General of India, the Dominion Legislature, the Federal Court, and any other dominion
9 authority.

10

11 **CHIEF JUSTICE DY CHANDRACHUD:** Even I couldn't get that.

12

13 **JUSTICE SANJAY KISHAN KAUL:** Where are you reading?

14

15 **TUSHAR MEHTA:** I'm sorry My Lord. I'm reading at Page 543, paragraph 3, at Placitum F

16

17 **CHIEF JUSTICE DY CHANDRACHUD:** F...F.. yes

18

19 **TUSHAR MEHTA:** Placitum F, My Lord. Your Lordship, just one line above Placitum F...

20

21 **JUSTICE SANJAY KISHAN KAUL:** By the said instrument..

22

23 **TUSHAR MEHTA:** By the said instrument, Court is referring to the Instrument of Accession
24 signed by...

25

26 **CHIEF JUSTICE DY CHANDRACHUD:** The IOA, Instrument of a Accession.

27

28 **TUSHAR MEHTA:** Shri Raghunath Rao or maybe his ancestor. 'By the said instrument, the
29 petitioner accepted the matter specified in the Schedule thereto as matters with respect to
30 which the dominion legislature may make laws for the state and declared his intent that the
31 Governor General of India, the dominion legislature, the Federal Court, and any other
32 dominion authority established for the purpose of dominion shall subject to terms of the
33 instrument exercise in relation to Kurundvad State. Such functions as may be vested in so and
34 so, so and so of the Instrument, provided that nothing therein shall be deemed to commit the
35 ruler in any way to acceptance of any future Constitution of India, or to fetter his discretion to
36 enter into agreements with the Government of India under any such future Constitution.
37 Subsequently, a number of rulers executed agreements of merger and transfer the

1 administration of their states to the Dominion of India. The merger agreement was in the form
2 given in the white paper on Indian States, and it was executed in so and so. Then My Lord para
3 4.

4

5 **CHIEF JUSTICE DY CHANDRACHUD:** You know? Just one... There is a little bit of a
6 background about Kurundvad State, Kurundvad is a very small town, very close to Sangli and
7 Kurundvad is on the banks of the River Krishna and there's a place of pilgrimage called
8 Narsobachi Wadi, lots of pilgrims come from across the country and once in a year the Krishna
9 will rise and sweep the whole town clean.

10

11 **TUSHAR MEHTA:** The town clean?

12

13 **CHIEF JUSTICE DY CHANDRACHUD:** And because the Krishna, and the lands are
14 extremely fertile because of the Krishna River, right on the banks of the Krishna.

15

16 **TUSHAR MEHTA:** Maybe that may be the reason why the human habitation must have
17 established there near the...

18

19 **CHIEF JUSTICE DY CHANDRACHUD:** Near the sources of water.

20

21 **JUSTICE B.R. GAVAI:** All earlier civilizations...

22

23 **TUSHAR MEHTA:** All earlier civilizations are on the bank of river. Now Your Lordships may
24 come to page 548, the arguments. Here, two constitutional provisions were dispensed with by,
25 were repealed by way of a definition clause. Not like, unlike interpretation clause here kindly
26 bear one factor in mind, 370, Sub-Article 3, has an inbuilt extinguishing provision. 370 Sub-
27 Article 3 is a provision whereby 370 can be extinguished. That's the distinction. But I'm on a,
28 My Lord, little wider argument made by the other side. Para 19 the submission, My Lord
29 Justice... the submission advanced by Mr. Sorabjee, the learned senior counsel, appearing on
30 behalf of the writ petitioner in Writ Petition number so and so are thus Article 291, 362 and
31 366(22). My Lord 366(22) is the definition clause defining 'Princes' then of the Constitution,
32 were integral part of the constitutional scheme and form the important basic structure. Since
33 the underlying purpose of these articles was to facilitate submission of new order and ensure
34 organic unity of India. These Articles guaranteed pledges to the Rulers based on elementary
35 principles of justice and in order to preserve the sanctity of solemn agreements. It was only by
36 the incorporation of these Articles that the unity of India was achieved by getting all the Rulers
37 within the fold of the Constitution, and that the deletion of these Articles has damaged and

1 demolished the very basic structure of the Constitution. The covenants entered into were in
2 the nature of contracts which had been guaranteed constitutionally and affirmed by making
3 the privy purse an expenditure charged under the Consolidated Fund of India and the use of
4 the expressions. "guaranteed or assured by the Government of the Dominion of India to any
5 Ruler" as embodied in Article 291 and the expression "guarantee and assurance given under
6 such covenants or agreements as is referred to in Clause (1) of Article 291..." as comprised in
7 Article 362 were a permanent feature of the Constitution reflecting the intention of the
8 founding fathers of the Constitution and as such these two Articles should have been kept
9 intact.' Please pause here for a minute. These articles even remotely did not suggest they are
10 temporary as against, My Lord, 370, which by its very definition says, and it's temporary. And
11 I will also be able to attempt to demonstrate that it could never have been but for temporary.
12 Such a drastic provision. The visionary Fathers and Mothers of the Constitution would never
13 have kept it permanent where two organs can change the Constitution the way they like. That's
14 a separate argument. Please see, learned counsel, 'according to the learned Counsel, the
15 deletion of these Articles amounted to a gross breach of the principle of political justice
16 enshrined in the preamble by depriving or taking away from the princes the privy purses which
17 were given to them as consideration for surrendering all their sovereign rights and
18 contributing to the unity and integrity of the country and that the deletion of these Articles by
19 the impugned Amendment Act is arbitrary, unreasonable and violative of Article 14 of the
20 Constitution. Further it has been urged that the Rulers acceded to the Dominion of India and
21 executed Instruments of Accession and covenants in consideration of the pledges and
22 promises enshrined in Articles 291 and 362 and that the impugned Amendment Act is beyond
23 and outside the scope and ambit of the constitutional power of the Parliament to amend the
24 Constitution as provided under Article 368 of the Constitution. Mr. Sorabjee, in his additional
25 written submissions has further urged that without the co-operation of the Rulers, not only
26 the territory of India, its population, the composition of the State Legislatures, the Lok Sabha
27 and Rajya Sabha but also the Constitution that was adopted on 26th November 1949 would
28 have been basically different and that India i.e. Bharat would have been fundamentally
29 different from the Bharat that came into being.' Kindly see My Lord para 22. Mr. Salve, the
30 learned senior counsel, contended that... he was also for the petitioner My Lord, with Mr
31 Sorabjee.

32

33 **CHIEF JUSTICE DY CHANDRACHUD:** Estoppel doesn't apply to him.

34

35 **TUSHAR MEHTA:** Pardon, My Lord.

36

1 **CHIEF JUSTICE DY CHANDRACHUD:** Estoppel doesn't apply to him based on what he
2 argued in that case.

3

4 **TUSHAR MEHTA:** That's the privilege on this side. We are not bombed by our arguments.
5 Mr. Salve learned senior counsel contended that Article 291 and 362 were...Yes. 'Mr. Salve, the
6 learned counsel appearing contended that Article 291 and 362 were incorporated, when
7 incorporated, were intended to grant recognition to the solemn promises on the strength of
8 which the former rulers agreed to merge with the Indian Dominion and the guarantee of privy
9 purses and certain privileges was as a just quid pro quo, for surrendering their sovereignty and
10 dissolving their States. It has been stated that the constitutional guarantees and assurances
11 promising continuance of privy purse as enshrined in the Agreements and covenants were "an
12 integral part of the Constitutional Schemes" and "an important part of the Constitutional
13 structure" and they were to be fully honoured and not cast away on a false morass of public
14 opinion or buried under acts of States, but the impugned Act, ex facie, has abolished and
15 destroyed those constitutional provisions of Articles 291 and 362 affirming the guarantees and
16 assurances given to the Rulers under those agreements.' Then Your Lordships may kindly
17 come to para 23. 'It is further emphasized that Sardar Patel, who made it clear that according
18 to the vision and views of the Constitution makers, the guarantees of privy purses privileges,
19 etc. were perfectly in keeping with view the democratic ethos and principles of Indian people.
20 Then the learned Counsel stated that views expressed in the Constituent Assembly were
21 unanimously accepted. And there was no dissent and that in fact the closing remarks in the
22 debate of Dr. B. Pattabhai Sitaramayya were only remarkably confirmatory of the permanence
23 and indefeasibility of the aforesaid guarantees and assurances, but also went a long way in
24 determining that the said guarantees and assurances have come to a stay, come to stay as an
25 integral and untouchable part of the basic structure of the Constitution. Finally, it was said
26 that there can be no basic structure of a Constitution, divorced from the historical evolution of
27 precepts and principles on which the Constitution is founded. Any effort to determine the basic
28 structure of the Constitution without keeping a finger on historical pulse of the Constitution
29 may well lead to substantial injustice. According to him, if the historical approach to the test
30 of basic structure is kept in view, the guarantees and assurances of the privy purses privileges,
31 etc. granted by the Constitution makers by incorporating Article 291, 362 and 366(22) in the
32 Constitution framed by them would, without any doubt or dispute, emerge in their own right
33 as basic features of the Constitution, which cannot be abrogated or annihilated by any
34 constitutional amendment, etc.' Now Your Lordships, kindly see para 28 at Page 551. 'The
35 learned Attorney General of India with regard to the above pre-Constitutional agreements
36 stated that the history of the developments leading to the merger agreements and the framing
37 of the Constitution clearly show that it is really the union of the people of the native States with

1 the people of the erstwhile British India and the Instruments of Accession were only the basic
2 documents but not the individual agreements with the Rulers and therefore to attribute the
3 agreements entered into by Rulers as a sacrifice by the Rulers is unfounded. Secondly, the
4 nature of the covenants is not that of a contract because a contract is enforceable at law while
5 these covenants were made nonjusticiable by the Constitution vide Article 363. According to
6 him, the covenants were political in nature and that no legal ingredients as the basis can be
7 read into these agreements and that the guarantees and assurances embodied in Articles 291
8 and 362 were guarantees for the payment of privy purses. He has urged that such a guarantee
9 can always be revoked in public interest pursuant to fulfilling a policy objective or the directive
10 principles of the Constitution. That being so, the theory of sanctity of contract or unamend-
11 ability of Article 291 or 362 did not have any foundation. He continues to state that the theory
12 of political justice is also not tenable because political justice means the principle of political
13 equality such as adult suffrage, democratic form of Government etc. In this context...' Your
14 Lordships can skip the citation. Then para 29. 'Before embarking upon a detailed discussion
15 on the various facets of the contentions, both factual and Legal, we shall deal with the recursive
16 point with regard to the pre-constitutional Instrument of Accession, the Merger Agreement
17 and the covenants which guaranteed the payment of privy purse and the recognition of
18 personal privileges etc. and which agreements ultimately facilitated the integration of these
19 States with the Dominion of India.' Then 30, Your lordships may skip, it's history. 31. ' This
20 accession of the Indian States to the Dominion of India established a new organic relationship
21 between the States and the Government, the significance of which was the forging of a
22 constitutional link or relationship between the States and the Dominion of India. The
23 accession of the Indian States to the Dominion of India was the first phase of the process of
24 fitting them into the constitutional structure of India. The second phase involved a process of
25 two-fold integration, the consolidation of States into sizeable administrative units, and their
26 democratization. Though high walls of political isolation had been raised and buttressed to
27 prevent the infiltration of the urge for freedom and democracy into the Indian States, with the
28 advent of independence, the popular urge in the States for attaining the same measure of
29 freedom as was enjoyed by the people in the Provinces, gained momentum and unleashed
30 strong movements for the transfer of power from the Rulers to the people. On account of
31 various factors working against the machinery for self-sufficient and progressive democratic
32 set-up in the smaller States and the serious threat of law and order in those States, there was
33 an integration of States though not in an uniform pattern in all cases. Firstly, it followed the
34 merger of States in the Provinces geographically contiguous to them. Secondly, there was a
35 conversion of States into centrally administered areas and thirdly the integration of their
36 territories to create new viable units known as Union of States.' Your Lordships may now come
37 to para 38 at page 554, PDF 554. Now, My Lord, the Hon'ble Court discusses **Madhavrao**

1 because **Madhavrao** obviously was cited. That which said that, 'Privy purses are an integral
 2 part of the Constitution of India.' That is one and number two, that you could not have taken
 3 it away by merely deleting the definition of princes. These were the two. Then 38, 'On May
 4 14th, 1970, the Constitution (Twenty-Fourth Amendment) Bill, 1970 for abolition of the above
 5 said privy purse privileges etc. conferred under Articles 291 and 362 and 366(22) was
 6 introduced in the Lok Sabha by the then Finance Minister, Shri Y.B. Chavan. The Bill
 7 contained three clauses and a short Statement of Objects and Reasons. The Statement reads
 8 thus: The concept of rulership, with privy purses and Special Privileges unrelated to any
 9 current functions and social purposes, is incompatible with an egalitarian social order.
 10 Government have, therefore, decided to terminate the privy purses and Privileges of the Rulers
 11 of former Indian States. On September 2, the Bill was voted upon in Lok Sabha, but on
 12 September 5 Rajya Sabha rejected the same since the bill failed in the Rajya Sabha to reach
 13 the requisite majority and not less than two third present as required by Article 368 and voting.
 14 Close on the heels of the said rejection, he President of India purporting to exercise his powers
 15 under Clause (22) of Article 366 of the Constitution, signed an Order withdrawing recognition
 16 of all the Rulers in the country enmasse.'

17

18 My Lord, this is... this was the subject matter in **Madhav**. My Lord, 'a communication to this
 19 effect was sent to all Rulers in India who had been previously recognized as Rulers.' So what
 20 was done was by a Constitutional Order, which is unheard of except in 370, the Hon'ble
 21 President virtually declared two Provisions to be nullity. 'The Presidential Order...' Para 40
 22 '...derecognizing the Rulers were questioned in **Madhavrao Scindia versus Union of**
 23 **India** by filing Writ Petition under Article 32 challenging it as unconstitutional ultra vires and
 24 void. An eleven Judge Bench of this Court by its judgment dated so and so, struck down the
 25 Presidential Order being illegal, ultra vires and inoperative on the ground that it had been
 26 made in violation of power of the President of India under Article 366(22) of the Constitution
 27 and declared that writ Petitions would be entitled to all their preexisting rights and privileges,
 28 including right to privy purses, as if the impugned orders therein had not been passed. Here it
 29 may be noted that Justice Mitter and Justice Ray gave their dissenting judgment.' Thereupon
 30 they started getting privy purses. Kindly come to para 77 at page 562. Rest may not help, assist
 31 Your Lordships either. 77, According to Mr. Sorabjee...Para 77...

32

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

34

35 **TUSHAR MEHTA:** Your Lordships would...I'm sorry...

36

1 **JUSTICE SANJIV KHANNA:** In the merger or the other agreements that the President of
2 India will recognize Ruler or something because of inheritance and otherwise. That was there.

3

4 **TUSHAR MEHTA:** 366...

5

6 **JUSTICE SANJIV KHANNA:** There was some stipulation because those rule of primary
7 nature and other things were all recognized in that. That's how...

8

9 **TUSHAR MEHTA:** My Lord, every... yes, My Lord every ruler was, apart from...

10

11 **JUSTICE SANJIV KHANNA:** We argued that [UNCLEAR]

12

13 **TUSHAR MEHTA:** My Lord, this guaranteed them not only privy purses, some privileges..

14

15 **JUSTICE SANJIV KHANNA:** Correct

16

17 **TUSHAR MEHTA:** All States were divided into Gun-Salute States. Some were 21 Guns
18 Salute, some were... the smallest was one Gun-Salute.

19

20 **JUSTICE SANJIV KHANNA:** They didn't refer to Presidential orders in that Merger
21 Agreements also, no? At that time there won't be any President as such?

22

23 **TUSHAR MEHTA:** No, My Lord there was none.

24

25 **JUSTICE SANJIV KHANNA:** Because at the time when the agreements were signed there
26 won't be...

27

28 **TUSHAR MEHTA:** Thereafter, the Constitution was made and the Hon'ble President was
29 elected. Merger Agreements were signed by Dominion of India, or subsequently Government
30 of India by the Secretary Minister of State, Ministry of state VP Menon, My Lord, essentially
31 is the signatory.

32

33 **JUSTICE SURYA KANT:** Para 75, make a brief...

34

35 **TUSHAR MEHTA:** Yes.

36

1 **JUSTICE SURYA KANT:** There are 74 and 75, there is a brief reference to all these
2 agreements.

3
4 **TUSHAR MEHTA:** Correct. I'm obliged. Your Lordships are on para... May I read para 75?

5
6 **CHIEF JUSTICE DY CHANDRACHUD:** Yes, para 75.

7
8 **TUSHAR MEHTA.** 75. 'Therefore, there cannot be any justification in saying that the
9 guarantees and assurances given to the Rulers were sacrosanct and the Articles 291 and 362
10 reflected only the terms of the agreements and covenants. In fact as soon as the Constitution
11 came into force, the Memoranda of Agreements executed and ratified by the States and Union
12 of States were embodied in formal agreements under the relevant Articles of the Constitution
13 and no obligation flowed from those agreements and covenants but only from the
14 constitutional provisions. To say differently, after the introduction of Articles 291 and 362 in
15 the Constitution, the agreements and covenants have no existence at all.' Everything gets
16 subsumed in the Constitution itself.

17
18 **CHIEF JUSTICE DY CHANDRACHUD:** In fact, that is the proclamation which Karan
19 Singh issued after the adoption of the Indian Constitution. Thereafter, the entire relationship
20 will be governed by the Indian Constitution. And all previous covenants, agreements will cease
21 to have any application.

22
23 **TUSHAR MEHTA:** They are, therefore, I say My Lords, it gets subsumed. And now the final
24 document is the Constitution of India, which we have given to ourselves. 'To say differently,
25 after the introduction of Articles 291 and 362 in the Constitution, the agreements and
26 covenants have no existence at all. The reference to covenants and agreements was casual and
27 subsidiary and the source of obligation flowed only from the Constitution. Therefore, the
28 contention urged on the use of the words "guaranteed" or "assured" is without any force and
29 absolutely untenable. The next vital issue is whether the impugned Amendment Act has
30 damaged any basic structure or essential feature of the Constitution. According to Mr.
31 Sorabjee, by the repeal of Articles 291 and 362 which were integral part of the constitutional
32 scheme, the identity of the Constitution has been changed and its character has been
33 fundamentally altered. The total repeal of these Articles coupled with an express repudiation
34 of the guarantees embodied therein has resulted in nullification of "a just quid pro quo" which
35 were the essence of these guarantees. He has urged that the underlying purpose of doing
36 justice to the Rulers has been subverted and breach of faith has been sanctioned.' He has relied
37 upon these judgments, including, My Lord, three is *Madhavrao Scindia*. Please see My

1 Lord, 79. Mr. D.D. Thakur, My Lord, the Father of My Lord Justice Thakur. My Lord, the Chief
2 Justice Thakur. 'Mr. D.D. Thakur in addition to the above has stated that one of the tests to
3 determine whether the provision of the Constitution was intended to be permanent or could
4 be deleted or amended is to see whether the Constitution makers had intended that to be
5 permanent. In support of his submission, he placed much reliance on the observation of
6 Mudholkar, J. in **Sajjan Singh**.' My Lord, I can skip that. And thereafter, My Lord, I may
7 directly come to 88, at page 563. Your Lordship has it? My Lord Justice Gavai and Justice...
8 Mr. Soli Sorabjee in support of his contention that Articles 291 and 362 and Clause (22) of
9 Article 366 were integral part of the constitutional scheme which otherwise would mean the
10 "essential part of the constitutional scheme", referred to Websters Dictionary and Collins
11 Concise English Dictionary, and has pointed out the lexical meaning say, that "integral" means
12 "essential" and, therefore, according to him, the total abolition of the provisions of the
13 Constitution which are its integral parts, otherwise essential parts, has damaged the essential
14 and basic features of the Constitution. To draw strength for his submission, he relied upon
15 certain observations made Justice Shah in his judgment in **Madhavrao** observing...' My
16 Lord, now Madhavrao is dealt with and distinguished. "By the provisions enacted in Articles
17 366(22), 291 and 362 of the Constitution the privileges of Rulers are made an integral part of
18 the constitutional scheme" and "An order merely "derecognising" a Ruler without providing
19 for continuation of the institution of Rulership which is an integral part of the constitutional
20 scheme is, therefore, plainly illegal." "The learned Attorney General has vehemently opposed
21 the above submission stating that the expression "integral part of the scheme of the
22 Constitution" used in **Madhavrao** are not the same as the basic structure and that expression
23 has to be read in the context of a challenge to the Ordinance which sought to render nugatory
24 certain rights guaranteed in the Constitution, then existing. It is further stated that the attack
25 on the Twenty-Sixth Amendment based on the principles laid down in **Madhavrao** is totally
26 misconceived because only in order to overcome the effect of that judgment, the Twenty-Sixth
27 Amendment was passed by the Parliament in exercise of its constituent powers.' The President
28 exercised executive power, which he did not possess. Just to contrast, Article 370 has a
29 constituent power in the President under Sub-Article 3, the self extinguishing provision.
30 'According to the Attorney General, the observations in the said case were nullified by the
31 Amendment and that judgment is no longer good law after the Amendment. To test the
32 Amendment on the basis of that judgment is impermissible and all the arguments based upon
33 this case are, therefore, misconceived.' Then 91. 'After the commencement of the Constitution,
34 in pursuance of Article 366(22), the Rulers were recognised and they had been enjoying the
35 privy purses privileges, dignities etc. on the basis of the relevant constitutional provisions.
36 Pursuant to the resolution passed by the All India Congress Committee in 1967, the Union of
37 India introduced the Twenty-Fourth Amendment Bill in 1970 to implement the decision of the

1 All India Congress Committee favouring removal of privy purses privileges etc. But the Bill
2 though passed in the Lok Sabha failed to secure the requisite majority in the Rajya Sabha and
3 therefore it lapsed. It was only thereafter that the President of India issued an order in exercise
4 of powers vested in him under Article 366(22), changing the definition clause by an
5 ordinance...' I'm sorry, My Lord Justice...

6

7 **JUSTICE SANJIV KHANNA:** Please, continue.

8

9 **TUSHAR MEHTA:** I'm sorry. 366(22) derecognizing the Rulers and stopping the privy
10 purses privileges, etc. enjoyed by the rulers. Now, this is important My Lord. This is the
11 distinction. 'This Order passed by the President was the subject matter of challenge in
12 **Madhavrao**. The Supreme Court struck down the Order of the President as invalid as in view
13 of the Court derecognition of the Rulers would not take away right to privy purses when
14 Articles 291 and 362 were in the Constitution.' This is the ratio that you can't delete a definition
15 while retaining the constitutional rights guaranteed under 291 and 362. 'It was only in that
16 context, the observations which have been relied upon by Mr. Sorabjee, were made. The
17 Twenty-Sixth Amendment itself was passed by Parliament to overcome the effect of this
18 judgment. Now by this Amendment, Articles 291 and 362 are omitted, Article 363A is inserted
19 and Clause (22) of Article 366 is amended. Therefore, one cannot be allowed to say that the
20 above said omitted Articles and amended clause were essential part of the constitutional
21 scheme. So they have to be read only in the context of a challenge made to the Presidential
22 Order which sought to render nugatory certain rights guaranteed in the Constitution which
23 were then existing. In any event, the constitutional bar of Article 362 denudes the jurisdiction
24 of any Court in disputes arising from covenants and treaties executed by the Rulers. The
25 Statement of Objects and Reasons of Twenty-Sixth Amendment clearly points out that the
26 retention of the above Articles and continuation of the privileges and privy purses would be
27 incompatible with the egalitarian society assured in the Constitution and, therefore, in order
28 to remove the concept of rulership and terminate the recognition granted to Rulers and abolish
29 the privy purses, this Amendment was brought...' Now 92 is very important, My Lord, which
30 would also assist Your Lordships on the question of federal diversity. 'We are of the opinion
31 that the observations of Justice Shah in **Madhavrao** that "privileges of Rulers are made an
32 integral part of the constitutional scheme" and that "institution of Rulership is an integral part
33 of the constitutional scheme", must be read in their proper context. That was a case, where by
34 a Presidential order, the Rulers were deprived of their privy purses and other privileges while
35 keeping Articles 291 and 362 intact in the Constitution.' This doesn't arise here, My Lord.
36 'Indeed, the said Presidential order was issued after the Government failed in its attempt to
37 effect an amendment on those lines. It is in that connection that the learned Judge made the

1 above observations. It is clear that the learned Judge used the words "integral part" in their
2 ordinary connotation-not in any lexicographical sense. Ordinarily speaking, "integral" means
3 "of a whole or necessary to the completeness of a whole" and as "forming a whole". Our
4 Constitution is not a disjointed document. It incorporates a particular socio-economic and
5 political philosophy. It is an integral whole. Every provision of it is an integral part of it. Even
6 the provisions contained in Article 21, temporary, transitional... I'm sorry, Part XXI
7 "Temporary, Transitional and Special Provisions". One may ask which provision which
8 concept or which 'institution' in the Constitution is not an integral part of the Constitution?
9 He will not find an answer. To say that a particular provision or a particular 'institution' or
10 concept is an integral part of the Constitution is not to say that it is an essential feature of the
11 Constitution. Both are totally distinct and qualitatively different concepts. The said argument
12 is really born of an attempt to read a judgment as a statute. One may tend to miss the true
13 meaning of a decision by doing so. We may say, the aforesaid observations of Justice Shah
14 constituted the sheet-anchor of the petitioners' argument relating to basic structure.' My Lord,
15 just similarly, federalism is also My Lord, a basic structure, but the federal diversity can still
16 exist within federalism. But that's a separate issue. The above, in the above premise it is not
17 permissible to test Twenty-Sixth Amendment with reference to observations made in
18 *Madhavrao*. Now kindly come to para 96 at page 566. 'Permanent...' Your Lordships... Para
19 96 at page 566.

20

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

22

23 **TUSHAR MEHTA:** 'Permanent retention of the privy purse and the privileges of rights
24 would be incompatible with the sovereign and republican form of Government. Such a
25 retention will also be incompatible with the egalitarian form of our Constitution. That is the
26 opinion of the Parliament which acted to repeal the aforesaid provisions in exercise of its
27 constituent power. The repudiation of the right to privy purse privileges, dignities etc. by the
28 deletion of Articles so and so by which the recognition of the rulers and payment of privy purse
29 are withdrawn, cannot be said to have offended Article 14 or 19(1)(f), and we do not find any
30 logic in such submission. No principle of justice, either economic, political or social is violated
31 by the Twenty-Sixth Amendment. Political justice relates to the principle of rights of the
32 people, i.e. right to universal suffrage, right to democratic form of government and right to
33 participation in political affairs. Economic justice is enshrined in Article 39 of the
34 Constitution. Social justice is enshrined in...' Your Lordships can skip that. 97. 'A series, a
35 serious argument has been advanced that the privy purse was a just quid pro quo to the Rulers
36 of the Indian States for surrendering their sovereignty and rights over their territories and that
37 move for integration began on a positive promising note but it soon de-generated into a game

1 of manoeuvre presumably as a deceptive plan of action. This argument based on the ground
2 of breaking of solemn pledges and breach of promise cannot stand much scrutiny. To say that
3 without voluntary accession, India i.e. Bharat would be fundamentally different from that
4 Bharat that came into being prior to the accession is untenable much less inconceivable.'
5 Please mark this My Lords. beautiful words. 'One should not lose sight of the fact that neither
6 because of their antipathy towards the Rulers nor due to any xenophobia, did the Indian
7 Government entertain the idea of integration but because of the will of the people. It was the
8 people of the States who were basically instrumental in the integration of India. It would be
9 apposite to refer to the observation of Justice Bose in **Virendra Singh** judgment, "every
10 vestige of sovereignty was abandoned by the Dominion of India and the states and surrendered
11 to the people of the land, who, through their representatives in the Constituent Assembly,
12 hammered out for themselves a new Constitution in which all were citizens in a new order,
13 having but one tie and owing but one allegiance, devotion, loyalty, fidelity to the Sovereign
14 Democratic Republic, that is, India." My Lords, thereafter, 'It is also worthwhile to take note
15 of the historical process of states integration...' Your Lordships may, directly can come to 109,
16 at page 569. 107. 'On a deep consideration...' Your Lordship gets, My Lord? Para 107. 'On a
17 deep consideration of the entire scheme and content of the Constitution, we do not see any
18 force in the above submissions. In the present case, there is no question of "change of identity
19 on account of the Twenty-Sixth Amendment. The removal of Articles 291 and 362 has not
20 made any change in the personality of the Constitution either in its scheme or in its basic
21 features, or in its basic form or in its character.' My Lord, please read 370 in this. Does it
22 change the personality or the character of the Constitution? 'The question of identity will arise
23 only when there is a change in the form, character and content of the Constitution. In fact, in
24 the present case, the identity of the Constitution even on the tests proposed by the counsel of
25 the writ petitioners and interveners, remains the same and unchanged. Shri so and so has
26 contended that by removing the "real and substantial" distinction between the erstwhile
27 Princes forming a class and the rest of the citizenry of India the Constitutional amendment
28 has at one stroke violated the basic structure of the Constitution as reflected both in Article 14
29 and 51(c) and treated unequal as equals thereby giving a go-by to a solemn treaty obligation
30 which was sanctified as independent Constitutional guarantee.' 109. My Lord, this is very, very
31 important and crucial for our purpose. The purpose of the Respondents. 'After carefully going
32 through the above decisions which relate to service matters, we are afraid that such an
33 argument as one made by Shri so and so could be substantiated on the principles laid down in
34 these two decisions that Article 14 will be violated if unequals are treated as equals. In our
35 considered opinion this argument is misconceived and has no relevance to the facts of the
36 present case.'

37

1 Please note this. 'One of the objectives of the Preamble of our Constitution is fraternity
2 assuring the dignity of the individual and the unity and integrity of the nation. It will be
3 relevant to cite the explanation given by Dr. Ambedkar for the word fraternity explaining that
4 "fraternity means a sense of common brotherhood of all Indians." No region, no part of the
5 region, no citizens staying in any region should get any different treatment than rest of the
6 country. 'In a country like ours with so many disruptive forces of regionalism, communalism
7 and linguism, it is necessary to emphasise and reemphasize that the unity and integrity of
8 India can be preserved only by a spirit of brotherhood. India has one common citizenship and
9 every citizen should feel that he is Indian first irrespective of other basis. My Lord, therefore I
10 started by saying that a psychological duality in the mind is now completely gone. 'In this view,
11 any measure...' please mark this. 'In this view, any measure at bringing about equality should
12 be welcome. There is no legitimacy in the argument in favour of continuance of princely
13 privileges. Since we have held that abolition of privy purses is not violative of Article 14, it is
14 unnecessary for us to deal with the cases cited which according to him go to say so and so.' In
15 110, 'one of the arguments advanced by Mr. D.D. Thakur is that the Constitution should be
16 read in the context of the pluralistic society of India where there are several distinct and
17 differing interests brought together and harmonised by the Constitution makers by assuring
18 each section, class and society, preservation of certain political, cultural and social features
19 specific to that class or section. By way of example, reference to Article 370 which confers a
20 special status for Jammu and Kashmir, is made. He continues to state that likewise in the
21 Northeastern States, the tribals were given autonomous powers for their District Councils co-
22 equal to what is conferred on the States and that for minorities, special provisions are made
23 under Article 30. Besides Articles 25 and 26 are meant to safeguard the minorities and
24 religious denominations. The persons to determine the injury will be those for whom these
25 provisions were made and whose interests are prejudiced.' According to him, in such a
26 circumstance, the assurance and guarantees given under Article 291 and 362, which are the
27 magna carta assuring the rulers of their pre-existing rights cannot in any way be destroyed.
28 We do not think that the aforesaid special provisions have any relevance here. 'As repeatedly
29 pointed out supra, the only question whether there is any change in the basic structure of the
30 Constitution by deletion of Articles 291 and 362 and by insertion of Article 363A and
31 amendment of Clause (22) of Article 366. We have already answered this question in the
32 negative observing that the basic structure or the essential features of the Constitution is or
33 are in no way changed or altered by the impugned Amendment. We cannot make surmises of
34 its ifs and but an arrive at conclusion that Article 291 and 362 should have been kept intact as
35 special provisions made for minorities in the Constitution. It is but a step in the historical
36 evolution to achieve fraternity and unity of the nation, transcending all regional, linguistic,
37 religious, and other diversities which are the bedrock on which the constitutional fabric has

1 been raised. The distinction between the erstwhile Rulers and the Citizenry of India has to be
2 put an end so as to have a common brotherhood.' The Court traces it to fraternity mentioned
3 in the preamble. My Lord, even removal of some provision according to this judgment can
4 further the constitutional objective. And can be in furtherance of the basic structure of the
5 Constitution. Fraternity, equality is a basic structure of the Constitution. It's a part of
6 brotherhood. It's a part of equality, part of fraternity. And if any provision which keeps out of
7 the total composition of our Constitution as an appendage, as a transitory provision to be
8 removed at an appropriate stage, if it is removed, it furthers the basic structure and it enhances
9 the equality and fraternity, which is the bedrock of the Constitution.

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

12
13 **TUSHAR MEHTA:** So, in this view, in my respectful submission, may not be necessary to
14 read *Madhavrao Scindia Judgement*. If you would wish, My Lord, I can assist Your
15 Lordship with that. But we will ultimately read the same paragraphs based upon which it is
16 distinguished that when you are doing something. Earlier it was done by a Presidential Order
17 in *Madhavrao*, one definition was deleted which the President did never possess. Even
18 today, it doesn't possess. But only in one provision that is 370 where you can amend any part
19 of the Constitution, so explanation 367 mechanism is used, this is the drastic nature of this
20 provision. 370(1) permits two organs, the Government or the President. President would mean
21 act and advice, aid and advice, and the Government of the State, again aid and advice. Please,
22 My Lord appreciate this. Two individuals technically the Prime Minister and the Chief
23 Minister of the State, whoever he is, can make any change, can make any alteration can choose
24 not to apply any provision, and like 35(A) can create a Constitutional Provision only applicable
25 to Jammu and Kashmir. That provision is exercised now as a last exercise to ensure that it
26 never happens. 367, explanation is added. I'll come to that... My Learned Friend wants me to...
27 My Lord there is a concurring judgment.

28
29 **CHIEF JUSTICE DY CHANDRACHUD:** Justice Mohan.

30
31 **TUSHAR MEHTA:** Justice Mohan... PDF 577. Just note the paragraphs, My Lord para 151,
32 152 and 118.

33
34 **JUSTICE B.R. GAVAI:** 1-8-0 ?

35
36 **TUSHAR MEHTA:** 1-1-8, My Lords. Yes, I'm sorry 206. It's at page... I'll just read Your
37 Lordships need not go to it. It's a two line paragraph My Lord but a very... 594, PDF 594. This

1 is, My Lord, the concurring view. Justice Mohan. My Lord, Justice Mohan, 'Therefore, this
2 Court cannot concern itself with the moral aspect of the impugned amendment. The impugned
3 amendment is the will of the people expressed through Parliament.' My Lord, here the
4 Parliament has examined on four occasions with two third majority in both the houses. In
5 **Madhavrao Scindia** judgement, if Your Lordships can note the paragraphs which we would
6 be reading. Since it's already 11:45 My Lord, I don't wish Your Lordships time. If possible My
7 Lord conclude at 01:00. My Lord, in **Madhavrao Scindia**, we will be relying upon 97, 109,
8 119, 120, 125, 126, 143 and 145.

9
10 **CHIEF JUSTICE DY CHANDRACHUD:** And?

11
12 **TUSHAR MEHTA:** And 145. Ultimately, it turned that without deleting. Article 291 and 362,
13 whether Presidential Order can be used by deleting the definition only, that was the discussion
14 which is distinguished My Lord in this judgement. Now, My Lord, with Your Lordship's
15 permission My Lord I may go to.....

16
17 **CHIEF JUSTICE DY CHANDRACHUD:** Mr. Solicitor can the abrogation stand
18 independent of the modification which is made to Article 367 here?

19
20 **TUSHAR MEHTA:** My Lord, that is my submission. Even in absence of the proviso,
21 explanation, the last explanation what it does. It merely substitutes the term Constituent
22 Assembly...

23
24 **CHIEF JUSTICE DY CHANDRACHUD:** With Legislative Assembly.

25
26 **TUSHAR MEHTA:** With Legislative Assembly. My submission is going to be that when the
27 Constituent Assembly is dissolved without any recommendation, that part of the requirement
28 goes because proviso becoming otiose cannot result into the main provision becoming
29 inoperative. Then the President was left to his own choice and 367 mechanism is affirmed in
30 **Damnoo**, Your Lordships have seen. My Lord, so far as 370....

31
32 **CHIEF JUSTICE DY CHANDRACHUD:** What was done **Madhavrao** was that a
33 Presidential Order was issued because if you see the provisions of Article 366(22) as it stood
34 prior to the amendment by the Twenty-Sixth Amendment. If you have this red book, it may
35 not be in that. You'll have to get it from the red book at page 372.

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37 **TUSHAR MEHTA:** Yes

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CHIEF JUSTICE DY CHANDRACHUD: That said, Ruler in relation to an Indian State means the Prince, Chief, or other person by whom any such covenant or agreement, as is referred to in Clause 1 of Article 291, was entered into and who for the time being is recognized by the President as a Ruler of the State and includes any person who for the time being is recognized by the President as a successor of such Ruler..

TUSHAR MHTA: Yes.

CHIEF JUSTICE DY CHANDRACHUD: Now what happened, there was, initially after the proposed amendment didn't pass muster in the Rajya Sabha, a Presidential Order is issued purportedly under Clause 22, and the object was now we are derecognizing you. If you are being derecognised, you lose the benefit of privy purse in Article 291...

TUSHAR MEHTA: Presumed to be consequence of derecognising.

CHIEF JUSTICE DY CHANDRACHUD: Right. So this was done in exercise the power which was conferred under Clause 22, as it then stood prior to the 26th Amendment. Our Court said, look by recourse to a Presidential Order you cannot override a substantive provision of the Constitution, namely, Article 291 and Article 362. That was *Madhavrao Scindia*.

TUSHAR MEHTA: Correct.

CHIEF JUSTICE DY CHANDRACHUD: Then came the Constitutional Amendment, which was upheld against the challenge on the ground of the basic structure violation. Argument in this case is that what you have done essentially here is worse because there, there was a Presidential Order in exercise of a provision in Article 366, which gave the President the power to recognize or derecognize a Ruler. here what is being done is that 367 itself is sought to be amended in exercise of the, you know during the, we've seen

TUSHAR MEHTA: Operating 370...

CHIEF JUSTICE DY CHANDRACHUD: To amend. 370.

TUSHAR MEHTA: Which has been done consistently and affirmed by Your Lordships. The distinction is, two fold distinction, (a) 370 is the only Article, was the only Article, which permitted the President to change any other Article. So 367 ,Your Lordships I have shown the

1 chart that 367 mechanism was used in past, that has been the convention. So the only thing
2 which happened My Lord, on 5th and 6th of August was that using the mechanism of 367, the
3 Constituent Assembly was changed. It is not worst. There My Lord....

4

5 **CHIEF JUSTICE DY CHANDRACHUD:** 367 mechanism which was used earlier, to for
6 instance, substitute the Sadr-e-Riyasat, etc that was with the concurrence of the Assembly?

7

8 **TUSHAR MEHTA:** No. Only once that was 370, Sub-Article 3. This My Lord, use of 367 is,
9 kindly My Lord, see the distinction, what was done with the concurrence was under 370, Sub-
10 Article 3. Constituent Assembly was there in 1952. It recommended and the change was made.
11 This time it is under 370(1)(d). My Lord, this time, I may emphasize so that I'm sorry I was
12 not clear...

13 [NO AUDIO]

14

15 May I request Your Lordships to take 370 once again for the time being to make myself clear.
16 My Lord. That would answer My Lord's query to My Lord's satisfaction. Your Lordships may
17 come to... I'll show only two provisions 370(1)(d). Your Lordships have 370(1) (d)?

18

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

20

21 **TUSHAR MEHTA:** This is the first power such of the other provisions of this Constitution
22 shall apply in relation to that State, subject to such exceptions and modifications as the
23 President may, by order specify. Correct, My Lords? Now read 3. Kindly read 3,
24 notwithstanding anything in the foregoing provisions of this article the President may, by
25 public notification, declare that this Article shall cease to be operative, that is first part, or shall
26 be operative only with such exceptions and modifications. And from such date as he may
27 specify, this is the power of extinguishing or partly extinguishing. Now, this is crucial, apropos
28 My Lord's question.

29

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

31

32 **TUSHAR MEHTA:** The first exercise, as Your Lordships have rightly said, was under 3.
33 Because the constituent assembly was in existence it recommended, rest whenever there were
34 modifications made in 367 were made under (1)(d) all rest all under (1)(d). Including this one.

35

36 **JUSTICE B.R. GAVAI:** With the concurrence of the government.

37

1 **TUSHAR MEHTA:** Concurrence of the government.

2

3 **JUSTICE SANJIV KHANNA:** The reason for that was very simple, because you are
4 amending the Constitution and you are not dealing with Sub-Clause 3 of...

5

6 **TUSHAR MEHTA:** 3, yes, My Lord.

7

8 **JUSTICE SANJIV KHANNA:** You're not doing the Sub-Clause 3.

9

10 **TUSHAR MEHTA:** I'm not dealing. I dealt with at the end on 6th of August.

11

12 **JUSTICE SANJIV KHANNA:** Because Sub-Clause 3 only deals with 370 itself.

13

14 **TUSHAR MEHTA:** Itself, not other, Your Lordships are right. Not other part of the
15 Constitution.

16

17 **CHIEF JUSTICE DY CHANDRACHUD:** Because (d) refers to other provision because
18 before (d), you have (c).

19

20 **TUSHAR MEHTA:** Yes.

21

22 **CHIEF JUSTICE DY CHANDRACHUD:** (c) says that the provisions of Article 1 and of
23 Article 370 shall apply to the State of Jammu and Kashmir.

24

25 **TUSHAR MEHTA:** Correct.

26

27 **CHIEF JUSTICE DY CHANDRACHUD:** Therefore, in that sense it freezes the provisions
28 of Article 370 in relation to the State of Jammu and Kashmir. Now what it does is therefore it
29 says other provisions of the Constitution shall apply subject to such exceptions and
30 modifications. Therefore, other provisions, provisions will mean provisions other than Article
31 1 and Article 370.

32

33 **TUSHAR MEHTA:** And 370 itself.

34

35 **CHIEF JUSTICE DY CHANDRACHUD:** And 370 itself.

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37 **TUSHAR MEHTA:** Correct.

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CHIEF JUSTICE DY CHANDRACHUD: Therefore if you have to make an alteration of 370 or abrogate its Status or reduce it or dilute it or alter it. You have to follow the...

TUSHAR MEHTA: 3.

CHIEF JUSTICE DY CHANDRACHUD: Recourse close to 3.

TUSHAR MEHTA: Correct My Lords... kindly... I'm sorry, My Lord, I'm almost reaching, My Lord, at Your Lordship's level.

CHIEF JUSTICE DY CHANDRACHUD: But then, can you do that? Can you do that?

TUSHAR MEHTA: Exactly. That's what I'm answering.

CHIEF JUSTICE DY CHANDRACHUD: Using the power under 367? That's the point.

TUSHAR MEHTA: Exactly. That's what I'm answering. I cannot do that under Sub-Article 3. 367 I cannot modify. Under 3, Sub-Article D that I can do, and I have done only under 370(1)(d). It has been used as a mechanism and *Damnoo* approves it.

CHIEF JUSTICE DY CHANDRACHUD: Right, we've seen *Damnoo*. Now we are looking at it as a matter of first impression.

TUSHAR MEHTA: Correct, My Lord, first impression.

CHIEF JUSTICE DY CHANDRACHUD: Can you alter the import of a provision of Article 370 itself by a process other than 3? Because what he has done essentially here is that you have used 367 to amend the proviso to 370.

TUSHAR MEHTA: Correct. Not amend 367 is explanation that instead of A, it would be B, It may have an effect of Amendment.

CHIEF JUSTICE DY CHANDRACHUD: Whether you call it an explanation or an amendment...

TUSHAR MEHTA: Yes.

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CHIEF JUSTICE DY CHANDRACHUD: One thing is very clear that the Amendment to 367 has the consequence of now reading the words Legislative Assembly in place of Constituent Assembly,

TUSHAR MEHTA: Which in fact was not necessary. But yes, it was done, but not under 370, it was done under first, the first step was My Lord, the first step was the President under 370(1)(d) added the explanation that henceforth...

JUSTICE SANJIV KHANNA: What the question being put to you is slightly, I think, different. The question is by making the Amendment in 366, by creating Constitution Assembly with the Legislative Assembly, aren't you, in fact, amending Article 370 without taking recourse to Clause 3 of 370, because Article 370 can be only amended in terms of Clause...

CHIEF JUSTICE DY CHANDRACHUD: Of Clause 3.

TUSHAR MEHTA: I understand. But then, My Lord, it has the effect of it becoming permanent because there is no Constituent Assembly. So it can never be modified. 370 can never be modified.

CHIEF JUSTICE DY CHANDRACHUD: Then take recourse, I mean, the argument on the other side is this that you can take recourse to Clause D, of... Sub-Clause D of Clause 1 in a situation where you have to amend any other provision of the Constitution other than Article 370.

TUSHAR MEHTA: My Lord, how?

CHIEF JUSTICE DY CHANDRACHUD: But can you... can you take...

TUSHAR MEHTA: It doesn't say so.

CHIEF JUSTICE DY CHANDRACHUD: Yes, it's very clear, It says,

TUSHAR MEHTA: Such other provisions....

CHIEF JUSTICE DY CHANDRACHUD: Such other provisions.

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TUSHAR MEHTA: Other means except 1 and 370.

CHIEF JUSTICE DY CHANDRACHUD: So you are saying other provisions will include 367. Mr. Solicitor... we are posing an issue because we have to deal with these issues. So we want to elicit a response.

TUSHAR MEHTA: Yes, Your Lordships.

CHIEF JUSTICE DY CHANDRACHUD: 367(1) Sorry. 370(1)(d) refers to other provisions of the Constitution. Other provisions of the Constitution, according to you would include 367, possible, we are not ruling this out at all. We will test that hypothesis, but can you use 367 and amend 367 to bring about an amendment to 370? If you do that while exercising the power under 370(1)(d), then are you not really doing that to amend 370 itself, because the only provision which the Constitution creates to amend 370 is 370 Clause 3? What you are now doing is according to them, is that we are using the amendment of 367 applying the provisions of 370(1)(d), to bring about an Amendment to 370 itself whereas the purpose of 370(1)(d) is to mention other provision of the Constitution. True 367 is another provision of the Constitution. But can we use that to amend then 370 itself? That's the point which you have to answer.

TUSHAR MEHTA: My Lord, I can assure my learned senior...

JUSTICE SANJIV KHANNA: No, No. Please

TUSHAR MEHTA: I can assure him nobody can disturb me or derail me without my consent. I'm quite accustomed to the such interruptions, My Lord...

CHIEF JUSTICE DY CHANDRACHUD: Mr. Solicitor, please don't get derailed because this is the heart of the matter....

TUSHAR MEHTA: No, no, I know that, I know that and he also knows...

CHIEF JUSTICE DY CHANDRACHUD: [UNCLEAR] some clarity on this is necessary. Let's sit down and...

1 **TUSHAR MEHTA:** I will put it slightly differently. I'll put it differently. The interpretation
2 which Your Lordships are, My Lord, prima facie, now testing...

3

4 **JUSTICE SANJIV KHANNA:** We're testing it.

5

6 **TUSHAR MEHTA:** No, we are testing the prima facie testing it. What will be the impact of
7 that interpretation. I'll read, My Lord the entire Article 370. Meaning thereby My Lord, in
8 absence of a Constituent Assembly, which can never be modified the Sub-Article 3, can never
9 come into effect come into operation and 370 gets the status of a permanent provision, please
10 read it in totality, My Lord. Please read the entire article. For my satisfaction, please have a
11 look at, My Lord, the entire Article. Notwithstanding, anything in this Constitution, A, Your
12 Lordships can skip. The power of Parliament to make laws for the said State shall be limited
13 to those matters in the Union List and Concurrent List, Your Lordships have seen those. The
14 provisions of Article 1 and of this Article shall apply in relation to that state. The purpose is
15 that Jammu and Kashmir can do nothing in their constitution, or even Parliament can do
16 nothing in their constitution. Kindly appreciate My Lord, the difficulty if Your Lordships
17 accepts them. Then even 368 route which is the second route suggested, cannot be done
18 because it says, one and this Article shall remain, if that is the meaning, given that that is
19 completely unalterable then 370 remains as a permanent, though there are hosts of
20 considerations for me to show that it has always been a temporary feature. Further, such of
21 the other provisions of this constitution shall apply in relation to that state, subject to such
22 exceptions and modifications as the President may, by order specify. Other provisions would
23 mean other than B.

24

25 **JUSTICE SANJIV KHANNA:** Just stopping you for a minute. Would the Legislative
26 Assembly make a recommendation in terms of 370(1)(d) saying that under 367 you equate
27 Constituent Assembly With Legislative Assembly?

28

29 **TUSHAR MEHTA:** Under 370(1) ...?

30

31 **JUSTICE SANJIV KHANNA:** .(1)(d) under 370 Clause. 1, Sub-Clause D. Could the
32 Legislative Assembly make a recommendation, saying...

33

34 **TUSHAR MEHTA:** If it is amendment it cannot....

35

1 **JUSTICE SANJIV KHANNA:** Just think about it and then answer, could the Legislative
2 Assembly have make a recommendation to the Parliament, please amend Article 367 and
3 equate....

4

5 **TUSHAR MEHTA:** My Lord, let me give it a thought, and I'll respond to that. I understand
6 the heart of the matter. Your Lordships discussion is driving that, any 367 use, which has the
7 impact of altering 370 itself then, my Lord, we would be setting it not all 367 usage is. Kindly
8 remember through the 367 mechanism, 370 has been modified.

9

10 **CHIEF JUSTICE DY CHANDRACHUD:** That's the point in favour of what you are saying
11 with the caveat that the use of the 367 mechanism to modify 370 was always with the consent.

12

13 **JUSTICE SANJIV KHANNA:** Concurrence

14

15 **CHIEF JUSTICE DY CHANDRACHUD:** Sorry concurrence.

16

17 **TUSHAR MEHTA:** Here also it is concurrence the only difference....

18

19 **CHIEF JUSTICE DY CHANDRACHUD:** It was concurrence.

20

21 **TUSHAR MEHTA:** Yes, this is...

22

23 **CHIEF JUSTICE DY CHANDRACHUD:** That is constitutionally the significant
24 difference.

25

26 **TUSHAR MEHTA:** But this is also with concurrence. The only difference is the concurrence
27 of the Governor because Governor steps into the shoes of the government.

28

29 **JUSTICE SANJIV KHANNA:** There's a difference between concurrence and
30 recommendation.

31

32 **TUSHAR MEHTA:** Correct.

33

34 **JUSTICE SANJIV KHANNA:** Concurrence can be subsequent recommendation has to be..

35

36 **TUSHAR MEHTA:** Recommendation is of the body, Constituent Assembly as it stood. And
37 subsequently, if we are right Legislative Assembly. Concurrence of the Government, please see

1 My lord. And government the only dispute was that government cannot mean Governor.
2 Please see, concurrence provision second provision

3

4 **JUSTICE SANJIV KHANNA:** Concurrence of the government means that Council of
5 Minsters.

6

7 **TUSHAR MEHTA:** Council of Ministers if it is there. Otherwise, powers are exercised by the
8 Governor. and that's why I pointed out that there are several exercise of 370(1)(d) when there
9 was a President's rule with concurrence of the Governor.

10

11 **JUSTICE B.R. GAVAI:** That list you have provided yesterday (UNCLEAR).

12

13 **TUSHAR MEHTA:** Yes, Your Lordships query is absolutely dot on the point. But I'll respond,
14 let me give it a thought but the real question would be...

15

16 **JUSTICE SANJIV KHANNA:** You have already responded.

17

18 **TUSHAR MEHTA:** The real question is that here concurrence is that of the Governor,
19 government. Whichever is the Government if it is Ministry, then Cabinet aid and advice
20 otherwise the Governor. And during Governor's Rule 370(1)(d) is used to change 367 also. Not
21 change, change is an incorrect word. To put an explanation to give meaning to 370.

22

23 **CHIEF JUSTICE DY CHANDRACHUD:** So simply put according to you that... according
24 to you at a time when there was no Legislative Assembly the explanation was amended so as
25 to provide that the Constituent Assembly shall itself be treated as the Legislative Assembly..

26

27 **TUSHAR MEHTA:** Because it was so treated...

28

29 **CHIEF JUSTICE DY CHANDRACHUD:** Because the Constitution was not been framed.
30 And there was no Legislative Assembly in the state of Jammu and Kashmir. So according to
31 the flip side, now is that when there is no Constituent Assembly, we treat the Legislative
32 Assembly or the Constitution Assembly.

33

34 **TUSHAR MEHTA:** To democratize My Lord. Otherwise My Lord kindly see, suppose the
35 government took the decision, the government took the decision, suppose...

36

1 **JUSTICE SANJIV KHANNA:** The second answer could be, and that's for the other side to
2 answer, by amending 367, in fact you are not really amending 370 as such because the 370
3 procedure has to be still applied to abrogate or nullify 370, the procedure has to be still applied.
4 Suppose 367 had been amended in terms of 370(1)(d), with the concurrence of the State
5 government. Second step the Legislative Assembly had made a recommendation, please
6 abandon or abrogate 370. It would have passed muster. Nobody would have really, probably
7 the other side wouldn't have been here also, except some of them.

8

9 **TUSHAR MEHTA:** They would still be here. But that's beside the point.

10

11 **JUSTICE SANJIV KHANNA:** But it could have been done, if this rule is permissible or not?

12

13 **TUSHAR MEHTA:** I'm putting a question to myself, My Lord, suppose...

14

15 **JUSTICE SANJIV KHANNA:** I thought I answered it in your favour.

16

17 **TUSHAR MEHTA:** Your Lordships are absolutely right. That's my answer My Lord, that's
18 my answer. I'm grateful to Your Lordship that thought didn't occur to me, but suppose we took
19 the decision that in view of the proviso becoming otiose because there is no Constituent
20 Assembly, that limitation of recommendation, ultimately its recommendation. Suppose it
21 recommends that don't abrogate President is not bound by it. So, now the Constituent
22 Assembly, having chosen, while being dissolved, not to recommend the Constituent Assembly
23 has left it to the absolute discretion of the President. It could have been done. Possibly it could
24 have been defensible action, but with a view to ensure that there is democratization of the
25 action. And My Lord, Your Lordships are dealing with the state of... this is a provision which
26 is one of its kind. There is no such provision, either in our Constitution or in any Constitution.
27 So the law which Your Lordship would ultimately lay down is not going to touch upon any
28 other provision. Suppose the Constituent Assembly while it was being dissolved, it framed the
29 Constitution. It had options for, a) don't abolish, I am recommending that President should
30 not exercise powers under Sub-Article 3. He should not abrogate 370. That was the first option.
31 Second option, he should abrogate Article 370 after five years, till then let the Constitution
32 continue.

33 Third, the President is, we recommend that President should modify some of the provisions
34 which we recommend and continue 370 as it is forever. Having done nothing of this the
35 Constituent Assembly goes without making any recommendation, and therefore leaving it to
36 the absolute discretion of the President.

37

1 **JUSTICE B.R. GAVAI:** Mr. Solicitor, you said that the President is recommended.

2

3 **TUSHAR MEHTA:** It's a recommendation My Lord, it's not a...

4

5 **JUSTICE B.R. GAVAI:** You see the words that you used in the proviso. "Provided that the
6 recommendation of the Constituent Assembly of the State referred to in Clause 2, shall be
7 necessary".

8

9 **TUSHAR MEHTA:** Yes. Why I say this My Lord kindly see, (d), second proviso, where
10 'concurrence' word is used. Concurrence means I have to say yes. Otherwise you cannot do it.
11 Therefore, I am contrasting the word concurrence with recommendation. Consultation... yes.
12 The concurrence is at the highest level, that without consent, concurrence means consent.
13 Consultation may sometimes may mean consent, may not mean consent. Your Lordship has
14 seen Justice Sheth's Transfer of Judges Judgment, where it says that consultation can even
15 mean concurrence. So I am not just contrasting the word concurrence with recommendation,
16 that the same provision uses the word concurrence means unless the state say, yes, Union
17 can... President can do nothing, but here same provision uses the word recommendation, that
18 you will recommend. Ultimate power with the President, President who is answerable to the
19 House, House which is answerable to we the people of India. So highest executive functionary
20 is conferred with this decision and we can read that in absence of Constituent Assembly and
21 its recommendation, the proviso goes, it becomes redundant. It becomes otiose. It becomes
22 not possible of being implemented and law doesn't require performance of an impossibility.
23 But, considering the nature of the strategic importance of the State, it was felt necessary that
24 let this be debated in both the Houses of Parliament and Rajya Sabha is My Lord, the House
25 of people. It has its own Federal structure. Every State has a representation in a different
26 indirect election form and both Houses passes, My Lord, with two third majority. My Lord,
27 even Constituent Assembly could have recommended that word 'temporary' be deleted. Even
28 Clause 3, be deleted. Why not? There was no embargo during the subsistence, during their
29 existence, and while being dissolved, or during that period, they could have said that delete
30 temporary provision. Delete Article 3. Now we don't want anybody's power to abrogate. They
31 could have said even C can be deleted. Suppose My Lord, the Constituent Assembly were to
32 say that delete (1)(c), that Article 1 is untouchable because now we have our own Constitution.
33 We no longer are a part of, integral part of India. It could have said, technically, it could have
34 said that, but Section 3 of the Constitution says, no we are an integral part of India they never
35 said that President's power under 3, we recommend being either diluted or taken away. They
36 never wanted Clause 3 to die, that's very clear.

37

1 **CHIEF JUSTICE DY CHANDRACHUD:** Alright. So we have covered now the first point
2 the interpretation of 370.

3

4 **TUSHAR MEHTA:** 370 My Lord. There are some points if Your Lordship permits..

5

6 **CHIEF JUSTICE DY CHANDRACHUD:** On 370 Mr. Solicitor, why don't you summarize
7 in three or four propositions? What's the heart of your submission?

8

9 **TUSHAR MEHTA:** Can I My Lord, do one thing? If Your Lordship permits. I knew My Lord,
10 I'll be running against time. My Lord instead of my 40, 50 pages of explanation and arguments
11 I have summarized in 4 pages. That would not save Your Lordship's time. Also, in My Lord

12

13 **CHIEF JUSTICE DY CHANDRACHUD:** You have it here ?

14

15 **TUSHAR MEHTA:** If I can be permitted.. I'll quickly go through

16

17 **CHIEF JUSTICE DY CHANDRACHUD:** Quickly in five minutes and we can be done
18 with...

19

20 **TUSHAR MEHTA:** Yes. It declares it to be temporary. Your Lordships may not read
21 anything, My Lord . It is contained in Part XXI, which has three categories, 'temporary, special
22 provisions and transitory provisions'. So constitutional framers are aware of what word they
23 are using. My Lord, second, I have said, My Lord, I have already said in this is something very,
24 very serious. Look at the width of the power, two individuals in practice and legally speaking,
25 two organs, namely the President and the State Government, can alter any part of the
26 Constitution and apply it to one part. Can delete any constitutional provision, can create a new
27 provision. And therefore the submission is considering the very expanse of this provision, the
28 Legislative, the constituent framers, would never have contemplated this to remain forever.
29 Such a position can never remain forever. Wherever Constitution remains a floating document
30 perennially for one state. Then 3. Impact of Article 370 was to deprive the residents of Jammu
31 and Kashmir and Ladakh from being treated at par with their fellow citizens. Therefore, I'm
32 saying that this also is one suggestive indication that framers never intended it to be
33 permanent. Then this is the entire provision. This is very important. This is the entire
34 provision in the constitution where application of not only Constitution. Please see this My
35 Lord, the seriousness of this. Application of Constitution of India, and application of central
36 laws, including beneficial legislation is dependent upon concurrence of the state. The only
37 provision. It says it would not apply, it will not apply. Such a drastic provision could never

1 have been intended to remain perennially, permanently. Then this is the only provision which
2 has an inbuilt self extinguishing provision. Article... Sub-Article 3. No other constitutional
3 provision has this self destructing clause. This again, is a pointer that it was intended to be
4 temporary. Then it is goal of equivalence, I have already said in the judgment which I read.
5 That temporary problem, provision cannot be read, so as to treat one part of state differently,
6 their citizens differently. Then, Your Lordships would not give interpretation to a temporary
7 constitutional provision having such drastic consequences. Because Your Lordships are not
8 going to be confronted with a similar situation in future. There is no other provision in the
9 Constitution and to our knowledge, any other part of the world. Where a provision of a
10 Constitution of the main unit applies only with the state consents. In a Federation like ours,
11 there cannot be any such provisions. Then I have seen My Lords, kindly examine it from the
12 peoples angle. When 370 is interpreted the way Petitioners interpreted, 370(1) would become
13 permanent, which is not only impermissible and not envisaged, but would result in the
14 unconstitutional provision remaining in the Constitution and operating. Unconstitutional,
15 why? It discriminates, it confers an authority which is never contemplated in other states. The
16 application of the Constitution of India given by we the people would either not apply fully or
17 would apply. I am on point no. 10 I would request if Your Lordships can read with me. The
18 Petitioner's assertion that such a huge decision is taken purely by an executive fiat is absolutely
19 wrong. The process followed clearly reflects participation of entire nation through their chosen
20 representatives both in Lok Sabha and Rajya Sabha. When a decision becomes, concerns a
21 federating unit it is of strategic significance. I have pointed out. Then 13 My Lord is most
22 important. Article... Sub-Article 3, the proviso to Sub-Article 3 was to remain in operation. I
23 have already said these are the five possible recommendations that Constituent Assembly could
24 have given. Your Lordships have seen that? Then (d) ones the Jammu and Kashmir constituent
25 assembly cease to exist. The proviso to Article 370 Sub-Article 3, itself ceases to exist, and the
26 President becomes the sole repository of power under Article 370, Sub-Article 3, which is
27 coupled with his duty to exercise in the interest of residents of Jammu and Kashmir without
28 any recommendation. It is for this reason that power is conferred upon the highest political
29 executive who is responsible to the Parliament, who in turn is responsible to we the people of
30 India. It is thus clear that Parliament, while framing the proviso merely gave an option to the
31 Constituent Assembly to make recommendation till its life. But 15 is important. This is how
32 the Petitioners want Your Lordships to read. 'Notwithstanding anything in the foregoing
33 provisions of this article on the recommendation of the Constituent Assembly of the State
34 referred to in Clause B, the President may, by public notification, declare that this Article shall
35 cease to be operative or shall be operative only with such exceptions and modifications.'

1 The very purpose that the concept of recommendation is provided in the proviso leads to an
2 inevitable conclusion that they wanted it to leave it an option to the Constituent Assembly
3 during its life to make some recommendation. Otherwise that proviso goes.

4

5 **JUSTICE B.R. GAVAI:** According to you the proviso will not govern the substantive
6 provision.

7

8 **TUSHAR MEHTA:** Cannot govern. Yes, My lords are right. I'm obliged. If the proviso
9 become otiose. The main provision does not become otiose. Then the conditionality attached
10 goes. Yes, my learned friend is right. If this interpretation to Article 373 is not accepted and
11 the President's power is under Article 373 is taken away merely because the Constituent
12 Assembly has ceased to exist without making any recommendation, it would create a
13 devastating situation which could never have been envisaged by the framers of the
14 Constitution nor ever been conceived. If the President cannot exercise the powers under
15 Clause 3, it would mean that existence and exercise of power of the President of India,
16 provided for in the Constitution is dependent upon some decision or lack of it by a different
17 body. Can we read a Constitution that President's decision is dependent upon some outside
18 body, takes a decision or does not take the decision? If it takes it's an option. If it doesn't take,
19 you lost your option. The President of India cannot be denuded of its power by either they
20 giving recommendations or at least not in absence of recommendation. Such an interpretation
21 would never be given as such a contingency could never have been conceived. Then 17.
22 Secondly, if mere absence of Constituent Assembly mentioned in the proviso to Clause 3 is
23 treated to be rendering the power of President of India nugatory, redundant and un-
24 exercisable. It would mean that by using any provision under article 370(1)(b) and (1)(d) any
25 provision of the Constitution can be amended and applied to the State of Jammu and Kashmir
26 and even the provisions which are part of basic structure. Please mark this My Lord. This is
27 what fell from my Lord Justice Kaul, that you are putting it at the higher threshold than the
28 basic structure. Basic structure cannot be altered by constitutional Amendment, but there is
29 no such limitation in (1)(d), they have chosen not to apply some of the fundamental rights.
30 Meaning thereby, a permanent power is vested on two organs of the state to alter even the
31 basic structure, so far as its application to the State of Jammu and Kashmir is concerned. And
32 this is very, very serious. Now, of course, it can never be done. Now all are at par. Even if the
33 Constituent Assembly would have been in existence, the limited role stipulated that I already
34 said My Lord. It is only recommendatory and President could have taken any other decision..

35

36 **CHIEF JUSTICE DY CHANDRACHUD:** That may not be correct, actually, because so
37 long as a Constituent Assembly, it was not recommendatory, because the way the article is

1 couched, provided that the recommendation of the Constituent Assembly of the State shall be
2 necessary. It's not recommendatory in that sense.

3

4 **TUSHAR MEHTA:** I'm sorry, My Lord.

5

6 **JUSTICE SANJIV KHANNA:** Constitution always, let's put it Constitution as a supreme
7 document in a democratic country will always face restrictions, whether it's a judiciary,
8 whether it's a President, whether it's the Legislature...

9

10 **TUSHAR MEHTA:** My Lord I bow down. My submission...

11

12 **JUSTICE SANJIV KHANNA:** Constitution is governance by limitation.

13

14 **CHIEF JUSTICE DY CHANDRACHUD:** And the use of the words 'recommendation shall
15 be necessary' is a clear indication that it's not merely recommendatory, but there has to be a
16 recommendation before you...

17

18 **TUSHAR MEHTA:** Can Your Lordships read it a slight differently, the way I read it? What
19 is mandatory? The word 'shall', that you take recommendation. The recommendation is not
20 binding otherwise, the Constitution would have said that it would... and act accordingly. What
21 is mandatory is taking the recommendation. That's another way of My Lord interpreting..

22

23 **JUSTICE SANJIV KHANNA:** The other part of the argument, we understand that the
24 proviso after the Constituent Assembly had done its job it's no longer applicable, but it doesn't
25 affect the main part, main Clause 3, we have examined that .

26

27 **TUSHAR MEHTA:** Yes. Now 19, the only constitutionally compliant way of interpreting
28 Article 370 to achieve the ultimate goal of bringing the people of Jammu and Kashmir at par
29 with the rest of the country, and conferring them with all Constitutional and Statutory Rights
30 at par with the rest of the Country, is to either read an unfettered and plenary power of the
31 President of India under Article 370, Sub-Article 3, once the Constituent Assembly ceases to
32 exist. Just now My Lord I pointed that out, or modifying the 370, Sub article 3, by replacing
33 the successor body. We went for the second, which, according to me, was not necessary. It
34 could have been done without My Lord, any recommendation also. Then power of the
35 President under Sub Article 3 is unfettered as Article 370 starts with a non-obstante Clause
36 notwithstanding anything contained in the Constitution of India, and Sub-Article 3, starts with
37 a non-obstante Clause notwithstanding anything in the foregoing provisions of this Article.

1 But, kindly see that something that might, My Lord, throw some light on the first discussion
2 which My Lords, the Chief Justice is very... enlightened discussion. My lord, 370 starts with a
3 non-obstante Clause. Nothing in this Constitution, this is how the 370 would function. 370,
4 Sub-Article 3, starts with a non-obstante Clause notwithstanding anything in the foregoing
5 paragraphs meaning thereby even 370 can be subjected to 370 Sub-Article 3. Kindly read it
6 once again. I do not know.

7

8 **CHIEF JUSTICE DY CHANDRACHUD:** Obviously, because 370(3) has, 370 Clause 3 has
9 a non-obstante clause, which overrides everything else in this Article.

10

11 **TUSHAR MEHTA:** Even (1)(d), which says that don't do anything except 1 and 3 ...

12

13 **CHIEF JUSTICE DY CHANDRACHUD:** There are two non-obstante Clause. The first is
14 notwithstanding anything in this Constitution and 370 Clause 3 says, notwithstanding,
15 anything in this Article. Therefore it overrides, therefore it is a power to override even Clause
16 1.

17

18 **TUSHAR MEHTA:** Yes. Clause 1, 2. 2 doesn't come My Lord, (1)(d) also. Your Lordships
19 very illuminating..

20

21 **CHIEF JUSTICE DY CHANDRACHUD:** There can't be any doubt about it because when
22 370 Clause 3 say notwithstanding anything in this article that would include Clause 1. There
23 is...

24

25 **TUSHAR MEHTA::** Meaning thereby modification in 370 itself was permissible through
26 367.

27

28 **CHIEF JUSTICE DY CHANDRACHUD:** And when you override Clause 1, the plain intent,
29 therefore, is that the Constitution itself becomes applicable then.

30

31 **TUSHAR MEHTA:** Correct

32

33 **CHIEF JUSTICE DY CHANDRACHUD:** Once you exercise the power under 3, whether
34 there was a valid exercise is what we have to decide. But once you exercise validly the power
35 under 3, then the Constitution applies, that would be the plain consequence of it.

36

37 **TUSHAR MEHTA:** My Lord, Your Lordship may treat this as read.

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CHIEF JUSTICE DY CHANDRACHUD: Yes, we will read it.

TUSHAR MEHTA: My Lord...

CHIEF JUSTICE DY CHANDRACHUD: Let's go now to the last point.

TUSHAR MEHTA: Only, My Lord, last

CHIEF JUSTICE DY CHANDRACHUD: The reorganisation...

TUSHAR MEHTA: My Lord, last two pages, last two pages. The status of Constituent Assembly. What was the status of Constituent Assembly? Because nomenclature is a Constituent Assembly, but whether it enjoy at the outset I mean.

CHIEF JUSTICE DY CHANDRACHUD: I am not saying it is subordinate to the Constituent Assembly for the Union. I mean you can't elevate that Constituent Assembly to...

TUSHAR MEHTA: I must clarify one thing as an officer of the Court. My Lord, I'm conscious of the principle laid down in *Kesavananda Bharati* that there is a distinction between Constituent Assembly...

CHIEF JUSTICE DY CHANDRACHUD: And a Legislative Assembly

TUSHAR MEHTA: And Parliament or Constituent Assembly and Legislature. They are not interchangeable. That's why My Lord, this submission. That here Constituent Assembly, for all intent and purpose, was a Legislative Assembly not preparing a document of governance for a sovereign region, but was... My Lord kindly see, My lord there are some arguments based on the Judgment also. My Lord, the position as far as the State of Jammu and Kashmir is concerned, even prior to coming into force of Article 1 was, who created Constituent Assembly? The Maharaja, who signed Instrument of Accession and surrendered his sovereignty, then he issued that proclamation, Your Lordships are remembering that now whatever Constitution is framed would be binding on it. He subsequently creates a constituency, so he could never have created a Constituent Assembly which would have a role independent of larger than or completely different from the Constituent Assembly of which he became an integral part. And at that time the Jammu and Kashmir was an integral part of India. So the body which was created was known as Constituent Assembly, but was a subordinate creature than Constituent

1 Assembly. And the Constitution of Jammu and Kashmir can never be put at the same pedestal
2 as the Constitution of India, because the very birth of the Constituent Assembly of Jammu and
3 Kashmir was because of Article 370. And, My Lord...

4

5 **CHIEF JUSTICE DY CHANDRACHUD:** According to you the role of the Constituent
6 Assembly of Jammu and Kashmir, is the role which is created for it by our Constitution by the
7 Constitution of India, nothing beyond that.

8

9 **TUSHAR MEHTA:** It cannot be beyond that, above that or superior to that it is subservient
10 and subordinate. It never had original constituent power. Please see My Lord the Constitution
11 as we understand around the world has certain attributes namely, it must be a document of
12 governance providing for everything. The way we have provided. This Constitution has only
13 certain aspects. Rest they leave it to the Constitution of India for being recognized as a
14 Constitution, you must provide for a kind of sovereignty. I'm not on..... sovereignty means
15 sovereignty, it's not autonomy. And sovereignty would mean right to acquire new areas and
16 right to cede new areas. Right to acquire territory and right to cede territories, which we have
17 in Article 1, 2, 3, 4. Constitution of India has. None of the attributes of a Constitution so to say
18 can be attached to this Constitution. It was a piece of legislature recognized, accepted, and
19 known till 5th of August and 6th of August, 2019, as Constitution. But for all intent and
20 purposes it was... Even the preamble of the Constitution doesn't say so a. Preamble of
21 Constitution of Jammu and Kashmir doesn't say so. That this is a document which is a
22 Constitution. It merely says please see the constituent, the preamble of Jammu and Kashmir
23 Constitution. It says 'With a view to further define our relationship with Union of India.' It
24 doesn't say that we are creating a Constitution of our governance. Please see, that's the only
25 purpose they say, 'We the people of Jammu and Kashmir with a view to...' I'll just read for Your
26 Lordships... I'll just read, it is kindly note the page, Volume 2, page 16. Your Lordships need
27 not open. I'll just read. Even preamble doesn't say that it has attributes of constitution per se.
28 We the people of the State of Jammu and Kashmir...

29

30 **CHIEF JUSTICE DY CHANDRACHUD:** Mr. Solicitor, there is another more fundamental
31 reason why your argument may be correct, which is this, look at Section 5 of the J&K
32 Constitution. It says 'The executive and legislative power of the State extends to all matters
33 except those with respect to which Parliament has the power to make laws for the state under
34 the provisions of the Constitution of India.' So once the Constitution of India defines which is
35 the areas in respect to which Parliament has the power to make laws, then that is denuded
36 from the Jurisdiction of the Jammu and Kashmir Legislative Assembly. Now we have seen

1 how progressively the ambit of the legislative domain of Parliament was expanded, for
2 instance, initially, the entire Concurrent List was outside the power of Parliament..

3

4 **TUSHAR MEHTA:** Correct.

5

6 **CHIEF JUSTICE DY CHANDRACHUD:** We had only certain entries in List 1, the Union
7 List.

8

9 **TUSHAR MEHTA:** I am obliged.

10

11 **CHIEF JUSTICE DY CHANDRACHUD:** Right? Subsequently, the concurrent list was
12 brought in. Once the Concurrent List is brought in within the domain of Parliament to that
13 extent the legislative domain of the Jammu and Kashmir Legislative Assembly denuded. Than
14 entry 97 was wholly outside the purview of Parliament initially. Later on as we see, Entry 97 is
15 also gradually brought in within the purview of Parliament. Be in the context of law affecting
16 the sovereignty and integrity of India..

17

18 **TUSHAR MEHTA:** Some subjects.

19

20 **CHIEF JUSTICE DY CHANDRACHUD:** ..terrorism, so on and so forth, Therefore, it's
21 very obvious from Section 5 of the J&J Constitution. That once the Constitution of India
22 prescribes a certain legislative domain for Parliament then that is progressively denuded from
23 the Legislative ambit of the J&K Legislative Assembly, and that was not fixed as of 1957.
24 Another very important feature is that Section 5 does not fix the ambit of the Legislative or
25 Executive Domain of the J&K Government and the Legislative Assembly as of 26th of January
26 1957.

27

28 **TUSHAR MEHTA:** Correct

29

30 **CHIEF JUSTICE DY CHANDRACHUD:** In fact, it contemplates that what the
31 Constitution of India will prescribe for Parliament to be outside the domain of the...

32

33 **TUSHAR MEHTA:** Of our domain.

34

35 **CHIEF JUSTICE DY CHANDRACHUD:** So in that sense it is always intended to be
36 subservient to the Constitution of India, and it's not really a document which is equivalent...

37

1 **TUSHAR MEHTA:** That's why, My Lord, 147 makes these provisions unamendable.

2

3 **CHIEF JUSTICE DY CHANDRACHUD:** Section 147.

4

5 **TUSHAR MEHTA:** Section 147, 3 and 5 cannot be amended. Otherwise what happens, this
6 is amendable. This Constitution if it would have survived was amendable by the Legislative
7 Assembly so they can amend their Preamble and academically, potentially can become a
8 theocratic state because secularism was not applicable.

9

10 **CHIEF JUSTICE DY CHANDRACHUD:** All right, Mr. Solicitor, I think we've gone
11 through our Article 370 note. Now what? Your Constituent Assembly note? Now what's...

12

13 **TUSHAR MEHTA:** Now, My Lord...

14

15 **CHIEF JUSTICE DY CHANDRACHUD:** Now you have to deal with the important part
16 about States reorganization and the conversion of the state into a UT. How do you answer
17 that?

18

19 **TUSHAR MEHTA:** I'll take a little time on this one. Not unrealistic time, but there are three,
20 four judgments, which are direct judgments.

21

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

23

24 **TUSHAR MEHTA:** Your Lordships would bear in mind the difference between our
25 Constitution and say, Constitution of America, where there is a contract between the State and
26 the Federal Government and that is how they form the United States. The Federal Government
27 doesn't have the power to even alter the boundaries of the States because it's a different and
28 distinct...

29

30 **CHIEF JUSTICE DY CHANDRACHUD:** There's no contract between the States and the
31 Federal Government in the U.S. The 13 colonies came together...

32

33 **TUSHAR MEHTA:** Internally...

34

35 **CHIEF JUSTICE DY CHANDRACHUD:** To form a Union and they surrendered some
36 powers to the Union.

37

1 **TUSHAR MEHTA:** I stand corrected... to the Union. Otherwise retaining some of the States
2 have supreme, its own Supreme Court, etc. Whenever a nation like us and the federalism,
3 which we have accepted which is kind of leaning towards unitary Feature. I'm not arguing on
4 that unitary versus federal at times the nation requires to rejig the boundaries and the status
5 of their States. There are several considerations, and therefore, at the outset I may point out
6 that this is a case, one of its type, which is not to be encountered My Lord by the Court. For
7 example, if Gujarat was to be bifurcated or Madhya Pradesh was to be bifurcated. The
8 parameters would be different. But when Jammu and Kashmir, considering its very strategic
9 importance, border state, history of terrorism, history of infiltrations, history of outside
10 influence, outside means outside the country etc. etc. My Lord, there would be several
11 considerations in the mind of the Government. We share border with four, at least countries,
12 all of which may not be friendly, to put it mildly.

13

14 **JUSTICE SANJAY KISHAN KAUL:** Argument based on border states is a problem, we
15 have many States on the border.

16

17 **TUSHAR MEHTA:** History also, the history continued. I have given the details in my
18 Affidavit filed long back how the situation in Kashmir is developing. The number of deaths of
19 civilians, the number of deaths of security forces the number of attacks, the number of stone
20 pelting, the number of every week, two or three days of *harthal*, paralyzing schools, hospitals,
21 banks, business houses, everything. All these are policy considerations. Whenever a state
22 reorganization takes place, not only there are policy considerations as to why the state needs
23 to be reorganized but there is always a blueprint as to what the central government would do
24 after the state is reorganized. How to bring, peculiar in effects of this case, the youth in the
25 mainstream, how to ensure that they are gainfully employed, how to float certain schemes so
26 that people on the bordering, or who have continuous, facing the attacks of shelling, etc. are
27 now getting a sense of confidence that the government has not left us, etc. There are several
28 considerations that we will have to start with say democratic, local self government elections
29 so that the people participate in the internal local self government institutions for their own
30 good..

31

32 **CHIEF JUSTICE DY CHANDRACHUD:** The source of the power to reorganize, which is
33 with the Union of India, is the same

34

35 **TUSHAR MEHTA:** Yes. Three and four.

36

37 **CHIEF JUSTICE DY CHANDRACHUD:** Right

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TUSHAR MEHTA: Parameters would differ.

CHIEF JUSTICE DY CHANDRACHUD: But therefore, you concede that power to the Union in respect of every Indian state. You're not saying that you should concede that no, this only exists for J&K. It exists for every Indian...

TUSHAR MEHTA: Every... the power is for all...

CHIEF JUSTICE DY CHANDRACHUD: Once you once you concede that power to the Union in relation to every Indian state, how do you ensure that the kind of abuse that they apprehended, we are now not defining it for today... it is revised by some larger bench at some point of time. How do you ensure then, that this power will not be...

TUSHAR MEHTA: Used, My Lord, in case of [UNCLEAR]. That was my worry. I share Your Lordship's worry. And therefore, My Lord, I started by saying that Your Lordships are dealing with a one of its kind situation, which is not going to arise. And if, My Lord, I point out My Lord, after....

JUSTICE SANJAY KISHAN KAUL: Not one of its kind situations we have seen on the Northern border, Punjab very different times. Similarly, some States at different times in Northeast all border States.

JUSTICE B.R. GAVAI: One of the States in northeast is presently.

TUSHAR MEHTA: None of them.

JUSTICE SANJAY KISHAN KAUL: Many because of whatever reason near the borders, we can't choose our neighbours, as they often say we have had problems.

TUSHAR MEHTA: Correct.

JUSTICE SANJAY KISHAN KAUL: So the worry which Chief Justice expresses is that tomorrow if there is a scenario [UNCLEAR] Can each of these states face this problem?

TUSHAR MEHTA: Why each of these States only My Lord, it can happen to My Lord, for example, Madhya Pradesh or Gujarat or any state.

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JUSTICE SANJAY KISHAN KAUL: Your argument of the border is what I'm testing. See, there are States which are on border of other countries where situation may not be very palatable. Now at least those border States, I understood your argument, then these border States are categories by themselves. How do we distinguish between Jammu and Kashmir , any other border state?

TUSHAR MEHTA: I'll just, My Lord... I'm, I'm grateful. I'll point out, My Lord, in any none of the border States, take Northeastern States, or Punjab, as Your Lordships gave an example...

[NO AUDIO]

Northeastern States or Punjab or any other Rajasthan as a border, Gujarat as a border.

JUSTICE SANJIV KHANNA: What possibly is being pointed out, you can't say because it's a border State, so it has to be treated so it has to be treated separately.

TUSHAR MEHTA: I'm not saying it My Lord. That's not the distinction I'm drawing.

JUSTICE SANJIV KHANNA: Because then it's a very...

TUSHAR MEHTA: There are several borders in Gujarat, Rajasthan.

CHIEF JUSTICE DY CHANDRACHUD: Uttarakhand.

TUSHAR MEHTA: Uttarakhand, Himachal, I'm not My Lord, kindly don't misunderstand my submission. That because it is a border state it requires different treatment. My Lord, kindly see the consistent, repeated situation which we are facing since decades, on a daily basis is not happening in Gujarat or Northeast or any other border State. Here is a border state where one of our territory is occupied by Pakistan, or we have POK I have given figures. What are the deaths taking place every year right from 20 years before. This is a problem faced by the nation from decades, since decades which we are trying to My Lord, sort out or deal with. And I'll show, My Lord, this is not just, these decisions are never taken as knee-jerk reactions. There is always policy considerations. Border, State, this particular State being a different kind of a border state is one, but there are several considerations. And one of the consideration would be, how to bring the youth in the mainstream. And I'll point out everything was kept in mind and is implemented. And what we are seeing today is the result of that blueprint being

1 implemented. After this decision there were elections which took place of District
2 Development Councils. There are 34,000 elected people. Democracy going to the grassroots.
3 There are large number of schemes which are introduced. Youth, which used to be employed
4 by the interest, not inimical to India, maybe terror groups or whoever and were paid now are
5 gainfully employed. There is always a blueprint. And I'll be able to show that blueprint
6 working. I'm not conscious of the fact that end would not justify the means. But end Your
7 lordships can certainly see whether these policy considerations which decided the
8 reorganization were correct or not. Because the Government has acted with a blueprint, not
9 only for reorganization what would be done after reorganization and how Jammu and Kashmir
10 would return to normalcy. And I'll be able to show the steps which are taken. Right now My
11 Lord, I will deal with in three parts but the impression which is given to Your Lordship is that
12 this has been reduced from State to Union Territory, means there is a down gradation there
13 are some other factually incorrect statements were made by one of the counsel member, who
14 argued for reorganization against reorganization. That we lost this. There is no representation.
15 There is no consolidated fund of India we can't participate in election of President, our seats
16 in the Parliament is gone.

17

18 **CHIEF JUSTICE DY CHANDRACHUD:** Let's look at it at the first level. Basic level of the
19 Constitution. Let's go step by step. Then we'll go to the last part, namely, which was what
20 motivated this decision. And there you have said that these are policy considerations, Look at
21 the nature of the state, the history. You can't lose sight of all that. We must also deal with it at
22 a textual level. Thus (a), does parliament have the power to convert an existing Indian State
23 Into Union Territory? if it does have that power, how do you read Article 3? If you can do assist
24 us on....

25

26 **TUSHAR MEHTA:** But before that....

27

28 **CHIEF JUSTICE DY CHANDRACHUD:** That is the textual question.

29

30 **TUSHAR MEHTA:** Yes, there are specific judicial pronouncement on that.

31

32 **CHIEF JUSTICE DY CHANDRACHUD:** No but... we will go to the judicial
33 pronouncement. Why don't you first look at the text of the statute of our Constitution.

34

35 **TUSHAR MEHTA:** Before that may I request Your Lordships to have just bird's eye view of
36 the Reorganization Act itself. No one has shown that My Lord to Your Lordships. I want Your
37 Lordships to see that.

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CHIEF JUSTICE DY CHANDRACHUD: Look at the Reorganization Act. That'll provide us?

TUSHAR MEHTA: I'm not reading. I'm not reading every part. I'm just taking Your Lordships through the titles. Nobody has.... read and ...

CHIEF JUSTICE DY CHANDRACHUD: That's worrying us. Let's look at the source of the power.

TUSHAR MEHTA: Kindly come to Article 3.

CHIEF JUSTICE DY CHANDRACHUD: Just in a minute or so.

TUSHAR MEHTA: Yes, yes.

CHIEF JUSTICE DY CHANDRACHUD: Just how you interpret Article 3.

TUSHAR MEHTA: Article 3, Article 3.

JUSTICE SANJAY KISHAN KAUL: Just also, I would like to know whether it's some kind of a...what is the nature of exercise of that power? Is it a permanent exercise of power? Is it a temporary exercise of power? What is....

TUSHAR MEHTA: No. It is.. Let me answer that straight. This question was put in the Parliament when the Reorganization Bill was passed. I'll just read the statement of the Hon'ble Minister on the floor of the House.

CHIEF JUSTICE DY CHANDRACHUD: So the Union Territory here is not intended to be a permanent...

TUSHAR MEHTA: No, no. And that's what, My Lord, I'm making...

CHIEF JUSTICE DY CHANDRACHUD: All right. Question number 2, how impermanent is it? And question number 3, when are we going to have elections?

1 **TUSHAR MEHTA:** I understand. That is why I was going to show to Your Lordships the
2 steps taken to ensure that we reach that stage. I will show those steps.

3

4 **CHIEF JUSTICE DY CHANDRACHUD:** All right. Now, let's go to Article 3.

5

6 **TUSHAR MEHTA:** Article 3. Article 3, formation of new states and alteration of areas,
7 boundaries or names of existing states. First My Lord before that, please read explanation. So
8 that Your Lordships can read in that context. In this article in Clause A to E State includes a
9 Union Territory, but in the proviso, state does not include a union territory.

10

11 **CHIEF JUSTICE DY CHANDRACHUD:** So wherever you read State, read Union
12 Territory.

13

14 **TUSHAR MEHTA:** Read 'Union Territory' except the provision.

15

16 **CHIEF JUSTICE DY CHANDRACHUD:** So now let's read Clause A in the light of that.

17

18 **TUSHAR MEHTA:** Yes. And this very Reorganization has been subjected. And this Hon'ble
19 Court has said that it is permissible, this reorganization has passed the muster of Your
20 Lordships under 3 and 4, the Judgment I'll show. Parliament may, by law form a new State by
21 separation of territory from any State, or by uniting two or more States or parts of States, or
22 by uniting any territory to a part of any State. So, I would read Parliament may by law, form a
23 new Union Territory by separation of territory from any State or by uniting two or more States,
24 we are not concerned, or parts of the state again, we are not concerned. So there is a power of
25 having two Union Territories out of one state. Then b), increase the area of any state, diminish
26 the area of any state, alter the boundaries of any state. My Lord, here this would also result...

27

28 **CHIEF JUSTICE DY CHANDRACHUD:** Does Clause A contemplate a situation when the
29 entirety of a state can become a Union Territory?

30

31 **TUSHAR MEHTA:** There are two, Jammu and Kashmir, and Ladakh and there is nothing
32 which prohibits...

33

34 **CHIEF JUSTICE DY CHANDRACHUD:** Does Clause A contemplate a situation where in
35 the entirety of state can become, say, more than one Union territory?

36

1 **TUSHAR MEHTA:** It can My Lord. I'm not answering that question because that doesn't
2 arise here.

3

4 **JUSTICE B.R. GAVAI:** Your argument is that because of explanation we'll have to read
5 Union Territory?

6

7 **TUSHAR MEHTA:** Yes, in a given case, I don't want to pitch that high.

8

9 **CHIEF JUSTICE DY CHANDRACHUD:** Clause A, the problem, form a new Union
10 Territory, we will not read it as state, form a new Union Territory singular will include a plural,
11 so form more than one Union Territory, no problem. Form a new Union Territory by doing
12 what?

13

14 **TUSHAR MEHTA:** By separation of territory from any State territory means geographical
15 area.

16

17 **CHIEF JUSTICE DY CHANDRACHUD:** Right, so from the state of J&K, you carve out a
18 Territory and form say a Union territory of Ladakh?

19

20 **TUSHAR MEHTA:** Jammu Kashmir and Ladakh. I don't want to My Lord pitch that high,
21 but otherwise it would not prohibit even a State being made Union Territory. But that's not
22 the question we are dealing with.

23

24 **CHIEF JUSTICE DY CHANDRACHUD:** So the first part of Clause A, in other words,
25 according to you form a new Union Territory by separation of territory from any state, and
26 contemplate a situation where you have a larger state and you contemplate the creation of a
27 Union Territory by separating out a territory. In this case, you separated out a Territory to
28 form the Union Territory of Ladakh, and then the remaining you carved out and said this will
29 be the Union Territory of...

30

31 **JUSTICE SANJAY KISHAN KAUL:** Does it not amount to reading, suppose you had not
32 carved out Ladakh and had declared the whole thing as a UT...

33

34 **TUSHAR MEHTA:** There is no restriction in doing that, I don't wish to pitch it that high.

35

36 **JUSTICE SANJAY KISHAN KAUL:** I'm going to test and understand. Suppose you create
37 one UT only then it is form a new state by separation of territory of a new state, that has not

1 occurred. No UT has been carved out or by uniting two or more states of part of the state, or
2 by uniting any of the territory into part of the state. How will it apply? Suppose you have not
3 carved out Ladakh

4

5 **TUSHAR MEHTA:** Possibly, possibly.

6

7 **JUSTICE SANJAY KISHAN KAUL:** The whole state... then the power would be the
8 conversion of any State into UT. The fact that that you carve out a part of a state...

9

10 **TUSHAR MEHTA:** Possibly Your Lordships, that is possibly not contemplative subject to
11 but form a new State that is form a new Union territory by separation of territory from any
12 state. So separation is necessary.

13

14 **JUSTICE SANJAY KISHAN KAUL:** So if you don't separate and create, you really, how
15 do you contemplate converting a state into UT? And if I'm just saying for the sake of argument,
16 if that is not possible, can you do that by carving out the UT and making the other also UT?

17

18 **TUSHAR MEHTA:** There is no restriction. And this is how it is understood by Your
19 Lordships also, because for example Assam, Tripura and Arunachal became UT first and
20 thereafter became state. Assam remained a State, that's the distinction. But Assam could have
21 also become a UT. There is no restriction.

22

23 **JUSTICE SANJAY KISHAN KAUL:** That's what I am saying. Just carving out Ladakh as
24 a UT is, I would say less complicated in its's nature. Therefore, to test the proposition, I am
25 saying, suppose you don't carve out Ladakh, you decide that the whole state should be UT. Can
26 you do that and say J&K State will remain as it is as boundary, but from State it becomes a UT,
27 when we want it, we'll reconvert it back to the State?

28

29 **TUSHAR MEHTA:** My first reading is separation is necessary, that's my first reading.

30

31 **JUSTICE SANJAY KISHAN KAUL:** That is what is a little...

32

33 **TUSHAR MEHTA:** Because that question we are not faced My Lord right now.

34

35 **JUSTICE SANJAY KISHAN KAUL:** The question that arise to test is that if you cannot
36 convert a State into a UT, then can you carve out a UT, which is fine, but in the bargain also

1 say that what I could not do without carving out a UT I can do it now by making both of them
2 the UT?

3

4 **TUSHAR MEHTA:** No, I had a separate reason to carve out Ladakh as a separate UT.

5

6 **JUSTICE SANJAY KISHAN KAUL:** In a way, no difficulty, it's a decision. That's why I am
7 saying let's complicated it, by its nature, carving out a UT.

8

9 **TUSHAR MEHTA:** Here it is less complicated,

10

11 **JUSTICE SANJAY KISHAN KAUL:** Reducing both parts of the carved out and the pre
12 carved out. So suppose Assam, you carved out a UT. Would you say no, we carve out a portion
13 of Assam as UT and also convert Assam into UT? The testing proposition.

14

15 **TUSHAR MEHTA:** It would be an extreme example, but for the purpose of testing, there can
16 be two answers.

17 (a). Separation would be necessary and if separation takes place, My Lord, that doesn't take
18 place if one State is declared UT. So one State cannot be declared.

19

20 **JUSTICE SANJAY KISHAN KAUL:** What is probably whether

21

22 **TUSHAR MEHTA:** Your Lordships are right. One state, possibly My Lord, under 3, cannot
23 be declared as UT. But here it is nobody's case that we declared Ladakh as UT to come out of
24 this embargo. It's nobody's case. We had separate reasons.

25

26 **CHIEF JUSTICE DY CHANDRACHUD:** Mr. Solicitor, there maybe another way of
27 looking at it. The theme, with which you began, which was the general situation in Jammu
28 and Kashmir. As we see, you know, the creation of Union Territories post independence. You
29 have on the one hand examples like Chandigarh, which was carved out during the Punjab
30 Reorganization Act and remained a Union Territory. It is a permanent Union Territory.

31

32 **TUSHAR MEHTA:** It was a part of State.

33

34 **CHIEF JUSTICE DY CHANDRACHUD:** It was part of a State, and became a Union
35 Territory to be the common capital for two sister States. Than one. Then you have a
36 progression where certain areas of existing States became Union Territories in the progression
37 of making them States, as the Northeast. For you have Mizoram, you have Manipur, you have

1 Tripura. They became, they were part of States. They become Union Territories. But that's in
2 the process of making them into a stable administration to become States, you can't
3 immediately make them States. Parliament can certainly make that. Today the situation is not
4 right to make them full-fledged States. Today we will carve them out, give them the status of
5 Union Territory at a future point of time when Parliament feels that well they are now are
6 sufficiently stable, institutionally we will make them as States which we did in the Northeast.
7 To put something, perhaps you may look at what we are trying to suggest. Why is it not possible
8 for the Union to say that, well, right now, say in a case of a particular State, we have such an
9 extreme situation in terms of national security, in terms of other...

10

11 **TUSHAR MEHTA:** We want direct control.

12

13 **CHIEF JUSTICE DY CHANDRACHUD:** That we want for a certain stipulated period that
14 a Union Territory should be created. But this creation for a Union Territory is not a feature of
15 permanence, but this shall then again progress back to its position of a State.

16

17 **TUSHAR MEHTA:** Removing the reasons why it was required to be converted.

18

19 **CHIEF JUSTICE DY CHANDRACHUD:** So the Union not have a control for a certain
20 stipulated period to bring stability because ultimately, let's face it, whether it's a State, whether
21 it's a Union Territory, all of us have survive if the Nation survives.

22

23 **TUSHAR MEHTA:** Doubtlessly.

24

25 **CHIEF JUSTICE DY CHANDRACHUD:** If Nation itself doesn't survive there's no
26 question, there's no relevance of States or Union Territories. So is it not necessary, so should
27 we not give that allowance to Parliament to sort of postulate that for a certain period in the
28 interest of the preservation of the Nation itself, in the interests of the preservation of the Union
29 itself we want for a certain stipulated period that this particular State should go into the fold
30 of Union Territory, on the clear understanding that this shall revert to a position of a State
31 over a period of time, you can't lay down that period in a given case. Given case it may be 6
32 months. In a given case, it may be 1 year. But that progression, I think the Government has to
33 also make a statement before us. That look that progression back to a State has to take place,
34 it can't be a Union Territory in permanence.

35

36 **TUSHAR MEHTA:** I'm grateful My Lord, that's exactly I'll read after the lunch. That's
37 exactly the statement made on the floor of the House. I'll read that statement that this is not a

1 permanent feature. After the situation returns to normalcy, we want it to become a State again.
2 I'll read My Lord, that statement...

3

4 **CHIEF JUSTICE DY CHANDRACHUD:** And then after lunch, we would also like... I
5 mean, we don't want to bind you down to a.. because we are conscious of the fact that these
6 are matters of national security. We understand that ultimately the preservation of the nation
7 itself is the overriding concern. Without putting you in a sense of a bind, both you and Attorney
8 may seek instructions of the highest level. Is there some time frame in view?

9

10 **TUSHAR MEHTA:** Time frame... I'll take instructions once, falling from Your Lordships.
11 But I'll show the statement made on the floor and the efforts made. And the statement is once
12 the efforts are fruitful and everything is normal. Then, My Lord there is a...But I will..

13

14 **CHIEF JUSTICE DY CHANDRACHUD:** Equally... Mr. Solicitor and Mr. Attorney,
15 restoration of democracy is a very important.....

16

17 **TUSHAR MEHTA:** Absolutely...

18

19 **CHIEF JUSTICE DY CHANDRACHUD:** It is a vital component for our nation.

20

21 **TUSHAR MEHTA:** In 2020...

22

23 **CHIEF JUSTICE DY CHANDRACHUD:** We can't have a situation where you have....

24

25 **TUSHAR MEHTA:** My Lord only one thing, give me a second more. In 2020 for the first
26 time in the history, the local government elections took place. 34,000 people are now elected
27 people. Which is possible only because of..

28

29 **CHIEF JUSTICE DY CHANDRACHUD:** Therefore the progression, we take your point.
30 We take your point that the progression has already begun.

31

32 **TUSHAR MEHTA:** Yes My Lord. No *harthal*, no stone pelting, no curfew.

33

34 **KAPIL SIBAL:** That means the situation is normal My Lords.

35

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

37

1 **TUSHAR MEHTA:** No, I am not only on, My Lord, election and politics. I am on, My Lord,
2 national integrity.

3

4 **CHIEF JUSTICE DY CHANDRACHUD:** Is there a roadmap?

5

6 **TUSHAR MEHTA:** Yes, yes, it is there

7

8 **CHIEF JUSTICE DY CHANDRACHUD:** And tell us what the roadmap is.

9

10 **TUSHAR MEHTA:** Apropos, My Lord, what fell from Your Lordships before the lunch break.
11 My Lord, I have taken instructions. My Lord, the instructions are, that UT is not a permanent
12 feature. But I'll make a positive statement, My Lord tomorrow. That is day after, because I will
13 have to meet My Lord.

14

15 **JUSTICE B.R. GAVAI:** Before Kashmir, Jammu and Kashmir?

16

17 **TUSHAR MEHTA:** Yes, My Lord. Not...

18

19 **JUSTICE B.R. GAVAI:** Not Ladakh.

20

21 **TUSHAR MEHTA:** Not Ladakh. Ladakh would remain UT. That's what we have understood
22 but we'll meet personally. Learned AG and me and we will make a statement. But I must tell
23 Your Lordships so far as Ladakh as My Lord I have already pointed out that local body in terms
24 of District Development Council Elections took place in 2020 and so far as the Ladakh is
25 concerned, it consists of two units. Units is a loose word I'm using that is Leh and Kargil. My
26 Lord election to Ladakh Autonomous Hill Development Council Leh is held in October 2020
27 for 26 seats and for Kargil it is going to be held on 10th September '23. So Ladakh election
28 would be over. I may, Your Lordships need not open. It is Volume 10. Document compilation
29 Volume page 763.

30

31 **JUSTICE B.R. GAVAI:** Document compilation Volume?

32

33 **TUSHAR MEHTA:** Volume 10, page 763. My Lord I'm reading four lines from Lok Sabha
34 and four lines from Rajya Sabha, because something said on the floor of the House has its own
35 sanctity. Therefore My Lord I am reading it. Your Lordship, has page 763, Volume 10 because
36 the Hon'ble Home Minister introduced the Bill and it was debated. It was debated for both the
37 days.

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CHIEF JUSTICE DY CHANDRACHUD: This is Lok Sabha. This one.

TUSHAR MEHTA: This is Lok Sabha. What I'm reading at page 763 is Lok Sabha. All members participated in the debate and My Lord, relevant is the last para. '*Adhyaksh Mahoday mein anuchhed 370 ki baat baad mein karunga Sabse pehle mein iss charcha mein kaafi saari sadasyon ne bhaag lete huye kuchh cheezon ke baare mein jaanna chaha hai, kuchh mudde bhi upasthith kiye hain, jinka mein sabse pehle jawab dena chahunga. Kaafi saare vipaksh ke sadasyon ne kaha hai sammaniya sadasyon ne kaha hai ki UT kya hamesha ke liye hai? UT kyon banayi gayi hai? UT kab tak rahegi? So and so ne, so and so ne bhi kaha. Mein is sadan ke madhyam se pure desh ke saamne aur visheshkar Ghaati aur Jammu. Ghaati means Valley, ke logo ke saamne spasht karna chahta hoon ki jahan tak UT ka sawaal hai paristhiti saamanya hote hi uchit samay per puran rajya ka darja dene mein is sarkar ko koi aapatti nahi hai.*'

JUSTICE SANJAY KISHAN KAUL: Just read the last three words again. Does it say *Puran Rajya?*

TUSHAR MEHTA: *Puran Rajya ka darja.* I will just read. *Mein is sadan ke madhyam se.*

JUSTICE SANJAY KISHAN KAUL: Full statement.

TUSHAR MEHTA: Full statement. '*Mein is sadan ke madhyam se pure desh ke saamne aur visheshkar Ghaati aur Jammu ke logo ke saamne spasht karna chahta hoon ki jahan tak UT ka sawaal hai paristhiti saamanya hote hi uchit samay per puran rajya ka darja dene mein is sarkar ko koi aapatti nahi hai.*' Then, My Lord 512 is Rajya Sabha, there also this question arose... somewhere 10th line from the top. It starts with 'kai maanniya sadasyon... I am on page 162. I'm sorry. Page 512. Your Lordship has?

CHIEF JUSTICE DY CHANDRACHUD: After the English words, Constitutional position?

TUSHAR MEHTA: No, My Lord, uss se, the same line. '*Agar Sabhapati Mahoday ki aagya ho to mein puri Constitutional Position sadhan ke samna rakhne ko taiyar hoon. Ek maanniya sadasya ne poocha ki kab tak ya UT rahega? Mein maanniya Shri so and so or jin anya maanniya sadasyon ne UT ke banne per aapatti darj ki hai mwin nischit roop se unko ashwasth karta hoon... karna chahtha hoon ki jaise hi normal paristithi hojayegi uchit samay aayega isko phie se state banane mein hume koi aitaraz nahi hai.*'

1 *Main aaj iss sadan ke madhyam se Jammu Kashmir ki janata ko bhi kehna chahta hoon ki*
2 *Jammu Kashmir Bharat ka mukutmani hai aur isme koi matbhed nahi hai. Jab bhi uchi*
3 *samay aayega, magar aaj jis prakaar ke bhashan ho rahe the, mujhe lagta hai thoda lamba*
4 *samay rahega' etc. etc. 'Kyonki bhashan iske baad Ghaati me bhi hone wale hai.'* That was
5 My Lord, an apprehension.

6

7 **JUSTICE SANJIV KHANNA:** What's the date of this?

8

9 **TUSHAR MEHTA:** 5th of August 2019, when Reorganization Bill was being considered. May
10 I quickly My Lord, take Your Lordships through the judgments on Article 3-4. Whichever way
11 Your Lordships would like me to go. I'll read only... cite few judgments on reorganization and
12 357.

13

14 **CHIEF JUSTICE DY CHANDRACHUD:** All right, where are they Mr. Solicitor?

15

16 **TUSHAR MEHTA:** My Lord, 162. Your Lordships have read...

17

18 **CHIEF JUSTICE DY CHANDRACHUD:** Which compilation?

19

20 **TUSHAR MEHTA:** My written submission Volume 3, combined written submissions. My
21 Lords have seen Article 3 and Article 4. The respectful submission is, My Lord. And this My
22 Lord, during discussion with Mr. Dwivedi, we came to know. The distinction is, this is the only
23 State where it was not at par with the rest of the country and now it is becoming the part. That
24 is the distinguishing feature which would never arise in case of any other State. Now, this UT
25 of Jammu and Kashmir came up for consideration of this Hon'ble Court. My Lord at page 162
26 for the judgment of...

27

28 **JUSTICE SANJIV KHANNA:** I've closed the compilation volume, I'll have to research
29 your...

30

31 **CHIEF JUSTICE DY CHANDRACHUD:** Volume Three.

32

33 **TUSHAR MEHTA:** I'm sorry. Volume three, Volume three.

34

35 **JUSTICE SANJAY KISHAN KAUL:** Which you are reading...

36

1 **TUSHAR MEHTA:** My written submission. What I've done is, so that Your Lordships may
2 not have to shuffle through the judgment volumes. I have quoted the paragraphs I am relying
3 upon verbatim.

4
5 **JUSTICE SANJAY KISHAN KAUL:** This para 85 onwards?
6

7 **TUSHAR MEHTA:** Yes. Para 85 onwards... I am skipping the paragraphs. I'm just reading
8 the judgment.

9
10 **JUSTICE SANJAY KISHAN KAUL:** I'm just locating. I have the paragraphs.
11

12 **TUSHAR MEHTA:** Yes, My Lord, I'll read the judgment. The judgment of this Court in case
13 of Jammu Kashmir, the present reorganization. Article 3, provides that Parliament may, by
14 law form new States and alters the areas...

15
16 **JUSTICE B.R. GAVAI:** Para 89...,
17

18 **TUSHAR MEHTA:** I'm sorry. Para 89, My Lord. I am sorry. May I read?
19

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

22 **TUSHAR MEHTA:** Article 3, provides that Parliament may, by law form new States and alter
23 the areas, boundaries or names of the existing States. The Explanation 1, provides that in
24 Clauses A to E of Article 3, a State includes Union Territory. Thus, Explanation 1, makes it
25 amply clear that the power of Parliament under Clause A of Article 3, to make a law to form a
26 new State or to alter a boundary of a State includes the power to make a law to form a new
27 Union Territory. Explanation 2, clarifies that power conferred by Clause A on Parliament to
28 enact the law to frame a new State includes a power to form Union Territory by uniting parts
29 of any State or Union Territory to any other State or Union Territory.

30 Kindly come to Para 26, at page 163. On conjoint reading of Article 3, 4 and 239(A), we find
31 that Parliament, by making a law can convert an existing State into one or more Union
32 Territories.

33 b) Parliament is empowered by law to create a body of legislature for the Union Territories of
34 Puducherry and Jammu and Kashmir. Accordingly, Sub-Section 2, of Section 14, of Jammu
35 and Kashmir Reorganization Act provides, that there shall be a Legislative Assembly for Union
36 Territory of Jammu and Kashmir; and c) even if law made by Parliament, creating a body of
37 legislature for Union Territories of Pondicherry, Puducherry and J&K has the effect of

1 amending certain parts of the Constitution, it shall not be deemed to be an amendment, of the
2 Constitution, for the purpose. My Lord, if Your Lordships sees holistically, Article 3 and Article
3 4, and I am seeing this academically. I am not pitching it My Lord, for this particular case, but
4 there is nothing, if we read as a common scheme, of My Lord reorganization, that one state for
5 a good reason, the threshold of Your Lordship satisfaction would be higher, can be converted
6 into UT, because 4 says, some incidental provisions can even include something which may
7 otherwise amount to amendment, but would not be treated as an amendment under 368. Then
8 My Lord, **Pradeep Chaudhary** I'm skipping.

9
10 **CHIEF JUSTICE DY CHANDRACHUD:** 1 and 2, are made applicable to Jammu and
11 Kashmir.

12
13 **TUSHAR MEHTA:** Yes My Lord, what happened was, during the first arguments of the
14 petitioners, they pointed out the Article 3, as applicable to the State of Jammu and Kashmir,
15 which provided that nothing can be done without consent of Jammu and Kashmir Assembly.
16 Without pointing out to Your Lordships, that before this Reorganization Act was placed before
17 the House, the entire Constitution was made applicable. Therefore, their proviso goes. Now,
18 what Article 3 Your Lordships have, applied My Lord, when this reorganization took place, I
19 hope I am able to make myself clear? What was shown was, the earlier Constitution as
20 applicable to Jammu and Kashmir. Article 3, as applicable to Jammu and Kashmir, which
21 provided for a mandatory consent. But first, the President issued 272, C.O. 272, applied the
22 whole Constitution, meaning, thereby, what we are reading now as Article 3 was, Article 3,
23 when reorganization took place.

24
25 **JUSTICE SANJIV KHANNA:** What's the date of Reorganization? What's the date of
26 Reorganization Bill?

27
28 **TUSHAR MEHTA:** It was passed on 6th of August. My Lord, this is **Berubari** is considered.
29 **Berubari**, Your Lorships are aware My Lord, has no application. A part of India was being
30 ceded to some other country, that was the concept, that was the fact situation arising in
31 **Berubari**. There was a mistake in **Berubari**, which five Judge Bench in **Ram Kishore**,
32 notes and corrects. And thereafter, there is an amendment to the Constitution, knowing that,
33 now there was a mistake in **Berubari** and I will show My Lord, please come to para 91 at page
34 164. Only My Lord, the relevant parts I have quoted and I'll read. This is a five judge bench,
35 My Lord, speaking to My Lord Justice Gajendragadkar, before proceeding to deal with the
36 points which have been raised before us by Mr. Mukherjee, on behalf of the appellants, it is
37 necessary to advert to the opinion expressed by discord *in re*, **Berubari Union** and exchange

1 and enclaves, so and so. The *Berubari Union* at para so and so, with a view to correct an
2 error, which has crept into the opinion through inadvertence. On this occasion... on that
3 occasion, it was urged on behalf of the Union of India, that if any legislative action is held to
4 be necessary, for implementation of Indo-Pakistan agreement, a law of Parliament relating to
5 Article 3, of the Constitution, would be sufficient for the purpose and that it would not be
6 necessary to take any action under Article 368. This argument was rejected. In dealing with
7 this contention, it was observed by this Court that the power to acquire new territory and the
8 power to cede a part of the National Territory where, outside the scope of Article 3(c), of the
9 Constitution of India. This Court then took the view, that both the powers were essential
10 attributes of sovereignty vested in India and vested in India as an independent, sovereign
11 Republic. While discussing the significance of the several clauses of Article 3, in that behalf, it
12 seems to have been assumed that Union Territories were outside the purview of the state
13 provisions. In other words, the opinion proceeded on the basis that the word State used in all
14 the said clauses of Article 3 did not include the Union territory specified in the First Schedule.
15 Apparently, this assumption was based on the distinction made between the two categories of
16 territories by Article 1(3). In doing so, however, the relevant provisions of the General Clauses
17 Act were inadvertently not taken into account. Under Section 358(b) of the said State, as it
18 respects any period after the commencement of the Constitution 7th Amendment Act shall
19 mean a State as specified in the First Schedule to the Constitution and shall include a Union
20 Territory. This provision of General Clauses Act has to be taken into account in interpreting
21 the word State in the respect of clauses of Article 3 because Article 367(1), specifically provides
22 that unless the context otherwise requires the General Clauses Act shall, subject to any
23 adaptations and modifications that may be made therein. Under. 372 apply for the
24 interpretation of this Constitution as it applies for interpretation of an act of Legislature.
25 Therefore, the assumption made in the opinion that Article 3, in its several clauses, does not
26 include Union territory is misconceived, and to that extent the incidental reason given in
27 support of the main conclusion is not justified. After this judgment, 18th Constitution
28 Amendment is made. Judgment is 27th August '66. I'm sorry the judgment is 1965.

29

30 **CHIEF JUSTICE DY CHANDRACHUD:** What is the date In 1965?

31

32 **TUSHAR MEHTA:** I'll just give. Lordships may give me a minute. The amendment is 27th
33 August '68.

34

35 **CHIEF JUSTICE DY CHANDRACHUD:** 27th August?

36

37 **TUSHAR MEHTA:** 66.

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CHIEF JUSTICE DY CHANDRACHUD: Just give us *Ram Kishore's...*

TUSHAR MEHTA: By which these explanations came to be added.

CHIEF JUSTICE DY CHANDRACHUD: Right.

TUSHAR MEHTA: State includes UT that was the result of this *Ram Kishore Sen* judgement. If Your Lordships would like to see where it is... PDF volume I'm sorry. Volume 6. Case compilation, Volume 6.

CHIEF JUSTICE DY CHANDRACHUD: *Ram Kishore* judgement?

TUSHAR MEHTA: *Ram Kishore* judgment. Your Lordships wanted. *Ram Kishore* judgement.

CHIEF JUSTICE DY CHANDRACHUD: Yes just the date. Just give us the date, that's all.

TUSHAR MEHTA: 11th August 1965.

CHIEF JUSTICE DY CHANDRACHUD: All right.

TUSHAR MEHTA: Now Your Lordships may kindly directly go to... Your Lordships have seen Page 167, the view of Justice Khanna. Justice Khanna, Delhi High Court, and thereafter I read *Mangal Singh* little later because it's not quoted here. Please come to 169. Page 169 *State of West Bengal* and read only the highlighted part. Now, My Lord, I am confining to highlighted part. Your Lordships may only note there is some typo. 1964, 1 SCR page number is not mentioned 371. 371. So this is a judgment by 6 Hon'ble Judges Bench. Legal sovereignty of Indian nation. Your Lordship gets, My Lord? My Lord, Justice Kaul? Para 101.

JUSTICE SANJAY KISHAN KAUL: 101.

TUSHAR MEHTA: The judgment is *State of West Bengal versus Union of India*. Legal sovereignty of the Indian Nation is vested in the people of India, who, as stated by the preamble, have solemnly resolved to constitute India into a Sovereign Democratic Republic for the object specified therein, the political sovereignty is distributed between as well, as we will presently demonstrate the Union of India and the States with greater weightage in favour

1 of Union. Kindly come down para 35 of the judgment, only the underlined portion. There are
2 no independent Constitutions of the States, apart from the National Constitution of Union of
3 India. Chapter 2, Part 6, from Article 152 to 237, deals with States the power of legislature of
4 the States, the power of executive and judiciary. What appears to militate against the theory
5 regarding the sovereignty of the State is the wide power with which the Parliament is invested
6 to alter the boundaries of States and even to extinguish the existing of a State. Existence of a
7 State. There is no constitutional guarantee against alteration of boundaries of the State. By
8 Article 2, of the Constitution, the Parliament may admit into the Union or establish new States
9 on such terms and conditions as it thinks fit. And by Article 3, the Parliament is by law
10 authorized to form a new State by redistribution of territory of a State, or by uniting two or
11 more States or parts of States, or by uniting any territory to a part of the State, increase the
12 area of any state, diminish, etc. My Lord then four lines from thereafter Parliament... the word
13 starts with Parliament. 'Parliament is therefore, by law invested with authority to alter the
14 boundaries of any State and to diminish it's area, so as even to destroy a State with all it's
15 power and authority. That being the extent of the power of Parliament. It would be difficult to
16 hold that the Parliament, which is competent to destroy a State is on account of some
17 assumption as to absolute sovereignty of the States incompetent effectively to acquire by
18 legislation designed for the purpose of property owned by the State for government purposes.'
19 Then next is again, **Babul Parate** is five judgment. **Babul Parate**. This is different,
20 not that 19(1)A judgment. That is also **Babul Parate**, My Lords recollects, freedom of
21 speech and expression. My Lord, here... the Assembly's views were taken from Bombay
22 Assembly for A, B, C, D, E areas. And when the Reorganization Act was passed it was some
23 additional areas where also, therefore, that was in the challenge. We proceed now to consider
24 these contentions, 'it is necessary to state at the outset that our task is to determine on a proper
25 construction the true scope and effect of Article 3, of the Constitution, with particular reference
26 to second condition laid down by the proviso thereto. We bring it to our task such
27 consideration as our germane to the interpretation of an organic instrument like the
28 Constitution. But it will be improper to import into the question of construction, Doctrine of
29 democratic theory and practice obtaining in other countries unrelated to the tenor scheme and
30 words of the provision which we have to construe. Kindly come to the later part. Article 1, of
31 our Constitution was somewhere in the 10th line from bottom of 170. Does Your Lordship get?

32

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

34

35 **TUSHAR MEHTA:** Article 1 of our Constitution says that India is a Union of States, and the
36 States and the territories thereof are specified in the Schedule. There is therefore no difficulty
37 in understanding what it means... meant by expression State in Article 3. It obviously referred

1 to States in the First Schedule, and the Legislature of State refers to the legislature which each
2 has under Constitution. That being the position we see no reason for importing into the
3 construction of Article 3, any doctrine, consideration of the sanctity of rights of States, or even
4 for giving an extended meaning to the expression State occurring therein. None of the
5 constituent units of Indian Union was sovereign and independent in the sense the American
6 Colonies or Swiss Cantons, where before they formed their federal unions. The Constituent
7 Assembly of India, deriving its power from the sovereign people, was unfettered by any
8 previous commitment in evolving a constitutional pattern suitable to the genius and
9 requirement of the Indian people as a whole. Unlike some other federal legislatures,
10 Parliament representing the people of India as a whole, has been vested with the exclusive
11 power of admitting or establishing new States, increasing or diminishing the area of an
12 existing State, all altering its boundaries. The legislature or legislatures of the States concern
13 having only the right to an expression of views on the proposal. It is significant that for making
14 such territorial adjustment, is it not necessary even to invoke the provisions governing,
15 constitutional amendments. Then My Lord, **Raja Ram Pal**, only one line My Lord. Now
16 coming down to one line My Lord, kindly My Lord, appreciate, it says, India is an
17 indestructible Union of destructible units. **Raja Ram Pal**, again five Judge Bench...

18 [NO AUDIO]

19

20 **TUSHAR MEHTA:** Law My Lord, I am pointing out, I am not pitching that argument, that
21 [UNCLEAR]. What we have done is, as a temporary measure, as it is clear from day one, the
22 parliamentary debates, that we have created two units, namely two Union Territories and one
23 Union Territory is with legislature, the power vested with them. Power of Police with the
24 Centre, because of the very peculiar nature of the situation arising since decades, rest
25 everything they have, what state has.

26

27 **JUSTICE SANJIV KHANNA:** You pointed out two instances where it has happened. First
28 was Punjab. That was a very peculiar problem. Punjabi Suba movement, etc. More or less
29 everybody was agreeable, probably could not muster through the Legislative Assembly.

30

31 **TUSHAR MEHTA:** No, there was no Assembly, it was during Governor's rule.

32

33 **JUSTICE SANJIV KHANNA:** No, I understand that. But earlier, it could not muster
34 through the division of you know Punjab, between Haryana and then parts of Punjab, going to
35 a Union Territory, first, even in Himachal Pradesh. Himachal Pradesh itself becoming a state.
36 And then probably, Cochin and Travancore is the other example which is given. The third is
37 this, because once you suspend the proviso and virtually the power of the state governments

1 are taken away, the representation of the State is represented by the will of the people of the
2 larger country.

3

4 **TUSHAR MEHTA:** Correct.

5

6 **JUSTICE SANJIV KHANNA:** Can lead to...

7

8 **TUSHAR MEHTA:** That is My Lord, touched upon in *Bommai. S.R. Bommai*. Please
9 come to page 173, even this question was My Lord, considered in *Bommai* judgment. We read
10 *Bommai's* judgment for a different issue, but this was also one of the consideration, one of
11 the factors which fell for consideration of the court. Page 173. Where the Court considers, what
12 is the scope and ambit of the State's views, as they told, that's why I'll My Lord, rather than
13 paraphrasing I'll read, My Lord kindly see *S.R. Bommai*, para. 108. My Lord, para. 108, My
14 Lord, Justice Kaul... page 173, I have quoted *S.R. Bommai*. My Lord, last four lines on that
15 para. I'm trying to rush My Lord, so that I can finish. Your Lordships gets, on a conjoint
16 reading? My Lord Justice Khanna gets it? My Lord Justice Surya Kant gets it?

17

18 **JUSTICE SURYA KANT:** Yes.

19

20 **TUSHAR MEHTA:** 'On a conjoint reading of these articles, it becomes clear that Parliament
21 has the right to form new States, alter existing States or the name any existing states. Thus,
22 the Constitution permits changes in the territorial limits of the States and does not guarantee
23 that territorial integrity. Even names can be changed. And the Article 2, it is left to Parliament
24 to determine the terms and condition on which it may admit any area into the Union or
25 established new States in doing so it has not to seek the concurrence of the State whose area,
26 boundary, or name is likely to be affected by the people. All that the proviso to Article 3
27 requires is that such cases the President shall refer the bill to the legislature of the States
28 concerned likely to be affected to express their views. Once the views of the States are known,
29 States are known it is left to Parliament to decide on the proposed changes.' Please My Lord
30 note. Parliament can, therefore, without the concurrence of the States or State's concern,
31 change the boundaries of the State or increase or diminish its areas, or change its name. These
32 provisions show that in the matter of Constitution of States, Parliament is paramount. This
33 scheme substantially differs from the federal setup established in the United States of America.
34 So, My Lord, in my respectful submission said that it's a provision which is strict compliance
35 is not insisted upon. Provided there is a broader compliance, namely, the entire nation
36 considering that this affects the nation as a whole. This situation doesn't affect a State or
37 neighbouring States. This affect the entire nation, and therefore, including representatives of

1 Jammu and Kashmir. Parliament and Rajya Sabha... I mean Lok Sabha and Rajya Sabha have
2 representatives of Jammu and Kashmir....These are my judgments on 3 and 4.

3

4 **TUSHAR MEHTA:** Would Your Lordships like to have a bird eye view of the Act?

5

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

7

8 **TUSHAR MEHTA:** Volume 3, documents page 112. I won't take more than five minutes to
9 do this . I am not tempted to show this because nobody has shown which could not have been
10 my objection, but without showing several statements were made that we are reduced to
11 nothing. Everything is taken up. Therefore, My Lord, it is my duty to point out just bird's eye
12 view. Page 112.

13

14 **JUSTICE B.R. GAVAI:** Volume three?

15

16 **TUSHAR MEHTA:** Volume document. Volume Three. My Lord. Page One, one, two pc
17 definition Assembly Constituency is defined 2(c) . It has all attributes of a state it is state which
18 UT, with Legislature, but all attributes of a state. Assembly Constituency Your lordship gets
19 2(c). Then Election Commission 2(d) then 2(g) on the next page. 113. 2(g) Legislative
20 Assembly, (j) Population Ratio and Union Territory. Please My Lord, see the formation of
21 Union territory of Ladakh without legislature. Then, My Lord formation of Union Territory of
22 Jammu and Kashmir with legislature. Correct, My Lords? Then come to page 114. No
23 reduction. They say that our representation in Parliament is reduced on Para 10, My Lord, on
24 and from the appointed date there shall be allocated five seats to successor Union Territory of
25 Jammu and Kashmir, and one seat to Union Territory of Ladakh in the House of People earlier
26 they had 6. Now it is 5 plus 1, 6 then limitation of constant. I'm sorry

27

28 **CHIEF JUSTICE DY CHANDRACHUD:** That's Section 10?

29

30 **TUSHAR MEHTA:** Section 10. The argument of Mr. C.U. Singh was that we have lost
31 representation in Parliament. Then somebody said that our seats are reduced. Mr. Naphade
32 said the seats are reduced. It was 6 in total. Now it is 5 Jammu and Kashmir and 1 Ladakh.
33 Then, My Lord 12, every sitting member of the House of People representing a constituency
34 which, on the appointed day by virtue of the provisions of Section 10, stands allotted with or
35 without alteration of boundaries to the successor Union Territory of Jammu and Kashmir, or
36 Union Territory of Ladakh, as the case may be, shall be deemed to have been elected to the
37 House of people by that Constituency as so allotted. So they continue as Lok Sabha members.

1 Then 13. 'All and from the appointed date the provisions contained in Article 239A, which are
 2 applicable to Union Territory of Puducherry, shall also apply to the Union Territory of Jammu
 3 and Kashmir.' So, now this is amending. This is amended. What is placed is not amendment.
 4 I'll just place Your Lordships the copies of the Amended Act. I'm not reading from this Act, I
 5 will give copies to the other side also. Because this has all the Acts which are made applicable,
 6 which were not applicable. Central Acts, including beneficial legislation. And amend... suitable
 7 amendments in the local Acts. Local Acts are retained if they are not repugnant to the Central
 8 Acts, which suitable modifications, making them Constitution compliant. This is amended.
 9 Para 30... Section 13, because the argument was that now we can't vote. MLAs of Jammu and
 10 Kashmir cannot vote. Page 10, foot of the Page, Section 13. My Lord, Justice Gavai and Justice
 11 Surya Kant has that? Page 10 of this book. Amendment is in this book. Page 10, right side. A
 12 left side top is the pagination. Section 13. 'On and from the appointed date, the provisions
 13 contained in Article 239 A or any other Article with reference to elected members of Legislative
 14 Assembly of the State, which are applicable to Union Territory of Puducherry, also apply to
 15 Union Territory of Jammu and Kashmir.' So they can vote wherever MLA is required to vote.
 16 For example, the example given by petitioner was Presidential election. Then 14. Section 14.
 17 'There shall be an administrator appointed under Article 239 A, of the Constitution for the
 18 Union Territory of Jammu and Kashmir and shall be designated as LT. Governor. The total
 19 number of seats in the Legislative Assembly would be 107. Then every Entry except Police.
 20 Police is now for obvious reasons, I need not even explain why Police is directly under the
 21 control of the Centre. And Clause 6, this comes for the first time, 14(6), this was never there.
 22 'Seats shall be reserved for Scheduled Caste and Scheduled Tribes in the Legislative Assembly
 23 of the Union Territory of Jammu and Kashmir.' This has come for the first time. Then come to
 24 My Lords, Section 16. Earlier, only permanent residence could contest elections under Section
 25 16. I'm not inviting Your Lordship's attention to read it. Now you should be a citizen of India.
 26 You need not be a permanent resident for being qualified to be elected like any other State.
 27 Please come to the relevant entry section, is at page 119, bottom Section 32, extent of
 28 Legislative power. My Lord subject to my answering Your Lordships, about the election on My
 29 Lord, day after, when, in the morning. But...

30

31 **JUSTICE SANJAY KISHAN KAUL:** 119, of your compilation or?

32

33 **TUSHAR MEHTA:** No, My Lord, the Act. Volume 3, same Act. I'm, reading from the Act, My
 34 Lord. Page 119, Section 32. Volume 3, Document Volume 3. Your Lordships have 32? Subject
 35 to the provisions of this Act, the Legislative Assembly, may make laws for the whole or any
 36 part of the Union Territory of Jammu and Kashmir, with respect to any of the matters
 37 enumerated in State List, except the subjects mentioned at Entry 1 and 2, namely, Public Order

1 and Police, respectively, or the Concurrent List in the 7th Schedule to the Constitution, insofar
2 as any such matter is applicable in relation to Union Territories. Then My Lord, 35
3 inconsistency between the laws My Lords, there is a provision, special provision as finance...

4

5 **CHIEF JUSTICE DY CHANDRACHUD:** So, it follows the Delhi, the Delhi model?

6

7 **TUSHAR MEHTA:** Delhi has led...

8

9 **CHIEF JUSTICE DY CHANDRACHUD:** Delhi of course, one and land. 1, 2 and 18 is
10 carved out, land is given to the state legislation.

11

12 **TUSHAR MEHTA:** Land is not given.

13

14 **CHIEF JUSTICE DY CHANDRACHUD:** Not given. Where is land accepted? Which
15 provision is land taken away ?

16

17 **TUSHAR MEHTA:** Not here. Not here. Here only Police and Public Order. My Lord in Delhi..

18

19 **CHIEF JUSTICE DY CHANDRACHUD:** That's correct. Oh, oh, I thought you are saying
20 land is also taken away.

21

22 **TUSHAR MEHTA:** No, no, no. In Delhi it is Public or Police...

23

24 **CHIEF JUSTICE DY CHANDRACHUD:** It's 1, 2 and 18.

25

26 **TUSHAR MEHTA:** 1, 2 and 18, Your Lordships have, we have troubled Your Lordships for a
27 long period on that. I wanted to avoid that part...

28

29 **CHIEF JUSTICE DY CHANDRACHUD:** It's argued so many times that, you know, 1, 2
30 and 18 are stuck like a *mantra* in the brain, you know, so...

31

32 **TUSHAR MEHTA:** But here My Lord, 18 is not there My Lord. It is only Public Order and
33 Police...

34

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

36

1 **TUSHAR MEHTA:** And for reasons obvious, the very object and purpose of reorganization
2 is this. Thereafter there are financial provisions...

3

4 **CHIEF JUSTICE DY CHANDRACHUD:** One more change, Parliament has competence
5 on all the three Lists.

6

7 **TUSHAR MEHTA:** That is because of 239 AA... Here, it's not there.

8

9 **CHIEF JUSTICE DY CHANDRACHUD:** Unlike a State Legislature. In the case of Union
10 Territories like Delhi, for instance, Parliament can enact the legislation on any item.

11

12 **TUSHAR MEHTA:** That is because of 239 AA.

13

14 **CHIEF JUSTICE DY CHANDRACHUD:** AA. But I am saying, the same principle is
15 followed here.

16

17 **TUSHAR MEHTA:** I don't think My Lord. Here in 239...

18

19 **CHIEF JUSTICE DY CHANDRACHUD:** It is, see Sub-Section 2, nothing in Sub-Section
20 1, shall derogates, from the powers conferred on the Parliament by the Constitution, to make
21 respect to any...

22

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

24

25 **CHIEF JUSTICE DY CHANDRACHUD:**... matter for the Union Territories

26

27 **TUSHAR MEHTA:** So My Lord that 239 AA, provision is incorporated in the statute. Your
28 Lordships are right. My Lord, there is a Consolidation, Consolidated Fund, which Mr. C. U.
29 Singh says it's taken away, annual financial statements audit, audit by the CAG, this is an
30 official language, but for the first time there is an official language, My Lord. I wish this was
31 pointed out to Your Lordship while saying that we have been deprived of everything. It's just
32 a UT. It is a state My Lord, for all purposes, except these two entries. I'm not going into the
33 minute details, My Lord it's a... My Lord Mr. C. U. Singh, argued that the assets are also merged
34 with Union of India.

35

36 **CHIEF JUSTICE DY CHANDRACHUD:** Actually nothing turns on it in this case. It's
37 almost like trivia right now, but Clause 2, says nothing in Sub-Section 1(32), shall derogate

1 from the powers conferred on Parliament by the Constitution to make law with respect to any
2 matter for the Union Territory of Jammu and Kashmir are any part thereof. So this provision
3 does not empower Parliament to make a law on the State List...

4

5 **TUSHAR MEHTA:** Like 239 AA.

6

7 **CHIEF JUSTICE DY CHANDRACHUD:** The provision comes in 246(4).. 246(4) says
8 Parliament has power to make laws with respect to any matter or any part of the territory of
9 India not included in a state notwithstanding that such matter is a matter enumerated in the
10 state. That is why...

11

12 **TUSHAR MEHTA:** That is at par with everybody.

13

14 **CHIEF JUSTICE DY CHANDRACHUD:** No this is a matter of constitutional position,
15 Parliament can enact a law on all the three lists for Jammu and Kashmir.

16

17 **TUSHAR MEHTA:** Even in absence of Sub-Section 2, it could have.

18

19 **CHIEF JUSTICE DY CHANDRACHUD:** That's right. That's Article 246 for.

20

21 **TUSHAR MEHTA:** Constitutional operation.

22

23 **CHIEF JUSTICE DY CHANDRACHUD:** That's a constitutional position.

24

25 **TUSHAR MEHTA:** So I'm not reading. Mr. C U Singh said that even the assets will go to...
26 has gone to the central government. There is a specific provision apportionment of assets.
27 Jammu and Kashmir assets remain with Jammu and Kashmir and Ladakh assets went to
28 Ladakh. That's how whenever reorganization takes place, the things happen. Now, My Lord, I
29 may come to Article 356. Kindly come to my written submissions and this is one of the last
30 part of my submissions My Lord. I have already crossed my time but 142. Just My Lord, I am
31 placing it for Lordships consideration. The government's rule...Governor's rule is in challenge,
32 as I have pointed out, after 14 months

33

34 **JUSTICE SANJAY KISHAN KAUL:** Which PDF?

35

36 **TUSHAR MEHTA:** 142, my Written Submissions 142. Volume 3 142. Your Lordships have a
37 chart My Lords?

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CHIEF JUSTICE DY CHANDRACHUD: Yes.

TUSHAR MEHTA: What I've done is I have mentioned the number of the petition with the name, prayer prayed for and the grounds for challenging this proclamation. These are the only petitions and these are the only grounds in those petitions. Your Lordships are aware My Lord how a constitutional act of imposition of Governor's Rule or President's Rule is to be challenged and what should be the averments. What was the material sufficiency, this that another....Nothing, because it was done after 14 months only as a corollary of challenging, 5th and 6 August action. I'm not reading the pleadings but there are no pleadings. That's all I am saying. My Lords now, I'm not reading but there are no pleadings that it is arbitrary, it is illegal, and therefore declare it to be avoided. That's all. Nothing. No pleadings. Only technically a prayer is there. That's what they can argue. Therefore, they have made a prayer after 14 months without pleadings. Now please come to 146 of these very note My Lords, on the question...This is again **S.R. Bommai**, I am on page 147. I'm going fast. I've seen Your Lordships eyes looking at the clock. I am also on the clock.

CHIEF JUSTICE DY CHANDRACHUD: Please don't have any such feeling...

TUSHAR MEHTA: On the lighter side...

CHIEF JUSTICE DY CHANDRACHUD: Eye goes to the clock just as a matter of training that's all.

TUSHAR MEHTA: On the lighter side I am saying so that...

JUSTICE SANJAY KISHAN KAUL: More than 22 years of training on this.

CHIEF JUSTICE DY CHANDRACHUD: Exactly more than 22 years of training. Mr. Solicitor when we were judges at the Bombay High Court, we had a colleague who had come from Gujarat on transfer, a God's good person. So he had this specialization. We would meet outside the Chief Justice Chamber every morning just a little bit of camaraderie and then we go to... so every day our colleague, who had come from Gujarat, would tell us how many more days there are to go back to the vacation... 36 days left for the vacation.

TUSHAR MEHTA: It is said that a Gujarati can come out of Gujarat. Gujarat never comes out of it. Always. My Lord, 146. Last part, only underlined portion. 147. **Bommai, S.R.**

1 **Bomma**. This kindly read My Lord, the canvas of the Court's jurisdiction. 'In fact once the
2 issuance of proclamation is held valid the scrutiny of the kind and degree of power used under
3 the proclamation falls in a narrower compass. There is every risk and fear of the Court
4 undertaking upon itself the task of evaluating with fine scales and through it's own lenses, the
5 comparative merits of one rather than the other measure. The Court will thus travel
6 unwittingly into the political arena and subject itself more readily to the charges of
7 encroaching upon the policy making. The political thicket objections sticks more easily in such
8 circumstances, although therefore on the language of Article 356(1), it is legal to hold that the
9 President may exercise only some of the powers given to him. In practice, it may not always be
10 easy to demonstrate the excessive use of power.'

11 Why I'm reading this, Mr. Sibal, read the first part of it, his attention, My Lord, missed this
12 last part. Therefore, I am for completion. This is the [UNCLEAR]. Kindly come to the next
13 judgment at page 148. **State of Rajasthan versus Union of India**. My Lord seven
14 honourable Judges. The bold part, there is a part which is made bold. The learned counsel,..
15 Your Lordship gets? My Lord, Justice Gavai gets? The bold part. 'The Learned Counsel,
16 appearing on behalf of the petitioners in the writ petitions contended that it is clear from the
17 provision enacted in Article 356, Clause 3, that the exercise of power by the President under
18 Clause 1, is subject to the control of both Houses of Parliament. The proclamation issued by
19 the President under Article 356, Clause 1, would cease to be in force at the expiration of two
20 months unless it is approved by both Houses of... ' Prior to My Lord, it was two months.
21 'Houses of Parliament and therefore no irretrievable action, such as dissolution of the
22 Legislative Assembly of the State can be taken by the President before the approval of both the
23 Houses of Parliament is given to the proclamation'. He also restricts that irretrievable action
24 can be taken, but not before it is approved by the both the Houses. Otherwise, the
25 Parliamentary control would be defeated and it would be possible for Central Government to
26 present *fait accompli* to the two Houses of Parliament, and neither House would be able to
27 remedy the mischief done, even if it disapproved the proclamation. Moreover, either House of
28 Parliament may disapprove the proclamation even before the expiry of two months. And where
29 that happens, the President would be bound to revoke the proclamation immediately because
30 the proclamation cannot continue in defiance of the wheel of either House of Parliament
31 without destroying the collective responsibility of Council of Ministers to the House.' This is
32 the contention. 'It was also urged that during the period of two months no power can be
33 exercised in virtue of the proclamation, which would bring about a final and irrevocable
34 consequence if the President has reason to believe that either House of Parliament may not
35 approve it, or also the control of the House of Parliament would be completely set at naught,
36 an Executive would be able to take irreversible action like dissolution of Assembly by passing
37 both Houses of Parliament and ignoring their decision...'

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CHIEF JUSTICE DY CHANDRACHUD: State of Rajasthan somewhat affected by the subsequent decision in *Bomma*?

TUSHAR MEHTA: Yes, My Lord.

CHIEF JUSTICE DY CHANDRACHUD: Because Rajasthan was '77. That was when Mr. Charan Singh wrote the letter to him and..

TUSHAR MEHTA: *Bomma*. It comes My Lord, subsequently.

CHIEF JUSTICE DY CHANDRACHUD: I thought that Rajasthan is substantially diluted by *Bomma*.

TUSHAR MEHTA: It is My Lord, that part I'm going to read.

CHIEF JUSTICE DY CHANDRACHUD: Yes.

TUSHAR MEHTA: My Lord, therefore, I have put it chronologically so that Your Lordship gets everything at one, in one document, without shuffling.

KAPIL SIBAL: This is not the majority decides. This is Justice Bhagwati's decision, not the majority.

CHIEF JUSTICE DY CHANDRACHUD: In Rajasthan.

TUSHAR MEHTA: Majority I can show My Lord. This is a better verdict from my point of view, majority says the same thing. I'll show those paragraphs tomorrow. Let's not give off the cuff answer, 160, if I'm sorry My Lord let me not give, I'll put it that way. It would be clear from this discussion that when a proclamation is issued by the President....

CHIEF JUSTICE DY CHANDRACHUD: [UNCLEAR]

TUSHAR MEHTA: Same, same judgment. Para. 146, I'll ...I'm not reading, but I'll give the majority also saying the same thing, but wording wise, I found this to be matching my submissions more. It would be clear from this discussion that when a proclamation is validly issued by the President, under Article 356, Clause 1, it has immediate force and effect, the

1 moment it is issued and where by proclamation the President has assumed to himself, the
2 powers of the Government, Governor under Sub-Clause A, he is entitled to exercise those
3 powers as fully and effectively as the Governor during the period of two months, when the
4 proclamation is in operation. There is no limitation imposed by that, by any article of the
5 Constitution, that these powers of the Governor can be exercised by the President only when
6 they have no irreversible consequences and where, they have such consequence, they cannot
7 be exercised, until the proclamation is approved by both Houses of Parliament. My Lord, here
8 in this case I must add, they are approved also, when the decision was taken, by both the
9 Houses on all occasions. Whilst the proclamation is enforced during the period of two months,
10 the President can exercise all the powers of the Governor assumed by him, and the Court
11 cannot read any limitations, which would have the effect of cutting down the width and
12 amplitude of such powers, by confining their exercise only to those cases where no
13 irretrievable consequences would ensue, which would be beyond repair. When any power of
14 the Governor assumed by the President under the proclamation, the President can, during the
15 two months when the proclamation is enforced, do whatever the Governor could in exercise
16 of such power, and it would be immaterial whether the consequence of the exercise of that
17 power is final and irrevocable or not. To hold otherwise would be to refuse to give full effect to
18 the Proclamation, which, as pointed out above continues to operate with full force and vigour
19 during the period of two months. It would be rewriting Article 356, and making approval of
20 both Houses of Parliament a condition precedent, to the coming into force of the proclamation,
21 so far as the particular power is concerned. Now, now kindly see only the bold part. It is true
22 that once the Legislative Assembly of the State is dissolved by the President, in exercise of the
23 power assumed by him under the proclamation, it would be impossible to restore the *status*
24 *quo ante*, if the proclamation is not approved by both houses of Parliament, but that is the
25 inevitable consequence flowing from the exercise of the power which the President
26 undoubtedly possesses during the time that the proclamation is in force. Then again My Lord,
27 only the bold part. It is therefore not possible to accede. Rest I'm not skipping because it's
28 against me. I am skipping because I am in hurry. If Your lordship would like me to read, I can
29 read everything it is therefore not possible to accede to the argument of the petitioner in the
30 writ petitions that during the period of two months before approval of the proclamation by the
31 two Houses of Parliament, no irreversible action such as, dissolution of the assembly of the
32 State can be taken. The power to dissolve the Legislative Assembly of the State cannot also be
33 denied, to the President on the ground, that the proclamation may not be approved by one or
34 other House. In the first place, the existence of a constitutional power or the validity of its
35 exercise cannot be determined by reference to a possible contingency. The Court cannot enter
36 into the realm of conjecture and surmises and speculate, as to what would be the position at
37 the expiration of two months, whether the proclamation will be approved by both Houses of

1 Parliament or not? Secondly, it is entirely immaterial whether or not the proclamation is
2 approved by both Houses of Parliament, because even if it is not so approved, it would
3 continue to be enforced and effect for a full period of two months her or not the proclamation
4 is approved by both Houses of Parliament, because even if it is not so approved, it would
5 continue to be enforced and effect for a full period of two months. This is diluted in **Bomma**,
6 **S.R. Bommai**. Please come to page 150. Next page My Lord, Justice Sawant and Justice
7 Kuldip Singh judgement.

8
9 153 are the summary of conclusions. On this point it is conclusion number IV. Roman 4. Since
10 the provisions contained in Clause 3 of Article, am I with Your Lordship? Justice Kaul My
11 Lord. Page 150. Since the provisions contained in Clause 3 of Article 356 are intended to be a
12 check on power of the President and the Clause 1 thereof it will not be permissible for the
13 President to exercise powers under subclause A, B, and C of the later Clause to take irreversible
14 actions till.. Please, please mark this. This the only dilution and this is the only limitation. Till
15 at least both the Houses of Parliament have approved of the proclamation and this is definitely
16 the majority. So here when the actions which are impugned were taken, they passed the muster
17 thrice. The proclamation passed the muster thrice. Then Justice Pandian, I find myself in
18 agreement with the opinion of Justice Sawant on his conclusion 1,2 and 4 to 8 with which
19 Justice B P Jeevan Reddy concurs in his judgment. So this becomes the majority view and last
20 Justice Jeevan Reddy and Justice Agarwal. In light of the reasons given and conclusions
21 recorded here in above, we find ourselves in agreement with conclusions 1, 2 , and 4 to 7. In
22 the judgment of our learned brother Sawant, Justice Sawant, delivered on behalf of himself
23 and Justice Kuldip Singh. We are also in broad agreement with conclusion Number 8. Then
24 **Badrinath** is the last judgment. I'll read only the first part para 25. When an elected... My
25 Lord Your Lordships have that?

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

28
29 **TUSHAR MEHTA:** My Lord. Justice Gavai? Page 150 when an elected government is not in
30 office, the orders of the Governor under Article 356(1)(a) as an agent of the President of India
31 are equivalent to the orders that might have been passed by an elected government in office
32 and the Governor's order had to be given effect fully and could not be ignored either by the
33 executive or by UPSC, etc. Kindly come to My Lord, one paragraph in **S.R. Bommai** at page
34 152 Justice Jeevan Reddy's exposition on this at page 153. I'm not reading the rest. Your
35 Lordships may... it gives what happens when 356 is implemented. Then at 153 4th line from
36 the top. My Lord Justice Surya Kant and Justice Gavai has that? I am on page 153. 4th line
37 from the top. Coming to Sub-Clause B. Justice Gavai gets it? Coming to Sub-Clause B. When

1 it speaks of the powers of Legislature of the State being made exercisable by Parliament, or
2 under its authority, it cannot and does not mean or imply dissolution of the Legislature of the
3 State. It is significant to note that the subclause refers to Legislature of the State and not
4 Legislative Assembly. In a given state, the legislature may consist of Legislative Assembly as
5 well as Legislative Council. In such a case, there can be no question of dissolving the Legislative
6 Council since it is continuing body. Only the Legislative Assembly can be dissolved. In words
7 there cannot be... there can be no question of dissolution of legislature of the state. The
8 expression employed in Clause B. The question may then arise. Why was Sub-Clause B put in
9 and what does it imply? Because entire legislation is not being dissolved. Only assembly is
10 being dissolved. And the Court answers. The answer must be that when the Government of the
11 State is dismissed or removed from House, the Legislative Assembly cannot function normally.
12 It is difficult to visualize a Legislative Assembly or for that matter legislature, functioning
13 without a Council of Minister, i.e. Government.

14 Thus, where the Government of a State is dismissed or removed from office, here, resignation.
15 The Legislature of the State becomes, *ipso facto* unworkable. It is for this reason that Sub-
16 Clause B, provides that powers of the Legislature of the State shall be exercisable by or under
17 the authority of Parliament. The best exposition of Sub-Article B. So these are my respectful
18 submissions My Lord. But I'm immensely grateful, very patient hearing My Lord. And it's
19 always a learning experience, My Lord, before Your Lordships.

20

21 **CHIEF JUSTICE DY CHANDRACHUD:** Thank you Mr. Solicitor.

22

23 **TUSHAR MEHTA:** My Lord, I wanted to read the concluding speech of Dr. Ambedkar, at
24 the conclusion of the Assembly. But if time permits at the end I'll read for 5-7 minutes. It's a
25 beautiful speech at the end of the... Not right now, not coming in the way of...

26

27 **ATTORNEY GENERAL R. VENKATARAMANI:** It's very hard, since while I was trying
28 to read late at night through my iPad still scribbling on the paper and then making some notes.
29 It's more than 61 years ago, we had a... If Your Lordships recollect, I had given my two sets of
30 written submissions. Where is that at volume... Detailed written submissions, which is at
31 volume 4. I don't propose to read at length, with some essential aspects which are thoughts
32 and supply by way of addition to the arguments made before Your Lordships.

33

34 **JUSTICE SANJAY KISHAN KAUL:** Which volume...?

35

36 **ATTORNEY GENERAL R. VENKATARAMANI:** I do that. This is Volume 4, PDF .. It's
37 at page... it's a separate written submission on behalf of the Attorney General for you.

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CHIEF JUSTICE DY CHANDRACHUD: That's Volume 4.

ATTORNEY GENERAL R. VENKATARAMANI: That's right and then I handed over a two page note in the last occasion, was a summary of my submission.

CHIEF JUSTICE DY CHANDRACHUD: Your opening arguments?

ATTORNEY GENERAL R. VENKATARAMANI: Yes...

[NO AUDIO]

ATTORNEY GENERAL R. VENKATARAMANI: 61 years ago we had *Puranlal Lakhanpal* wanting to...

JUSTICE B.R. GAVAI: [UNCLEAR]

TUSHAR MEHTA: Not a very good compliment for me.

CHIEF JUSTICE DY CHANDRACHUD: Brother Gavai, was worried you know, because he noticed that the same position persisted for 30 minutes.

TUSHAR MEHTA: Fortunately for me, he was the only one.

ATTORNEY GENERAL R. VENKATARAMANI: In continuation of my summary. Your Lordships have been taken through the whole historical narrations. And in matters like this, it's very difficult to capture their entire history. Through a list of days narration we want to communicate to the court, what exactly happened for a period of five weeks, momentous years before 1950. And they convey only a very telescope point of view, and a large amount of literature which is available to us, how this momentous process took shape. A variety of efforts and engagements, ideas and conglomeration of thought, but by and large, but the history has been brought open for Your Lordships. But for the narration of history, the understanding of not only Article 370, but with the constitutional integration process would have been incomplete, and that's why the detailed list of date narrations to the learned Solicitor, occupies an important space. Now they said 61 years ago, *Puranlal Lakhanpal* wanted to contest an election. Now his dream has come true, he can contest an election in Jammu and Kashmir, he had to wait for 61 year, for all of us. All of us are Puranlal and Lakhanpal in a way. So these are

1 grand contribution to what one may say, but there's very significant historical constitutional
 2 process that has taken place in the history of India. Now why do we have to look at the
 3 historical narratives, is that, of course, both sides would like to place a certain perspective, on
 4 why a certain course of event, alone are important. If you look at the constitutional integration
 5 process, the rest of the country and compare it to the constitutional integration of J&K, the
 6 historical narratives show that there is no fundamental distinction at all. The political
 7 compulsions which happen in the context of J&K, made a very slight deviation. And that
 8 deviation is again I would call, a formalization of the principles and the procedures for
 9 integration. Article 370 is nothing but the outcome of the formalization of the principles and
 10 the procedures for integration, while the rest of the country had gone through all the process.
 11 Union of States, merger of small Union Territories, and the idea of a concept in assembly and
 12 framing a Constitutional, all that process have gone through. But since there was little
 13 intervention, which is a political historical fact, Article 370 are to intervene. And if you try to
 14 attribute to Article 370 any other purpose or intent, then I think we're fundamentally
 15 mistaken. So we are asked to go back. I would probably ask Your Lordships to go back to 1949,
 16 1950 and look at from the point of those who engage in praying[UNCLEAR] Article 370 and
 17 with the visualization as to what would happen soon thereafter to the integration clause of
 18 Article 370. Instead of that we are sitting today, almost 60-70 years later, and trying to imagine
 19 into Article 370, what contemporary context want us to imagine. I say that imagination, to a
 20 large extent is forbidden. So we are to look at it from the text and context and the intent and
 21 content of Article 370. Let me quickly formulate my understanding about Article 370, I don't
 22 propose to read in extent so many of the judgments which have looked into Article 370. If Your
 23 Lordships just kindly turn to my written submissions. ..Page PDF, Internal page 27 of my
 24 written submission. And please turn to before that page 30, paragraph nine.

25

26 The three dimensions of Article 370.

27 a). Your Lordships have that page?

28 a) Enabling Parliament to legislate in respect of matters in para 1 and 2 of Sub-Clause(b) of
 29 Clause 1 of Article 370.

30 b). Application of the provisions of the Constitution of India, subject to exceptions and
 31 modification Clause [UNCLEAR] Article 370 and

32 c) Termination of the role of Article 370 under Clause 3 of the Article 370.

33 These are the three dimensions. Then the requirements of consultation, concurrence, and
 34 recommendation as the case may be, or the processes to be followed by the President. And I
 35 think for the purpose of our understanding is unnecessary to go into the question of
 36 concurrence and consultation, etc and the distinction but since you're debating on the proviso
 37 to Clause 3 of Article 370 as a Recommendation Clause, we need to place some attention to

1 that. In my understanding, kindly see the old exceptions, modifications, additions, changes,
2 power is I think, virtually available in the entire spectrum of the Constitution of India in
3 different contexts and for different purposes but more prominently when it comes to the 5th
4 and 6th Schedule the legislation making power of the Governor has been noticed by this court
5 on more than one occasion and I place only one recent judgment. Kindly turn to page...
6 Paragraph 10 at page 30. This is a Constitution bench judgment on the powers of the Governor
7 under a 5th Schedule. Paragraph 39 at page 30. It begins at page 30. Your Lordships may skip
8 forward to the next page and turn over to page 32. Middle of that page 32. There is a sentence
9 beginning, 'the extent of the legislative power of the Governor... the extent to the legislative
10 part of the Governor under Section 92, the Government of India Act 1935, in making the
11 regulations for the peace and good government of any area conferred the Governor is the word
12 of Lord Halsbury and at most discretion enactment for the attainment of object. Pointer two.
13 In that case a word which felt a consideration [UNCLEAR] legislative committee by the power
14 of Parliament of Canada to make provisions for the administration, peace or and good
15 governance for any territory not for the time being included in any province. It contended that
16 if any legislation differs from the provisions in England have been made, that the
17 administration of Petrod and good governance the same could not be sustained as
18 valid. That contention was not accepted.'

19 Then kindly turn over to the next page, Page 33. The sentence beginning, 'applying the law'...,
20 the middle of the paragraph. 'Applying law to an area is making regulations which are laws so
21 that the power to apply laws is inherent when there is a power to repeal or amend any act or
22 any existing law applicable to the area in question. The power to apply laws really, to bring
23 into legal effects sections of an act achieve the same act had been amended, enacted in the
24 entirety. Application of laws is one of the recognized forms of legislation. Your Lordships will
25 find an Article 370. The application principle is virtually distributed in Article 370. I just press
26 [UNCLEAR] you read that. So the application principle of [UNCLEAR] recognise forms of
27 legislation. Therefore, I would probably say that Article 370 conferring power in the President
28 is not in the nature of an executive power of the President. The executive head is conferred a
29 legislative power. A very extensive and wide power. If I were to modify a parliamentary law,
30 the power to subject a Constitution to modification is a very vast power and is conferred in the
31 President, not as an executive head. And therefore, in order that President is enabled in
32 exciting that power. We have only those processes to be followed. Concurrence and
33 consultation. So if the scheme was to have a provision to facilitate an aid.

34

35 The Constitutional Integration processes. We need all that to put in place. The comfort and
36 the aspirations also to be, not to be compromised. And therefore, you are a concurrence under
37 consultation.

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JUSTICE SANJIV KHANNA: Mr. Attorney, if we accepts that position, is something which we put to the other side what has been the practice and the convention is something different.

ATTORNEY GENERAL R. VENKATARAMANI: That factor in fact, goes from what the President is expected to do in order to complete the process of integration. The Constitutional integration process. It is not linearly, unilaterally flow from the deliberations into the Constituent Assembly of J&K. It was not the sole authority. Yes.

JUSTICE SANJIV KHANNA: We understand your argument to the extent that there were conflicting views expressed in the Constitution Assembly which is quite you have pointed out or what was pointed out. And what we have today is Article 370, as it stands in the Constitution. So we have to interpret that and apply that.

ATTORNEY GENERAL R. VENKATARAMANI: Yes. Kindly now turn to page 36. But we try to understand if this is a constitutional integration process. And the Constituent Assembly at J&K will play a role in the Constitutional Integration process. Now how do you really make that happen? So I said the two important elements of 370 enable you extending the provisions of the Constitution on the one hand. And enabling Parliament to legislate in the mean while, as the Assembly is in the process of drafting a Constitution for the State of J&K. Very essentially important steps of Parliament in the meanwhile, will legislate for the State of J&K. And the extension of provisions and Constitution are equally important. These are two limbs, important limbs. These are the two important limbs in the hands of the President and a terminus point will arise at some point of time. I try to imagine that if Article 370 did not have Clause 3, at all. It's impossible to think of a provision like this without a terminus point. If it is not to serve a perpetual aid and advise positions for the State of J&K through exchanging periodically for what happened over a period of time is what the President has done is where you are updating various provisions of Constitution into by issuing various Constitutional Order. The updating exercise went on till recently. Beyond the C.O. of 54 and 1965, by which time the majority and important provisions of the constitutional external state of J&K. Beyond that, except in two occasions, it become contentious. They are really updating exercises. So if Article 370 was to be conceived as a permanent updating exercise, one would have wondered why it should have come at the time of enactment of the Constitution or Constitutional integration of J&K. It could take an entirely different shape. So that was certainly not the intention. So if a terminus point has to be, has brought in, and that power has to be necessarily lesser than the President. Now Article 370 begins with a non-absentee Clause. I understand notwithstanding anything in this Constitution also, our Article 368. Anything done within the

1 scheme of Article 370, anything and everything done by the President. Doesn't admit of any
2 role for Article 368. So therefore, when Article 368 does not come into the scheme of the
3 Constitution, the argument that during a President's Rule under 356, you could not have
4 probably taken any which way reversible or irreversible without treading the part of Article
5 368 in this conceit.

6

7 The realistic understanding of Article 370, was to complete a scheme, let's say at one level,
8 enactment of the Constitution of J&K to the deliberation, the Legislative Constituent Assembly
9 and it must come to an at that point of time. And if it came to an end by the point of time,
10 because Section 3 and 5, virtually captured the essence of Constitutional Integration, nothing
11 more will require to be done after Section 3 and 5, becoming the part of the constitutional
12 document. It hardly matters that whether you call it today as a Constitution, we not get into
13 the question at all. Therefore, if the integration [UNCLEAR] contemplated came to an end by
14 enactment of Section 3 and 5 of the Constitution of J&K, that's at one level, at a different level.
15 If Thereafter President is issued various orders in excise of Powers and Article 370(1)(d). And
16 if I'm right in saying they're all essentially updating order, except those two controversial
17 orders. where Article 35 [UNCLEAR]. I asked myself a question either President precluded,
18 from taking stock off all that has happened under Article 370 (1)(d). And say, what shall I do
19 with it today? That today can come at any point of time. There is nothing therefore, in the
20 scheme of Article 370, enabling or injuncting the President, take this, ask this question. She is
21 entitled to ask this question any point of time, at any given point of time, either a figure will
22 facilitate and enable the person take stock in the whole situation. So C.O.s 272, 273 which are
23 preceded by stock taking authority of the President, the President has taken stock or whether
24 what shall I do with Article 370. Should it continue or should it be called to absurd his purpose
25 and terminate it? If that authority or the President is untrammelled, the measures taken by
26 the President to deal with, looking for aid and assistance measures in terminating it, coupled
27 with, what the Parliament ultimately did, in dealing with a very vast question of bringing peace
28 and restoration[UNCLEAR] to State of J&K. We are trying to tell Your Lordship, that
29 justiciability probably will not come. Now, let me try to understand why the J&K the
30 Constituent Assembly was given only a narrow power of recommendation? Well, yes. It was
31 necessary to have the recommendation taken from the Constituent Assembly, but necessity
32 does not enlarge the scope of the role given to the assembly, which is a very narrow, narrow
33 role, namely, a recommendation role. I would probably be able to argue that if the Assembly
34 having dissolved itself, the proviso probably would have expired or is old. It's no longer
35 operative. It is no longer operative. It cannot be operated at all, then can you say as, the tail
36 cannot wag., et cetera, Although it is figurative metaphorical. But what I mean say is the
37 President lose, the authority and power available in the Article 370, Clause 3, to bring to a

1 close, the entire scheme of Article 370. I would say the President has not lost that power, in
 2 the Presidential poll case, question was, whether by reason of the fact that the Gujarat
 3 Assembly was resolved, at presently play [UNCLEAR] that citation. Gujarat Assembly was
 4 resolved and for the conduct of the elections of the President, the Electoral College is
 5 incomplete and the election will be complete in a certain period. That's a mandate of the
 6 Constitution, but you can't do it now, because Your Lordships in a 140 reference said, if the
 7 mandate of holding an election within a period, now becomes impossible without a Electoral
 8 College being available there, does not relieve the mandate from being complied with. So
 9 therefore in certain circumstances, certain what's called facilitating or what would be what is
 10 called the recommending role of the assembly is just not available, the President's authority
 11 under Article 370 (3) can operate without any further assistance from any other authority. The
 12 President could have said under Article 370(1)(d), precisely what has happened here. He did
 13 not require any further assistance from any other authority but by way of abundant caution in
 14 continuation of what happened earlier under Article 370(1)(d), we followed, the President
 15 followed the same footsteps now. Substituting Legislative Assembly in the place of the
 16 Constituent Assembly. So whatever gap... a suggested gap is perceived. President says, now,
 17 I'll fill that gap. There are several situations when such conditions, precondition or
 18 performance cannot be performed is called the doctrine of impossibility. So therefore the
 19 performance is not relaxed. [UNCLEAR] performance will still be done. The conditions may
 20 be ignored. So therefore if following an earlier precedent of Article 370(1)(d) invocations, we
 21 had the substitution of Legislative Assembly in the place of Constituent Assembly. The
 22 President follows suit. Please also bear in mind when...

23

24 **JUSTICE SANJIV KHANNA:** When you referred to Sub-Clause (d) to Article 370 (1) to the
 25 Government of the state. Now if one has to take the concurrence of the government of the
 26 state... Clause 3 of Article 370 as giving complete and absolute power to the President could
 27 be virtually going against the entire object and purpose of enactment because otherwise Clause
 28 D, and the proviso says concurrent State. [UNCLEAR] becomes a formality. When we read
 29 that article, when we read Clause 3 to Article 370. We have to, we cannot ignore the Article
 30 370 Clause 1, Including D and the proviso.Not to the Sadr-e-Riyasat, but Council of
 31 ministers. Governor with the Council of Ministers.

32

33 **ATTORNEY GENERAL R. VENKATARAMANI:** Let me try to look at it for that.

34

35 **JUSTICE SANJIV KHANNA:** So if you're going to read Clause 3 of Article 370 in isolation
 36 without reference to Clause, Sub-Clause (d) to Article 370 (1) and then argue that this absolute

1 power given or absolute because there's an integration which has to be done. Will it not be...
2 Will it not be in conflict with or not be in terms of the entire purport of the article?

3

4 **ATTORNEY GENERAL R. VENKATARAMANI:** The perceptions about if conflicts are in
5 because we are dealing with a provision which was meant to work during a certain period and
6 during the period how it should have worked. And since I had crossed that period we have all
7 these questions which are apparently in conflict. So that's why if you go back to a period prior
8 to 1957 and imagine what would have happened if the Constituent Assembly had
9 recommended to the President to dissolve to delete Article 370 partially or fully. Question
10 would have been entirely different. So because it did not happen. We have to put in position a
11 certain understanding has to make it...or give it a meaning and context. Still ultimately,
12 President takes stock on that. So that giving meaning and context relevance will flow from
13 what has happened over a period of time and what the President can ultimately do in our
14 understanding of the roles and relevance of Article 370. And that's the most... That's the most
15 fundamental thing. If the role in relevance of Article 370 regardless of it's exercise over a
16 period of time, is clearly understood by the President now, then by what other normative
17 yardstick about the relevance of Article 370, will the Court judicially scrutinize, the exercise of
18 power by the President today?

19

20 **JUSTICE SANJIV KHANNA:** Even if he... but in this case, is there any President's
21 proclamation exercising power under Clause 3 to Article 370, saying that I'm abrogating
22 Article 370?

23

24 **ATTORNEY GENERAL R. VENKATARAMANI:** I'll just come back. Can I come back to
25 it by after reading some part of, in the line of my presentation? Kindly come to, let me complete
26 this and come to Your Lordship to answer Your Lordship's question. Page 36 of my written
27 submission, talking about paragraph 12. We're talking about the recommendation role. I
28 would just want to finish that part of the argument and then try to come back to this. Kindly
29 turn to page 36, paragraph 12. Because if I try to extol the recommendation role beyond the
30 certain level then we are rewriting Article 370. So, the recommendation role is a very minimal
31 role. And how is it been understood in different contexts?

32

33 **CHIEF JUSTICE DY CHANDRACHUD:** The recommendation...Does a recommendation
34 postulate a positive recommendation or does it mean just any of the...?

35

36 **ATTORNEY GENERAL R. VENKATARAMANI:** It is an advice. It's an advice. It's an
37 advice to facilitate and enable the President to find as to see whether Article 370 has served

1 it's purpose and to close it. The very Clause 3 of Article 370, is to render article 370 inoperative
2 in that context...

3

4 **CHIEF JUSTICE DY CHANDRACHUD:** Suppose there is a Constituent Assembly. We'll
5 not go into this issue of the Constituent Assembly and the Legislative Assembly. And the
6 Constituent Assembly recommends to the President, do not abrogate Article 370. Is it open to
7 the President, then to override the advice?

8

9 **ATTORNEY GENERAL R. VENKATRAMANI:** That power of recommendation is
10 available to the Consequence Assembly. The Assembly has to only recommend the President
11 in regards to rendering Article 370 inoperative. The President seeks that advice for the
12 Assembly. The Assembly will not say I have my different thinking on Article 370, and I'll ask
13 you to retain 370 the way we want it. So therefore the advisor...

14

15 **CHIEF JUSTICE DY CHANDRACHUD:** Recommendation is not just an opinion when
16 the Constitution uses the expression recommendation, it means a positive decision because
17 Article 370 uses different phrases. It uses consultation, it uses concurrence. It uses decision.
18 And it uses recommendation.

19

20 **ATTORNEY GENERAL R. VENKATARAMANI:** Chief Justice is right. So therefore, the
21 use in Article 370 of all these distinct expressions, concurrence , consultations and their
22 context. So therefore recommendation is in the entirely distinct idea altogether.

23

24 **CHIEF JUSTICE DY CHANDRACHUD:** Idea containing that even if the Constituent
25 Assembly were to say that, please don't abrogate 370. The President can still Abrogate 370?

26

27 **ATTORNEY GENERAL R. VENKATARAMANI:** She can. She can. Recommendation is
28 not binding on the President. Therefore, it is recommendation. It is not concurrence. So
29 concurrence for the purpose of...Concurrence for the purpose where you get the provisions of
30 the Constitution extended. Stands a different [UNCLEAR] altogether. Consultation where the
31 Parliament will enable to enact during that period. Consultation. So recommendation occupies
32 that it comes at the end of the day when all the parties have understood that the job of 370 is
33 done. What shall I do? The President says, let me know what I shall do now. I want to probably
34 say I've taken stock of all the Presidential Orders issue. The constitutional integration process
35 is over. Now, is there anything left by way of invoking Article 370 or extending the provisions
36 of the Constitution of India to J&K? That question will have to be necessarily asked. When that
37 question is asked, what is the role of the Constituent Assembly? So if the 370 Act envisage a

1 larger role that would have defeated the very purpose of Constitutional integration therefore,
2 the only relevance Your Lordship...

3

4 **CHIEF JUSTICE DY CHANDRACHUD:** The use, Mr. Attorney, the use of the expression
5 recommendation is not by itself dispositive of the content of the expression as to whether it is
6 merely an advice, whether it is a condition to see them. I'll give you two examples, see, there
7 are two examples, when the Constitution, where the word recommendation is used. Article
8 109 and 117. Article 109 deals with Money Bills. A Money Bill, after it is passed by the, is not
9 introduced in the *Rajya Sabha*. Always introduced in the *Lok Sabha*. After the bill is passed
10 by the *Rajya Sabha*, I'm sorry by the *Lok Sabha*, it is transmitted to the *Lok Sabha* to the
11 *Rajya Sabha*, recommendation. Those recommendations are not binding on the *Lok Sabha*.
12 It may either accept them, it may accept them in part, it may reject them. That is what Article
13 109 says. So in Article 109, 109(2). See, the way it is worded. The recommendation of the *Rajya*
14 *Sabha* doesn't bind the *Lok Sabha*, on a Money Bill. Now See 117, and 117 says, that a Money
15 Bill cannot be introduced except on the recommendation of the President. See 117. A Bill or
16 Amendment making provision for any of the matters specified in sub-clauses A to F of Clause
17 1 of Article 110. I'll go to 110 in a moment, shall not be introduced a move except on the
18 recommendation of the President. Now in Article 117, the same word is used, unless
19 recommendations. Recommendation is mandatory. You can't move a Money Bill unless there
20 is a recommendation by the President. Now comes 370, there are many other provisions of the
21 Constitution. I think if I'm not mistaken in my dissent in *Aadhar*, I'd analyse those provisions
22 of recommendation. Now see 370, it says provided that the recommendation of the
23 Constituent Assembly of the State...

24

25 **ATTORNEY GENERAL R. VENKATARAMANI:** Shall be necessary.

26

27 **CHIEF JUSTICE DY CHANDRACHUD:** Shall be necessary before.

28

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

30

31 **CHIEF JUSTICE DY CHANDRACHUD:** Shall be necessary and before. So it's a condition
32 preceding and a condition in terms of time, it can't be post-facto recommendation. It has to be
33 before, what's the reason for it there has to be a recommendation by the Constituent Assembly
34 for the abrogation of Article 370, and second that recommendation has to be before, the
35 President decides to abrogate it. Therefore, to say that this recommendation is just an opinion,
36 it's not binding on the President...

37

1 **ATTORNEY GENERAL R. VENKATARAMANI:** My submission is not to slight that
2 recommendation, though, but I say it's still only a recommendation. Let me try that way... the
3 necessity of having a recommendation does not add any further content to the role of
4 recommendation, there is a procedure which is required because during the Constitution
5 integration process..

6

7 **CHIEF JUSTICE DY CHANDRACHUD:** So your contention is that you have to have a
8 recommendation and it's not binding. It may be a positive or negative recommendation. The
9 President can override whatever is said by the Constituent Assembly.

10

11 **ATTORNEY GENERAL R. VENKATARAMANI:** No, the reason why therefore, whatever
12 call a minimal role of recommendation given to the Constituent Assembly, is in the context of,
13 1) the scheme of [UNCLEAR] and that being part of the larger integration process can a body,
14 like the Constituent Assembly of J&K can have a final say on Article 370. It is not a constituent
15 body of a Parliament of India, it doesn't have all that attributes and powers. So the
16 recommended role has been assigned in the contract keeping in mind that once the
17 constitutional integration process is completed, in understanding of all the parties involved
18 there has to be a terminus. And to bring the terminus to a complete.. completion, then the role
19 of recommendations assigned. Are there is a Constituent Assembly would have been probably
20 given the power, the consultation, concurrent and why State Government coming into Article
21 370 at all, so it's only at the end of the day when you have done all that job. It's a stock staking
22 exercise, and it must be probably envisaged that you will do it before the constitutional
23 integration process gets over.

24

25 **CHIEF JUSTICE DY CHANDRACHUD:** What is a sequitur? Are you therefore contending
26 that, therefore this is purely recommendatory. Therefore, the absence of a recommendation
27 also doesn't make a difference is that the submission or what is the submission?

28

29 **ATTORNEY GENERAL R. VENKATARAMANI:** I'll personally try to address this
30 question. That's only when...

31

32 **CHIEF JUSTICE DY CHANDRACHUD:** 103(2) Yes...

33

34 **DINESH DWIVEDI:** There are different qualifications. Wherever they want, that opinion
35 or recommendation should be acted upon it will be referred to the Commission. Commission
36 will give an opinion, and then it says and shall act according to such opinions which is missing
37 in...

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TUSHAR MEHTA: Just My Lord my notes I have mentioned. I didn't read it, but the President of India being bound solely by a body which is outside the Constitution of India. My Lord may perhaps not be the correct interpretation of our Constitution. That if it says yes, he can do it, if he says no President cannot do it. The Constitution of Jammu and Kashmir is beyond and outside our Constitution.

CHIEF JUSTICE DY CHANDRACHUD: : Clause D does the same thing. It says that other provisions is a Constitution can be adopted, subject to such modification and exceptions. If they relate to the Instrument of Accession consultation, anything else, Concurrence...

TUSHAR MEHTA: Of the State government and not Constituent Assembly.

CHIEF JUSTICE DY CHANDRACHUD: But then if the Constituent Assembly was not in existence, then it has to placed before the Constituent Assembly for a decision. That means, even in the case of the operation of Clause B, read with subsection with Clause 2 the Constituent Assembly is given the overriding power, even in relation to the President,

TUSHAR MEHTA: Till it survives, till it..

JUSTICE KHANNA: See you can't say when the Constituent...when Article 370 itself refers to Constituent Assembly, you can't say that these Constituent Assembly is outside the Constitution. It's within the constitutional framework because it refers to it. Yes your argument that once the Constituent Assembly is no longer there, what will the position with regard to Clause C to 370 is something which we'll have to examine with reference to the procedure you have... with reference to because the judgments itself.. many of the Constitutional bench judgments itself says we are not examining that issue. We'll have to examine.

TUSHAR MEHTA: The worry is ... with permission of the learned...the worry is My Lords suppose this exercise would have been undertaken in 2007... in 57, when Constituent Assembly was in existence. Suppose it would have recommended that don't abolish or don't abrogate or apply with modification that none of the provisions of the Constitution of India were applicable, would be applicable or never apply fundamental rights with that modification. I'm putting a question to myself. The President of India will deluded of its power. Was it intended, that by recommending not to abrogate, it would become permanent.

1 **JUSTICE SANJIV KHANNA:** We have taken that argument, that proviso will no longer be
2 applicable after the Constituent Assembly is not there, but that will not deprive the President
3 of his power under Clause 3.

4

5 **ATTORNEY GENERAL R. VENKATARAMANI:** In other words, given the object role of
6 Article 370, is essentially and fundamentally a constitutional integration process. Anything
7 which emanates from the Assembly to the contrary as a way of negation to integration process
8 we forbid it under scheme of Article 370. You have a negation there.

9

10 **JUSTICE SANJIV KHANNA:** Mr. Attorney, you extended that argument. Therefore, the
11 questions arose. You extended the argument to say, recommendation is only means advice,
12 and even no advice, suppose the Constituent Assembly was as assuming that Constituent
13 Assembly was...

14

15 **ATTORNEY GENERAL R. VENKATARAMANI:** At equating..

16

17 **JUSTICE SANJIV KHANNA:** That part, the extension part is the one...

18

19 **ATTORNEY GENERAL R. VENKATARAMANI:** We have to probably understand the
20 context in which why this provision was at all enacted. The Constitution integration, it was
21 repeated by the only Mantra under Article 370. And everything around it revolves around it.
22 370 (1)(A). (B)...The Parliament is unable to legislate extension of provisions of Constitution.
23 They all revolve around this central theme.

24

25 **CHIEF JUSTICE DY CHANDRACHUD:** See the only thing is in relation to Jammu and
26 Kashmir. One thing is very clear from reading Article 370. It expressly recognizes the
27 Instrument of Accession. Categorical recognition of the Instrument of Accession in Article 370
28 itself. Second. A categorical recognition in Article 370 of the process of the formation of the
29 Constitution of the State of Jammu and Kashmir. Third, a categorical recognition of the status
30 of the Constituent Assembly of Jammu and Kashmir. So therefore, it's not that these were
31 instances which were taking place as a part of the real politic in that State. The IOA, the
32 Constituent Assembly, the Process of Constitution formation in Jammu and Kashmir. They
33 are expressly recognized in Article 370. It's a certain constitution recognition. It's not a
34 constitutional status, a constitutional recognition in Article 370.

35

36 **ATTORNEY GENERAL R. VENKATARAMANI:** I just want to enter a small query,
37 because the historical narrative about what happened in the rest of the country towards

1 constitutional integration. As I said, essentially the process of one and the same. Constitution
2 Assembly is changing to...

3

4 **CHIEF JUSTICE DY CHANDRACHUD:** You are right Mr. Attorney General, in the point
5 that this was an aid of constitutional integration. And as we see that integration was taking
6 place by and by from 1957, right through to 2019. So subjects which were completely excluded
7 to the Parliament were brought in within the purview of Parliament. That was also when the
8 clear understanding of the constitutional movement towards greater integration of Jammu
9 and Kashmir into the Indian... into the Republic of India and the Dominion of India originally,
10 then the Republic of India. So there was undoubtedly a gradual and imperceptible integration
11 apart from the unconditional accession to India, which we saw right at the outset in Article 3,
12 there's no difficulty about that. But the only point really is this that there are two ways of
13 looking at Article 370 (3). If the proviso can't apply, we keep 367 apart for a moment, if the
14 proviso to Article 370 (3) cannot apply, does that mean that the power under the substantive
15 part of 370 is completely denuded a loss?

16

17 **ATTORNEY GENERAL R. VENKATARAMANI:** No. The answer will be no. I'll try to
18 explain..

19

20 **CHIEF JUSTICE DY CHANDRACHUD:** And if that power is not lost, is it a unilateral
21 power, then which can be exercised by the President? What Parliament really did was this.
22 They didn't have a Constituent Assembly in the State of Jammu and Kashmir. There was no
23 Constituent Assembly. They were exercising this power to abrogate. They followed the 367
24 clause, obviously with an idea that in the absence of a Constituent Assembly, there's no
25 Legislative Assembly in the State. You go to Parliament, which in that sense represents the
26 bright diversity of...You have the Rajya Sabha, which is a Council of States, which represents
27 the overall diversity of the nation. You have the *Lok Sabha*, which consists of elected
28 representatives of the nation, but in that process there's one, I wouldn't say casualty, but one
29 dilution. And that dilution is the role which was ascribed by the provider to Article 370 (3),
30 now that role can as you are trying to, as you are trying to sort of elaborate, that's really merely
31 recommendatory. Merely because recommendatory does not mean that it can be dispensed
32 with because the Constitution provides for a recommendation where a Constitution provides
33 a recommendation. We can't say that, well, even if there is no recommendation, that's fine.
34 You can override it...

35

1 **JUSTICE SANJIV KHANNA:** Can I just add one thing? Sorry to interrupt. You see after
2 your amend 367, you say Legislative Assembly is equal to Constituent Assembly, we have to
3 take it to the logical[UNCLEAR] conclusion.

4
5 **TUSHAR MEHTA:** We've accepted that it exists. That's right but not only one question then
6 Your Lordship can consider this during this holiday. But suppose in 1957, at the time when the
7 Constitution was framed, Constitution of Jammu and Kashmir and the Constituent Assembly
8 was dissolving itself. Last speeches were made, etc. Suppose it would have said that now, in
9 exercise of our powers under 370, Sub article 3, we recommend the President, that the
10 Constitution which we have framed. We provide for a semi kind of monarchy. And now,
11 therefore, you delete 370. My Lord would it not go against the very spirit which with 370 was
12 incorporated? That it has to be temporary. And you are an integral part. Because 370. Sub-
13 Article 3, says, notwithstanding anything contained in the foregoing provision, meaning
14 thereby 1 and 2, Instrument of Accession and Article 1 being applicable. So Constituent
15 Assembly, technically was not bound by, 1 and 2. It could have said that then the President be
16 completely denuded and act as per the desire of the Constituent Assembly? It cannot be for
17 the simple reason that debates in the Constituent Assembly repeatedly say that this is a
18 temporary provision

19

20 **KAPIL SIBAL:** So that's why you can't...

21

22 **JUSTICE SANJIV KHANNA:** You don't have to refer to the debates...

23

24 **ATTORNEY GENERAL R. VENKATARAMANI:** That's why I said, there can't be a
25 negation principle. Read into the proviso, your principle of negation whittling down the entire
26 scheme of Article 370. You can't read it into the proviso.

27

28 **DINESH DWIVEDI:** [UNCLEAR] as Sheikh Abdullah wanted at that time [UNCLEAR].

29

30 **JUSTICE SANJIV KHANNA:** Mr. Dwivedi that answer is given in Article 370.

31

32 **DINESH DWIVEDI:** Had they proposed, then the President is not bound.

33

34 **JUSTICE SANJIV KHANNA:** That proposal is what will be contrary to Article 370.

35

36 **DINESH DWIVEDI:** That's right.

37

1 **ATTORNEY GENERAL R. VENKATARAMANI:** May I have Your Lordship's permission
2 in support of this submission reading material can be shared with....

3

4 **KAPIL SIBAL:** Kashmir is an integral part [UNCLEAR]

5

6 **ATTORNEY GENERAL R. VENKATARAMANI:** Some reading material can be shared
7 with Your Lordships and then.....

8

9 **CHIEF JUSTICE DY CHANDRACHUD:** Nothing in terms of reading material Mr.
10 Attorney.

11

12 **JUSTICE SANJAY KISHAN KAUL:** We have enough reading material.

13

14 **CHIEF JUSTICE DY CHANDRACHUD:** Now we will go by churning material which we
15 have at the bar. Because then in the rejoinder, we'll get in a couple of thousand pages. Mr.
16 Attorney, we only know what difficulty that provides at the end to us.

17

18 **ATTORNEY GENERAL R. VENKATARAMANI:** Coming through that I understand.

19

20 **KAPIL SIBAL:** [UNCLEAR]

21

22 **ATTORNEY GENERAL R. VENKATARAMANI:** These are some...

23

24 **JUSTICE SANJAY KISHAN KAUL:** You put that discipline on you because we realize
25 what could happen...

26

27 **ATTORNEY GENERAL R. VENKATARAMANI:** But what happened...

28

29 **KAPIL SIBAL:** [UNCLEAR] Sardar Patel.

30

31 **JUSTICE SANJIV KHANNA:** Mr. Sibal, you will have your chance.

32

33 **ATTORNEY GENERAL R. VENKATARAMANI:** I don't think this statement is necessary
34 at all. The reading is an excerpt from the book. Some thoughts come that how do you explain
35 internal sovereignty, how do you explain certain... it is useful I can certainly...

36

1 **CJI CHANDRACHUD:** One last word. Then we'll rise. Of course then we'll think of all that
2 you have argued for the holiday tomorrow, that the wide chasm between absolute autonomy
3 as it existed on the 26 January 1950, all right and complete integration, as it was brought about
4 on 5 August 2019, that chasm had been substantially bridged by what is happening in between.
5 So really in the sense it was not. It was not a complete migration from absolute autonomy to
6 absolute integration...

7

8 **TUSHAR MEHTA:** That become a shell My Lord..

9

10 **CHIEF JUSTICE DY CHANDRACHUD:** Whether you call it a shell or not.

11

12 **TUSHAR MEHTA:** Guljari Lal Nanda said.

13

14 **CHIEF JUSTICE DY CHANDRACHUD:** It is obvious that substantial degree of
15 integration had already taken place in the last between 1950 and 2009. 69 years and therefore
16 what was done in 2019, was it really a logical step forward to achieve that integration?

17

18 **DINESH DWIVEDI:** Absolutely. Integration was already 1950.... Only assimilation was
19 [UNCLEAR].

20

21 **CHIEF JUSTICE DY CHANDRACHUD:** They are interesting issues. They very interesting
22 issues, Mr. Attorney, about how long would it take? About half an hour?

23

24 **ATTORNEY GENERAL R. VENKATARAMANI:** Maybe an hour. Maybe an hour more.

25

26 **CHIEF JUSTICE DY CHANDRACHUD:** After that Mr. Dwivedi will take.

27

28

29

30

31

END OF DAY'S PROCEEDINGS