

**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**

-----  
TRANSCRIPT OF HEARING

28-August-2023  
-----

**Document Control**

<b>Document Name &amp; Date</b>	Transcript of WP (Civil) 1099 of 2019 Hearing dated 28.08.2023
<b>Status</b>	Released
<b>Version</b>	1.0
<b>Last Update</b>	28.08.2023
<b>Nature of Update</b>	Original version
<b>Release Date</b>	28.08.2023
<b>Document Owner</b>	Supreme Court of India

10:45 AM IST

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30  
31  
32  
33  
34  
35  
36

**KAPIL SIBAL:** My Lords, Zahoor Ahmad Bhat, the academic who came here and argued for a few minutes

**CHIEF JUSTICE DY CHANDRACHUD:** Yes.

**KAPIL SIBAL:** My Lords because he argued what he argued he was suspended from the faculty. On 25th August he took leave for two days, went back and then he was suspended on the 25th of August. These things should not happen in our country.

**TUSHAR MEHTA:** When I...

**KAPIL SIBAL:** I'm sure the AG will look at it.

**CHIEF JUSTICE DY CHANDRACHUD:** Mr. Attorney General just see what Mr. Sibal is saying.

**TUSHAR MEHTA:** I have checked up. My Lord, after having read in the newspapers

**CHIEF JUSTICE DY CHANDRACHUD:** Yes

**TUSHAR MEHTA:** I did check-up and of course, My Lord, the Advocate General is also here but what is reported in the newspaper may not be the whole truth, he files petition...

**KAPIL SIBAL:** It's not from the newspaper My Lords. The order itself 25th August, I've got the order with me.

**TUSHAR MEHTA:** Just a minute, allow me. There are other issues. He appears in various courts, and there are other issues also. We can place it before Your Lordships and...

**KAPIL SIBAL:** Then he should have been suspended earlier. Why? Why, My Lords?

**PETITIONER'S COUNSEL:** He gave written submissions.

**KAPIL SIBAL:** Written submissions, this is not fair. This is not the way that democracy should function...

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30  
31  
32  
33  
34  
35  
36  
37

**CHIEF JUSTICE DY CHANDRACHUD:** Mr Attorney General just see what has happened. Somebody who appears in this court is suspended...

**TUSHAR MEHTA:** That's not the [UNCLEAR] but we'll look into it. We'll...

**CHIEF JUSTICE DY CHANDRACHUD:** Have a look into it. Just talk to the

**ATTORNEY GENERAL R. VENKATARAMANI:** Without any doubt...

**CHIEF JUSTICE DY CHANDRACHUD:** Talk to the Lt. Governor and see what has happened. If there is something apart from this, that's different. But you know, why in such close succession to his appearing before us.

**TUSHAR MEHTA:** Certainly.

**KAPIL SIBAL:** 23rd he appeared, the order refers to this. He appeared here and then next day he was ...anyway, I just wanted to bring it to Your Lordship's notice, I'm sure the Attorney will use his good office as well as any...

**TUSHAR MEHTA:** Officers are here. It would be taken care of. It's not concerning this. Everyone has a right to appear before Your Lordships. It can never be by way of a retribution. There is something else My Lord, we will...

**JUSTICE B.R. GAVAI:** Mr. Solicitor, the close proximity between the arguments and the order...

**TUSHAR MEHTA:** Timing is definitely not proper. I bow down. I bow down, the timing is not proper. No argument on this.

**JUSTICE SANJAY KISHAN KAUL:** Timing and the reference to this aspect, if it is there in the letter. I don't know. I have not seen the letter. I do not know. But if the reference to his appearance here is there, then there is a little problem.

**JUSTICE B.R. GAVAI:** What happens to the so much freedoms in [UNCLEAR]?

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

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30  
31  
32  
33  
34  
35  
36  
37

**CHIEF JUSTICE DY CHANDRACHUD:** Yes, Mr. Solicitor.

**TUSHAR MEHTA:** My Lord, on Friday, on Thursday, Your Lordships desired what happened to other assimilation of other states. During the weekend, we have undertaken that exercise. The documents were available in the National Archives. And the officials of the Home Ministry went in National Archives. They studied everything and we have prepared a two page note for that. If Your Lordship allows, I can My Lords, immediately share it with others and...

**CHIEF JUSTICE DY CHANDRACHUD:** What you can do is since it was in response to a question of the Court, you can just ask the Nodal Counsel to make it a part of your submissions as an annexure so it won't get misplaced.

**TUSHAR MEHTA:** Correct.

**CHIEF JUSTICE DY CHANDRACHUD:** Make sure and circulate it to the other side as well.

**TUSHAR MEHTA:** My Lord, right now, would Your Lordships like to?

**CHIEF JUSTICE DY CHANDRACHUD:** Yes, yes. We can see it's right away. No problem.

**TUSHAR MEHTA:** I'll just, kindly allow me to send the mail. It is sent. It won't take more than, it is sent. It's in fact a one page note, My Lord. Not even, rest is My Lord list of states. So, we need not read the list. The figures would matter. Not the names.

**CHIEF JUSTICE DY CHANDRACHUD:** In the meantime, if you have it for my colleagues on...

**TUSHAR MEHTA:** My Lord, can I be permitted to circulate?

**CHIEF JUSTICE DY CHANDRACHUD:** Yes, no difficulty, We will see it. It will take two minutes.

**TUSHAR MEHTA:** One more. One more. One, I already said this is from National Archives, coupled with My Lord facts stated in the white paper. I'm sorry My Lords, some My Lords...

1 **CHIEF JUSTICE DY CHANDRACHUD:** [INAUDIBLE] now there on the... All the  
2 members of the bar will also get it on your screens in front of you actually.

3

4 **TUSHAR MEHTA:** It is now received.

5

6 **CHIEF JUSTICE DY CHANDRACHUD:** It is now on screen for everybody. Yes.

7

8 **TUSHAR MEHTA:** First is My Lord, we have said that this is combination of our research  
9 in the National Archives and white paper. Second, at the outset, it is necessary to clarify that  
10 the process of integration of princely states with Dominion of India and, or Union of India was  
11 not a linear process. The Merger Agreements and Instruments of Accession, along with  
12 proclamations, did not operate in a step by step manner for every state. They represented  
13 various means of integration of princely states with the country, the signing of either of  
14 Instrument of Accession or revised Instrument of Accession or Merger Agreement, or even a  
15 proclamation only, like Hyderabad state is sufficient for integration with Union of India.  
16 Therefore, the list of princely states which fall under Merger Agreements are separate from  
17 the list of princely states which are covered with Instruments of Accession or revised  
18 Instruments of Accession. Therefore, broadly there are two heads, princely states falling under  
19 Merger Agreements and princely states falling under Instruments of Accession, followed by  
20 proclamation. Under the first head, princely states falling under Merger Agreements the  
21 princely states were of two kinds; (a) princely states which merge with the existing Indian  
22 Provinces, My Lord, they were British controlled Provinces. And second princely states which  
23 merge with states as centrally administered areas. My Lord some of the princely states desired  
24 that we should be directly governed. Some of them were strategically so located that the...

25

26 **CHIEF JUSTICE DY CHANDRACHUD:** They became the Chief Commissioners

27

28 **TUSHAR MEHTA:** ...Chief Commissioners Provinces Your Lordships are right. The next  
29 category of princely states, My Lord, this is important, Table C, are the ones covered by the  
30 Instrument of Accession, Revised Instruments of Accession, followed by proclamations. The  
31 distinction between the two is of terminology and not of step by step linear process. As a large  
32 number of States directly signed revised Instrument of Accession without signing the  
33 proforma Instrument of Accession before that. Therefore the same is being clubbed and  
34 expressed as Table C. Princely states covered by Instrument of Accession or Revised  
35 Instrument of Accession and proclamation excepting Indian Constitution. It may be noted to  
36 the limited position emanating from the National Archives and white paper that these princely  
37 states did not sign any Merger Agreement. Then Your Lordships would come to the next page.

1 My Lord 1 to...page 1 is 1 to 32, then 33 to 65 then My Lord 66 to 77. Your Lordships have, My  
2 Lord? Please see My Lord, the States from Balasinor to Surgana where a part of one group  
3 which had a total of 144 States. They formed their own group. Therefore, My Lord they are 77  
4 to 140 then My Lord total comes to 204. So we have started with 205. It goes up to 216. Then  
5 provincially merged Khasi States. Khasi States were essentially in the northeast and they are  
6 241. Total My Lord are 241. Then if Your Lordship turns the page, this is Table B. Princely  
7 states which were merged with States as centrally administered areas. Then My Lord we have  
8 started with 242. It goes up to 302. We need not read the names. These were My Lord the  
9 States, which were centrally notified areas. Now My Lords may kindly come to para 7 at the  
10 foot. 'It is to be noted that the above agreements were signed by the Secretary, Department of  
11 States, Government of India on signing of these Merger Agreements, orders under the relevant  
12 provisions of the Government of India Act were issued, giving legal force to these agreements.'  
13 Then My Lord Table C. Princely states covered by The Instrument of accession or revised  
14 Instrument of Accession and proclamation excepting Indian Constitution no Merger  
15 agreements.' There were several States which did not sign merger agreements. My Lord which  
16 we have started from 303, taking the list from 302 under earlier para. And it goes on till 580.  
17 So it is 555 plus 24, because Khasi States are separately dealt with even in the white paper.  
18 Therefore My Lord, this is the total figure which became a part of Union of India, when Article  
19 1 came into force. And My Lord, we have given the disclaimer that of course this is based on  
20 National Archives and the white paper. But My Lord as a matter of interest, the National  
21 Archive the officers, the Joint Secretary and others who went. It's worth visiting. It's very well  
22 maintained National Archives. In some of the documents, you need to maintain a particular  
23 temperature so that the document is not destroyed. Every carry is taken since beginning. As  
24 an interest also, Your Lordships may consider once visiting it. Not for this matter, but there  
25 are several historical documents, several films. Films not as we understand, My Lord. That  
26 some of the documents are filmed and they are preserved. Some of the speeches of our national  
27 leaders, whichever could be video-graphed in those days are very well preserved. There are  
28 several maps, My Lord, many matters of historical interest. But the beauty is that since the  
29 beginning of the country it has been preserved well.

30

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

32

33 **TUSHAR MEHTA:** My Lord I was at Page 47, and whatever is irrelevant Your Lordships  
34 may take it from me, again I have diluted and I will not take much time My Lord. Whatever  
35 may be relevant to be put here as a completion of chronology I have put it I'll not read it. Page  
36 47, now this is after India attains Independence and the Constitution is adopted. Constitution  
37 is adopted My Lord we are aware 26th January '49. Sorry, 26th November '49. I will just check-

1 up My Lord, our impression is subject to verification Article 1 came on that very day, from the  
2 beginning Article 1 is there, subject to verification. My Lord, page 47, C.O. 10.

3

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

5

6 **TUSHAR MEHTA:** I will just orally point out what it... it contained two aspects, My lords  
7 are aware Article 371(a), which provided that first take the list of three entries, which the  
8 Instrument of Accession maintained that is Defence, Communication, etc. And the President  
9 was to find out which are the corresponding entries in the Union list, because Defence can  
10 have five corresponding entries. Communication can have wireless, telephone, etc., five, so  
11 first Act which I have mentioned is that with which Your Lordships may directly not be  
12 concerned. Just by way of example, that the Honourable President by this first C.O identified  
13 the entries, that these entries would fall within those three broad subjects with the ruler has  
14 given under the Instrument of Accession. Then it is exercise of powers under 370(1)(d) and  
15 applying these provisions of the Constitution of India. Your Lordships would find I'm not  
16 reading Union, relations between Union and States, but all were applied with modifications.  
17 As Article 370 or itself My Lord points out, for example, amendment of the Constitution. 368  
18 was applied, but with a provision in Sub-Article 6, that any amendment made in the Indian  
19 Constitution would not *ipso facto* apply to the Jammu and Kashmir...

20

21 **CHIEF JUSTICE DY CHANDRACHUD:** This followed the Article 370 route?

22

23 **TUSHAR MEHTA:** Unless, yes applied through Article 370. In that fashion the second part  
24 of this C.O 10 is...

25

26 **CHIEF JUSTICE DY CHANDRACHUD:** First part was with consultation and the second  
27 part was with concurrence?

28

29 **TUSHAR MEHTA:** With Concurrence. Consultation is only qua..

30

31 **JUSTICE SANJIV KHANNA:** As far as Article 368 is concerned the Constitution can be  
32 amended in terms of that article by the Parliament and so forth. Now as proviso to 368, it says  
33 that Legislative Assembly can then adopt or with concurrence and it will apply over, whereas  
34 (d) requires concurrence, concurrence probably will be prior concurrence.

35

36 **TUSHAR MEHTA:** My Lord that would be so.

37

1 **JUSTICE SANJIV KHANNA:** Because when we are talking about Constitution as it exists  
2 370(1)(d) refers to the Constitution as it was originally enacted. 368 refers to the amendments  
3 thereafter. There is a slight difference between the two.

4

5 **TUSHAR MEHTA:** Yes, My Lord. So whatever amendment is made in any part of the  
6 Constitution would not apply unless it is so applied, either fully or with modification and  
7 exception under 370(1)(d) route.

8

9 **JUSTICE SANJIV KHANNA:** Uh, it will be 370(1)(d) route or 368 route?

10

11 **TUSHAR MEHTA:** No. It would be 370(1)(d) route. So I'll tell Your Lordships why. Suppose  
12 the India, Indian Parliament amends...

13

14 **CHIEF JUSTICE DY CHANDRACHUD:** 368 is not in this red book *na*?

15

16 **TUSHAR MEHTA:** No, My Lord, it is now deleted.

17

18 **CHIEF JUSTICE DY CHANDRACHUD:** No, but the red book has a lot of other things,  
19 but some of that...

20

21 **TUSHAR MEHTA:** Would Your Lordships like to see My Lords the original C.O.? That Your  
22 Lordships would find that Volume 3... Let us take a hypothetical illustration. Just My Lords...

23

24 **JUSTICE SANJIV KHANNA:** Just a, that of logics, that's all.

25

26 **TUSHAR MEHTA:** Yes. Only two minutes, My Lord. The concerned amendment My Lord,  
27 in this C.O. is at page 4 and 9. 4 to 9 in Volume 3.

28

29 **CHIEF JUSTICE DY CHANDRACHUD:** Volume 3, right?

30

31 **TUSHAR MEHTA:** CCD. Please come to My Lords, page 8. The directly My Lord. Page 8.  
32 And I'll give one illustration only My Lord, at the foot, My Lord. Your Lordships have now 360  
33 part xii, part Roman xii. I'm sorry, part Roman xx. My apologies. Part Roman xx.

34

35 **JUSTICE SANJIV KHANNA:** Which page are you?

36



1 **TUSHAR MEHTA:** Page 8. Volume 3, the document Volume 3. PDF page 8. This is My Lord,  
2 the concerned C.O., C.O. 10.

3

4 **CHIEF JUSTICE DY CHANDRACHUD:** Unless applied by order of the President under  
5 clause...

6

7 **TUSHAR MEHTA:** Provided, I'm sorry. Yes, My Lord, Justice Khanna gets me. Provided the  
8 proviso the Article 368 shall apply subject to the additional proviso provided further, that no  
9 such amendment shall have this...

10

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

12

13 **JUSTICE SANJIV KHANNA:** This talks back to Article...

14

15 **TUSHAR MEHTA:** Yes. I'll just give an illustration.

16

17 **CHIEF JUSTICE DY CHANDRACHUD:** 370(1).

18

19 **TUSHAR MEHTA:** Just to illustrate. For example, Constitution of India amended an  
20 inserted Article 21(a), right to education, free education et cetera. It never applied to Jammu  
21 and Kashmir till 2019, because this route was never followed.

22

23 **CHIEF JUSTICE DY CHANDRACHUD:** Likewise, when you said, the preamble  
24 amendment of 1976 was...

25

26 **TUSHAR MEHTA:** Was applied with modifications, etc.

27

28 **CHIEF JUSTICE DY CHANDRACHUD:** So, the secularism and socialism amendment  
29 was never adopted in the case of Jammu and Kashmir.

30

31 **TUSHAR MEHTA:** Yes. Even integrity word is not, My Lord, that was also not applied.

32

33 **CHIEF JUSTICE DY CHANDRACHUD:** We can skip this now. We can go ahead.

34

35 **TUSHAR MEHTA:** Yes, yes. My Lord this is contemporaneous. Your Lordships would find  
36 the date, it is 26th of January 1950. So contemporaneous, nothing much turns on that. Your  
37 Lordships may directly come to page 49.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30  
31  
32  
33  
34  
35  
36  
37

**JUSTICE B.R. GAVAI:** 49 of the same Volume?

**TUSHAR MEHTA:** Of my written submission. I'm sorry, my written submissions. My Lord, It is respondent conjoined written submissions. Written submission Volume 3. 1st May, Your Lordship gets the date ? My Lord, the Chief Justice gets... 1st May 1951, Yuvraj Karan Singh, issued a proclamation directing the establishment of an elected Constituent Assembly to draft a Constitution for the State of Jammu and Kashmir. Please don't read the note, My Lord, I'll orally point out what it says, My Lord, when I take Your Lordships to the position of Jammu Kashmir Assembly vis-a-vis our Constitution of India and the Constituent Assembly of India. I'll read that proclamation just to show that it was intended to be subservient to and subordinate to the Constitution of India. But right now, this is a date that the....

**CHIEF JUSTICE DY CHANDRACHUD:** Mr. Solicitor. You may deal with this. What I'm suggesting. I'll forget it. So I was reading a list of dates in the morning, the thoughts, struck me.

**TUSHAR MEHTA:** Yes.

**CHIEF JUSTICE DY CHANDRACHUD:** At one level, you may be right or subject, of course, to what we have to consider on their rejoinder that the, your argument is that the Constitution for the Republic of India is really a document which lies on a higher platform than, say, the Constitution of the State of Jammu and Kashmir. That J&K Constitution, according to you, is subordinate to the Union Constitution. That's one aspect. The second aspect which you have tried to make out in your note, which we will, may elaborate upon it later, which is your contention that look, the Constituent Assembly of J&K was in the nature of a Legislative Assembly and not a Constituent Assembly. That strictly speaking that there may be a problem for two reasons that's not how Article 370(2), refers to it. It refers to it as a constituent assembly of the State.

**TUSHAR MEHTA:** Correct.

**CHIEF JUSTICE DY CHANDRACHUD:** But more important, once Article 238 made certain provisions of the Constitution inapplicable to the Part Three States and particularly the State of Jammu and Kashmir, including executive, legislature, judiciary, which would be brought into force by the Constituent Assembly, framing a constitution for the State of Jammu and Kashmir. Then it may be very difficult to call it purely just a Legislative Assembly. That is

1 an aspect which you may want to deal with. You may deal with it in just one sentence and then  
2 may...

3  
4 **TUSHAR MEHTA:** It is a separate segment, My Lord, of my submission...

5  
6 **CHIEF JUSTICE DY CHANDRACHUD:** Then you may deal with it at that point with the  
7 list of dates.

8  
9 **TUSHAR MEHTA:** I am obliged. My Lord, rest of the three dates Your Lordships can ignore.  
10 Kindly come to page. ...Not ignore, My Lord, skip. Sorry, My Lords.

11  
12 **CHIEF JUSTICE DY CHANDRACHUD:** And we have read Sheikh Abdullah's address. It  
13 was read out to us by the other side so we'll...

14  
15 **TUSHAR MEHTA:** I'm not reading, My Lord, any address now. I am just on the chronology,

16  
17 **CHIEF JUSTICE DY CHANDRACHUD:** Yes, yes.

18  
19 **TUSHAR MEHTA:**... and the chronology which is relevant right now...

20  
21 **CHIEF JUSTICE DY CHANDRACHUD:** Absolutely you can go...

22  
23 **TUSHAR MEHTA:** Rest is My Lord for completion, but may not invest Your Lordships time.  
24 Then Constituent Assembly is created. Now My Lord comes C.O. 39, that is, 1952 C.O. My  
25 Lord, please see under Article 370(1), these are all appears to be My Lord under powers in the  
26 370(1)(d), but all C.O.s mention it as 370(1). May be making it little broad source of power. Of  
27 the Constitution of India, in following consultation with the Government of Jammu and  
28 Kashmir, the President issued the so and so order 1952, modifying Article 54 and 55 of the  
29 Constitution insofar as it applied to the state of Jammu and Kashmir. By C.O., by this C.O. for  
30 the first time, President recognized the Constituent Assembly as the Legislative Assembly for  
31 the purpose of election of the President of India. Your Lordships, My Lord would known when  
32 the Constituent Assembly of Jammu and Kashmir was formed, obviously there was no  
33 Legislative Assembly because that was yet to be a part of the constitution to be framed. So as  
34 to ensure that they do not lose their representation in election of the President, this C.O. was  
35 issued that you will be treated as Legislative Assembly also. Your Lordships, would find at the  
36 end of this chronology, 370 has been applied in kind of a floating way. Whenever My Lord, it

1 is required to use the word interchangeably it is logically so used and whenever any word has  
2 become otiose it is replaced by its successor. My Lord this....

3

4 **CHIEF JUSTICE DY CHANDRACHUD:** At that point, there was no Legislative Assembly  
5 at all...

6

7 **TUSHAR MEHTA:** At all. Correct. I...

8

9 **CHIEF JUSTICE DY CHANDRACHUD:** Therefore, they had to make this C.O...

10

11 **TUSHAR MEHTA:** Correct.

12

13 **CHIEF JUSTICE DY CHANDRACHUD:** to reach that instead of the, word Legislative  
14 Assembly shall also include a reference to Constituent Assembly. Because at that point there  
15 was no Legislative Assembly.

16

17 **TUSHAR MEHTA:** My Lord, exactly that is where I would respectfully [UNCLEAR]. When  
18 there is no Legislative Assembly, uh Constituent Assembly the President has stated now it  
19 would be treated as Legislative Assembly, My Lord that I'll come little later, but it has been  
20 used My Lord, kindly see there are two prominent features in C.Os which comes up.

21 (a) it has been used in a floating way, some words used interchangeably and second and most  
22 important for my purpose. Whenever a word in Article 370 becomes otiose for that post not  
23 being exist... in existence, that body not being in existence. It is immediately replaced by its  
24 successor. Sadr-e-Riyasat is replaced by Governor, etc. Now Your Lordships may come to the  
25 next date 20th of June, 5th ...[NO AUDIO]

26

27 **TUSHAR MEHTA:** There was a letter referred to by Mr. Gopal Sankaranarayanan, where  
28 Dr. Rajendra Prasad, the then Honourable President of India, writes to the Prime Minister,  
29 Honourable Prime Minister Nehruji, that this can be used only once, etc. That can be used My  
30 Lord in addressing the arguments which I am also advancing. But we also got the response of  
31 the Honourable Prime Minister. I'll put it when that fact comes and thereafter the same  
32 Honourable President issued order under 370 Sub-Article 3 also. So literally actions speaks  
33 louder than words. That was My Lord the understanding. But the understanding was that it is  
34 so drastic a provision that use it only once it's an self-extinguishing provision. That's the tenor  
35 of the letter My Lord. While the Constituent Assembly of Jammu and Kashmir was in session,  
36 Lok Sabha also continued its session. In New Delhi, as per Constitution of India during one of  
37 the Lok Sabha debates, please see how our Parliament understood Article 370. The purpose is

1 to satisfy Your Lordships that Article 370 is not just stated to be temporary. Legislative  
2 Assembly debate says it is temporary. Even during the subsequent parliamentary procedure  
3 also everyone treated it as a temporary measure, only for that. This is N C Chatterjee,  
4 incidentally, he was the Counsel in ***Prem Nath Kaul*** Judgement. N C Chatterjee, he must be  
5 a Member of Parliament also. I will just read the underlined portion. 'I maintain, and I say that  
6 with all earnestness that under the law, under Constitution accession to the dominion of India  
7 under Section 6 of the Government of India Act, as amended after the Indian Independence  
8 Act was final and irrevocable, and there ought not to have been any question of plebiscite. I  
9 maintain that accession is final and irrevocable. Under our Constitution too Kashmir is an  
10 integral part of India, and Article 1, the Indian Constitution consists of Federation of States  
11 and it is a Part B state. There cannot be any going back on that. But the unfortunate thing is  
12 that the Constituent Assembly is doing something there which is against the spirit of our  
13 Constitution. I know my honourable and learned friend Dr. Katju, will point to me Article 370  
14 of the Constitution. Article 370 is part of Chapter 21, and it deals with temporary and  
15 transitional provisions.' Then Dr. Mukherjee, 'In a Democratic federal state, the fundamental  
16 rights of citizens of one constituent unit cannot vary vis a vis the citizens of another unit. Are  
17 not people of Jammu and Kashmir entitled to the fundamental rights that we have given to  
18 the people of India, minus Jammu and Kashmir? There is no scope for varied constitutional  
19 patterns, disparities as between one federating unit and another. The legislative or executive  
20 authority of the units in respect of the State will be co-extensive with the similar authority in  
21 and over the provinces to certain adjustment during the transitional period, the fiscal  
22 relationship, etc.' Then My Lord, Panditji as the Prime Minister and Minister of External  
23 Affairs responds, 'So Kashmir, obviously is a constituent unit of the federation of Union of  
24 India. But a difference has arisen, subsequently arisen, you please remember that not  
25 originally between Kashmir and other states, because subsequent to the earlier accession, the  
26 other states have become integrated, more which Kashmir has not and could not in the  
27 circumstances, as I have tried to point out. But nevertheless, it is a full constituent unit of  
28 India. Various things flow from it. Various consequences. Consequences for instance, in regard  
29 to the President of the Republic. The President has certain authority which he exercises on  
30 behalf of Republic and wherever the constituent unit may be, the President will exercise that  
31 authority in that measure.' Come to the last line. 'But the President's ultimate right has to  
32 remain for a constituent unit of India.' That irrespective of 370, the President of India's right,  
33 which he exercises on behalf of the republic, which he exercises on behalf of we the people of  
34 India, must remain as a plenary power without any fetters. That's how the Parliament  
35 understood. Thereafter, Your Lordships would come to page 52. First two days, dates Your  
36 Lordships may skip. During the Jammu and Kashmir Constituent Assembly debates also, My  
37 Lord, I have quoted, but I may not just paraphrase it and proceed further. It says, every

1 member says that this is temporary. They also understood it to be temporary. I am not  
2 labouring on the point right now why it is temporary. The point is which I will ultimately make,  
3 despite full knowledge that Article 370 is a part of the Constitution, despite having accepted  
4 in the Constituent Assembly debates of Jammu and Kashmir that it is temporary, they chose  
5 not to make any recommendation under Sub-Article 3. That's a separate limb, My Lord, I'm  
6 just flagging it here. Kindly see highlighted part. This assembly came into being because of  
7 Section 370 of the Indian Constitution, and it was because of the Section that we enacted such  
8 laws as were necessary for our society. So they understand that it's very source of existence  
9 was Constitution of India. My Lord kindly come to page 53. Third... My Lord this is third date,  
10 15-11-52. This was the first use of Article 370, Sub-Article 3. Kindly note this.

11

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

13

14 **TUSHAR MEHTA:** Kindly allow me to point out that this might appear to be striking  
15 because it is striking. It should never have been at the first given and should never have been  
16 continued. The effect of 370 with 367 or any provision of the Constitution is, that by an  
17 administrative act of the Honourable President and the Governor of, Government of the state,  
18 any part of the Constitution can be amended, can be altered, can even be destroyed and not  
19 applied and new provisions can even be created in Constitution of India. 35(a). I'll come it.  
20 Article 35(a) was created, which is a part of Constitution of India only to be applied to the state  
21 of Jammu and Kashmir. That's why this 370(1) route and 367 mechanism has been used more  
22 than once, because 370 permits it. It stopped, My Lord, only after 5th of August 2019.  
23 Otherwise, any provision, any Article, My Lord, it was placed much at a higher pedestal, as My  
24 Lord, Justice Kaul rightly pointed out then even a Basic Structure. Please see My Lords,  
25 Constitution Application to Jammu and Kashmir Order 52 was issued by way of the State  
26 Presidential Order issued under Article 370(1)(d). The first exercise is 370(1)(d). The term  
27 Rajpramukh used anywhere in the Constitution of India, Jammu and Kashmir being a Part B  
28 state, was replaced by Sadr-e-Riyasat of Jammu and Kashmir.

29

30 My Lord because in Jammu and Kashmir, Rajpramukh was not there, Sadr-e-Riyasat was  
31 there. So wherever one authority ceased to exist, It was replaced by the successor authority.  
32 Now the second part which is done. Similarly, vide C.O. 44, there are two C.O.s. Explanation  
33 to Clause 1 to Article 370 was modified by the President in exercise of his powers under Article  
34 370, Sub-Article 3, on the recommendation of the Constituent Assembly. My Lord because  
35 there at that point of time Constituent Assembly was in existence, so the proviso to sub Article  
36 3 could be operated. Therefore it was so recommended. And the President added this verse,  
37 'the person for the time being recognized by the President, on the recommendation of the

1 Legislative Assembly of the state as Sadr-e-Riyasat of Jammu and Kashmir, acting on the  
2 advice of Council of Ministers of the state for the time being enforced.' The purpose of pointing  
3 out is, that 370 has continuously been evolved depending upon the need of that situation.  
4 Situation at the point of time. Earlier it was Maharaja. Since Maharaja ceased to exist and  
5 Sadr-e-Riyasat, came. It was modified using 370, Sub-Article 3, and since Constituent  
6 Assembly happened to be functioning it was with recommends. I'm sorry... Now, Your  
7 Lordships may kindly come to page 54. C.O. 48, that is, 14th May '54, several other provisions  
8 were applied but Your Lordships may right now only mark fundamental rights, how it was  
9 applied is really shocking and I am using that word consciously. But what was not applied is  
10 also interesting at the foot of page 54. Which continued not to apply till 5th August 2019. That  
11 is My Lord at the foot Your Lordships gets notably? I'm sorry, but I am on page 54. My Lord,  
12 Justice Khanna may see.

13

14 **JUSTICE SANJIV KHANNA:** Yeah, I have got it.

15

16 **TUSHAR MEHTA:** Fundamental rights, just mark that they were applied. But what was not  
17 applied notably, it did not apply the following parts at all. That is directive principles of the  
18 state policy, the states in Part B and scheduled and tribal areas. My Lord the tribal areas, and  
19 any tribal reservation, etc. never applied in the State of Jammu and Kashmir till 2019. Now,  
20 the preamble was applied. Your Lordships are aware preamble is not treated to be a part of the  
21 constitution, and therefore it is separately applied. I am not repeating the word socialist and  
22 secular was not applied. Of course, they have put it in the directive principles. But directive  
23 principles are amendable by legislature. Your Lordships are on page 50?

24

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

26

27 **TUSHAR MEHTA:** Kindly come to foot of page 55, because this according to me as a student  
28 of law and as a citizen, is something very, very serious. Other notable features, My Lord by this  
29 C.O. what was done, it provided for a separate provision for permanent residence of Jammu  
30 and Kashmir in Article 7, that is Citizenship of Indian Constitution by inserting 35(a).

31

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

33

34 **TUSHAR MEHTA:** Then it removed references to Scheduled Tribes from Article 15, Sub-  
35 Article 4. So, one, you alienate those who do not fall within the artificially created definition of  
36 permanent residents. Second, you alienate those who belong to Scheduled Tribes. Then, this  
37 is important, Article 19, 22, 31, 31(a), and 32 were applied with some modifications, and I'll

1 show which modification. Surprisingly, in Article 19, please note this My Lord, this is  
2 something really shocking. And for 25 years this continued. I am arguing this matter, not from  
3 the point of view of Centre succeeding or State succeeding. How 370 operated on the people  
4 of Jammu and Kashmir, because of 370, that's what My Lord my attempt is. Surprisingly in  
5 Article... I'm sorry.

6

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

8

9 **TUSHAR MEHTA:** Surprisingly in Article 19, the following Sub-Article 7 was added by way  
10 of modification, which remained till 1979, 25 years. And what was that?

11

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

13

14 **TUSHAR MEHTA:** Article 19, Sub-Article 7, as applicable to the state of Jammu and  
15 Kashmir. The words "reasonable restrictions" occurring in Clause 2, 3, 4, and 5 shall be  
16 construed as meaning such restrictions as the appropriate legislature deems reasonable. My  
17 Lord the citizens apply fundamental rights against the state and now the Legislature would  
18 decide what are the reasonable restrictions.

19

20 **JUSTICE SURYA KANT:** Other provisions of Part 3 were applied without any  
21 modification?

22

23 **TUSHAR MEHTA:** There is a modification.

24

25 **JUSTICE SURYA KANT:** 35(c).

26

27 **TUSHAR MEHTA:** 35(c), and that is more draconian My Lord if I'm permitted to say so,  
28 because that directly affected the personal liberty of the entire population of Jammu and  
29 Kashmir.

30

31 **JUSTICE SURYA KANT:** Preventively.

32

33 **TUSHAR MEHTA:** Preventively. 21 and 22 would not apply. But it's unthinkable in any  
34 constitutionally governed, civilized, society that Article 21 and 22 would not apply. Please see,  
35 Article 35(c) was added, India's Constitution was amended by the Government of India in  
36 consultation with the State government, adding this Sub-Article, My Lord, see, 'No law with  
37 respect to preventive detention made by the Legislature of the State of Jammu and Kashmir



1 whether before or after the commencement of the Constitution Order 1954 shall be void on  
2 the ground that it is inconsistent with any of the provisions of this part, but any such law shall,  
3 to the extent of such inconsistency, cease to have effect on the expiration of five years from the  
4 commencement of the said order, except as respects things done or omitted to be done before".  
5 These five years became ten, and thereafter it became 15. It continued till 1974 and My Lord  
6 most interesting part which I found...

7 .

8 **CHIEF JUSTICE DY CHANDRACHUD:** Mr. Solicitor you are appearing for the  
9 Government of India, which did all this.

10

11 **TUSHAR MEHTA:** Yes, My Lord.

12

13 **CHIEF JUSTICE DY CHANDRACHUD:** In constitutional theory. The Government of  
14 India is a perpetual entity.

15

16 **TUSHAR MEHTA:** My Lord, the Government of India has a right to say that this ought not  
17 to have been done and correct itself, which we did. And I'm justifying that correction. I'm not  
18 saying that government and this government. It's our government.

19

20 **CHIEF JUSTICE DY CHANDRACHUD:** But in Constitutional doctrine, the Government  
21 of India is one perpetual entity.

22

23 **TUSHAR MEHTA:** Perpetual entity with perpetual succession, and therefore My Lord, the  
24 justification which I am trying to give is that the mistake of past should not befall on the future  
25 generations. And that's why what we did in those days, I am justifying, I am justifying our  
26 undoing it in 2019.

27

28 Yes, My Lord. One very interesting angle I found out My Lord, while researching this on this  
29 question. My Lord in ***Prem Nath Kaul*** , some person was, Mr. Kaul was, Prem Nath Kaul  
30 was detained under preventive detention law. He approached this Honourable Court under  
31 Article 32 challenging his detention. The learned Attorney General then, appearing for the  
32 Government took the contention that 32 petition is not maintainable because it would lie only  
33 for violation of fundamental rights, and for Jammu and Kashmir. Article 21 and 22 are not  
34 fundamental rights. Fortunately My Lord, the court did not go into that question and decided  
35 it on merits. I'm sorry, ***Sampat Prakash***, not ***Prem Nath Kaul***. That was the position of  
36 the 70... 35(c). Fundamental rights. Your Lordships have said 21, 22 is the heart and soul of  
37 the entire Chapter 3. That was not applicable. It could be dispensed with while making a law

1 for detention. Then My Lord, 35(a) was added. Please come to page 56 and this My Lord, if  
 2 we were to believe resulted in several consequences. Please see 35(a), amended in Constitution  
 3 of India only to be applied in one state of Jammu and Kashmir. Please see My Lord. One  
 4 artificial class was created. Notwithstanding, anything contained in this Constitution, that is  
 5 Constitution of India, no existing law in force in the state of Jammu and Kashmir, and no law  
 6 hereafter enacted by the legislature of the state defining the classes of persons who are or shall  
 7 be permanent residents of the state of Jammu and Kashmir or conferring on such permanent  
 8 residents, any special rights and privileges or imposing upon other persons any restrictions as  
 9 respects employment under the state government, acquisition of immovable property in the  
 10 state, settlement in the state, or right to scholarship and such other forms of aid of the state  
 11 government may provide, shall be void on the grounds that it is inconsistent or which, with or  
 12 inconsistent with, or takes away or abridges any right conferred on the citizens of India by any  
 13 provision of this part. A separate category of permanent residents was created and any law  
 14 which provides for this kind of special privileges would not be hit either by Article 14, Article  
 15 19, or any part of the Constitution. And that demarcating line from which date a person should  
 16 be treated to be a permanent resident was, I think...

17

18 **JUSTICE SANJIV KHANNA:** 35(a) challenged on the ground that it violates the Basic  
 19 Structure...

20

21 **TUSHAR MEHTA:** 35(a)? It is. There are five petitions pending My Lord.

22

23 **JUSTICE SANJIV KHANNA:** No. But before that it was never challenged.

24

25 **TUSHAR MEHTA:** They were challenged at the relevant point of time. Could never be  
 26 decided... I think...since long... My Lords kindly see My Lord the impact of this. The cutoff date  
 27 was, I am told 1927. So whoever came in Jammu and Kashmir in 1927, were permanent..

28

29 **JUSTICE SANJIV KHANNA:** That is the law, that part is the provision itself, it says it  
 30 brought the judicious scrutiny as therefore prevented because...

31

32 **TUSHAR MEHTA:** Now the impact was... For example, people from Jammu and Kashmir...  
 33 people from Pak occupied Jammu and Kashmir... Pak occupied Kashmir, POK were driven out  
 34 both Hindus and Muslims, but they were driven out in '47, during those raids they are not  
 35 permanent residents. They were not permanent residents till 2019. They were large number  
 36 of *safai karamcharis* who have filed a petition My Lord or Intervention application, who were  
 37 brought from other states to do the manual work of cleanliness etc. They are not permanent

1 residents. They are not getting any of these benefits. Despite living for decades together. No  
2 person beyond, outside Jammu and Kashmir can acquire property meaning thereby no  
3 investment.

4

5 **CHIEF JUSTICE DY CHANDRACHUD:** So from this point of view, I was just looking at  
6 the 1954 Order C.O.48.

7

8 **TUSHAR MEHTA:** Yes My Lord.

9

10 **CHIEF JUSTICE DY CHANDRACHUD:** That applied the entirety of Part 3 and then made  
11 certain modifications therefore Article 16 applied, Article 19 applies. But now see what  
12 happens if you look at the C.O., it applies Part 3, that is Volume 3. You get it at Volume 3,  
13 page...

14

15 **TUSHAR MEHTA:** 14, My Lord.

16

17 **CHIEF JUSTICE DY CHANDRACHUD:** Page 14.

18

19 **TUSHAR MEHTA:** Yes.

20

21 **CHIEF JUSTICE DY CHANDRACHUD:** Volume 3, Page 14. But you bring in article 350,  
22 sorry, Article 35(a) which creates an exception in three areas, employment under the state  
23 government, two, acquisition of removable property, three, settlement in the state. Leave aside  
24 scholarship. So though part 3 is made applicable by the same way when you introduce Article  
25 35(a), you are taking away the three rights, three fundamental rights. 16(1), 19...

26

27 **TUSHAR MEHTA:** 14

28

29 **CHIEF JUSTICE DY CHANDRACHUD:** One second. 16(1). Then you are taking away the right  
30 to acquire removable property, which then was a fundamental right under 19(1)(f) and Article  
31 31. And third, settlement in the state, which is a fundamental right under 19(1)(e). So, though  
32 the Constitution expressly made the provisions of Article 19 applicable, which would include  
33 these three rights and Article 16. By enacting 35(a), you virtually took away the fundamental  
34 rights.

35

36 **TUSHAR MEHTA:** Employment is also right to life.

37

1 **CHIEF JUSTICE DY CHANDRACHUD:** But there's a direct right under 16(1).

2

3 **TUSHAR MEHTA:** Yes, employment is a separate right, would fall within separate category  
4 of right to life.

5

6 **CHIEF JUSTICE DY CHANDRACHUD:** No, that itself was not taken away. What was  
7 taken away was employment under the state government, because what 35(a) did was, it says  
8 conferring on such permanent residents any special rights and privileges are imposing upon  
9 any other persons, any restrictions. So it does both things. You can give special rights to  
10 residents and you can take away that right insofar as non-residents are concerned.  
11 Employment under the state government. Employment under the state government is  
12 expressly covered by Article 16(1). Because 16(1) says there shall be equality of opportunity for  
13 all citizens relating to...

14

15 **TUSHAR MEHTA:** Yes, Your Lordships are right

16

17 **CHIEF JUSTICE DY CHANDRACHUD:** Employment under the state. That includes the  
18 union as well as the states. So while on the one hand, Article 16(1) was preserved, 35(a) directly  
19 took away that fundamental right. And granted immunity to any challenge on the ground that  
20 it would deprive you of a fundamental right, which is protected by 16. Likewise, 19. 19  
21 recognizes the right to reside, settle in any part of the country,

22

23 **TUSHAR MEHTA:** To acquire property.

24

25 **CHIEF JUSTICE DY CHANDRACHUD:** And property then was 19(1)(e)...

26

27 **TUSHAR MEHTA:** Now, it is 300.

28

29 **CHIEF JUSTICE DY CHANDRACHUD:** So, all three fundamental rights were essentially  
30 taken away by 35(a) which it was brought in by C.O. 48.

31

32 **TUSHAR MEHTA:** It continued till 2019.

33

34 **CHIEF JUSTICE DY CHANDRACHUD:** Power of judicial review was taken away.

35

36 **TUSHAR MEHTA:** Judicial review was taken away. So, it is beyond a Ninth Schedule, almost  
37 put at par, My Lords beyond the Ninth Schedule also. And this continued till 2019, till the

1 interim resolution, interim C.O. was passed. Therefore, My Lords, I'm respectfully urging that  
 2 please look at the matter from the point of view of people of Jammu and Kashmir. Something  
 3 which is impugned before Your Lordships is a constitutional exercise of power, which confers  
 4 fundamental rights, which applies the entire Constitution, which brings the Jammu and  
 5 Kashmir people at par with their rest of brothers and sisters and applies all laws which are  
 6 welfare legislations. And I have the list which was not applicable to the state of Jammu and  
 7 Kashmir. And the very unfortunate part is, and this is really a troubling part that till now the  
 8 people were convinced by those who were supposed to guide them, that this is not a hindrance  
 9 in your progress. This is your privilege. You fight. Nobody can take away 370 from you. That  
 10 is the most unfortunate part. And Your Lordships have at least two major political, I'm not  
 11 being political, major political parties before Your Lordships defending 370, including 35(a).  
 12 When Your Lordships ask, what did you lose out of it? There is no list. This is what the people  
 13 rightly lost. They got their fundamental rights, 35(a) goes. They got their fundamental rights,  
 14 35(c) goes. And I will come to several other provisions which were working against the interest  
 15 of the people. But they were convinced. Now they have realized what they have lost. Because  
 16 now, because of 35(a) not being there, investments are coming. Now because of, I'll show My  
 17 Lords from the Reorganization Act, because of the policing being now with the Centre, tourism  
 18 has started. Jammu and Kashmir traditionally didn't have much of big industries. There were  
 19 cottage industries, small industries, etc. Main the source of income was tourism. Now tourism  
 20 has started. By now 16 lakhs tourists have come, new hotels are coming up, which gives  
 21 employment, employment generations for the two large number of people right from  
 22 *tangawala* to officials. I'll come to that, My Lord. So...

23

24 **ATTORNEY GENERAL R. VENKATRAMANI:** In a manner speaking, 35(a) is not a  
 25 modification of Article 35. It is a creation of a new article in the Constitution, that is...

26

27 **JUSTICE SURYA KANT:** The scope of...

28

29 **ATTORNEY GENERAL R. VENKATARAMANI:** It is not a modification at all.

30

31 **JUSTICE SURYA KANT:** The Scope of expression, exceptions and modifications...will  
 32 also...

33

34 **ATTORNEY GENERAL R. VENKATRAMANI:** That's right. Virtually created a new  
 35 article in the Constitution...

36

37 **JUSTICE SURYA KANT:** ...a new provision.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30  
31  
32  
33  
34  
35  
36  
37

**ATTORNEY GENERAL R. VENKATRAMANI:** That's right. It's not a modification.

**TUSHAR MEHTA:** It is not a modification. Therefore I respectfully urge, 35(a), is creating a new provision in Constitution of India only to be applied to Jammu and Kashmir. Now, if a lady marries outside Jammu and Kashmir, she loses permanent resident-ship. There are several such things people coming from West Pakistan who were settled down from decades were not...

**JUSTICE SANJAY KISHAN KAUL:** The first part was cut down by the Three Judges Bench of the J&K High Court.

**TUSHAR MEHTA:** By the High Court My Lord. I'm sorry, I was not aware of it.

**JUSTICE SANJAY KISHAN KAUL:** [UNCLEAR]

**TUSHAR MEHTA:** I'm told that their children will not get. Whatever, My Lord that's now...

**JUSTICE SANJAY KISHAN KAUL:** I didn't say children will not get it. It was a nebulous situation which will get...

**TUSHAR MEHTA:** Now My Lord, kindly come to page 57. My Lord, the argument was that why did you not consult A, B, C, D... My Lord, out of A, B, C, D; A, B, C is proclaiming that 370 is our right. Official, that's the official [UNCLEAR] leave it at that, My Lord. Please come to page 57. Now My Lord, use of mechanism under Article 367 for the interpretation of Article 370 for the first time. Any provision of the Constitution can be amended by executive action or constituent action now without bringing the Parliament. Therefore, 367 is a legitimate use so long as...

[NO AUDIO]

**CHIEF JUSTICE DY CHANDRACHUD:** ...into the Constitution as applicable to the State of Jammu and Kashmir...

**TUSHAR MEHTA:** Only.

**CHIEF JUSTICE DY CHANDRACHUD:** ...by C.A. 48 of 1954.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30  
31  
32  
33  
34  
35  
36  
37

**TUSHAR MEHTA:** Correct. So constitution was amended, which was, that was 370. You can amend the Constitution, or you can apply existing provisions.

**JUSTICE SANJAY KISHAN KAUL:** Under 370 a C.O. was issued and which brought it in a sense 35...

**TUSHAR MEHTA:** Correct. Now My Lord, page 57. As I pointed out whenever the situation required 370 remained floating, whenever some changes were required, depending upon the circumstances they were made through the mechanism of 367. 367 is an interpretation, My Lord. So the interpretation was made. Please come to page for 57.

**CHIEF JUSTICE DY CHANDRACHUD:** Yes.

**TUSHAR MEHTA:** Sub-Article 4, was added in Article 367 as applicable to Jammu and Kashmir. This Sub-Article 4 is not applicable elsewhere. It's only for Jammu and Kashmir. 'For the purpose of this Constitution, as it applies in relation to the State of Jammu and Kashmir. References to this Constitution or to the provisions thereof shall be construed as references to the Constitution or provisions thereof as applied in relation to the said State. Then references to the Government of the State shall be construed as including references to the Sadr-e-Riyasat acting on the advice of his Council of Ministers'. Because by that time Sadr-e-Riyasat had come. 'References to a High Court shall include references to the High Court of Jammu and Kashmir'. D, please note this My Lord. 'References to the Legislature or the Legislative Assembly of the said State shall be construed as including references to the Constituent Assembly.' They were used interchangeably.

**JUSTICE SANJAY KISHAN KAUL:** At that time, there was no Legislative Assembly?

**JUSTICE SANJIV KHANNA:** At that time, there was no Legislative Assembly?

**TUSHAR MEHTA:** No, it was to be made immediately. Therefore, My Lord, in advance they must have made a provision. There was none My Lord. This is '54, so there was none, because Constitution was framed in '57.

**JUSTICE SANJAY KISHAN KAUL:** So, in terms of giving representation to the State in other forms it would require Constituent Assembly to be interchangeably used so that till the Constituent Assembly finalized something it would not...

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30  
31  
32  
33  
34  
35  
36  
37

**TUSHAR MEHTA:** No, My Lord, another purpose is that till the Legislature Assembly comes, Legislative Assembly comes, somebody will have to make laws other laws other than Constitution. They were made. The Constituent Assembly after this function as a Legislature of Jammu and Kashmir also and they made other laws also. I have given the list.

**JUSTICE SANJIV KHANNA:** Primarily to ensure enforcement of 370 Article Clause 1, which power was vested with the Legislative Assembly so they vested it with the Constituent Assembly.

**TUSHAR MEHTA:** Constituent Assembly so that laws can be made by the Constituent Assembly. Otherwise, Constitution Assembly is not a lawmaking body in that sense. Of course my submission is that Constitution of Jammu and Kashmir is at par with the Legislature, Legislation only. It's not My Lord a kind of a Constitution, as we understand as a document of governance. I think you can confirm that from... Page 59 these are the laws made. I'm not reading, it's not necessary. I'm sorry My Lord, Justice Kaul is conferring. These are the laws which were made by the Constituent Assembly acting as a Legislative Assembly of Jammu and Kashmir. Page 59. Page 59 up to page 60. Your Lordships can consider noting here that exercise of mechanism under Article 367 to make changes in 370 is undertaken four times which I'll come periodically. And whenever some body was not available, the successor body was named.

**CHIEF JUSTICE DY CHANDRACHUD:** Yes.

**TUSHAR MEHTA:** I'm sorry. I'm sorry. I thought My Lords are... My Lord the Chief Justice is writing, This exercise or use of mechanism under 367 was directly an issue in *Damnoo* judgment, and it is approved by My Lords, Your Lordships speaking through the Constitution Bench. Then comes *Puranlal Lakhanpal*. My Lord, I'm not reading it because I don't think anything turns on that either for me or for the other side. It would not render any assistance. Just record the history. That's all My Lords, which we have already given. Now, Your Lordships may kindly see page 62. The State Reorganization Act comes. It does two things. One, Part A, and Part B states are clubbed into one called States. So Jammu and Kashmir ceases to be Part B, but it became a state like any other state. And Part C states became union territories. That's first. I'm sorry, C and D both became, Andaman Nicobar was D. So A and B became states and C and D became union territories. We are not concerned with that right now, in this matter. Second was, the identity of princely states was completely abolished. Till then, till '56, the Rajpramukh, was the erstwhile princely ruler. This was abolished. That now henceforth, it



1 would be the Governor appointed by the President of India, the President who is responsible  
2 to the Parliament and the Parliament who is responsible to we, the people of India. So now,  
3 no Rajpramukh, who is the princely state. He can be appointed as a Governor. That's one thing.  
4 Some of them were appointed, but not by virtue of their being members of that lineage in the  
5 princely states. This happened. At this stage, Article 238 was repealed, rather omitted, not  
6 repealed. It was omitted by 7th Constitutional Amendment Act.

7

8 Please come to page 63, only for one date. It is relevant. I'm not reading anything.

9

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

11

12 **TUSHAR MEHTA:** Page 67, 63, 17-11-56 The Constitution of the State of Jammu and  
13 Kashmir is framed, the document called Constitution of Jammu and Kashmir is framed, that's  
14 all. Thereafter straightway My Lord, I have given excerpts from the debates, which essentially  
15 says that Jammu and Kashmir is an integral part of India. I don't think that is something which  
16 is required to be laboured much. Therefore I am skipping..

17

18 **JUSTICE SANJAY KISHAN KAUL:** [UNCLEAR] that also.

19

20 **TUSHAR MEHTA:** Therefore, I'm skipping that. Please come directly to page 67. The second  
21 use of the mechanism under Article 367, where Your Lordships would recall in the first use the  
22 Honourable President said, Constituent Assembly and Legislative Assembly are used  
23 interchangeably, but at this stage, the Constituent Assembly ceased to exist because the  
24 Constitution was framed. Therefore, My Lord, please come to page 67.

25

26 **CHIEF JUSTICE DY CHANDRACHUD:** This is C.O. 56, right?

27

28 **TUSHAR MEHTA:** Yes, My Lord. C.O. 56, dated 26 February '58. It was required in '58  
29 because of, a) Constitution of Jammu and Kashmir being framed and Constituent Assembly  
30 ceasing to exist and because of the State Reorganization Act. Please see at page 67 bottom, D  
31 is deleted, he read, 'Reference to the Legislature or the Legislative Assembly of the said State'  
32 shall be construed as including reference to the Constituent Assembly of the said State'.  
33 Because the Constitution was framed, Constituent Assembly ceased to exist and therefore My  
34 Lord this Clause was amended. And E, the term Rajpramukh was replaced by the word  
35 'Governor' because of the state reorganization, now Rajpramukh system has gone.

36

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

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30  
31  
32  
33  
34  
35  
36  
37

**JUSTICE SANJAY KISHAN KAUL:** The phraseology used was 'Governor' henceforth from this?

**TUSHAR MEHTA:** Yes, henceforth it was Governor.

**JUSTICE SANJAY KISHAN KAUL:** But the phraseology used to head of the elected government as Prime Minister did not cease with this.

**TUSHAR MEHTA:** I beg Your Lordship's pardon...?

**JUSTICE SANJAY KISHAN KAUL:** Chief Minister used to be called the Prime Minister then.

**TUSHAR MEHTA:** That went after 'Sadr-e-Riyasat' itself. It became 'Sadr-e- Riyasat', Prime Minister went.

**JUSTICE SANJAY KISHAN KAUL:** After that only as a matter of sequence of dates I wanted.

**TUSHAR MEHTA:** Yes, it became 'Sadr-e-Riyasat', then thereafter 'Rajpramukh', and thereafter 'Governor'. Now it remains Governor throughout thereafter. Now kindly see page 69. I'm skipping the rest. My Lord, Kindly see My Lord first page 68 ***Prem Nath Kaul*** , but the first judgment it was more on the competence of the Yuvraj, and therefore I believe it may not render...

**CHIEF JUSTICE DY CHANDRACHUD:** Can you just read that para?

**TUSHAR MEHTA:** Yes, I will read. 'The Supreme Court renders its judgment in ***Prem Nath Kaul versus State of Jammu and Kashmir***'. It's a five judge bench My Lord. 'The issue before the Court was the validity of Jammu and Kashmir Big Landed Estates Abolition Act, which was enacted by the Yuvraj in exercise of powers vested in him under Section 5 of Jammu and Kashmir Constitution Act 1996'. 1996 is *Samvat* year. 1939 the Old Constitution. 'The Judgment discusses the constitutional history of the State in great detail and at the same time discusses the power of Maharaja under the previous Constitution of the Princely State. The question before the Court was whether the provision of Article 370 Sub-Article 1 till the time the Constituent Assembly of Jammu and Kashmir was in session affect the plenary

1 powers of Maharaja in the matter of governance of the state. In this context, the Court held  
2 that the Act in question, which was enacted in 1950 would not stand interdicted by Article 370  
3 and held that Yuvraj was competent to enact the Act. The case effectively concerned the issue  
4 of legislative competence of Yuvraj when there is no Constituent Assembly of Jammu and  
5 Kashmir'. In these very proceedings, when there was a request for a reference to a larger bench  
6 in this very petition the Five Judge Bench, it was speaking through My Lord Justice Kaul  
7 exactly said this, that it may not have bearing on the either side. Now, My Lord, Page 69. Now  
8 My Lord, the integration of Judiciary, slowly some provisions came to be applied, truncated,  
9 some full, some modified, some with exceptions. But Article 222 was made applicable  
10 regarding transfer of Judges. Earlier My Lord till '60, Honourable Judges of the High Court  
11 were not transferable by the Supreme Court. But the oath was prescribed until 2019. The  
12 Honourable judges of Jammu and Kashmir High Court used to subscribe to this oath My Lord  
13 listen, oath or for affirmation to be made by judges of the High Court. I so and so, having been  
14 appointed Chief Justice or a Judge of the High Court of Jammu and Kashmir, do swear in the  
15 name of God, solemnly affirm that I will bear true faith and allegiance to the Constitution of  
16 the state. Though they were My Lord, under an obligation because of Article 1. They were  
17 applying the Constitution of India. But the oath which they used to take was expressing their  
18 allegiance to the Constitution of Jammu and Kashmir state. Even the Honourable Chief  
19 Justices who would be appointed there, that would be taking this oath. That's it My Lord.  
20 Nothing beyond that. Now Your Lordships may kindly come to **Puranlal Lakhanpal**  
21 judgement My Lord, where I would read only one para of that judgment because something  
22 turns on that and I will show My Lord **Sampat Prakash** thereafter. At this stage only, please  
23 come to case law compilation, Volume 1, Page 24. Only para...kindly see, My Lord in those  
24 days..

25

26 **JUSTICE SANJAY KISHAN KAUL:** Case law compilation which one did you say?

27

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

29

30 **CHIEF JUSTICE DY CHANDRACHUD:** Volume 1, Volume 1.

31

32 **TUSHAR MEHTA:** Case law compilation, Volume 1, PDF Page 24. My Lord, somebody  
33 wanted to stand for election to be elected to the House of People that is Lok Sabha. He filed  
34 this petition. Please see page 1 and 4. My Lord, only two would be relevant. Am I with Your  
35 Lordships on page, My Lord 24? **Prem Nath Kaul.** The petition challenges the  
36 constitutionality of a provision in the Constitution Order 54 made by the President under  
37 Article 370(1). The case of the petitioner is that he's registered as an electoral in the

1 parliamentary constituency of Delhi. As such, he has a right to stand for election from any  
2 parliamentary constituency in India. Six seats are allotted to the state of Jammu and Kashmir  
3 in the House of People, Lok Sabha. Ordinarily the election to these seats should have been  
4 direct election from the territorial constituencies in the states as provided by Article 81(1). And  
5 this is what was happening in rest of the country. But the President modified that Article  
6 insofar as it relates to the State of Jammu and Kashmir by para 5(c) of the Order in these  
7 words. 'Article 81 shall apply, subject to the modification that the representatives of the state  
8 in the House of People shall be appointed by the President on the recommendation of  
9 legislature of the state.' No direct election in Lok Sabha. It's like Rajya Sabha. 'And the  
10 contention was, the petitioner contends that the President had exceeded his powers when he  
11 made this modification for he thereby substituted direct election to the House of People by  
12 nomination, which he could not do.' This it is said, was a radical alteration. My Lord, please  
13 mark these words.

14

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

16

17 **TUSHAR MEHTA:** Now kindly My Lord come to para 4. Record says even radical  
18 modification is permissible. But even assuming that the introduction of indirect election by  
19 this, Your Lordships have para 4 at page 25. May I read with Your Lordships permission? 'But  
20 even assuming that the introduction of indirect election by this modification is a radical  
21 alteration of provisions of Article 81(1), the question still remains whether such a modification  
22 is justified by the word modification as used in Article 370(1). We are hereby dealing with the  
23 provision of a Constitution which cannot be interpreted in any narrow or pedantic sense. The  
24 question that came for consideration in *Delhi Laws* case was with respect to power of  
25 delegation to a subordinate authority in making subordinate legislation. It was in that context  
26 that the observations were made that the intention of the law there, under consideration when  
27 it used the word modification was that Central Government would extend certain laws to Part  
28 C States without any radical alteration in them. But... Now this is the ratio. But in the present  
29 case, we have to find out the meaning of the word modification used in Article 370, Sub- Article  
30 1 in the context of the Constitution, as we have said already, the object behind enacting Article  
31 370, Sub-Article 1, was to recognize the special status of State of Jammu and Kashmir and to  
32 provide for that special provision by giving power to the President to apply the provision of  
33 the Constitution to that State with such exceptions and modification as the President might by  
34 order specified.

35 We have already pointed out that the power to make exceptions implies that the President can  
36 provide that a particular provision of the Constitution would not apply to that State, if  
37 therefore, the power is given to the President to efface in effect any provision of the

1 Constitution altogether in its application to the State of Jammu and Kashmir it seems that  
2 when he is also given the power to make modifications, please note My Lord, mark that power  
3 should be considered in its widest possible amplitude. If he could efface a particular provision  
4 of the Constitution altogether in its application to the State of Jammu and Kashmir, we see no  
5 reason to think that Constitution did not intend that he should have the power to amend a  
6 particular provision in its application to the State of Jammu and Kashmir. It seems to us that  
7 when Constitution used the word modification in Article 370(1), the intention was that the  
8 President would have the power to amend the provisions of the Constitution if he so thought  
9 fit in their application to the state of Jammu and Kashmir. My Lord, thereafter, dictionary  
10 meanings, etc. is quoted. My Lord, why I am reading this My Lord, Mr. Naphade urged that  
11 this is an obiter and therefore not laying down any law. My Lord in **Sampath Prakash**  
12 subsequent judgment again, My Lord, the same numerical strength, 5 Honourable Judges  
13 reproduces this para, relies upon it as a ratio, it's not an obiter. Let me directly go to **Sampath**  
14 **Prakash** so that this point is clear this is not an obiter this question directly fell for  
15 consideration. The petitioner wanted this Honourable Court to interpret whether there is any  
16 power of radical alteration or modification. And this Honourable Court said you can even  
17 efface a part of the Constitution. Then obviously radical alteration is something which you can.  
18 Now, My Lord in the same compilation. If Your Lordships can come, the next judgement My  
19 Lord.

20

21 **JUSTICE B.R. GAVAI:** 27?

22

23 **TUSHAR MEHTA:** Yes. Please come to My Lord, Page 27. This was a detention case. Please  
24 come to Para 2, at Page 28. Does Your Lordships, not have it? I'll just read Para 2. During the  
25 preliminary hearing of this petition, Mr. Ramamurthy, representing the petitioner. It was My  
26 Lord, a detention case, raised the ground that Section 13(a) of the Act under which My Lord,  
27 the Local Act under which the petitioner was detained was ultra vires the Constitution as  
28 contravening the provisions of Article 22 of the Constitution. That question was referred by  
29 the Constitution Bench to the Court to a larger Bench and came before the full court. On this  
30 occasion, the court held that in view of Clause C of Article 35 of the Constitution introduced in  
31 the Constitution, in its application to the State of Jammu and Kashmir, the point that had been  
32 raised stood answered by the addition of this Clause and unless the Clause itself was  
33 challenged, the point raised on behalf of the detainee did not arise. In this view, the reference  
34 was dissolved and the case has been heard by the Constitution Bench. They said that till you  
35 challenge 35(c), obviously, Fundamental Rights under 21-22 are not applicable to a detainee.  
36 Thereafter, My Lords, Your Lordships may kindly come to page 29. So this takes care of Mr.

1 Dwivedi's argument, Mr Dwivedi, for the petitioner. No, My Lord on this side also we have a  
2 Dwivedi.

3

4 **JUSTICE B.R. GAVAI:** [UNLEAR] argue anything.

5

6 **JUSTICE SANJAY KISHAN KAUL:** That's in a brotherly sense.

7

8 **TUSHAR MEHTA:** Yes... 29. The first argument, My Lords would find after quotation of the  
9 section. The first argument was that this article contained temporary provisions which ceased  
10 to be effective after the Constituent Assembly convened for the purpose of framing the  
11 Constitution of Jammu and Kashmir State had completed its task by framing the Constitution  
12 for that State. Reliance was placed on the historical background in which this Article 370 was  
13 included in the Constitution to urge that the powers under this article were intended to be  
14 conferred only for the limited purpose and limited period until the Constitution of the State  
15 was framed and the President could not resort to them after the Constituent Assembly had  
16 completed its work by framing the Constitution of the State. The background or the Legislative  
17 History to which reference was made was brought to our notice, that Your Lordships can skip.  
18 Then Your Lordships may kindly see para 5. Your Lordships can directly come to 7, page 30 at  
19 the foot. Para 7, 'There are...' May I read? 'There are, however, much stronger reasons for  
20 holding that provisions of this Article continued in force and remained effective even after the  
21 Constituent Assembly of the State has passed the Constitution of the State. The most  
22 important provision in this connection is that contained in Clause 3 of the Article, which lays  
23 down that this article shall cease to be operative or shall be operative only with such exceptions  
24 and modifications, and from such date as the President may specify, by public notification,  
25 provided that the recommendation of the Constituent Assembly of the State referred to in  
26 Clause 2, shall be necessary before the President issues such a clarification notification. This  
27 clause clearly envisages that the Article will continue to be operative and can cease to be  
28 operative only if on the recommendation of the Constituent Assembly of the State, the  
29 President makes a direction to that effect. In fact, no such recommendation was made by the  
30 Constituent Assembly of the state nor was any order made by the President declaring that  
31 Article shall cease to be operative.' Both things are separately mentioned. Neither  
32 recommendation made nor President exercised meaning thereby, the President could have  
33 exercised the power even in absence of a recommendation since there is no Constituent  
34 Assembly. I hope My Lord, I am able to make myself clear. That till Constituent Assembly was  
35 in existence recommendation, even otherwise, President could have done it after the  
36 Constituent Assembly ceased to exist. On the contrary, it appears that the Constituent  
37 Assembly of the State made a recommendation that the article should be operative with one

1 modification to be incorporated in the explanation to Clause 1 of the Article, this modification  
2 in so and so. Thereafter, kindly come to the real issue My Lord. That is 14. Para 13 My Lord.

3

4 **JUSTICE SANJIV KHANNA:** Para 13 or 14?

5

6 **TUSHAR MEHTA:** 13 first. The next point urged was that Article 368 of the Constitution,  
7 having been applied to Jammu and Kashmir with a proviso added to it, there now exists a  
8 provision relating to amendment of the Constitution as applied to Jammu and Kashmir under  
9 this Article, and consequently, while such special provision for this purpose exists, we should  
10 interpret Article 370 as being no longer applicable for amending or modifying the provisions  
11 of the Constitution applied to that state. This is what was argued by Mr. Naphade. Now, please  
12 see what Your Lordship say. Para 14 I'm sorry. I'll read it for you. This argument, in our  
13 opinion, is based on a wrong premise. Article 368 has been applied to Jammu and Kashmir,  
14 primarily with the object that amendments made by Parliament in the Constitution of India,  
15 as applicable in the whole of the country, should also take effect in the State of Jammu and  
16 Kashmir. The proviso when applying this article serves the purpose that those amendments  
17 made should be made applicable to the state of Jammu and Kashmir only with the concurrence  
18 of the state government, and after such concurrence is available, these amendments should  
19 take effect when an order is made under Article 370 of the Constitution. Thus, Article 368, is  
20 not primarily intended for amending the Constitution as applicable to Jammu and Kashmir,  
21 but is for the purpose of carrying the amendments made in the Constitution for the rest of  
22 India into the Constitution as applied in the State of Jammu and Kashmir. Even in this process,  
23 the powers of the President and the Article 370 have to be exercised, and consequently it  
24 cannot be held that applicability of this Article, that is 368, would necessarily curtail the power  
25 of the President under Article 370. It was also urged that the power of making modifications  
26 and exceptions in the orders made under Article 370(1)(d) should at least be limited to making  
27 minor alterations and should not cover the power to practically abrogate an article of the  
28 Constitution applied in that state. The submission is clearly without force. The challenge to  
29 the validity of Article 35(c), introduced in the Constitution as applied to the Jammu and  
30 Kashmir on this ground was repelled by this court in ***PL Lakhanpal versus State of***  
31 ***Jammu and Kashmir***. Subsequently, the scope of the powers of making exceptions and  
32 modifications was examined in greater detail by this Court in ***Puranlal Lakhanpal ...***

33

34 **CHIEF JUSTICE DY CHANDRACHUD:** Yes

35

36 **TUSHAR MEHTA:** And that is which I read para 4, which, as per Mr. Naphade, was a mere  
37 obiter. But the subsequent bench treats it as a ratio, relies upon it, and holds the same. Please

1 come to now, just before one line before paragraph 50. I'm sorry, para, page 34, just above  
2 para 50. This decision, Your Lordship gets, how the subsequent 5 Judge Bench treats  
3 **Puranlal Lakhanpal**. Para 4 of **Puranlal Lakhanpal** which Mr. Naphade contended is  
4 an obiter. This decision being binding on us, it is not possible to accept the submission urged  
5 by the Counsel. So **Puranlal Lakhanpal** para 4 is treated as a ratio. Then 15, may not be of  
6 relevance. I'll just come back to my written submissions again. That's on the facts. Rest is My  
7 Lord, on the facts of the case. Please come to page 70. Here parliamentary supremacy...

8

9 **JUSTICE B.R. GAVAI:** 70 of your submissions?

10

11 **TUSHAR MEHTA:** My submissions, My Lord. That would be combined submission, Volume  
12 3. 246 was applied, with some modification of course My Lord... C.O. 66, Article 246, which  
13 was originally applied in 1954 with only one clause, was applied with modification that  
14 Parliament would have the power to make laws in the Union List and some entries in the  
15 Concurrent List applicable to Jammu and Kashmir. Article 254 was applied in-toto thereby  
16 ensuring supremacy of the Parliamentary Laws in case of repugnancy. Rest there are some  
17 additions, My lord, which may not be of much assistance. Kindly come to Page 71. Once again  
18 the Lok Sabha, My Lord, takes up this issue and where My Lords, those famous words of the  
19 Honourable Prime Minister Nehru ji, My Lords, are reproduced, only underlined portion, 'As  
20 a matter of fact as the Home Minister has pointed out, it has been eroded, if I may use the  
21 word and many things have been done in the last few years, which have made the relationship  
22 of Kashmir with the Union of India very close. There is no doubt that Kashmir is fully  
23 integrated. I repeat that it is fully integrated.' The provision eroded, most of the provisions are  
24 applied according to the situation of the date. And it was awaiting of being extinguished right  
25 from '64 onwards. Then, My Lord, Page 72, C.O. 69, My Lord this provisions of Article 19 Sub-  
26 Clause 7 was added, and 35(c) were extended from 10 years to 15 years. As I have pointed out,  
27 My Lord, it came to be kept on being extended till '74. Now My Lord, a Private Members Bill  
28 comes before the Parliament for abrogation of Article 370. Please see My Lord, the debate, the  
29 underlined portion only My Lord, for brevity, My Lord, so that I don't, My Lord, waste more  
30 time of Your Lordships. Inder Malhotra nominated from Jammu and Kashmir, says this, 'The  
31 people of the State have no special liking for this Article 370, which exists in the Constitution,  
32 and we shall be very happy as soon as this is omitted.' This was the debate whether it should  
33 be omitted. It should be abrogated, etc. Then Hari Vishnu Kamath he was also a member of  
34 the Constituent Assembly of India a very leading and leading member, one of the members  
35 who contributed immensely, that 'Accession is irrevocable and that integration must come  
36 very speedily. If that is accepted, then there cannot be two opinions on the question that Article  
37 must go. I take my stand so far as this article is concerned on the firm base that now Jammu



1 and Kashmir State is suffering because this Article is there, because difficulties are thereby  
2 created. If this Article is repealed, the state will deprive, will derive some benefits as other  
3 States of the Union are deriving from their relationship with the Indian Union, and therefore  
4 it is from this point, that point of view that Jammu and Kashmir should be as much a  
5 beneficiary of the relationship with the Indian Union as every other State, such as Mysore or  
6 Kerala or Bengal or Maharashtra or Madhya Pradesh, is today, but unfortunately today  
7 Jammu and Kashmir is not a beneficiary of this relationship in the same way and to the same  
8 extent as other States.' Then My Lord Sham Lal Saraf, My Lords, adds, 'Retaining Article 370  
9 by not bringing the State at par with the States in the rest of the country. What has happening,  
10 what has been happening? Firstly, there is a sort of insecurity in the minds of the people.  
11 Secondly, I will say this frankly, in certain cases, local vested interest, some of them may have  
12 been my colleagues want to have the best of everything and want to take advantage of the  
13 present situation. Without bringing any communal, sectarian or any other view into the  
14 matter, I will say that purely from the people's point of view, the people of State have suffered.  
15 Once these barriers are removed. Once they are allowed to function as any other part of the  
16 country, the people will very much benefit. My Lord, what was barrier for the people was being  
17 canvassed and people were being convinced as a privilege to fight for'. Then My Lord, Shri  
18 [UNCLEAR]... was from Jammu and Kashmir in the Parliament. Then Shri [UNCLEAR]  
19 underlined portion, 'There is the non-application of labour laws in my state there are lakhs of  
20 people working in various forests, handicrafts and factories and all the beneficial laws that we  
21 have in the Centre and which are applicable to the rest of the States as Nanda ji knows, as Ex-  
22 Labor Minister, that is Gulzarilal Nanda who became acting Prime Minister twice, Labor  
23 Minister, should ipso facto apply to their state also. I have myself been a small labour worker  
24 and as a Minister, I was in charge of labour also, and I know the feeling of workers in that state.  
25 Every time they say, Why do you keep this wall of separation? Let us all get tile benefit as the  
26 rest of our countrymen, after all in labour, where people work, there is no question of caste,  
27 colour, or religion. Therefore, it is equally important and I would say forcefully that these  
28 things should apply there also.' Then My Lord DC Sharma, 'My Honourable friend Shri Gopal  
29 Dutt Mengi has said that Article 370 is a wall. I would say it is not a wall. If it was a wall, I  
30 could demolish the wall easily and in no time. It is not a wall, but it is a big mountain which  
31 stands between India and Jammu Kashmir. Although we have dug the Banihal Tunnel and we  
32 have done everything else. We have not demolished the mountain yet. I feel this mountain  
33 should be blasted with dynamite. With the dynamite of goodwill, firmness and decision. That  
34 way lies the salvation of India. And that way lies the good and welfare of the people of  
35 Kashmir.' Then My Lord, at the foot of this page, in the debate, Sri Abdul Ghani Goni, 'The  
36 people of Kashmir had decided once and for all and have decided once and for all that Kashmir  
37 is an integral part of India. Whether there is Article 370 or no Article 370, it is only a

1 provisional provision and a temporary provision in the Constitution, which can be removed at  
2 any time. But as far as the complete accession is concerned, that is final and nobody can  
3 challenge it.' Then Man Singh Patel... on the second, next page 76. I'm skipping the rest. Mr.  
4 Goni, I am told was also a member of Constituent Assembly of Jammu and Kashmir and  
5 thereafter he was a Minister also. Man Singh Patel, 'We have said before the world as a whole  
6 that there is no possibility now of plebiscite and the integration of Kashmir is firm, final and  
7 irrevocable. We continue with this Article 370, thereby showing to the world as if there is still  
8 some difference between Jammu and Kashmir and other States of the Indian Union. This kind  
9 of maintenance of separate identity of a state creates difficulty for us.' Chatterjee, My Lord I'm  
10 not reading, voices the same sentiment. Please come to page 77. Shri S S More only the  
11 highlighted part, I'm sorry My Lord my Learned friend wants me to...

12

13 **JUSTICE SANJAY KISHAN KAUL:** Interestingly Mr. Chatterjee refers to the statement  
14 of Mr. Sadiq who is the...

15

16 **TUSHAR MEHTA:** Yes, I'm sorry, I would rather leave that. I have... My Lord. I have in my  
17 hand an extract from Hindustan Times dated so and so which reads thus, 'The veteran founder  
18 and National Conference leader, Mr. Sadiq, today confirmed reports of lawlessness and  
19 corruption in the administration of Jammu and Kashmir.' Mr. Sadiq, I'm told, was the Chief  
20 Honourable Chief Minister then.

21

22 **JUSTICE SANJAY KISHAN KAUL:** He took over after [UNCLEAR].

23

24 **TUSHAR MEHTA:** Yes My Lord. Mr. Sadiq, who is the senior Vice President of the ruling  
25 National Conference, declared in an interview that abrogation of Article 370 of the  
26 Constitution was essential for the restoration of normalcy in that state. I maintain that it is  
27 today more imperative for the restoration of normal conditions, for the upkeep of democratic  
28 life of that state, and for greater cohesion, both of the people of Kashmir and India as a whole  
29 we should not delay any further. What has happened since 29th of November '63 till today,  
30 which necessitates that there should be any going back on the solemn declaration that Article  
31 370 must be abrogated and it is essential for restoration of normal conditions in that state.  
32 What is heading of this chapter, that chapter? It is in Part 21 of the Constitution, temporary  
33 and transitional. Therefore, Article 370 was never...

34

35 **TUSHAR MEHTA:** The last four lines of N C Chatterjee, My Lords. Therefore...

36

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

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30  
31  
32  
33  
34  
35  
36

**TUSHAR MEHTA:** 'Therefore, in the very content of this Article, there is a clear demarcation, a clear expression of the will of the makers of the Constitution, that it shall not be permanent feature and the President by a declaration, by a notification can say that this Article shall cease to operate.' My Lord, why I am reading this, the argument of the petitioner was that once the Constituent Assembly of Jammu and Kashmir is dissolved without recommending anything, it became permanent. I am just pointing out that subsequently also, two things are happening. Everyone says it is temporary and everyone expresses the desire why is it not being...

**CHIEF JUSTICE DY CHANDRACHUD:** These are views really. These are views on the floor of the...

**TUSHAR MEHTA:** But My Lord, please see Mr. More's view. He has articulated beautifully on that very page. Next. 'I rise to accord my hearty support to the present Bill.' I have read, I'm sorry... They are views. This is how Parliament understood it.

**CHIEF JUSTICE DY CHANDRACHUD:** Not Parliament, an individual member of Parliament.

**TUSHAR MEHTA:** This is how, nobody disputes that, no, it is permanent.

**CHIEF JUSTICE DY CHANDRACHUD:** It was not the view of the Government of India, at least. Because they would have done it then.

**TUSHAR MEHTA:** No, our honourable Law Minister has said that, Honourable Prime Minister has said.

**CHIEF JUSTICE DY CHANDRACHUD:** These are individual views.

**JUSTICE SANJAY KISHAN KAUL:** What happened to the Bill, but?

**TUSHAR MEHTA:** It was a private...

**KAPIL SIBAL:** It was a private member Bill, My Lords.

1 **JUSTICE SANJAY KISHAN KAUL:** What he is reading Mr. Sibal, is a sentiment running  
2 across.

3

4 **KAPIL SIBAL:** But, then you read the whole debate. He's only given you parts. The whole  
5 debate...

6

7 **JUSTICE SANJAY KISHAN KAUL:** There will be debates in favours. There will be debates  
8 against.

9

10 **KAPIL SIBAL:** That's what I'm...

11

12 **CHIEF JUSTICE DY CHANDRACHUD:** Ultimately Mr. Solicitor, we have to construe the  
13 concept. We can't really... these are not really any expressions of view by Parliament as a  
14 collective body.

15

16 **TUSHAR MEHTA:** This is how My Lord, it was understood. That's all. I'll leave it at that.  
17 Now My Lord, kindly see the view of the Government at page 78, bottom. 4th December 1964.  
18 In continuation of the debates mentioned above, in a speech, then Home Minister Gulzarilal  
19 Nanda reaffirmed the temporary nature of Article 370. This is the view of the Government.  
20 There is no wall between Jammu and Kashmir and India. At the most you can say it is some  
21 kind of a movable partition. We can move it on our own there is nothing coming in the way,  
22 this is the view of the Government also. 'I take this opportunity to inform the House that it has  
23 been decided to apply the provisions of Article 356 and 357, also to Jammu and Kashmir. Entry  
24 43 and 78 of the Union List and 33 and 34 of the Concurrent List are also being made  
25 applicable.' I skip My Lord, then the highlighted part. 'Therefore the area of uniformity is being  
26 constantly extended and it is being accelerated and expedited. And as I said before, the House  
27 would certainly understand from what I have said that anything else which has to be done  
28 quickly could certainly be considered and some kind of action could be taken on that. The  
29 Government assures the Parliament.' Then [UNCLEAR], 'When you have done so much, why  
30 don't you do the rest?' Shri Nanda, 'Those who have done so much will certainly do the rest.'

31

32 **CHIEF JUSTICE DY CHANDRACHUD:** The Concurrent List was made applicable with  
33 of course modifications by C.O. 66. right? Just for the sake of... C.O. 66.

34

35 **TUSHAR MEHTA:** For the first time, Yes My Lord.

36

37 **CHIEF JUSTICE DY CHANDRACHUD:** That is 26 September 1963, right?

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30  
31  
32  
33  
34  
35  
36  
37

**TUSHAR MEHTA:** My Lords are right. Now comes my third instance of mechanism under Article 367, Page 80, My Lord.

**JUSTICE SANJAY KISHAN KAUL:** A substitution. That is what I was asking for a fact only, Mr. Solicitor?

**TUSHAR MEHTA:** Yes, My Lords.

**JUSTICE SANJAY KISHAN KAUL:** In only 1965 then the expression Prime Minister changes to Chief Minister. Your list of dates of 10-4-1965.

**TUSHAR MEHTA:** No, My Lord, Prime Minister description went long back, Sadr-e-Riyasat was changed.

**JUSTICE SANJAY KISHAN KAUL:** Please read 10-4-1965.

**TUSHAR MEHTA:** No. Your Lordships are at page...

**JUSTICE SANJAY KISHAN KAUL:** Your notes.

**JUSTICE SURYA KANT:** Your notes.

**TUSHAR MEHTA:** Your Lordships are right. Though this act, the expression Sadr-e-Riyasat and Prime Minister in the State's Constitution were to respectively be, Your Lordships are right.

**JUSTICE SANJAY KISHAN KAUL:** I had an impression. I was not sure that both things occurred...

**TUSHAR MEHTA:** In the Constitution of Jammu and Kashmir.

**JUSTICE SANJAY KISHAN KAUL:** Kashmir occurred simultaneously.

**TUSHAR MEHTA:** Your Lordships are right, I stand corrected. I was not answering the Constitution of India point of view when it changed My Lord in 367. But Your Lordships are right in the Constitution of Jammu and Kashmir it was simultaneous in '65. Then My Lord,

1 C.O. 74. That is Page 80. My Lord, please see at the foot, what changes were made, C.O. 367  
2 was the mechanism of Article 3, I'm sorry. Article 367 of the Constitution was amended so as  
3 to give effect to Article 370, please see, My Lord, (aa), this is addition in green. Your Lordship  
4 gets, My Lord. References to the person for the time being recognized by the President on the  
5 recommendation of the Legislative Assembly of the State as Sadr-e-Riyasat of Jammu and  
6 Kashmir acting on the advice of Council of Ministers of the State for the time being in office  
7 shall be construed as references to the Governor of Jammu and Kashmir. References to the  
8 Government of the said State shall be construed as including references to the Governor of  
9 Jammu and Kashmir acting on the advice of his Council of Ministers provided, that in respect  
10 of any period prior to 10th day of April '55, such references shall be construed as including  
11 references to *Sadr-e-Riyasat*. Then D was already deleted. E was already deleted. I have just  
12 kept it here, My Lord, as a record for continuation. It was not deleted by this C.O.. It was earlier  
13 deleted, which I have already shown to Your Lordships. This change was the subject matter of  
14 **Mohd. Maqbool Damnoo**. This particular C.O. My Lord, I'll have to read some paragraphs  
15 of **Damnoo** My Lord. Can I do it after the lunch break?

16

17 **KAPIL SIBAL:** Just as an aside My Lords, during these debates Pandit Jawaharlal Nehru  
18 intervened and he said, if you talk about outsiders buying land in Jammu Kashmir. I am totally  
19 opposed to it because big business will come in and will destroy the entire state completely. So  
20 he was very adamant on that.

21

22 **TUSHAR MEHTA:** That was a mistake, My Lord.

23

24 **KAPIL SIBAL:** I'm only saying that... those parts have been read. Everything that we did was  
25 always a mistake, My Lords.

26

27 **TUSHAR MEHTA:** No, I'm not being political. From citizens point of view. Unless  
28 investment comes you never develop...

29

30 **JUSTICE SANJAY KISHAN KAUL:** Why it did not culminate into something?

31

32 **KAPIL SIBAL:** Just for the record for that debate 23 for, 157 against 160 pages of debate.  
33 Gulzarilal Nanda says that you cannot change 370 till you follow 370. So all that what is  
34 happening is we expanding all this which is not part of...

35

36 **TUSHAR MEHTA:** I may assure my learned friend.

37

1 **KAPIL SIBAL:** At least you should point the facts out.

2

3 **TUSHAR MEHTA:** There is no intention My Lord. Everyone, We were led by eminent  
4 people. Everyone contributed. There is no undermining the contribution of anyone. The only  
5 purpose was voting may differ. This was the view consistently explained and my only purpose  
6 of reading was, this is how the country treated it as temporary, that's all. My learned friend  
7 may take any other meaning out of it. Everyone contributed, but even 370 must have come  
8 with good intention of integrating the nation. The purpose of reading the debate was and is  
9 My Lord... I'm not reading it now, that it was conceived from the beginning as a temporary  
10 provision. That's all. Not to undermine anyone's contribution. I pointed out C.O. and now, I  
11 requested Your Lordships to allow me to place only four paragraphs of **Damnoo**. Your  
12 Lordship knows My Lord, case law compilation Volume 1, Page 36, at 44, I'll read only the  
13 relevant part .

14

15 **JUSTICE SANJAY KISHAN KAUL:** Page?

16

17 **TUSHAR MEHTA:** Volume 1, compilation Page 36 at 44 but before rising for lunch, when  
18 Your Lordship rose for lunch, I read the Constitution Order which was under challenge.  
19 **Maqbool Damnoo**. Para 19. At page 44, Your Lordships would find Article 367, as modified  
20 is quoted. Then Para 18 may not be relevant. 19. Your Lordships get that? May I read with Your  
21 Lordship's permission? On November 17, 1956, Jammu and Kashmir Constitution was  
22 adopted. Some sections came into force on that date and remaining sections came into force  
23 on January 26, 1957. Nothing turns on that. At the last two lines of that para, My Lord. Order  
24 of 1965. Under this order for Clause B of Clause 4 of Article 367, the following clauses were  
25 inserted. Then *Sadr-e-Riyasat* becomes Governor of Jammu and Kashmir. Correct, My Lords?  
26 Now, please come to 21. According to the Attorney General, this is a mere definition inserted  
27 for the purpose of the Article in accordance with the constitutional conditions prevailing at  
28 that time. My Lords, it says, at that time because 65 was the C.O. 65 or 66, but the matter was  
29 heard somewhere in 70. Therefore, nothing turns on that. According to Mr. Garg, this is the  
30 kingpin of the whole relationship between the Union and India, Union of India and the State  
31 of Jammu and Kashmir. According to him neither the Jammu and Kashmir Assembly nor the  
32 President were competent to impair the functioning of *Sadr-e-Riyasat*, and insofar as  
33 Constitution of Jammu and Kashmir Order of 1965 replaced the *Sadr-e-Riyasat* by the  
34 Governor. It is ultra vires. According to him either there has to be an amendment to the of the  
35 Constitution of India under Article 368 and Article 370, Sub-Article 3, or a fresh Constituent  
36 Assembly has to be convened to amend the explanation. Please mark this. This was the  
37 contention being considered by Your Lordships.

1 22, 'It seems to us that the essential feature of Article 370, Sub-Clauses B and D, is the necessity  
2 of concurrence of the State Government, or consultation of the State Government. What the  
3 State Government is, at a particular time has to be determined in the context of Constitution  
4 of Jammu and Kashmir.' Please mark this. I very respectfully, heavily rely on this finding.

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

7  
8 **TUSHAR MEHTA:** The explanation did no more than recognize the constitutional position  
9 as it existed on that day and the explanation as substituted from November 17, 1952, also did  
10 no more than recognize the constitutional position in the State. So earlier C.O. is also taken  
11 into consideration. That whoever was in office was recognized by way of an explanation added  
12 to Article 367. Then 24, the learned counsel, relying upon *Sampath Prakash*, contended  
13 that the only way of modifying Article 370 is specified in Article 370. Sub-Article 3, itself. He  
14 said that this was expressly laid down by this Court in the decision, just referred to. We are not  
15 concerned with the question whether Article 370, Sub-Article 3, can now be utilized to amend  
16 the provisions of Article 370(1) and (2), and therefore we do not express any opinion on that  
17 point. We are now not concerned with the amendment of Article 370, Sub-Article 1. We are  
18 concerned with the situation where the explanation ceased to operate. Because there was no  
19 Sadr-e-Riyasat. It had ceased to operate because there is no longer any Sadr-e-Riyasat of  
20 Jammu and Kashmir. If the definition contained in the explanation cannot apply to the words  
21 Government of the State then the meaning given in Article 367(4), as amended, will have to  
22 be given to it. So if an authority contemplated under Article 370 ceases to exist. It can be  
23 replaced by the successor or the closest possible successor under 367.

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

26  
27 **TUSHAR MEHTA:** If this meaning is given, it is quite clear that the Governor is competent  
28 to give the concurrence, stipulated in Article 370 and perform other functions laid down by  
29 Jammu and Kashmir Constitution. Now Your Lordships may kindly come to the last para. 26.  
30 It is true, that Governor is not elected, as was the *Sadr-e-Riyasat*, but the mode of  
31 appointment would not make him any the less a successor to *Sadr-e-Riyasat*, both are Heads  
32 of the State. I am My Lord, reading this in the context of Constituent Assembly being read in  
33 the same mechanism of Article 367 to be the Legislature. Now coming back to my submissions  
34 My Lords, written submissions Volume 3, combined written submissions Volume 3, My Lords.  
35 I'm sorry My Lords, if Your Lordships are at the judgment, can I, only one My Lord, argument  
36 I left, My Lord. Para 28, I'm sorry at page 47. I missed that My Lord, I should have read that.  
37 This was also an argument My Lord, a similar argument is made before Your Lordships by the



1 Petitioners, therefore, I am relying upon para. 28 in **Damnoo** Judgment, My Lord, at page  
2 47. Para 28, Your Lordships get that? My Lord Justice... Mr. Garg drew our attention to clauses  
3 (aa) and B of Article 367(4) as substituted by C.O. 74 of 66. We have already set them out  
4 above. He said that this was an amendment of Article 370, Sub Article 1, by the back door, and  
5 the President could not exercise these powers under Article 370(1), when he had not purported  
6 to exercise these powers under Article 370 Sub-Article 3. But, as we have already said, the  
7 explanation had become otiose, and references to Sadr-e-Riyasat, in other parts of the  
8 Constitution had also become otiose. There were two alternatives, first, either to leave the  
9 court to interpret the word government of the state and give it its legal meaning or secondly,  
10 to give the legal meaning in a definition clause, that is, Article 367. What has been done is that  
11 by adding Clause (aa), and (b) in the definition is supplied with the court would have in any  
12 event given therefore, we do not agree that there has been any amendment of Article 370, Sub-  
13 Article 1 by the backdoor. Just for completion 32 on that page. It is also not necessary to dwell  
14 on the third point, namely, violation of Article 21 and 22 of the Constitution, because it is clear  
15 that they are excluded by Article 35(c) of the Constitution. Now coming back to my written  
16 submissions, page 83. Again My Lord, as I had done, I'll skip what is not My Lord relevant  
17 right now and is added only for completion. Page 83. My Lord, Justice Gavai, My Lord, my  
18 summary, my... Respondents written submissions, Volume 3, page 83. Your Lordships gets  
19 that?

20 17-02-1969. Article 248 was applied in a substituted form, giving exclusive power up to the  
21 Parliament to make laws with respect to the prevention of activities directed towards  
22 disclaiming, questioning, or disrupting the sovereignty and territorial integrity of India or  
23 bring about secession of a part of the territory of India, or secession of a part of territory, etc,  
24 etc. This is where the residuary power in a wide sphere dealing with sovereignty was given.  
25 Then Your Lordships may, My Lord, kindly come to page 86. 85 bottom. I am skipping two  
26 pages. 85. Bottom. 06-05-1972 Your Lordships has that? It further expands the residuary  
27 power of the Parliament C.O. 93. C.O. 93 the scope of Article 248 was increased, whereby the  
28 exclusive power was vested to the Parliament to make laws with regard to the prevention of  
29 activities, of disrupting the sovereignty and territorial integrity, etc., to also include taxes on  
30 foreign travel, inland air travel, postal articles, etc. Then Your Lordships may come to page 87.

31  
32 28th of August '76, 42nd Amendment of the Indian Constitution come into being. My Lord  
33 what was not applied was the word, socialist and secular, I have already pointed out, the word  
34 integrity was not applied and fundamental duties were not applied. Then March to July 1977,  
35 the President's rule is applied, is imposed. I have given the note. Please note My Lord, as a  
36 matter of fact till 2023, Governor's Rule under Section 92 of the Jammu and Kashmir  
37 Constitution have been imposed eight times and President's rule...I'm sorry Your Lordships

1 are at page 87 at the foot of the page, till '23 Governors Rule under 92 of Jammu and Kashmir  
2 Act eight times and President's rule under Article 356 three times. Under 92, there is a  
3 stipulation that it cannot exceed six months. Therefore, then next date 09-05-1878, 44th  
4 Amendment of the Indian Constitution was brought in, the Note, the non-application of the  
5 said amendment resulted in non-application of Clause 4 of Article 22, which provides for  
6 major protections against preventive detention, which were not applied. This is what they lost  
7 and this is what they started getting from 2019.

8

9 **CHIEF JUSTICE DY CHANDRACHUD:** 22, has not been notified yet, right? So for the  
10 rest of the country it is also not been notified as yet.

11

12 **TUSHAR MEHTA:** No, it is.

13

14 **CHIEF JUSTICE DY CHANDRACHUD:** 22 (4), is not notified.

15

16 **KAPIL SIBAL:** 427 is not yet.

17

18 **TUSHAR MEHTA:** I'll check-up.

19

20 **CHIEF JUSTICE DY CHANDRACHUD:** That you can't issue a mandamus to notify a  
21 Constitutional Amendment.

22

23 **TUSHAR MEHTA:** In Article 359 related to suspension of enforcement of rights conferred  
24 by Part 3 during emergencies, the words accept Article 20 and 21, inserted by 44th  
25 Amendment not applied. Hence, an absurd situation arises wherein Jammu and Kashmir,  
26 even Article 20 and 21 can be suspended during emergencies while in rest of the country it  
27 cannot be done. That's all My Lord. Emergency provision is a provision of 44th Amendment.  
28 There is an... my learned friend must not feel angry about it. That is the provision which is not  
29 applied. That's the only purpose of pointing out. Then next, 4th June 85. It modified Article  
30 248 as it applied to the State by empowering the Parliament to make law for prevention of  
31 terrorist activities. Please see the note only, that's relevant. This indicates the Government of  
32 India was taking steps to maintain law and order in Jammu and Kashmir. Notably, the  
33 modification to the Union List included the term disrupting sovereignty and integrity of India.  
34 Then some provisions with regard to Schedule Tribe and... in the state but that were in a  
35 truncated way, not for election purposes, etc. Nothing turns on that. Then 30th of July '86, My  
36 Lord. Page 89. The same order in and My Lord, this is...

37

1 **CHIEF JUSTICE DY CHANDRACHUD:** June 1985, Entry 97 was also applied, were  
2 confined to this area?

3

4 **TUSHAR MHTA:** My Lord that was made applicable... It was expanded. It was applied in  
5 69, 1969 I'll just, My Lord... If Your Lordships comes to page 83, it is 17th February 1969,  
6 where Entry 97, may Your Lordships would find the first para, last second line. Does Your  
7 Lordship get? My Lord Chief Justice gets? My Lord, page 83, date is 17th February '69. 85

8

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

10

11 **TUSHAR MEHTA:** The first para, last line My Lord. 'Further, Entry 97 of the Union list was  
12 applied in a modified form dealing with the above subject.'

13

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

15

16 **TUSHAR MEHTA:** Then My Lords...

17

18 **CHIEF JUSTICE DY CHANDRACHUD:** Now you'll go back to your ...

19

20 **TUSHAR MEHTA:** Yes. 89 My Lords. 'The said order was, order issued during Governor's  
21 rule.' This is important and the notes would be more important. Several C.O.s are issued  
22 during Governor's Rules also, that has been a consistent practice under Constitutional  
23 convention. 'The said order issued during Governor's Rule, Modified Article 249. In its  
24 application to the State to states that the Rajya Sabha by passing a resolution with over two  
25 third majority, could empower Parliament to make laws on any matter specified in the  
26 resolution, bring a matter which is not enumerated in the Union List or Concurrent List.' So,  
27 effectively all residuary powers with two third majority. And including State List, My Lords.  
28 And this was done during Governor's Rule. Please come to page 37... page 90.

29

30 **JUSTICE SANJIV KHANNA:** C.O.s were in fact amending Article 356 because that  
31 prescribes three years.

32

33 **TUSHAR MEHTA:** I'm sorry...

34

35 **JUSTICE SANJIV KHANNA:** These were then extending the President's Rule as prescribed  
36 in the Article 356, because the period prescribed is three years maximum..

37

1 **TUSHAR MEHTA:** But it kept on being extended by the Parliament.

2

3 **JUSTICE SANJIV KHANNA:** By C. O.s, it was extended from three to four, four to five.

4

5 **TUSHAR MEHTA:** It can go up to seven My Lord, because Parliament will have to then  
6 extend it, because situation was My Lord in a, it was an extraordinary situation, during that  
7 period it was...

8

9 **JUSTICE SANJIV KHANNA:** I'm not on that, I am not on that, that the power to amend,  
10 was excised in terms of 356, notwithstanding the proviso to...

11

12 **TUSHAR MEHTA:** Yes, Your Lordships are right.

13

14 **JUSTICE SANJIV KHANNA:** 368, notwithstanding the proviso...

15

16 **TUSHAR MEHTA:** Yes...

17

18 **JUSTICE SANJIV KHANNA:** But the body is challenged? No, they were never challenged.

19

20 **TUSHAR MEHTA:** No, no they were not challenged. Your Lordships are on page 90?

21

22 **JUSTICE SANJIV MEHTA:** Yes, I am on page 90.

23

24 **TUSHAR MEHTA:** All four Constitutional Orders, were passed under the President's Rule  
25 and President's Rule lasted over six years in the State. So thereafter, I have given what Mr.  
26 Sibal has already taken Your Lordships through. Blue is Mr. Sibal's note My Lords, list of dates.  
27 Then 01-03-2015, the Legislative Assembly of Jammu and Kashmir was elected and oath was  
28 administered by the members. The tenure of the assembly is 6, was My Lords, it should be  
29 was, 6 years, which was to expire on 1 March '21 the last Ministry. Even thereafter My Lords,  
30 kindly come to the next date, 6th of July 2017? C.O. 269, the said Constitution Order  
31 harmonized the tax administration of the State of Jammu and Kashmir with the GST regime  
32 operating in the rest of India. Correspondingly Entry 82 of Union List, was applied with  
33 modifications. My Lord, this ensured even economic unification, so to say. Then My Lords,  
34 2017 is the judgment in **Santosh Gupta**, which I will read only two or three paragraphs a  
35 little later. Please come to My Lords, page 94. 19th June 2018, the then Hon'ble Chief Minister  
36 resigned. Correct My Lords? And 20th June, 20 June 2018, the Governor took the decision to  
37 exercise the powers under Section 92 of the Jammu and Kashmir, Kashmir Constitution. Now,

1 a couple of things Your Lordships may note at this juncture. This is appointment of Governor,  
2 imposition of Governor's Rule in June 2018, no contemporaneous challenge by anyone. Either  
3 a political party or any elected member, or any citizen, anyone. The first challenge comes after  
4 14 months when, the impugned action of 5th and 6th August 2019 is taken.

5

6 **JUSTICE SANJIV KHANNA:** Can you invoke Section 92 after Article 356 was made  
7 applicable?

8

9 **TUSHAR MEHTA:** No, Article 356 came subsequently. Yes.

10

11 **JUSTICE SANJIV KHANNA:** Nobody's raised that issue?

12

13 **TUSHAR MEHTA:** But subsequently 356 comes. Yeah, I understand, My Lord that query.  
14 Even if there was an irregularity which is cured subsequently by 356. After 600....

15

16 **JUSTICE SANJIV KHANNA:** ...saying that.

17

18 **TUSHAR MEHTA:** But Your Lordships are right. That is the reason why ultimately, I would  
19 show My Lords, the Constitution of Jammu and Kashmir required to be repealed because it  
20 can never coexist. Once you apply the entire Constitution you cannot have a situation where  
21 there is a separate document of governance operating. It was not, according to me, it's a  
22 separate argument, a piece of legislation, but Your Lordships are right. It has been directly  
23 under 356, Your Lordships, are absolutely right.

24

25 **JUSTICE SANJIV KHANNA:** And Mr Solicitor when you say their contradiction the very  
26 fact that you invoke section 96... 92 and not 356, you're accepting that both of them can  
27 coexist.

28

29 **TUSHAR MEHTA:** 92, Yes. Otherwise, there are several provisions which I'll be able to  
30 demonstrate, but My Lord in any case, that's My Lord a separate submission on that. How  
31 Jammu and Kashmir Constitution would not exist? The moment 370 Sub-Article 3 is invoked.  
32 But Your Lordships are right.

33

34 **JUSTICE SANJIV KHANNA:** You can argue but other way also. There are other arguments  
35 available to make that argument for that submission.

36

1 **TUSHAR MEHTA:** Correct. MY Lord, thereafter on 21st November 2018 the Constituent  
2 Assembly is dissolved. Pardon me?

3

4 **JUSTICE SANJAY KISHAN KAUL:** Legislative Assembly.

5

6 **TUSHAR MEHTA:** I'm sorry, Legislative Assembly. Legislative Assembly was dissolved. No  
7 challenge to this contemporaneously. Most importantly, My Lords. I am sorry. Today there is  
8 no challenge to the dissolution of Assembly. The petitions which were filed after 5th and 6th  
9 of...

10

11 **JUSTICE SANJIV KHANNA:** That dissolution also takes place in the Constitution of India,  
12 as applicable to Jammu and Kashmir?

13

14 **TUSHAR MEHTA:** Your Lordships are right.

15

16 **JUSTICE SANJIV KHANNA:** It is under Section 53?

17

18 **TUSHAR MEHTA:** It should have been under 170. The petition, which Mr. Sibal argued,  
19 argue Mohammad Akbar Lone is a petition filed by two members of Parliament belonging to  
20 National Conference. Mohammad Akbar Lone and one another member. No challenge either  
21 to the Governor's Rule, President's Rule or dissolution of Legislative Assembly. One I.A. is filed  
22 by the former Chief Minister, argued by Ms. Ram Krishnan in 2022. I.A. for impleadment.  
23 That is I.A. number, Your Lordship wants? That is I.A. number is, 154272 of 2022, 154272 of  
24 22 in writ petition Civil number 1099 of 19. That is Item 501, on board with the lead petition,  
25 Shah Faesal. Now not My Lord, Shah Faesal, but... Correct, My Lords? So, no political party  
26 challenges either Governor's Rule or President's Rule or dissolution of assembly,  
27 contemporaneously. Dissolution not challenged at all. Otherwise, Your Lordships are aware,  
28 My Lord, Your Lordships are disturbed even in the middle of the night that now we are ready  
29 to forge an alliance. And we are ready to form a stable government. Because there are several  
30 arguments were made on that. That how can the assembly be dissolved like that? I'm just  
31 pointing out the hollowness of that argument. Before I go further, I must deal with one  
32 submission...

33

34 **JUSTICE SANJIV KHANNA:** So, writ petition Civil 1099 of 2019, did not challenge these  
35 three things?

36

37 **TUSHAR MEHTA:** My Lord, writ petition is, by it's...

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30  
31  
32  
33  
34  
35  
36  
37

**JUSTICE SANJIV KHANNA:** Did not challenge the Governor's Rule, President's rule or before that...

**TUSHAR MEHTA:** My Lord, I must point out, the Governor's Rule is challenged, but after 14 months...

**JUSTICE SANJIV KHANNA:** After 1099...

**TUSHAR MEHTA:** 5th and 6th of August, 2019. That must be being drafted. It must have been advised that you have to challenge the main imposition. That appears to be the case.

**JUSTICE SANJIV KHANNA:** So the Governor's Rule was challenged...

**TUSHAR MEHTA:** Challenged after 14 months...

**JUSTICE SANJIV KHANNA:** Then obviously the President's Rule would have been also challenged?

**TUSHAR MEHTA:** Yes.

**JUSTICE SANJIV KHANNA:** Its bound to be.

**TUSHAR MEHTA:** Bound to be.

**JUSTICE SANJIV KHANNA:** And dissolution of the Legislative Assembly is also challenged?

**TUSHAR MEHTA:** It's not challenged.

**JUSTICE SANJIV KHANNA:** It's not challenged?

**TUSHAR MEHTA:** Is not challenged. Still not challenged. In any of the petitions, till date.

**JUSTICE SANJIV KHANNA:** Till now, none of the petitions, it's challenged?

**TUSHAR MEHTA:** Yes, none of them.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30  
31  
32  
33  
34  
35  
36  
37

**JUSTICE SANJIV KHANNA:** And that's the terms of Section 53(2)?

**TUSHAR MEHTA:** And My Lord, the petition argued by Mr. Sibal, which was, My Lord, which is number 10, double *nahi*, Lone Abdul.

**JUSTICE SANJIV KHANNA:** That was 10...

**TUSHAR MEHTA:** Mohammad Abdul Lone My Lords, which was by National Conference, not even President's Rule or Governor's Rule under challenge. My Lords, I have a list. I have the list, My Lord. I'll just show that list to Your Lordships.

**KAPIL SIBAL:** As a matter of fact My Lord, the Governor's rule was challenged through a PIL filed in this court... dismissed. There was a PIL filed in this court, challenging Governor's Rule was dismissed by Justice Gogoi and I'll be very happy if this court were to say, that because all this was not challenged, the entire process that is adopted is [UNCLEAR]

**TUSHAR MEHTA:** My Lord, when did I argue that?

**KAPIL SIBAL:** Very happy My Lord, very happy, if this court were to say that.

**TUSHAR MEHTA:** My learned friend... Why is he presuming My Lord, what I'm going to argue?

**KAPIL SIBAL:** Since you are talking about it.

**TUSHAR MEHTA:** No, I am talking about it because half an hour, of a political kind of argument was made. How can you dissolve the Assembly like this? What are the powers of the Governor, et cetera..?

**KAPIL SIBAL:** Constituent Bench of this Court has said that, you can't do it.

**TUSHAR MEHTA:** Correct. But you can't argue it without the challenge.

**KAPIL SIBAL:** I have never made a political argument in this Court, and Your Lordships knows that. Not a single political argument.



1 **TUSHAR MEHTA:** But if there is no challenge, and if you raise a plea that there was,  
2 Governor should never have dissolved. It becomes a political argument. It's not an argument  
3 based to [UNCLEAR].

4

5 **CHIEF JUSTICE DY CHANDRACHUD:** Taking your point, that Mr. Sibal writ petition,  
6 there is no challenge to President's rule, Governor's rules or the dissolution.

7

8 **TUSHAR MEHTA:** Yes and dissolution not in challenge in any of the petitions.

9

10 **CHIEF JUSTICE DY CHANDRACHUD:** That we've got.

11

12 **TUSHAR MEHTA:** So My Lord, that question Your Lordships need not go into. That's the  
13 respectful submission. And my learned friend is right...

14

15 **S. PRASANNA:** Paper book 501.7. In fact their counter affidavit has a listing of all the prayers  
16 of all the petitioners.

17

18 **TUSHAR MEHTA:** I was going to say that please allow me, I have prepared a list and place  
19 it. My Lord, this is the submission in support of My Lord plea, that Your Lordship need not  
20 go. My Lord, a substantial time was consumed on this argument. Therefore, I am leveraging this  
21 point that it was not necessary. Please come to Volume 501.7 Paper Book, 2993. My Lords the  
22 prayers are quoted.

23

24 **JUSTICE SANJAY KISHAN KAUL:** Which document file are you saying?

25

26 **TUSHAR MEHTA:** The main paper book My Lords.

27

28 **JUSTICE SANJIV KHANNA:** 1. ?

29

30 **TUSHAR MEHTA:** Page 2993. Why would I not point out something which is in my favour?  
31 And I have placed with my reply. Incorporated all the prayers with writ petition, numbers.  
32 2993 is the page number. PDF page 2993. The Lordships have seen that chart. These are the  
33 only prayers before Your Lordships and that to after 5th and 6th of August 2019. After 14  
34 months and I have also narrated a chart showing the pleadings also.

35

36 **CHIEF JUSTICE DY CHANDRACHUD:** But we have petitions where everything is  
37 challenged except the dissolution of the Legislative Assembly.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30  
31  
32  
33  
34  
35

**TUSAHR MEHTA:** Correct. My Lord there are petitions.

**CHIEF JUSTICE DY CHANDRACHUD:** There are petitions challenging the imposition of Governor's rule. The imposition of President's rule and the... but according to you no challenge to the dissolution of the Legislative Assembly.

**TUSHAR MEHTA:** Correct My Lords. but one factual clarification, in some of the petitions, even that the Governor's rule is not under challenged for...

**CHIEF JUSTICE DY CHANDRACHUD:** There are some petitions where there is...

**TUSHAR MEHTA:** Yes.

**CHIEF JUSTICE DY CHANDRACHUD:** We will deal with it anyways. once it is even raised, even if....

**TUSHAR MEHTA:** You have a challenge to Governor's rule..

**JUSTICE SANJIV KHANNA:** Governors role was challenged in most of these petitions post the President's rule.

**CHIEF JUSTICE DY CHANDRACHUD:** Post the President's rule.

**TUSHAR MEHTA:** All the petitions post the decision. That is...

**JUSTICE SANJIV KHANNA:** What Mr. Sibal said there was earlier petition filed which was dismissed.

**TUSHAR MEHTA:** Yes, that's what I have pointed out in my summary of submissions. Please see, My Lord. That is My Lord at Page.

**KAPIL SIBAL:** If there were no actions on 5th and 6th, we won't be here. We won't have challenged anything. We are challenging the actions under those... that's all. I am just saying.

1 **TUSHAR MEHTA:** No, I am also. Whenever interrupt... I'm just saying, but don't do that.  
2 That's why the rejoinder stage is always there. I understand your discomfort. But what can you  
3 do? What can I do?

4  
5 **KAPIL SIBAL:** I understand...

6  
7 **TUSHAR MEHTA:** PIL. It was not a PIL. I'm sorry. It was not a PIL. My learned friend  
8 possibly not correctly briefed it. It was PDF 250. Take, My Lord, PDF 250 in my written  
9 submissions I have done this. One MLA challenged, it was not a PIL. Please see My Lord the  
10 order of this Honourable Court. Kindly have a look at pdf 250.

11  
12 **CHIEF JUSTICE DY CHANDRACHUD:** Ten paper book?

13  
14 **TUSHAR MEHTA:** Yes. No, I'm sorry. Volume paper book. No, I'm sorry. Written  
15 submissions paper book.

16  
17 **JUSTICE SANJAY KISHAN KAUL:** You are taking us back to Volume 3.

18  
19 **TUSHAR MEHTA:** No. The same Volume 3 of written submissions.

20  
21 **JUSTICE SANJAY KISHAN KAUL:** That's what I am saying.

22  
23 **TUSHAR MEHTA:** Yes My Lord. There pdf page 250. This Gagan Bhagat was not a PIL  
24 petitioner. He was an MLA. We argued... anyway My Lord. We learned from my senior. I will  
25 not say anything more than that. I am only arguing a matter. I have no political... I have  
26 nothing. This is a constitutional point for me. Your Lordships gets that order?

27  
28 **CHIEF JUSTICE DY CHANDRACHUD:** This is a petition challenging President's Rule.

29  
30 **TUSHAR MEHTA:** Yes, My Lord.

31  
32 **CHIEF JUSTICE DY CHANDRACHUD:** Governor's Rule.

33  
34 **TUSHAR MEHTA:** Dissolution. I'm sorry. Dissolution

35  
36 **JUSTICE SANJIV KHANNA:** This was a case for challenging dissolution or the Governor's  
37 rule.?

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30  
31  
32  
33  
34  
35  
36  
37

**TUSHAR MEHTA:** Dissolution. Dissolution.

**CHIEF JUSTICE DY CHANDRACHUD:** Therefore they've not included that prayer in any of these petitions, because that is attained finality.

**TUSHAR MEHTA:** That's what they came to know when I say in my written submission, they were not aware of it. They have not mentioned that we have not challenged because it is affirmed by the Supreme Court. I'm sorry, My Lord, Your Lordships said that we have heard, we have seen the record and we dismissed the petition. Therefore, I am not going into the details otherwise I can show details also. But there are reasons My Lords for it is not challenged. You don't have a case on the floor, you don't challenge it. That's as simple as that. But let's not go into it. Why they have not challenged it? It's definitely not because this petition was filed and dismissed, because none of the petitioners say that this petition was filed, heard by this Court and dismissed and therefore, we are not challenging it. They came to know possibly only when I pointed out in my written submission. So far it was not on record. Now, page 95. 19-12-2018. My Lord, proclamation under Article 356.

My Lord, here, I must answer one question. The suspension of proviso to Article 3. That was an argument. There are two arguments. The argument was advanced with a nuance that this was a device to bring certain legislative enactments or certain Parliamentary actions by suspending the provisions of the proviso to Article 3. Namely, the Reorganization Act. That was the allegation. Correct My Lords? Your Lordships recollects that. As a matter of fact, right from the inception of this country whenever President's Rule is imposed, proviso to Article 3, is a stay. We have studied each and every proclamation issued by the President under Article 356 with regard to each and every State, not Jammu and Kashmir. Proviso to Article 356 is suspended in every case. And please have a look at the chart which I have placed, at page 227 of this very file My Lord. Of this very Volume. As if we did something surreptitiously because some sinister plan was in the mind. This happens right from the inception. The first President Rule was in Kerala in 1957. Since then we have studied and we have the learned AG also has the Volume, if Your Lordships would like to see that, but I have said so. Please come to page 227 of this very volume.

226. Please see Andhra, Arunachal, Assam, Bihar, Goa everywhere suspended, suspended, suspended. Then Your Lordship would come to Clause 9. Erstwhile State of Jammu and Kashmir. Twice, 86 and 90. On both the occasions, the proviso to Section Article 3, was suspended. There is a reason My Lord why this format is used. It's not to do something surreptitiously. My Lord, in **S.R. Bommai**, the law laid down and I'll come to that, the law

1 laid down is, that the legislature cannot function, without Council of Ministers. When that is  
2 the position here, additionally, the legislature was dissolved, but otherwise  
3 also, whichever provision of the Constitution mentions something to be done by the legislature  
4 that provision is suspended, that's the format to be used being used from the beginning. 1977  
5 was the first use of 356... 59. I'm sorry. 59. Mr. Namboodiripad's Government was removed  
6 and the President's rule was imposed, My Lord. That was one of the first and perhaps the most  
7 controversial imposition of President's rule. There also suspension of three proviso was there.  
8 We have the, My Lord notification, if Your Lordship would like to see that. The first use of 356.  
9 This is the idea. This is the purpose whichever Constitutional Provision says. Use of some  
10 legislative act by way of making law, by way of views, by way of recommendation. Those  
11 provisions tend suspended during President's rule. It was not with a view to, do something  
12 which they claim to be a fraud on the Constitution. That's the respectful submission. Now  
13 coming back to page 95.

14

15 Once the President's rule is imposed, Your Lordships are aware, Article 356 requires, that it  
16 needs approval of the Parliament. Both the Houses will have to approve it. My Lord, last but  
17 one date, 28th December 2018, a resolution approving this proclamation issued by the  
18 President on 19-12, was passed in Lok Sabha. I have given my counter affidavits number, this  
19 is not a fact in this dispute. 3rd January 2019, approving this proclamation issued by the  
20 President on 19-12-2018 by Rajya Sabha, correct My Lord? Now, during the President's rule  
21 there are certain steps taken My Lord, with a view to infuse confidence amongst the people.  
22 My Lord, there were situations which were alarming situations, everything won't come on  
23 record. Pulwama happened in February 2019, etc... And the government will have to take  
24 certain proactive steps. My Lord, that first step is, 1st of March 2019. My Lord, this is a well-  
25 considered administrative decision making, keeping in mind several factors, national  
26 integrity, sovereignty, security, border issues, internal issues of the particular state, etc. etc.  
27 Please see My Lord. Using the power under Article 370(1)(d), C.O. 271 was passed, which  
28 extended. My Lord, please allow me to delete 61st Amendment. My Lord, that's a mistake and  
29 kindly My Lord, delete in Your Lordships copy also, it was applied earlier. Nothing turns on  
30 that My Lord, either way it is a simple mistake, but just to put the record straight. Then 77th  
31 Amendment and 103rd Constitutional Amendment, providing for reservation in favour of  
32 economically weaker sections of Jammu and Kashmir and for providing, reservation in  
33 promotions. Now please note this. 'It may be noted that this was during the currency of  
34 President's rule, similar to impugned C. O. 272. However, the same has not been challenged  
35 till date. Further, the power under Article 370(1)(d) to issue C.O. has been exercised during  
36 President's rule on six occasions in his note one. The extension of this amendment. My Lord,  
37 this is the relevance. Please note this My Lord. Something may turn. Something may not turn,

1 but it may satisfy Your Lordship's conscience. The extension of this amendment to the state  
2 reinforces the fact that in terms of social justice policy of reservation, the State of Jammu and  
3 Kashmir is governed by Constitution of India. Acceptance of social policy of the union, further  
4 means that Jammu and Kashmir does not, and did not have a sovereign right to determine the  
5 social policy at odds with that of the Union. Thereafter, President's rule is extended on 22nd  
6 July 2019 and thereafter, please directly come to page 97. But one fact My Lord, from Mr.  
7 Sibal's notes I may show. Mr. Sibal My Lord in blue has said that several questions were being  
8 put to the Minister. Are you going to change 370? Are you going to take some steps? And the  
9 Minister concerned used to say that we'll act according to the Constitution. That's all. But  
10 please see My Lord, just above 28th June 2019. The question is put post Pulwama and the  
11 answer. Please see this. The question Shrimati so and so and so and so asked question number  
12 so and so...Your Lordship gets?

13

14 **JUSTICE SANJAY KISHAN KAUL:** Referring to Page?

15

16 **TUSHAR MEHTA:** I'm sorry. Page 97. But for this My Lord, e-filing, but this kind of matter.  
17 My Lord, it was very, almost impossible to... effectively argue. Page 97, date 26th June 2019,  
18 from my learned senior Mr. Sibal's note. Shrimati, so and so and so ask question number 485  
19 from the Minister of Home Affairs. S 2-A. The viewpoint of the Government regarding Article  
20 370 and 35(a) in respect of Jammu and Kashmir. The policy government is working on to  
21 control the terrorist activities and details thereof. Then Shri Reddy, My Lord, MoS Home, 'At  
22 present, Article 370 is a part of Constitution of India under the title Temporary Provisions with  
23 respect to the State of Jammu and Kashmir, and Article 35(a) is contained in the Constitution  
24 Application of Jammu and Kashmir Order 1954, issued by the President under 370, B and C.  
25 The Government has adopted a policy of zero tolerance towards terrorism, effective response  
26 is given by security forces to counter terrorism activities in the state of Jammu and Kashmir.  
27 In order to combat activities of terrorists, several steps have been taken, including  
28 strengthening operational greed, enhancing coordination among security agencies, effective  
29 retaliation of terror acts.' Please Mark this. And this comes immediately, 'strengthening the  
30 ROP to protect convoys, etc.' I leave it at that. I don't wish to elaborate it further. Since the  
31 President's rule was extended, it had to again go for approval. Both the Houses respectively,  
32 on 28th June and 1st July approved the extension of the President's rule. Now comes an  
33 important event. Again to ensure that those who are staying in border areas are having a sense  
34 of security, social security. 1st July, 2019, it is critical to note that on the same day Jammu and  
35 Kashmir Reservation Amendment Act was passed by the Parliament exercising powers as the  
36 Legislature of Jammu and Kashmir. Your Lordships have seen Article 256(1)(b), that when  
37 President's rule is there the Parliament exercises the powers of the Legislature. My Lord this

1 enactment was passed. Considering the strategic and security concerns in mind the Jammu  
2 and Kashmir Reservation Amendment Act was passed by the Indian Parliament. This fact is  
3 mentioned to show that like in past, the Parliament has exercised legislative powers of Jammu  
4 and Kashmir Assembly under Article 356(1)(b). Prior to... This is important, ..'Prior to the  
5 aforesaid Act some category of reservation was available only to border areas of Kashmir  
6 division. Border areas of all divisions that is Kashmir, Jammu were facing frequent attacks  
7 and shelling and resultantly more hardship regimes prior to 01-03-2019 somehow confined  
8 the reservation benefit to borders areas of Kashmir Division only.' My Lord, there are several  
9 steps which are required to be taken in view of several circumstances which the nation faces,  
10 and these are the steps as precursor. Kindly see now, PDF Page 229 of this very compilation. I  
11 have said that this has been the practice and the constitutional convention throughout.  
12 Whenever there is a President's Rule, the Parliament exercises the power of the legislature as  
13 contemplated under the Article 356(1)(b), in all States.

14

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

16

17 **TUSHAR MEHTA:** Page 229. I'm just... I'm not reading, but I have taken My Lord till date,  
18 whichever are the Acts passed, by the Parliament, acting as a Legislature of the State during  
19 President's Rule, the list is given My Lord. But there are total 248 such laws passed. My Lord  
20 go to 242. I'm sorry, 243. There's something which would require Your Lordship's attention.  
21 242, I am sorry, at 243. This is I'm showing, in case of Punjab. The most important part of any  
22 legislative transaction is passing of the budget. Budgets are passed by the Parliament on behalf  
23 of the States, acting as a State Legislature. Come to the important part. 243. And I'll point out,  
24 My Lord, what is the relevance of showing this. In case of Punjab, Your Lordships would find,  
25 Item number 31, the Punjab Reorganization Bill. Your Lordship gets that?

26

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

28

29 **TUSHAR MEHTA:** My Lord. Justice... 240. My Lord, during the President's Rule, the  
30 Parliament acting as the legislature even reorganized the State of Punjab. Something which  
31 happened here My Lord. My Lord, Punjab was divided, bifurcated into Punjab, and Haryana.  
32 Chandigarh was carved out as union territory and some part of erstwhile Punjab went in  
33 Himachal. These were the four bifurcations My Lord, which took place by Punjab  
34 Reorganization Act passed by the Parliament, acting as a legislature. So My Lord, it is not  
35 uncommon, or it is not something which has happened for the first time, that you can elevate  
36 the argument to the level of a constitutional fraud.

37

1 **JUSTICE SURYA KANT:** But this must be in Reorganization Act under Article 3.

2

3 **TUSHAR MEHTA:** Yes. And I'll come to that My Lord, because I am right now pointing out,  
4 that suspension of proviso to Article 3, is not unusual. Whenever provision is suspended and  
5 President rule is also imposed, the Parliament acts as a legislature. In this My Lord, when I  
6 make my submissions on Reorganization Act, I'll also point out, this Reorganization Act was  
7 challenged on this very ground before Delhi High Court

8

9 **JUSTICE SANJIV KHANNA:** Punjab....

10

11 **TUSHAR MEHTA:** Yes, My Lord, Justice HR Khanna's judgment. And it was also challenged  
12 before this Hon'ble Court and *Mangal Singh*, I'll point out 5 Judge Bench, this very  
13 Reorganization Act. Now coming back My Lord, I'm sorry...

14

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

16

17 **TUSHAR MEHTA:** My Lord, kindly come to 10, before I take, now My Lord, I am on the last  
18 leg of this written submission followed namely...

19

20 **CHIEF JUSTICE DY CHANDRACHUD:** But Mr. Solicitor, If the powers of the legislature  
21 were stayed, under 356(b) can be exercised by Parliament, then what is the constitutional  
22 necessity of suspending the proviso to Article 3?

23

24 **TUSHAR MEHTA:** So that legislature, if present, if not dissolved, may not do anything. This  
25 is we are dealing with a case where the legislature was dissolved, but suppose it is in suspended  
26 animation, the legislation remains, the legislature remains. It might assemble and pass a  
27 resolution.

28

29 **JUSTICE SANJIV KHANNA:** The very fact, except in the case possibly the case of Punjab,  
30 I don't think Article 3 would have been invoked in many other cases, but as a matter of  
31 convention, what has been happening is whenever 356 is imposed going by your submission,  
32 proviso to Article 3 is also suspended.

33

34 **TUSHAR MEHTA:** Suspended.

35

36 **JUSTICE SANJIV KHANNA:** Because the power under Article 3 is different from the  
37 power of legislation.



1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30  
31  
32  
33  
34  
35  
36  
37

**TUSHAR MEHTA:** No, My Lord, I'll point out. 356, just take...

**JUSTICE SANJIV KHANNA:** That's what was highlighted, was power under Article 3 is different from the power of which is conferred of making legislations, making or enacting laws.

**TUSHAR MEHTA:** That's where My Lord, I would like to say something, if Your Lordships takes 356, taking a slight detour, My Lord...

**JUSTICE SANJIV KHANNA:** No it is, it is the [UNCLEAR] functions.

**CHIEF JUSTICE DY CHANDRACHUD:** It says the powers of the legislature.

**TUSHAR MEHTA:** No, not just powers to make laws.

**JUSTICE SANJIV KHANNA:** Correct it's broader.

**TUSHAR MEHTA:** All power, all powers. And now please keep proviso to Sub-Article... to Article 3, proviso to Article 3. Provided that. I'm sorry... Yes, yes My Lord, 'Provided that no bill for the purpose shall be introduced in either House of Parliament, except on the recommendation of the President and unless where the proposal contained in the Bill affects the area, boundaries or name of any of the states, the Bill has been referred by the President to the legislature of that state for expressing its views thereof.' This is the different power of the legislature, then power to make laws. So even this power in the present case was exercised by the Parliament. Now before I take the last leg of my...

**CHIEF JUSTICE DY CHANDRACHUD:** Otherwise in the absence of the suspension of the proviso, what would happen was, that the Parliament is exercising all the powers of the legislature of the state. It would give its views on it. And it would also enact the Bill.

**TUSHAR MEHTA:** Yes. Yes My Lord. That's the Constitutional order.

**JUSTICE SANJIV KHANNA:** That's your answer to the challenge that there is duality is missing in this case because you say when Article 356 is invoked and we have been and proviso is suspended, there are instances in the past where it was... this argument of duality was rejected?

1 **TUSHAR MEHTA:** Yes, My Lord. I can take directly to Your Lordships to...

2

3 **JUSTICE SANJIV KHANNA:** No we'll come to that, you take... go in your own way.

4

5 **TUSHAR MEHTA:** No, otherwise, Justice HR Khanna's judgment on this as a Delhi court...  
6 in Delhi High Court is directly on the point and My Lord the interpretation of Article 3, by a  
7 Constitution Bench in *Mangal Singh*, there also My Lord concerned Punjab. This very  
8 reorganization which was under 356 and the power exercise by Parliament as a Legislature.

9

10 My Lord, in Punjab incidentally, even views were not taken of the Parliament as a Legislature,  
11 saying that the assembly is suspended. So straightway the Reorganization Bill was passed. As  
12 a Reorganization My Lords this is interesting and I'll show that judgment. What happened was  
13 in the erstwhile state of Punjab, for example there were 85 seats of MLAs. Now some portion  
14 goes. So 85 became 70. The remaining 15 challenged that. How have you taken away our right  
15 to continue as members of the Legislative Assembly. And the number was lower than even  
16 minimum prescribed for any assembly to have. And then the question arose about Article 4,  
17 that you can make incidental provisions, which might even amount to amending the  
18 Constitution but would not be treated as amendment of the Constitution. Constitution Bench  
19 of Your Lordships. Since My Lords we are on this. Let me not show Justice HR Khanna's  
20 judgement, because Your Lordships have just seen Article 356 and Article 3. Kindly have a  
21 look at Volume 1, Compilation Volume 1 that is a separate argument but at this stage I'll just  
22 show these two judgments just to...It's marked in my written submissions also. It's easier  
23 rather than going to page 167 of this very compilation.

24

25 **JUSTICE SANJAY KISHAN KAUL:** Now you are back to written work?

26

27 **TUSHAR MEHTA:** Yes, So that Your Lordships you may not have to shuffle through. What  
28 I have done is for Your Lordships convenience. I have quoted the paras... of my written  
29 submissions that is Joint Written Submissions, Volume 3.

30

31 **CHIEF JUSTICE DY CHANDRACHUD:** 67, right?

32

33 **TUSHAR MEHTA:** 167, My Lord. On reading Article 3 and Article 174(1), of the Constitution,  
34 along with above proclamation of the President, it is seen that the President had suspended  
35 the power of Governor to summon the House, or each House of Legislature of the State, which  
36 by itself prevented the State Legislature from meeting and also suspended the State  
37 Legislature from meeting and also suspended so much of proviso to Article 3, of the

1 Constitution relating to the reference by the President to the Legislature of the State. It will  
2 thus be seen that the power to summon the Legislature of the Governor having been  
3 suspended, no occasion could thereafter arise, during the period when such suspension was in  
4 operation for the legislature to meet for the purpose of expressing its views on the Bill. Here it  
5 was dissolved. Bill to be introduced in Parliament affecting the area, boundaries or name of  
6 the concerned State. This would be the direct result of the suspension of the power of Governor  
7 to summon the Legislature of the State, even without suspension of so much of the proviso to  
8 Article 3, relating to the reference by President to the legislature of the State. However, in  
9 order to make the matter clearer, the operation of so much of proviso to Article 3, had also  
10 been suspended by the President. In view of the clear power conferred by Article 356(1)(a)(b),  
11 to declare that powers of the Legislature of the State shall be exercisable by or under the  
12 authority of Parliament. It enacted Act Number 31 of 66, by which all powers of the Legislature  
13 of the concerned State, State of Punjab to make laws were conferred on the President. We can  
14 find no warrant for the contention of the petitioner that what was transferred by means of  
15 Article 356(1)(b), of the Constitution was only the legislative power of the State Legislature,  
16 but not the power to meet and express its views as contemplated by the proviso to Article 3, of  
17 the Constitution. As My Lord pointed out, that the word power is wider, which includes power  
18 to make law. But all powers give recommendation, expressing views etc. According to the  
19 petitioner, Article 356(1)(c), only enabled the President to make such incidental and  
20 consequential provisions as appeared to him to be necessary or desirable for giving effect to  
21 the objects of the proclamation, including provisions for suspending in whole or in part. The  
22 operation of any provisions of the Constitution to anybody or authority in the State, but not to  
23 make provisions which were not both incidental and consequential. This was the contention.  
24 This argument of the petitioner would appear to have no validity for two reasons. Firstly, the  
25 expression incidental and consequential may be read as incidental or consequential to suit the  
26 context that this is a permissible mode of construction if the context so requires, it is well  
27 settled. It will be sufficient to refer. Then the judgment is when 10, can be read, as or Your  
28 Lordship may skip. Para 10.

29

30 **CHIEF JUSTICE DY CHANDRACHUD:** Mr. Solicitor, you refer to the fact that there's a  
31 practice, a Constitutional practice that during the operation of a proclamation under 356, the  
32 proviso to Article 3, has been suspended. And you have said that that is obviated by the reason  
33 that if you don't do so and the Legislature is only in a state of suspended animation and not  
34 dissolved. The legislature may conceivably meet to expresses this view, to obviate that  
35 Parliament. The Presidential proclamation does this. But none of this, this constitutional  
36 practices cannot obviate the legality of what is done, right?

37

1 **TUSHAR MEHTA:** Here, in the present case even the views are taken, but views are given  
2 by the Parliament as a legislation. In Punjab that was not the case.

3

4 **CHIEF JUSTICE DY CHANDRACHUD:** So Parliament would then give the views..

5

6 **TUSHAR MEHTA:** To itself...

7

8 **CHIEF JUSTICE DY CHANDRACHUD:** And it would also enact the legislation for  
9 Reorganization.

10

11 **TUSHAR MEHTA:** Yes, My Lords that's inevitable consequence.

12

13 **CHIEF JUSTICE DY CHANDRACHUD:** But would that really be consistent with the  
14 federal, for the federal...

15

16 **TUSHAR MEHTA:** I will show that. It does not destroy federalism at all. I'll be able to satisfy  
17 Your Lordships. I'm just, My Lords, since we are discussing this, I have not taken up the point  
18 of State Reorganization Act.

19

20 **CHIEF JUSTICE DY CHANDRACHUD:** Alright but you're saying that...

21

22 **TUSHAR MEHTA:** Yes, but since we were, My Lord answering... I was answering the proviso  
23 to Article 3, which came with 356 My Lord, I'm reading this judgement.

24

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

26

27 **TUSHAR MEHTA:** Para 10, My Lord. It can hardly be denied that the dispensing with the  
28 need to consult the views of concerned State legislature what it was itself, a direct consequence  
29 of the legislature being unable to meet for any purpose whatsoever during the period when  
30 Governor's power to summon the legislature was itself suspended. The petitioner does not  
31 advance his case in any manner, therefore, by laying stress on the expression incidental alone,  
32 in Article 356(1)(c). Secondly, the petitioner cannot seek to derive any assistance from the  
33 English decisions, which he quoted in order to show that he contended that what he contended  
34 was the restricted meaning given to the said expression, etc, etc. It could even have been that..

35

1 **JUSTICE SANJIV KHANNA:** It refers to the earlier incident in the case of erstwhile state  
2 of Travancore and Cochin, probably also under, 356. May not have been challenged in that  
3 case.

4

5 **TUSHAR MEHTA:** Not to my knowledge My Lord.

6

7 **JUSTICE SANJIV KHANNA:** Paragraph 95, it refers to.

8

9 **TUSHAR MEHTA:** Paragraph?

10

11 **JUSTICE SANJIV KHANNA:** 5.

12

13 **TUSHAR MEHTA:** Novel situation has been taken place in past Punjab was passed further,  
14 the erstwhile State of Travancore Cochin was also reorganized during Article 356. My Lord in  
15 both the cases, the views were not taken.

16

17 **JUSTICE SANJIV KHANNA:** Possibly it takes into account, sometimes there may be a  
18 breakdown of constitutional machinery within the state when the reorganization...

19

20 **TUSHAR MEHTA:**... is the solution, when there is My Lord. Kindly appreciate why this, I'm  
21 sorry, kindly consider this. My Lord when the reason for imposition of the President rule is  
22 such that to bring that state out of the situation which resulted into imposition of President's  
23 rule, maybe state requires to be reorganized. Then My Lord, the position cannot continue as it  
24 is. The President of India, can take a call, that the only solution of the problem is  
25 reorganization of the state. And Your Lordships are under... arguments repeatedly advanced  
26 was that there is a retrograde step, we were brought down from state to UT state. I will show  
27 My Lord, from the reorganization, it's a state for all purpose. It's a state with legislature, with  
28 only power of police with the President. It's a detailed state reorganization. Everything was  
29 factually wrong, that my consolidated fund has gone, my representation in Parliament has  
30 gone, my election, voting in President's election is gone. Specific statutory provisions are  
31 made. GST Council is gone. These are the arguments which were made. So, I am coming to  
32 that reorganization. The UT, My Lord is essentially, as much a part of federal structure as any  
33 other state, in a given set of facts. Your Lordship have, I don't want to jumble up, My Lord, my  
34 submissions, but there are submissions, what would be the contours of Your Lordships  
35 examination, once Your Lordship finds, that 356 exercise was not to be faulted with, what  
36 happens thereafter, there would be a restricted scope of judicial review. That's what **Bommai**

1 has said, it's a narrow compass doctrine. Your Lordships are aware. I'll take Your Lordship  
2 through them. But here to obviate that also the views of the Parliament...

3

4 [NO AUDIO]

5

6 ... some situations where it is necessary that for some time this remains under union as union  
7 territory. And the Hon'ble Home Minister on the floor of the House has said, that this is a  
8 temporary measure. Ultimately, it will become a state. But that's a separate argument. But I'll  
9 come to that now I may complete my written submissions, my list of dates My Lord

10

11 **CHIEF JUSTICE DY CHANDRACHUD:** What page?

12

13 **TUSHAR MEHTA:** My Lord, I was at page 102 but before that, I wanted Your Lordship to  
14 read one judgment, My Lord, 102... Let me complete this step wise. Step One, Your Lordships  
15 have seen?

16

17 **CHIEF JUSTICE DY CHANDRACHUD:** You were going to read that actually. Then we  
18 were just going to read that actually?

19

20 **TUSHAR MEHTA:** Yes, no. Your Lordships are at step one.

21

22 **CHIEF JUSTICE DY CHANDRACHUD:** We are now at step one.

23

24 **TUSHAR MEHTA:** Yes My Lord. Please see My Lord, as a first step, the Honourable  
25 President issued C.O. 272, by the said Constitutional Order issued under 370 Sub-Article 1 that  
26 is D. The President applied all provisions of the Constitution of India, and superseded all  
27 previous Constitution Orders by which selected provisions of the Constitution of India were  
28 made applicable either with or without modification.

29

30 **CHIEF JUSTICE DY CHANDRACHUD:** This is which one?

31

32 **TUSHAR MEHTA:** I'm sorry. Justice Kaul gets My Lord?

33

34 **CHIEF JUSTICE DY CHANDRACHUD:** Point number one?

35

36 **TUSHAR MEHTA:** Point number one. Step number one. As a first step the Honourable  
37 President issued C.O. 272 by the said Constitution Order issued under Article 370 Sub-Article

1 1. The President applied all provisions of the Constitution of India, and superseded all previous  
2 Constitution Orders, by which selected provisions of the Constitution of India were made  
3 applicable, either with or without modifications and 2- the Honourable President applied  
4 Article 367. Your Lordships have seen, it has been applied four times in past of the Constitution  
5 of India as modified under the said order in which modification was made in Article 367, Sub-  
6 Article 4, Please see at D. This is the exercise which is approved in **Damnoo**. D in proviso to  
7 Clause 3 of Article 370 of this Constitution, the expression Constituent Assembly of the State  
8 referred to in Clause 2, shall read Legislative Assembly of the State. This is the first step. When  
9 I explained this. I assist Your Lordships, that in absence of an assembly, Constituent Assembly  
10 my contention in law is that the President is free to take a call even without recommendation.  
11 But I'll come to that little later.

12

13 Step two, after having applied the entire Constitution with modification as stipulated in  
14 367(4)(d), as reflected above, because we had to save 367 because that's the mechanism we  
15 have used, reflected above the Parliament after C.O. 272 was placed before it undertook the  
16 following exercise in its capacity as the Legislature of the State. Then Rajya Sabha  
17 recommended to the President under Article 370, Sub-Article 3 as under. Now Rajya Sabha as  
18 a legislator... Legislative Assembly recommends, please see My Lords the bottom, that this  
19 House recommends the following public notification to be issued by the President of India  
20 under Article 370, Sub-Article 3. Please see the next para. All provisions of this Constitution,  
21 as amended from time to time, without any modifications or exceptions, shall apply to the  
22 State of Jammu and Kashmir notwithstanding anything contrary contained in Article 152 or  
23 Article 308, or any other Article of this Constitution, or any other provision of the Constitution  
24 of Jammu and Kashmir, or any law document, judgment, ordinance, order, bylaw, rule,  
25 regulation, notification, custom or usage, having the force of law in the territory of India, or  
26 any other instrument, treaty or agreement as envisaged in the Article 363. Simultaneously,  
27 simultaneously on Bill being sent to Rajya Sabha under proviso to Article 3, which according  
28 to me I can safely argue, not necessary in absence of the legislature.

29 Views. I'll show the **Mangal Singh** judgment but it was placed before the Rajya Sabha as a  
30 legislature. First step of Legislature because second is Lok Sabha. Rajya Sabha expressed its  
31 view to accept Jammu and Kashmir Reorganization Bill as under that the President of India  
32 has referred the Jammu and Kashmir Reorganization Bill to this House under the proviso to  
33 Article 3, of the Constitution of India for its views as this House is vested with the power of  
34 State Legislature of Jammu and Kashmir as per proclamation of the President of India dated  
35 19<sup>th</sup> December 2018. This House resolves to express the view to accept the Jammu and  
36 Kashmir Reorganization Bill. Simultaneously on the Bill being sent to Rajya Sabha under  
37 proviso to Article 3, the President... Lok Sabha expressed its view. After Rajya Sabha, Lok

1 Sabha. So that whole becomes the legislature. They also My Lord, accepts the....Thereafter,  
2 Rajya Sabha passes Jammu and Kashmir Reorganization Act 2019, after views of both the  
3 Houses. Now Your Lordships may skip the note and kindly come to page 106, bottom. Next  
4 day, 6th of August, 2019. The Lordships have seen the recommendation of the Rajya Sabha  
5 acting as a Legislature under Article 370, Sub-Article 3. Now it comes before Lok Sabha. On  
6 6th August 2019, again, the Parliament commenced its proceedings exercising its function as  
7 Legislative Assembly of Jammu and Kashmir. The following legislative activity took place. Lok  
8 Sabha recommended to the President under Article 370, Sub-Article 3, My Lords, see, I'm not  
9 reading it, recommending to the President that you apply all provisions of the Constitution as  
10 was recommended by Rajya Sabha. And Lok Sabha passed Jammu and Kashmir  
11 Reorganization Act. Because the views were expressed the previous day. So both the views and  
12 Act, it becomes an Act, namely, Jammu and Kashmir Reorganization Act and both the  
13 recommendations which now culminates into 263. C.O. 273. I'm sorry. C.O. 273. Please see  
14 page 108, further in the appendix to the Bill, a comprehensive schedule contained the list of  
15 central laws made under the Union List and the Concurrent List by the Parliament, which  
16 would henceforth be applicable to the Union Territory of Jammu and Kashmir and Union  
17 Territory of Ladakh. The amendments have also been carried out to the existing state laws  
18 made under the State List by the erstwhile State Legislature in order to bring them in line with  
19 all provisions of the Constitution of India. So they become now Constitution compliant. It is  
20 critical to note that the said Reorganization Act applies an already existing constitutional  
21 provision that is Article 239(a) to the region. It is stated that the same contours... same  
22 counters, the assertion of the petitioners that it was in breach of federal structure. It is stated  
23 that Article 239(a), itself is a part of federal or asymmetrical federal structure and cannot  
24 divorce the concept from the landscape of Indian constitutional law. Article 239(a), applicable  
25 to Puducherry for decades is one of the ways of maintaining federal relationship between  
26 region and centre and cannot be said to be arbitrary and irrational. Then step four. And the  
27 last step C.O. 273. President issued C.O. 273, in exercise of powers, under Article 370, Sub-  
28 Article 3, of the Constitution, as amended by C.O. 272, declared that Article 370 would cease  
29 to apply with effect from 06-08-2019. This is what is impugned. Thereafter, My Lord...

30

31 **JUSTICE SANJIV KHANNA:** Mr. Solicitor, this may be your answer, as far as the Ladakh  
32 is concerned but converting J&K into a Union Territory, what has been argued by the other  
33 side is downgrading.

34

35 **TUSHAR MEHTA:** I must meet with that My Lords.

36



1 **JUSTICE SANJIV KHANNA:** Number one. Number two, is Article 356, the maximum  
2 tenure, as prescribed, is three years we have crossed those three years.

3

4 **TUSHAR MEHTA:** At the time of, My Lord... I'll answer that. My Lords, 2019 we have not  
5 and thereafter we are in a different regime.

6

7 **JUSTICE SANIV KHANNA:** I know. Now as a Union Territory, that 356, that part will not  
8 apply because Union territory is something different.

9

10 **TUSHAR MEHTA:** Therefore, My Lord...

11

12 **JUSTICE SANJIV KHANNA:** But if it was not a union territory?

13

14 **TUSHAR MEHTA:** It would have crossed, it would have crossed by now, but for the  
15 intervention of 5th and 6th of August 2019...

16

17 **JUSTICE SANJIV KHANNA:** Yes, that is...

18

19 **TUSHAR MEHTA:** Yes. For Your Lordship's convenience, I have prepared My Lord, chart.  
20 This is only section, the article and how it changes, it would be for quick reference for, if Your  
21 Lordship permits, it's not nothing new, nothing new. But 367 application My Lord, is little  
22 confusing if we read from various pages. Therefore, we have just made a common kind of a  
23 three page chart.

24

25 **JUSTICE SANJIV KHANNA:** As for 367 is concerned?

26

27 **TUSHAR MEHTA:** Only 367.

28

29 **JUSTICE SANJIV KHANNA:** 367, because there was some deletion also in the 367.

30

31 **TUSHAR MEHTA:** Therefore, therefore My Lord, please take, it won't take more than five  
32 minutes. Kindly pardon me, this I think better to have the physical copy My Lords because it's  
33 big, larger. My Lord, left hand side is the Article 370, as it stood, on the date of Constitution  
34 coming into force. Correct, My Lords? Right hand side, is as on 17-11-52, C.O. 44, My Lord, the  
35 change made under 370 Sub-Article 3. Please see the colour part, Your Lordships, I think My  
36 Lord, Chief Justice is ahead of me.

37

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

2

3 **TUSHAR MEHTA:** Always so, but even in this chart.

4

5 **CHIEF JUSTICE DY CHANDRACHUD:** Explanation, right?

6

7 **TUSHAR MEHTA:** Explanation. Explanation. For the purpose of this Article, the  
8 Government of State means My Lords, this is replaced by Sadr-e-Riyasat, please see.

9

10 **CHIEF JUSTICE CHANDRACUD:** Right.

11

12 **TUSHAR MEHTA:** Person for the time being recognized by the President on the  
13 recommendation of the Legislative Assembly, as Maharaja of Jammu and Kashmir, acting on  
14 the advice of Council of Ministers for the time being in office under Maharaja's proclamation  
15 dated so and so. The person for the time being, recognized by the President on the  
16 recommendation of the, this is edit, the green part is addition My Lord, green part, kindly My  
17 Lordships can consider, writing green part is addition. Please mark one thing though, My  
18 Lord, at that date, 17-11-52, the Constituent Assembly was in place. In 52 Constituent  
19 Assembly was in place but only Legislative Assembly, My Lord, was used while defining the  
20 state.

21

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

23

24 **TUSHAR MEHTA:** When there is a State Legislative Assembly of the state, President, on  
25 recommendation of Legislative Assembly of the state, as Sadr-e-Riyasat of Jammu and  
26 Kashmir. This is the first change.

27

28 **JUSTICE SANJIB KHANNA:** But this was done pursuing to the recommendation given by  
29 the Constituent Assembly?

30

31 **TUSHAR MEHTA:** Correct. I've said so in my written submissions as well. My Lords are  
32 right. Thereafter, My Lord, page 2, this is as on 14th May '54, the second change takes place

33

34 **JUSTICE SANJIV KHANNA:** This would be, this amendment, which came as a result of,  
35 this is under Article 370 Clause 3?

36

37 **TUSHAR MEHTA:** First exercise.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30  
31  
32  
33  
34  
35  
36  
37

**CHIEF JUSTICE DY CHANDRACHUD:** The First exercise.

**JUSTICE SANJIV KHANNA:** This is under Clause 3 of Article 370?

**TUSHAR MEHTA:** The first one, yes, My Lord.

**JUSTICE SANJIV KHANNA:** Because at that time Constituent Assembly was there.

**TUSHAR MEHTA:** Was in force...

**JUSTICE SANJIV KHANNA:** So they then, pre, pre...

**TUSHAR KHANNA:** Recommended

**JUSTICE SANJIV KHANNA:** Recommendation resulted in the amendment to the Constitution...

**CHIEF JUSTICE DY CHANDRACHUD:** May 1954, that is C.O. 48?

**TUSHAR MEHTA:** Yes, My Lord, the entire green part is added.

**CHIEF JUSTICE DY CHANDRACHUD:** Under Article 360?

**TUSHAR MEHTA:** Yes, My Lord only D, we have highlighted in yellow, to show to Your Lordships, I have already emphasized that reference to the legislature or the Legislative Assembly of the state, of the state shall construed as including reference of Constituent Assembly, so inclusive definition. So they were used interchangeably. Otherwise, My Lord this entire green part is added in '54 and its effect is given on the right hand side. It is the same thing, and therefore I am not reading it. I have given the effect of the 367 exercise. Then My Lord coming to page number 3. It is again under 367 where D Your Lordships would find in red is deleted. Correct?

**CHIEF JUSTICE DY CHANDRACHUD:** Right.

**TUSHAR MEHTA:** The reference to Legislature or the Legislative Assembly is deleted and green is added. What is deleted is in red. Rajpramuk reference goes in '58 because of I have

1 pointed out Reorganization Act, etc and Article 238 being repealed. Reference to a Governor  
2 shall include reference to the Governor of Jammu and Kashmir, provided that in respect of  
3 any period prior to the 10th day of April '55, such a reference that is for the past period. So  
4 now comes the Governor because Sadr-e-Riyasat ceases to exist and therefore the Governor.  
5 Right hand side I have given effect to this amendment.

6

7 **CHIEF JUSTICE DY CHANDRACHUD:** C.O 56 came in after the Constitution was  
8 framed.

9

10 **TUSHAR MEHTA:** Correct.

11

12 **CHIEF JUSTICE DY CHANDRACHUD:** After 26 January 1957...

13

14 **TUSHAR MEHTA:** My Lords are right..

15

16 **CHIEF JUSTICE DY CHANDRACHUD:** Therefore, the reference to the Constituent  
17 Assembly is done away with in Article 367...

18

19 **TUSHAR MEHTA:** Deleted. But exercising the mechanism under 367 that's the... My Lord I  
20 wish to highlight otherwise that's the two reasons; a) constituent assembly was not there and  
21 Governor, because of state reorganization. Now, My Lord (aa) is the new addition. This is 66.  
22 This is the left hand side on page 4 is what *Damnoo* judgment approves. That 367 can be  
23 used for this purpose. (aa) is addition reference to the person for the time being recognized by  
24 the President on the recommendation of Legislative Assembly of the State as Sadr-e-Riyasat  
25 of Jammu and Kashmir acting on the advice of Council of Ministers of the State for the time  
26 being in office shall be construed as references to the Governor of Jammu and Kashmir and  
27 My Lord...

28

29 **CHIEF JUSTICE DY CHANDRACHUD:** But Sadr-e-Riyasat has already gone right?

30

31 **TUSHAR MEHTA:** Yes, yes, My Lord.

32

33 **CHIEF JUSTICE DY CHANDRACHUD:** So then what is the need for bringing this in  
34 1966?

35

36 **TUSHAR MEHTA:** No, I'm sorry. Sadr-e-Riyasat went here.

37

1 **CHIEF JUSTICE DY CHANDRACHUD:** Oh, it went here.

2

3 **TUSHAR MEHTA:** Earlier it was removed from (b). 4(b). I'm sorry, (b) it remained. It went  
4 in (e). Now it goes from (b) as well.

5

6 **JUSTICE SANJIV KHANNA:** Earlier the amendment was Sadr-e-Riyasat acting on the  
7 advice of the Council of Ministers. Earlier it was individual capacity. Then it became acting on  
8 the advice of Council of Ministers. Here, now the Sadr-e-Riyasat is replaced by Governor.

9

10 **TUSHAR MEHTA:** Governor acting on the aid and advice. Yes, My Lords. Now the last one  
11 at page 5. My Lord, which is done by C.O. 272 the impugned one. Page 5, the proviso is added.  
12 The exercise which was undertaken so far under 367, was again undertaken for the purpose of  
13 Jammu and Kashmir for Article 370, the word Constituent Assembly was replaced by the word  
14 Legislative Assembly. Same thing because Constituent Assembly ceased to exist it became  
15 Legislative Assembly now. And the rest I have already explained.

16

17 Tomorrow... there was one request .. it's more of a convenience request. If Your Lordships  
18 were pleased to seat on Monday. My lord, if Your Lordships can consider sitting even on  
19 Friday. Maybe My Lord we might be able to finish.

20

21 **CHIEF JUSTICE DY CHANDRACHUD:** Your whole side can wrap up then?

22

23 **TUSHAR MEHTA:** Yes, because there's one holiday. That's a request, if it suits Your  
24 Lordships and the other side My Lords.

25

26 **CHIEF JUSTICE DY CHANDRACHUD:** 01:00 on Friday, we will give you up to 01:00 on  
27 Friday?

28

29 **TUSHAR MEHTA:** No, I will finish tomorrow.

30

31 **CHIEF JUSTICE DY CHANDRACHUD:** No, you means your side. So that you can  
32 all...until 04:00. You are only saying if you can all finish by lunch on Friday, then there is no  
33 difficulty. We can sit on Friday, but all of you can try and finish upon. No, you have to do it.  
34 But now it's going to be repetition, because by next Tuesday we want to give them two days in  
35 rejoinder. Mr. Giri, otherwise this will go sometime to September. The Bench may not be  
36 available for ten days, twelve days.., we don't want to...

37

1 **TUSHAR MEHTA:** Keeping that in mind I am requesting for Friday.

2

3 **CHIEF JUSTICE DY CHANDRACHUD:** No, no, we will not we'll wrap up on Friday.

4

5 **TUSHAR MEHTA:** In fact, we have bifurcated the subjects. There may not be much of a  
6 duplication, but...

7

8 **CHIEF JUSTICE DY CHANDRACHUD:** Thursday is a holiday right?

9

10 **TUSHAR MEHTA:** Wednesday, is a holiday.

11

12 **CHIEF JUSTICE DY CHANDRACHUD:** Wednesday, is a holiday. So we'll decide  
13 tomorrow, but you can all meet in the evening so that your side is completed on Friday. We  
14 don't mind stretching it a little more on Friday beyond 01:00. So that we don't come back after  
15 lunch. We'll give you a little more time.

16

17 [NO AUDIO]

18

19 **CHIEF JUSTICE DY CHANDRACHUD:** We can Friday we can start at 10. It will give you  
20 3 hours on a trot and wrap up at 01:00 for your side. So at least we're giving you a little more  
21 time on Friday.

22

23 **TUSHAR MEHTA:** We will, My Lord, discuss and come back tomorrow

24

25 **CHIEF JUSTICE DY CHANDRACHUD:** Give us a solution. I know. But everybody now  
26 has to because we've heard the other side. So we've seen the entire material. Now we are  
27 hearing submissions really. Because you don't have to read now even the judgments have been  
28 read out to us...

29

30 **V. GIRI:** Shortest possible but some...

31

32 **CHIEF JUSTICE DY CHANDRACHUD:** That's all that we are requesting. We are sure  
33 that you can achieve it. Mr. Giri, we are...

34

35 **V. GIRI:** Your Lordships have seen, when it went on the other side, somebody was given half  
36 an hour to 2 hours. We'll not do that. Some perspectives will have to be pleased graciously,  
37 take note of the fact that...

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15

**CHIEF JUSTICE DY CHANDRACHUD:** All right but please do meet this evening in a way that on Friday between 10 and 1 we will hear you on a trot for 3 hours and we'll conclude this side on Friday. Then we give them Monday and Tuesday to wrap up the rejoinders.

**V. GIRI:** Will Your Lordships then give us time for the whole of Friday.

**CHIEF JUSTICE DY CHANDRACHUD:** There's some difficulty about the whole of Friday. That's why we are saying.

**TUSHAR MEHTA:** Obliged, My Lord.

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