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Article 35A took away fundamental rights while giving special rights to permanent residents of J&K, says CJI

However, the Chief Justice asked the government whether the Centre had adhered to the principle of federalism while abrogating Article 370 and abolishing J&K as a full-fledged State

August 28, 2023 08:03 pm | Updated August 29, 2023 08:31 am IST - NEW DELHI



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which was introduced through the Constitution (Application to Jammu and Kashmir) Order, 1954 issued by the President under Article 370, demarcated permanent residents with exclusive right to purchase land, seek State government employment and other benefits in education and health care. The others, called 'non-permanent residents', were not privy to these privileges.

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The Chief Justice noted that Article 35A had even granted immunity from judicial review to these special privileges.

“This artificially created class of ‘permanent residents’ alienated people who did not fall within the category. Article 35A further mandated that any law which provides for these special privileges to this class would not violate fundamental rights like Articles 14 (right to equality), 19 (1)(f) and 31 (then right to property), 19(1)(e) (right to settle anywhere in the country) and even Article 21 (right to life and personal liberty) and 22 (protection against preventive detention). That demarcating line between permanent residents and non-residents did this for decades together. It was unthinkable in a constitutional democracy.. the Government of India with the State government of Jammu and Kashmir added Article 35A,” Solicitor-General Tushar Mehta, for the Government of India, submitted.

To this, Chief Justice Chandrachud indicated that the current Union government cannot distance itself from its predecessors.

“Mr. Solicitor, you are appearing for the Government of India. You [Government of India] did all this. In constitutional theory, the Government of India is one, perpetual entity,” Chief Justice Chandrachud reminded the law officer.

Mr. Mehta said the Centre corrected itself in August 2019 when it abrogated Article 370 and its creation, Article 35A.

“I am justifying this correction we made in 2019. I am not saying that or this government. ‘Our government’ is what I say. The mistakes of the past should not befall the future generations,” he replied.

The Solicitor-General pointed to how people, both Hindus and Muslims, driven out of Pakistan-occupied Kashmir in 1947 were not recognised as permanent residents until 2019. The large population of safai karamcharis brought to J&K for manual work were not given this status despite residing in the State for years.

“Article 35A had enjoyed a status over and above the Ninth Schedule (laws outside the ambit of judicial review) of the Constitution,” he stressed.

Mr. Mehta said that Article 35A had been a hindrance to the growth and flow of investments into J&K. Despite this, the class of people known as ‘permanent residents’ were misguided into believing that they were enjoying a privilege that none could take away from them.

“Here, in this case, we have two major political parties defending Articles 370 and 35A... But now the people have realised what they had lost all those years... Investments, tourism, etc., have started now. Hotels are being built and 16 lakh tourists have visited Jammu and Kashmir,” Mr. Mehta said.

However, the Chief Justice asked the government whether the Centre had adhered to the principle of federalism while abrogating Article 370 and abolishing J&K as a full-fledged State.

The Chief Justice said the abrogation was facilitated by first dissolving the J&K State Legislature and then proclaiming President's Rule under Article 356 on the ground of breakdown of constitutional machinery in the State.

Chief Justice Chandrachud pointed to the proviso to Article 3, which made it mandatory for the President to consult the State Legislature before altering the status of a State. The proclamation of President's rule in December 2018 had done away with the applicability of the proviso to Article 3.

"But the Parliament assumed the role of the Jammu and Kashmir State Legislature. That is usually done," Mr. Mehta insisted.

"So, are you saying that the Parliament would then give its views to itself about the alteration of Jammu and Kashmir from a State to Union Territories and also enact the law for reorganisation of the State? Would that really be consistent with the federal structure?" Chief Justice Chandrachud asked.

Mr. Mehta defended that J&K was "still a State for all purposes".

"It is a State with a legislature, everything... only the police powers are with the President. It was a very detailed reorganisation," the Solicitor General assured.



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