

Achieving Federal Equilibrium: A Critical Analysis of Government of National Capital Territory of Delhi V. Union of India (2018)

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Case Review

Abstract

The objective of this paper is to analyze the Supreme Court's verdict in *Government of National Capital Territory of Delhi v. Union of India* (2018 SCC OnLine SC 661) that determined the federal position guaranteed to the national capital. The dispute stems from the unique position enjoyed by Delhi leading to a tussle for power between the governments of the Union and the State. The analysis commences by describing the nature of Union Territories in India, in general, and Delhi, in particular. Delhi enjoys *sui generis* powers in our Constitutional landscape. The same has been highlighted. The author then continues to explain the existing political framework envisaged under the Indian Constitution. The role played by the State Council of Ministers, the Union Government and the crucial link between the two played by the Lieutenant Governor has been underlined. The judgment speaks of the need for greater democratic devolution to the State and minimal centralization in the Union. The LG has been denuded of any independent decision-making power and his discretion minimized. The author has sought to present objectively the arguments advanced both by the Union and the State of Delhi. Each argument is followed by the verdict of the Delhi High Court and its reversal by the Supreme Court. The rationale for the decision and its critical analysis has been presented as well. The paper concludes with an analytical description of Delhi's unique constitutional position at the heart of our federal polity. The need for a smooth and harmonious cooperative relationship is fundamental to a democratic federation like India.

Keywords: *Constitution of India, Cooperative Federalism, Collaborative Federalism, Delhi Government, Lieutenant Governor*

1. Background

In an unprecedented move in early June 2018, the Chief Minister of Delhi, Arvind Kejriwal, staged a sit-in at Raj Niwas for 9 days. It was alleged that the senior civil servants of the capital

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were on an informal strike and refusing to follow orders of the Delhi Ministers, at the behest of the Prime Minister and the Lieutenant Governor (LG).² This came as part of a series of allegations by the CM regarding obstruction by the LG in the administrative affairs of the national capital.³

Several writ petitions were consequently filed at the Delhi High Court (HC) in 2015 for an authoritative interpretation of Article 239AA. It was alleged that there was rule by proxy by the Central government. It included contentions over the notification empowering LG over “services”; establishment of inquiry commissions for investigating CNG Fitness Certificates, functioning of Delhi and District Cricket Association; appointment of Directors of Power Discoms; directions to Power Discoms for compensation; revision of stamp duty rates; and appointment of a Special Public Prosecutor. The High Court declared the LG as the administrative head of the Government of the National Capital Territory of Delhi (GNCTD).

Subsequently, the GNCTD filed an appeal before the Supreme Court (SC) against the judgment. The judgment of the SC reverted the locus of power with the Legislative Assembly of Delhi. The Apex Court declared that the interpretation of the Constitution must be done in a manner that enhances the democratic spirit ingrained in it. It held that “in a democratic republic, the collective will of the people is supreme and the legislative representatives must reflect this spirit.”⁴

2. Delhi as a *Sui Generis* Union Territory

The judgment of the HC starts off by establishing its jurisdiction over the said matter. It explains that the matter at hand is not a dispute of a federal nature, for the purposes of Article 131. Reliance is placed on *State of Rajasthan v. Union of India*⁵ to clarify that, according to

² FP Staff, “AAP’s sit-in protest: Kejriwal writes to Modi, asks for help to end IAS ‘strike’; party to hold candle march at Rajpath”, *Firstpost*, Jun. 14, 2018, available at: “<https://www.firstpost.com/politics/aaps-sit-in-protest-kejriwal-writes-to-modi-asks-for-help-to-end-ias-strike-party-to-hold-candle-march-at-rajpath-4510071.html> (Last visited on Sept. 20, 2020).

³ For a brief timeline, see: Shivangi Saxena, “Decoding Delhi’s Full Statehood Demand: Chronological Timeline of the Tussle”, *BusinessWorld*, Jul. 05, 2018, available at: <https://m.dailyhunt.in/news/india/english/business+world-epaper-bizworld/decoding+delhi+s+full+statehood+demand+chronological+timeline+of+the+tussle-news+91626126> (Last visited on Sept. 20, 2020).

⁴ Mehal Jain and Manu Sebastian, “Breaking: Delhi Vs LG- LG is Bound by ‘Aid and Advice’ of Elected Govt. He can’t Interfere in Each and Every Decisions of Govt: SC”, Jul. 04, 2018, available at: <https://www.livelaw.in/breaking-delhi-vs-lg-lg-is-bound-by-aid-and-advice-of-elected-govt-he-cant-interfere-in-each-and-every-decisions-of-govt-sc/> (Last visited on Sept. 20, 2020).

⁵ (1977) 3 SCC 592. See also: *State of Karnataka v. Union of India*, (1977) 4 SCC 608.

Article 131, only matters on which the presence or degree of a legal right rests are sufficient for adjudication. Under that structure, mere wrangles between governments have no position.

It continues to illustrate the Constitutional scheme of states and Union Territories (UTs) by highlighting the presence of Delhi under Part II of the First Schedule. The UT does not lose its existence under Union control.⁶ In any of the lists, Parliament has the right to make regulations with respect to any subject.⁷ The President administers the UT under Article 239 through an administrator that serves as his delegate.⁸

As regards Delhi, Article 239AA was introduced in the Constitution of India by virtue of Constitution (69th Amendment) Act, 1991. The UT of Delhi has been called the “Delhi National Capital Territory” to be governed by a Lieutenant Governor. A Legislative Assembly of 70 members to be directly elected by the people is established. Article 239AA (3) empowers the Legislative Assembly, with the exception of matters relating to the police, public order and property, to frame legislations on matters specified in the State List and Concurrent List. The Parliament enjoys overriding powers over all laws. A Council of Ministers, headed by a Chief Minister (to be appointed by the LG), to aid and advise the LG is also established. The Council of Ministers is to be collectively responsible to the Legislative Assembly. The matter has to be referred to the President in the event of a conflict of opinion between the LG and its ministers. The GNCTD Act (1991) and the Transaction of Business of the GNCTD Rules (1993) and the Allocation of Business of the GNCTD Rules (1993) were further enacted to supplement the said provisions.

In order to deal with matters concerning the common man of Delhi, the unique federal framework was created. Delhi is entrusted with a permanent constitutional status to grant it a special UT status.⁹ In *NDMC v. State of Punjab*¹⁰, the court had traced the constitutional history of the capital while making it clear that Delhi is a UT. At the commencement of the Constitution, Delhi was part of Part C states (along with Coorg, Himachal Pradesh, Manipur and Tripura). The States Reorganisation Commission removed the division and categorized Indian territories as “States” and “Union Territories” as part of Schedule 1. It is also worth

⁶ *Chandigarh Administration v. Surinder Kumar*, (2004) 1 SCC 530.

⁷ The Constitution of India, art. 246(4).

⁸ *Sushil Flour Dal & Oil Mills v. Chief Commissioner*, (2000) 10 SCC 593.

⁹ Statement of Objects and Reasons, Constitution (74th Amendment) Bill, 1991.

¹⁰ (1997) 7 SCC 339.

noting that though Delhi is a UT, the system of administration (both legislative and executive) is not uniform among the UTs.

The SC held that Delhi may enjoy a division of power *sui generis* to its constitutional status.¹¹ Dipak Misra, CJI, as he was then, while writing the judgment for himself, AK Sikri, J and AM Khanwilkar, held that Having maintained that the position of the NCT of Delhi is a different class, and that of the Lieutenant Governor of Delhi is not that of the Governor of the State, he remains, in a limited way, the Administrator working on the classification of the Lieutenant Governor. DY Chandrachud, J., in a separate but concurring judgment, held that the “constitutional scheme indicates several features in relation to the NCT which have resulted in the conferment of a constitutional status which falls short of the trappings of full statehood.”¹²

3. Binding Nature of “Aid and Advice”

According to Article 293AA (4), The Cabinet of Ministers must “aid and advise the LG in the exercise of his functions in relation to matters with respect to which the Legislative Assembly has power to make laws, except in so far as he is, by or under any law, required to act in his discretion.”¹³

The GNCTD argues that the dictum of *Samsher Singh v. State of Punjab*¹⁴ being applicable makes the advice binding. The court in *Samsher Singh* had held With the President (in the Union) and the Governor (in the province) as the Head of State, India follows a cabinet system of government. In such a system, the Head of the State must function in accordance with the aid and advise of the Ministers. It was observed that “either the President or the Governor is to exercise the functions personally and where the Governor has any discretion, the Governor acts on his own judgment.”¹⁵ Emphasis is also placed on *Rajendra Singh Verma v. Lieutenant Governor of NCT of Delhi*¹⁶. It is argued that, due to the presence of an elected Assembly, the LG enjoys a status similar to the Governor of a state and thus cannot act on his own with regard

¹¹ Delhi and Puducherry have Legislative Assemblies with Council of Ministers. The Administrator for Delhi, Puducherry and Andaman and Nicobar Islands is designated as Lieutenant Governor.

¹² Judgment on the website of the Supreme Court, available at: https://main.sci.gov.in/supremecourt/2016/29357/29357_2016_Judgement_04-Jul-2018.pdf. (Last visited on Sept. 20, 2020).

¹³ *Supra* note 4.

¹⁴ AIR 1974 SC 2192.

¹⁵ *Supra* note 12.

¹⁶ (2011) 10 SCC 1.

to matters that are within the exclusive legislative competence of the Legislative Assembly. For matters beyond the purview, the LG must consult the CM.

The Union of India argues that the scope and nature of the “aid and advise” made to the Governor under Article 162 is not comparable to the same made to the LG under Article 239AA. The counsel relies on the ratio of *Devji Vallabhbhai Tandel v. Administrator Goa, Daman & Diu*¹⁷ to buttress the argument. An order under COFEPOSA passed by the Goa, Daman and Diu UT Governor (who then had an elected Assembly with a Council of Ministers) was questioned in the matter. While contrasting Section 44 of the Act on the Government of the Union Territories (1963) and the comparable text of Article 239AA (4) with Articles 74 and 163 of the Act on the Government of the Union Territories (1963), the Court stated that the position of President and Governor differed from that of Administrator.

The HC took the side of the UOI and upheld the ratio of *Devji Vallabhai Tandel* while holding that when complying with the advice of the Council of Ministers, the Administrator is not obligated to rule. In the event of a disagreement between the two, the LG may refer the matter to the President, whose judgment may outweigh the opinion of the ministers. Furthermore, the protocol for such a relation is laid down in Chapter V of the Transaction of Business of the GNCTD Rules (1993). The LG is required to act according to the decision of the President¹⁸. For the period the matter is being considered by the President, the LG shall suspend any decision on that matter and the Minister would be obliged to act accordingly. No further action may be taken except in accordance with the Central Government’s decision.¹⁹ The LG is also empowered to take urgent action pending such decision.²⁰

Dipak Misra, CJI held that the meaning of ‘aid and advise’ employed in Article 239AA (4) has to be “construed to mean that the Lieutenant Governor of NCT of Delhi is bound by the aid and advice of the Council of Ministers and this position holds true so long as he does not exercise in his discretion”.²¹ LG has not been delegated any autonomous decision-making authority. It was observed that the LG must act either on the ‘aid and advice’ of the Council of Ministers or, when a reference is made to him, he is obliged to follow the decision taken by the President.

¹⁷ (1982) 2 SCC 222.

¹⁸ Transaction of Business of the Government of National Capital Territory of Delhi Rules, 1993, Rule 50.

¹⁹ *Id.* at rules 51, 52, 56.

²⁰ *Supra* note 7, art. 239AA (4).

²¹ *Supra* note 4.

4. Wider Discretionary Powers of the Lieutenant Governor

The LG's executive powers are even greater than those of the Governor, although the President has no such jurisdiction. Under Article 163, the gubernatorial discretion is limited to functions "by or under this Constitution", while under Article 239AA the discretion extends to all functions expected "by or under any law". The GNCTD Act provides that discretion is available on "matters outside the purview of the powers conferred on the Legislative Assembly"²² for functions entrusted to him by the President as well as for roles that are legal or quasi-judicial. LG's decision as to whether or not those matters need discretion is final.

The court places reliance on *Nabam Rebia and Bamang Felix v. Deputy Speaker*²³ to corroborate further. The SC had then held that the measure of the discretionary power is limited to the scope under Article 163, viz. situations in which discretion is specifically required by a statutory clause or where such intent derives from a valid reading of the provision. Discretion can also be practiced in situations concerning ministerial conflicts of interest. For those matters, judicial oversight still occurs.

The court disagrees with the analysis of *Samsher Singh* and *Rajendra Singh Verma* by the GNCTD. In each of them, the disputed orders of the Governor were given on the grounds of Article 234, terminating or compulsorily removing judicial officers on the basis of the advice of the HC concerned. The Governor requested the advice of the Council of Ministers in the former, while no opinion in the latter was sought. In both the cases, the court then ruled that the order from the Governor was valid.

5. Presidential References Only in Exceptional Circumstances

The GNCTD submitted that a Presidential reference may only be made in respect of reserved subjects while the LG argued that a Presidential reference may be made on any matter he deems fit.

Dipak Misra, CJI agreed that it was not possible to conclude from the words 'any matter' used in the proviso of Article 239AA (4) that they meant 'any matter'. It was held that "the power of the LG under the said proviso represents the exception and not the general rule which has to be exercised only in exceptional circumstances by the LG keeping in mind the standards of

²² *Supra* note 12.

²³ (2016) 8 SCC 1.

constitutional trust and morality, collaborative federalism, constitutional balance, constitutional and representative governance”.²⁴ In order to refer any decision of the Council of Ministers to the President, the Lieutenant Governor could not behave in a “mechanical manner without due application of mind.”

DY Chandrachud, J. concluded that prior to making a reference to the President, “the course of action mandated in the Transaction of Business Rules must be strictly followed. The LG must, by a process of dialogue and discussion, seek to resolve any difference of opinion with a Minister and, if it is not possible to have it so resolved, to attempt it through the Council of Ministers.”²⁵ The Rules consider a reference only where the above-mentioned modalities fail to offer a solution, when the matter can be referred to the President.

6. Keeping Lieutenant Governor Posted

According to Section 45 of the GNCTD Act (1991), it is the responsibility of the CM to inform the LG of all actions of the Council of Ministers affecting the governance of the capital and plans for legislation. The LG can also request certain details or demand that decisions made by the Minister be forwarded for submission to the Council of Ministers. The method for such contact is prescribed by Rule 10 of the Transaction of Business Law.

In its submission, the GNCTD argues that only final decision of the Ministers needs to be communicated. It relies on Rule 23 of the Transaction of Business Rules that specifies various classes of matters to be mandatorily submitted to the LG through the Chief Secretary. The Union contends that all decisions require the LG’s imprimatur.

The HC agreed with the Union of India’s submission, to allow LG to resolve any conflict of opinion or to refer it to the President, it is important to send all decisions to LG. The court clarifies that Rule 23, the legislative intent is made clear by the use of the word ‘essentially’ that the stated matters are not extensive, but demonstrative. Any other interpretation would make Article 239AA (4) nugatory. To substantiate further, the Court relies on the Balakrishnan Committee (1987) set-up to study reorganization of Delhi, based on which Article 239AA was introduced.

²⁴ *Supra* note 4.

²⁵ *Ibid.*

The Committee stressed the unique role of the national capital and the need, in the national interest, to maintain it under the jurisdiction of the Union. It is submitted that a uniform administration is needed over the area as potential conflicts between political parties may hamper smooth functioning of an area that belongs to the nation as a whole. The committee also recommended including a special provision to allow the LG to exercise discretion allowing him to play a more pro-active role than the Governor. The President is entrusted with the supreme responsibility for the effective governance of Delhi by the Administrator. The statements of the concerned Minister in the Rajya Sabha to reflect the special status enjoyed by Delhi, being home to several important national and international institutions, necessitating complete Union control. For such reasons, the HC holds that the Council of Ministers must communicate its decisions to the LG in all matters, including matters for which exclusive legislative competence under Article 239AA (3) exists. An order executing such a decision may only be made where the LG does not take a different view.

Ashok Bhushan, J. held that the LG has to be kept informed of “all proposals, agendas and decisions taken. The purpose of communication of all decisions is to keep him posted with the administration of Delhi. From persons holding high office, it is expected that they shall conduct themselves in faithful discharge of their duties so as to ensure smooth running of administration so that rights of all can be protected.”²⁶

7. Union Control over Delhi

Article 239AA(3) empowers the Legislative Assembly, with regard to any of the matters mentioned in the State List or in the Concurrent List, to make legislation for the entire or part of the National Capital Territory, to the degree that any other matter is relevant, except for those subjects reserved. To the point of repugnance to Union rule, the right of the Parliament to make laws with regard to any subject for a UT was assured and rendered superior to any law made by the Legislative Assembly.

The GNCTD argues that the Legislative Assembly, being established under Article 239AA, enjoys Constitutional respect. It is different from a body established under a Parliamentary Act under Article 239A for Puducherry. The extent of executive power too thus stands on a separate footing. For this reason, the executive control of the President over the UT of Delhi through

²⁶ *Ibid.*

the Lieutenant Governor is limited as compared to the control exercised over other UTs through an Administrator.

The Union maintains that it continues to be regulated by Article 239, pending the adoption of Article 239 AA to the Constitution. Delhi remains a UT and thus under the overall control of the Centre. Since the Parliament enjoys predominance over state laws, as a natural corollary, the Union executive too would enjoy supremacy over the state executive.

The HC gave supremacy to the will of Union, while the SC reverted the locus of power to the people, represented by the elected representatives in the Legislative Assembly of Delhi. The Apex Court ruled that ‘with regard to the NCT of Delhi, the Union of India has sole executive power over the three matters in the State List in respect to which the control of the Legislative Assembly of Delhi has been removed.’ The executive authority of the Government of NCT of Delhi is to be practiced in consideration of other subjects.

8. Conclusion

The verdict marks a landmark point in liberal federalism in India. In a way that strengthens the democratic spirit, the Constitution must be read. The common will of the people is paramount in a democratic republic and the members have to embody this spirit. It reminds the elected representatives to perform their duties in the spirit of Constitutional principles. It is the citizenry that is prejudiced by animosities between different levels of governance. There is thus need for smooth and cooperative communication and collaboration between the Union and State government.

The judgment further reignites the debate on the need for granting statehood for Delhi. Though this question is *de hors* the scope of this paper, a few arguments in favour and against such status are been listed. The need for statehood arises from the huge population residing in the area. According to Census (2011), around 20 million residents have made Delhi their home. It is imperative to grant them a louder democratic voice. The burgeoning population also calls for greater governance reforms, more possible in a full-fledged state. The unique cultural history and ethos of Delhi would be better represented nationally by a state, it is also argued. On the contrary, Delhi is home to the Indian Parliament and all Union Ministries. The control of the Union is necessary in such areas. It is also resident to foreign embassies and diplomats,

who expect the Union to grant them security. The small landscape enjoyed by Delhi also makes constituting a state difficult.

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