Reportable

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 2357 OF 2017

Government of NCT of Delhi ... Appellant

Versus

Union of India & Another ... Respondents

WITH

CONTEMPT PETITION (CIVIL) NO. 175 OF 2016
IN
WRIT PETITION (CRIMINAL) NO. 539 OF 1986
CIVIL APPEAL NO. 2358 OF 2017
CIVIL APPEAL NO. 2359 OF 2017
CIVIL APPEAL NO. 2360 OF 2017
CIVIL APPEAL NO. 2361 OF 2017
CIVIL APPEAL NO. 2362 OF 2017
CIVIL APPEAL NO. 2363 OF 2017
CIVIL APPEAL NO. 2364 OF 2017
AND
CRIMINAL APPEAL NO. 277 OF 2017

J U D G M E N T

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Dipak Misra, CJI (for himself, A.K. Sikri and A.M. Khanwilkar, JJ.)

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A. <u>Prologue</u>:

The present reference to the Constitution Bench has its own complexity as the centripodal issue in its invitation of the interpretation of Article 239AA of the Constitution invokes a host of concepts, namely, constitutional objectivity navigating through the core structure with the sense and sensibility of having a real test of constitutional structure; the culture of purposive interpretation because the Court is concerned with the sustenance of glory of constitutional democracy in a

Democratic Republic as envisioned in the Constitution; and understanding the idea of citizenry participation viewed with the lens of progressive perception inherent in the words of a great living document emphasizing on the democratic theme to achieve the requisite practical goal in the world of reality. We may call it as pragmatic interpretation of a constitutional provision, especially the one that has the effect potentiality to metamorphose a workable provision into an unnecessary and unwarranted piece of ambiguity. In such a situation, the necessity is to scan the anatomy of the provision and lift it to the pedestal of constitutional ethos with the aid of judicial creativity that breathes essentiality of life into the same. It is the hermeneutics of law that works. It is the requisite constitutional stimulus to sustain the fundamental conception of participative democracy so that the real pulse is felt and further the constitutional promise to the citizens is fulfilled. It gets rid of the unpleasant twitches and convulsions. To put it differently, the assurance by the insertion of Article 239AA by the Constitution (Sixty-ninth Amendment) Act, 1991 by

exercise of the constituent power is not to be renounced with any kind of rigid understanding of the provision. It is because the exercise of constituent power is meant to confer democratic, societal and political powers on the citizens who reside within the National Capital Territory of Delhi that has been granted a special status.

2. The principal question is whether the inhabitants or voters of NCT of Delhi remain where they were prior to the special status conferred on the Union Territory or the amended constitutional provision that has transformed Delhi instills “Prana” into the cells. Let it be made clear that any ingenious effort to scuttle the hope and aspiration that has ignited the idea of “march ahead” among the inhabitants by any kind of linguistic gymnastics will not commend acceptation. The appellant claims that the status of the voters of NCT Delhi after the Sixty-Ninth Amendment has moved from notional to real but the claim has been negatived by the Delhi High Court. Learned counsel for the appellant criticize the judgment and order of the High Court by contending,

apart from other aspects, that the language employed in the entire Chapter containing Article 239AA, unless appositely interpreted, shall denude the appellant, the National Capital Territory of Delhi, of its status.

3. The criticism is founded on the base that the Constitution of India, an organic and continuing document, has concretised their desire and enabled the people to have the right to participate as a collective in the decision making process that shall govern them and also pave the path of their welfare. The participation of the collective is the vital force for larger public interest and higher constitutional values spelt out in the Constitution and the silences therein and the same are to be protected. It is the assertion that the collective in a democracy speak through their elected representatives seeking mitigation of the grievances.

4. This Court, being the final arbiter of the Constitution, in such a situation, has to enter into the process of interpretation with the new tools such as constitutional pragmatism having due regard for sanctity of objectivity, realization of the purpose

in the truest sense by constantly reminding one and all about the sacrosanctity of democratic structure as envisaged by our Constitution, elevation of the precepts of constitutional trust and morality, and the solemn idea of decentralization of power and, we must say, the ideas knock at the door to be invited. The compulsive invitation is the warrant to sustain the values of democracy in the prescribed framework of law. The aim is to see that in the ultimate eventuate, the rule of law prevails and the interpretative process allows the said idea its deserved space, for when the rule of law is conferred its due status in the sphere of democracy, it assumes significant credibility.

5. We would like to call such a method of understanding "confluence of the idea and spirit of the Constitution", for it celebrates the grand idea behind the constitutional structure founded on the cherished values of democracy.

6. As we have used the words "spirit of the Constitution", it becomes our obligation to clarify the concept pertaining to the same. The canon of constitutional interpretation that glorifies the democratic concepts lays emphasis not only on the

etymology of democracy but also embraces within its sweep a connotative expansion so that the intrinsic and innate facets are included.

7. A seven-Judge Bench of the Court in ***Keshavan Madhava Menon v. The State of Bombay***[1] observed:-

> "An argument founded on what is claimed to be the spirit of the Constitution is always attractive, for it has a powerful appeal to sentiment and emotion; but a court of law has to gather the spirit of the Constitution from the language of the Constitution. What one may believe or think to be the spirit of the Constitution cannot prevail if the language of the Constitution does not support that view. Article 372(2) gives power to the President to adapt and modify existing laws by way of repeal or amendment. There is nothing to prevent the President, in exercise of the powers conferred on him by that article, from repealing, say the whole or any part of the Indian Press (Emergency Powers) Act, 1931. If the President does so, then such repeal will at once attract Section 6 of the General Clauses Act. In such a situation all prosecutions under the Indian Press (Emergency Powers) Act, 1931, which were pending at the date of its repeal by the President would be saved and must be proceeded with notwithstanding the repeal of that Act unless an express provision was otherwise made in the repealing Act. It is therefore clear that the idea of the preservation of past inchoate rights or liabilities and pending proceedings to enforce the same is not foreign or abhorrent to the Constitution of India. We are, therefore, unable to accept the contention

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[1] 1951 SCR 228

> about the spirit of the Constitution as invoked by the learned counsel in aid of his plea that pending proceedings under a law which has become void cannot be proceeded with. Further, if it is against the spirit of the Constitution to continue the pending prosecutions under such a void law, surely it should be equally repugnant to that spirit that men who have already been convicted under such repressive law before the Constitution of India came into force should continue to rot in jail. It is, therefore, quite clear that the court should construe the language of Article 13(1) according to the established rules of interpretation and arrive at its true meaning uninfluenced by any assumed spirit of the Constitution."
>
> [Emphasis is ours]

The aforesaid decision has to be understood in the context of the phraseology 'spirit of the Constitution'. As we understand, the Court has not negatived the concept as an alien one. It has laid emphasis on the support from the language used. It has not accepted the assumed spirit of the Constitution. Needless to say, there cannot be assumptions. Every proposition should have a base and the Constitution of India to be an organic and living one has to be perceived with progressive dynamism and not stuck with inflexibility.

Flexibility has to be allowed room and that is what we find in later authorities.

8. In ***Madhav Rao Jivaji Rao Scindia and others v. Union of India and another***[2], Hegde, J, in his concurring opinion, emphasized on the spirit of the Constitution. The learned Judge, while not accepting the exercise of power for collateral reasons, stated:-

> "Exercise of power for collateral reasons has been considered by this Court in several decisions as a fraud on that power — see *Balaji* v. *State of Mysore*. Breach of any of the Constitutional provisions even if made to further a popular cause is bound to be a dangerous precedent. Disrespect to the Constitution is bound to be broadened from precedent to precedent and before long the entire Constitution may be treated with contempt and held up to ridicule. That is what happened to the Weimar Constitution. If the Constitution or any of its provisions have ceased to serve the needs of the people, ways must be found to change them but it is impermissible to by-pass the Constitution or its provisions. Every contravention of the letter or the spirit of the Constitution is bound to have chain reaction. For that reason also the impugned orders must be held to be ultra vires Article 366(22)."
>
> [underlining is ours]

2(1971) 1 SCC 85

9. In ***State of Kerala and another v. N.M. Thomas and others***[3], Krishna Iyer, J., in his concurring opinion, opined thus:-

> "106. Law, including constitutional law, can no longer "go it alone" but must be illumined in the interpretative process by sociology and allied fields of knowledge. Indeed, the term "constitutional law" symbolises an intersection of law and politics, wherein issues of political power are acted on by persons trained in the legal tradition, working in judicial institutions, following the procedures of law, thinking as lawyers think. So much so, a wider perspective is needed to resolve issues of constitutional law. Maybe, one cannot agree with the view of an eminent jurist and former Chief Justice of India:
>
> > "The judiciary as a whole is not interested in the policy underlying a legislative measure."
>
> Moreover, the Indian Constitution is a great social document, almost revolutionary in its aim of transforming a medieval, hierarchical society into a modern, egalitarian democracy. Its provisions can be comprehended only by a spacious, social-science approach, not by pedantic, traditional legalism. Here we are called upon to delimit the amplitude and decode the implications of Article 16(1) in the context of certain special concessions relating to employment, under the Kerala State (the appellant), given to scheduled castes and scheduled tribes (for short, hereinafter referred to as harijans) whose social lot and economic indigence are an Indian reality recognized by many articles of the

3(1976) 2 SCC 310

Constitution. An overview of the decided cases suggests the need to reinterpret the dynamic import of the "equality clauses" and, to stress again, beyond reasonable doubt that the paramount law, which is organic and regulates our nation's growing life, must take in its sweep "ethics, economics, politics and sociology". Equally pertinent to the issue mooted before us is the lament of Friedmann:

> "It would be tragic if the law were so petrified as to be unable to respond to the unending challenge of evolutionary or revolutionary changes in society."

The main assumptions which Friedmann makes are:

> "First, the law is, in Holmes' phrase, not a 'brooding omnipotence in the sky', but a flexible instrument of social order, dependent on the political values of the society which it purports to regulate . . . ."

107. Naturally surges the interrogation, what are the challenges of changing values to which the guarantee of equality must respond and how? To pose the problem with particular reference to our case, does the impugned rule violate the constitutional creed of equal opportunity in Article 16 by resort to a suspect classification or revivify it by making the less equal more equal by a legitimate differentiation? Chief Justice Marshall's classic statement in *McCulloch* v. *Maryland* followed by Justice Brennan in *Katzenbach* v. *Morgan* remains a beacon light:

> "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited,

> but consist with the letter and spirit of the Constitution, are constitutional"."
>
> [Emphasis is added]

10. In ***Supreme Court Advocates-on-Record Association and another v. Union of India***[4], this Court observed that a fortiori any construction of the constitutional provisions which conflicts with the constitutional purpose or negates the avowed object has to be eschewed, being opposed to the true meaning and spirit of the Constitution and, therefore, being an alien concept.

11. We have referred to the aforesaid precedents to state that the spirit of the Constitution has its own signification. In the context of the case at hand, the democratic nature of our Constitution and the paradigm of representative participation are undoubtedly comprised in the "spirit of the Constitution". While interpreting the provisions of the Constitution, the safe and most sound approach is to read the words of the Constitution in the light of the avowed purpose and spirit of the Constitution so that it does not result in an illogical outcome which could have never been the intention of the

4(1993) 4 SCC 441

Constituent Assembly or of the Parliament while exercising its constituent power. Therefore, a constitutional court, while adhering to the language employed in the provision, should not abandon the concept of the intention, spirit, the holistic approach and the constitutional legitimate expectation which combinedly project a magnificent facet of purposive interpretation. The Court should pose a question to itself whether a straight, literal and textual approach would annihilate the sense of the great living document which is required to be the laser beam to illumine. If the answer is in the affirmative, then the constitutional courts should protect the sense and spirit of the Constitution taking aid of purposive interpretation as that is the solemn duty of the constitutional courts as the final arbiters of the Constitution. It is a constitutional summon for performance of duty. The stress has to be on changing society, relevant political values, absence of any constitutional prohibition and legitimacy of the end to be achieved by appropriate means. We shall refer to the aspect of purposive interpretation regard being had to the

context and other factors that gain primacy to be adverted to at a subsequent stage._

12. Having prefaced thus, we shall now proceed to state the controversy in brief since in this batch of appeals which has been referred to the Constitution Bench, we are required to advert to the issue that essentially pertains to the powers conferred on the Legislative Assembly of the National Capital Territory of Delhi and the executive power exercised by the elected Government of NCT of Delhi. The facts involved and the controversy raised in each individual appeal need not be dwelled upon, for we only intend to answer the constitutional issue.

13. The primordial adjudication, as is presently the requisite, commands our focus on the interpretation of Article 239AA of the Constitution of India. The said interpretation, be it noted, is not to be done in an exclusive compartment but in the context in which it has been introduced and also keeping in view the conceptual structure of the other relevant articles of the Constitution. Before we delve into the various facets of

Article 239AA and other provisions of the Constitution which have been pressed into service by the learned counsel appearing for the appellant and the learned Additional Solicitor General, we think it appropriate to narrate a brief history of Delhi.

14. On 12.12.1911, Delhi became the capital of India. Delhi Tehsil and Mehrauli Thana were separate from Punjab and annexed to Delhi headed by a Commissioner and it came to be known as the Chief Commissioner's province. In 1912, the Delhi Laws Act, 1912 came into force with effect from 01.10.1912 making certain laws prevalent in Punjab to be applicable to Delhi. The Delhi Laws Act, 1915 empowered the Chief Commissioner, Delhi to determine application of laws by issuing appropriate notification in the Gazette of India. The Government of India Act, 1919 and the Government of India Act, 1935 retained Delhi as a centrally administered territory. On coming into force of the Constitution of India on 26.01.1950, Delhi became a Part C State. In the year 1951, the Government of Part C States Act, 1951 was enacted

providing, inter alia, for a Legislative Assembly in Delhi. Section 21(1) of the 1951 Act empowered the Legislative Assembly to make laws on all matters of List II of the Seventh Schedule of the Constitution except (i) public order; (ii) police (including railway police); (iii) constitution and powers of municipal corporations and local authorities, etc.-public utility authorities; (iv) lands & buildings vested in/in possession of the Union situated in Delhi or New Delhi; (v) offences against laws about subjects mentioned from (i) to (iv); and (vi) jurisdiction of courts with respect to the above matters and court fee thereon.

15. On 19.10.1956, the Constitution of India (Seventh Amendment) Act, 1956 was passed to implement the provisions of the States Re-organization Act, 1956 which did away with Part A, B, C and D States and only two categories, namely, States and Union Territories remained and Delhi became a Union Territory to be administered by an administrator appointed by the President. The Legislative Assembly of Delhi and the Council stood abolished. In the

year 1953, the Government of Union Territories Act, 1963 was enacted to provide for Legislative Assemblies and Council of Ministers for various Union Territories but the provisions of the said Act were not made applicable to Delhi. The Delhi Administration Act, 1966 was enacted to provide for limited representative Government for Delhi through a Metropolitan Council comprising of 56 elected members and five nominated members. In the same year, on 20.08.1966, the Ministry of Home Affairs issued S.O. No. 2524 that provided, *inter alia*, that the Lieutenant Governor/Administrator/Chief Commissioner shall be subject to the control of the President of India and exercise such powers and discharge the functions of a State Government under the Commission of Inquiry Act, 1952 within the Union Territories. In the year 1987, the Balakrishnan Committee was set up to submit its recommendations with regard to the status to be conferred on Delhi and the said Committee recommended that Delhi should continue to be a Union Territory but there must be a Legislative Assembly and Council of Ministers responsible to

the said Assembly with appropriate powers; and to ensure stability, appropriate constitutional measures should be taken to confer the National Capital a special status. The relevant portion of the Balakrishnan Committee report reads as follows:-

> "6.5.5 In paragraphs 6.5.2 and 6.5.3 we have briefly summarised the arguments for and against making Delhi a constituent State of the Union. After the most careful consideration of all the arguments and on an objective appraisal, we are fully convinced that most of the arguments against making Delhi a State of the Union are very substantial, sound and valid and deserve acceptance. This was also the view expressed before us by some of the eminent and knowledgeable persons whom we interviewed. As these arguments are self-evident we find it unnecessary to go into them in detail except those relating to constitutional and financial aspects covered by them.
>
> 6.5.6 The important argument from the Constitutional angle is based on the federal type of our Constitution under which there is a constitutional division of powers and functions between the Union and the State. If Delhi becomes a full- fledged State, there will be a constitutional division of sovereign, legislative and executive powers between the Union and the State of Delhi. One of the consequences will be that in respect of matters in the State List, Parliament will have no power on jurisdiction to make any law except in the special and emergency situations provided for under the Constitution and to that extent the Union

Executive cannot exercise executive powers or functions. The constitutional prohibition on the exercise of powers and functions will make it virtually impossible for the Union to discharge its special responsibilities in relation to the national capital as well as to the nation itself. We have already indicated in an earlier chapter the special features of the national capital and the need for keeping it under the control of the Union Government. Such control is vital in the national interest irrespective of whether the subject matter is in the State field or Union field. If the administration of the natural capital is divided into rigid compartments of State of field and Union field, conflicts are likely to arise in several vital matters, particularly if the two Governments are run by different political parties. Such conflicts may, at times, prejudice the national interest……

x x x

6.5.9 We are also impressed with the argument that Delhi as the national capital belongs to the nation as a whole and any constituent State of the Union of which Delhi will become a part would sooner or later acquire a predominant position in relation to other States. Sufficient constitutional authority for Union intervention in day-to-day matters, however vital some of, them may be, will not be available to the Union, thereby prejudicing the discharge of its national duties and responsibilities.

x x x

LT. GOVERNOR AND COUNCIL OF MINISTERS

6.7.19 As a necessary corollary to the establishment of a responsible Government for Delhi the structure

of the executive should be more or less on the pattern provided by the Constitution. Accordingly, there should be a Head of the Administration with a Council of Ministers answerable to the Legislative Assembly. As Delhi will continue to have the status of a Union territory, Article 239 will apply to it and so it will have an Administrator with such designation as may be specified. The present designation of the Lt. Governor may be continued and recognized in the Constitution itself. …

x x x

6.7.21 The Administrator should be expressly required to perform his functions on the aid and advice of the Council of Ministers. The expression "to aid and advice" is a well understood term of art to denote the implications of the Cabinet system of Government adopted by our Constitution. Under this system, the general rule is that the exercise of executive functions by the Administrator has to be on the aid and advice of his Council of Ministers which means that it is virtually the Ministers that should take decisions on such matters. However, for Delhi, the following modifications of this general rule will have to be adopted:

(i) Firstly, the requirement of acting on the aid and advice of the council of Ministers cannot apply to the exercise by the Administrator of any judicial or quasi-judicial functions. The reason is obvious because in respect of such functions there is no question of acting on the advice of another person.

(ii) Secondly, the requirement is only in relation to matters in respect of which the Legislative Assembly has the powers to make

laws. This power will be subject to the restrictions already dealt with earlier in the Report. Accordingly, the Council of Ministers will not have jurisdiction to deal with matters excluded from the purview of the Legislative Assembly.

(iii) Thirdly, there is need for a special provision to resolve differences between the Administrator and his Council of Ministers on any matter concerning the administration of Delhi. Normally, the general principle applicable to the system of responsible Government under the Constitution is that the Head of the Administration should act as a mere Constitutional figurehead and will have to accept the advice of the Council of Ministers except when the matter is left to his discretion. However, by virtue of Article 239 of the Constitution, the ultimate responsibility for good administration of Delhi is vested in the President acting through the Administrator. Because of this the Administrator has to take a somewhat more active part in the administration than the Governor of a State. It is, therefore, necessary to reconcile between the need to retain the responsibility of the Administrator to the Centre in this regard and the need to enforce the collective responsibility of the Council of Ministers to the Legislature. The best way of doing this is to provide that in case of difference of opinion which cannot be resolved between the Administrator and his Council of Ministers, he should refer the question to the President and the decision of the President thereon will be final. In cases of urgency, if immediate action is necessary, the Administrator may direct action to be taken

> pending such decision of the President. A provision of this kind was made for this very reason not only in the 1951 Act, but also in the 1963 Act relating to the Union territories as well as in the 1978 Bill."

16. As the chronology would show, after due deliberation, the Parliament, in exercise of its constituent power, amended the Constitution by the Constitution (Sixty-ninth Amendment) Act in the year 1991 and inserted Articles 239AA and 239AB in the Constitution to which we shall refer at an appropriate stage when we dwell upon the interpretative process.

B. <u>Rivalised Submissions</u>:

17. Now, we may note the rivalised submissions at the Bar. We have heard Mr. P. Chidambaram, Mr. Gopal Subramaniam, Dr. Rajiv Dhawan, Ms. Indira Jaising and Mr. Shekhar Naphade, learned senior counsel appearing on behalf of the Government of NCT of Delhi. Mr. Maninder Singh, learned Additional Solicitor General of India, has advanced arguments on behalf of the Union of India and the Lieutenant Governor of Delhi.

18. A common written submission has been filed on behalf of the Government of NCT of Delhi and Mr. Maninder Singh, learned Additional Solicitor General of India, has filed written submissions on behalf of both the Union of India and the Lieutenant Governor of NCT of Delhi.

19. An application for intervention being I.A. No. 10556 of 2017 was filed by the applicant, Reliance Industries Ltd. We have heard Dr. A.M. Singhvi, learned senior counsel on behalf of the said intervenor. Another application for intervention was filed by The Kapila and Nirmal Hingorani Foundation and we have heard Mr. Aman Hingorani, learned counsel on behalf of the said Foundation.

B.1 <u>Submissions on behalf of the appellant</u>:

20. It is submitted by learned senior counsel appearing on behalf of the appellant that the NCTD occupies a unique position in the constitutional scheme by virtue of the insertion of Articles 239AA and 239AB and the consequent enactment of the 1991 Act that has shaped the NCTD into a constitutional hybrid and has led Delhi to acquire certain

special characteristics solely attributed to full-fledged States under the Constitution. As per the appellant, the Government of NCT of Delhi enjoys far more power than the administrative set ups of other Union Territories especially after the constitutional amendment and coming into force of the 1991 Act.

21. After expansively referring to the constitutional history of the NCTD, it is urged on behalf of the appellant that the insertion of Article 239AA was intended to eradicate the hierarchical structure which functionally placed the Lieutenant Governor of Delhi in a superior position to that of the Council of Ministers, especially with respect to the executive powers and the Lieutenant Governor has to be treated as a titular head alone in respect of matters that have been assigned to the Legislative Assembly and the Council of Ministers.

22. The appellant has alluded to the nine-Judge Bench decision in ***New Delhi Municipal Corporation v. State of***

Punjab[5] to contend that the Union Territory of Delhi is a class by itself different from all other Union Territories which our Constitution envisages, and the larger Bench had no occasion to decide in what shape and form the NCTD is different from other Union Territories, for the said issue did not arise therein. Nevertheless, the majority opinion clearly rules as regards Delhi's unique constitutional status unlike other Union Territories by virtue of the constitutionally created Legislative Assembly, Council of Ministers and Westminster style cabinet system of government that have been brought by the Sixty-ninth Amendment and the 1991 Act.

23. It is further submitted by the appellant that the Sixty-Ninth Amendment to the Constitution and the consequent 1991 Act were passed with the aim to give the citizens of NCT of Delhi a larger say in the governance of NCTD. Democracy being one of the facets of the basic structure of the Constitution, the Sixty-ninth amendment was aimed at furthering democracy in Delhi and hence, Article 239AA

5(1997) 7 SCC 339

should be interpreted in the backdrop of the fact that Delhi has been conferred special status among various UTs and in such a way that democracy in its true sense is established in Delhi.

24. It is submitted that constitutional jurisprudence in the Indian context has undergone a sea change after the decisions in ***R.C. Cooper v. U.O.I***[6] and ***Maneka Gandhi v. U.O.I***[7]. Learned counsel for the appellant submit that this Court should adopt a more purposive and an organic method of interpretation as adopted by this Court in a catena of cases including the recent one in ***Justice K.S. Puttaswamy (Retd.) and another v. U.O.I. and others***[8] wherein the majority observed that the decisions of this Court prior to ***R.C. Cooper*** (supra) and ***Maneka Gandhi*** (supra) must be understood in their historical context.

25. Article 239AA has deliberately excluded the words "assist and advice" as were used in the 1963 and 1966 Acts, rather

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6AIR 1970 SC 564
7AIR 1978 SC 597
8(2017) 10 SCC 1

the said Article employs the expression "aid and advice" and, therefore, it consciously obviates the requirement of the Lieutenant Governor's concurrence on every matter. Thus, it is the proponement of the appellant that Article 239AA of the Constitution which has conferred a Westminster style cabinet system of government for the NCT of Delhi makes the Lieutenant Governor bound by the 'aid and advice' of the Council of Ministers. To buttress its argument, the appellant has referred to the judgments in ***Rai Sahib Ram Jawaya Kapur and Ors. v. State of Punjab***[9] and ***Shamsher Singh v. State of Punjab***[10] which, as per the appellant, though arose in the context of the State of Punjab, decided that since our Constitution has conferred a Westminster style cabinet system for the Government of State of Punjab, an executive Government established under the aegis of the Constitution should be able to exercise all executive powers necessary to fulfill the needs that the situation warrants and consequently, the Governor has to act in accordance with the aid and advice

9AIR 1955 SC 549
10AIR 1974 SC 2192

tendered by the Council of Ministers with the Chief Minister as its head.

26. It is further argued that GNCTD has the sole power to take executive actions on all matters on which the Delhi Legislature is competent to pass laws irrespective of whether or not the Legislature has actually passed a law on the subject. Emphasis is laid on the principle of collective responsibility to a democratically elected legislative body and, on that basis, it is proponed that the Lieutenant Governor of Delhi is bound by the aid and advice of the Council of Ministers of Delhi. It is put forth that such an interpretation can alone meet the purpose of constitutionally mandated governance in Delhi post insertion of Article 239AA in the Constitution.

27. It is the stand of the appellant that the extent of executive powers of the Government of NCT of Delhi can be understood by appositely juxtaposed reading of Article 239AA(3) with Article 239AA(4) which stipulates that the Government of NCT of Delhi has exclusive executive powers in

relation to matters which fall within the purview of Delhi Assembly's legislative competence. Article 239AA(3) gives the Delhi Legislative Assembly the legislative powers over all except three subjects in the State List and all subjects in the Concurrent List and as a natural corollary, Article 239AA(4) confers executive power on the Council of Ministers over all those subjects in respect of which the Delhi Legislative Assembly has the legislative power to legislate.

28. It is asserted by the counsel for the appellant that Article 239AA preserves the Parliament's legislative powers over all subjects in the State and the Concurrent Lists, but no such executive power is reserved for the Union. The appellant contends that there is conscious difference between the language of Article 239AA(3) which gives overriding legislative powers to the Parliament and that of Article 239AA(4) which refrains from doing the likewise in the context of executive powers. The Centre's executive power stems from Article 73 and would normally be co-extensive with the Parliament's legislative powers, but this is explicitly subject to other

provisions of the Constitution which has to include Article 239AA. Thus, Article 239AA has, in the case of Delhi, whittled down the executive power of the Centre to only the three reserved subjects falling outside the purview of the executive power of the Council of Ministers of Delhi.

29. The appellant has argued that though Article 73 of the Constitution lays down the principle that there may exist under the Constitution concurrent legislative powers between the Parliament and the State Legislative Assemblies, yet there can never be concurrent executive powers between the Central and the State Governments as such a situation would result in chaos in the absence of any responsibility/accountability for executive actions. This principle, as per the appellant, must apply equally in relation to matters contained in List II and List III of the Seventh Schedule and the effect of Article 239AA(3) is that all matters on which the Delhi Legislative Assembly has power to legislate are effectively equivalent to matters of the Concurrent List.

30. Article 239AB would become redundant if it is to be accepted that the Constitution allows the Union Government to override all executive actions/decisions of the GNCTD in the ordinary course of things, as in such a situation, it would never be necessary to invoke the special provision in the form of Article 239AB for the Union Government to take over the administration of Delhi. Further, Article 239AB stipulates that if the administration of Delhi is not carried out in accordance with Article 239AA, the President may suspend the operation of any part or whole of Article 239AA. This, as per the appellant, clearly shows that when an elected government is in place, the administration of Delhi has to be carried out in accordance with Article 239AA.

31. After quoting Dr. Ambedkar on federalism in the Constituent Assembly Debates dated 25.11.1949, the appellant has contended that Article 239AA is an example of the hallmark of federalism in our Constitution which reserves legislative primacy of the Parliament in certain limited areas but there is no such corresponding provision in the

Constitution which reserves the executive powers of the Central Government vis-a-vis GNCTD.

32. It is contended on behalf of the appellant that there is necessity for uniform and consistent interpretation of the phrase 'aid and advice' used in different articles of the Constitution such as Article 74, Article 163 and Article 239AA in the context of the functions of the President, the Governor and the Lieutenant Governor respectively. It is urged that the provisions of the Constitution being on a higher pedestal than ordinary statutory provisions require to be interpreted in a different manner and in view of the same, Article 239AA(4) deserves to be interpreted in a manner as other provisions of the Constitution and, hence, there is warrant for interpreting the phrase 'aid and advice' in a broad sense so that such 'aid and advice' is binding on the nominee of the President, i.e., the Lieutenant Governor. It would be an anathema to the constitutional philosophy to surmise that just because the Constitution permits a difference of opinion between the Lieutenant Governor and the Council of Ministers, the 'aid and

advice' tendered by the Council of Ministers is not binding upon the Lieutenant Governor.

33. The appellant has further submitted that under Article 239AA(4), the Government of NCT of Delhi and the Council of Ministers of the NCT of Delhi have exclusive power over all matters in relation to subjects under List II (excluding Entries 1, 2 and 18 thereof and Entries 34, 65 and 66 in so far as they apply to Entries 1, 2 and 18 thereof) and List III of the Seventh Schedule. According to the appellant, the substantive part of Article 239AA(4) itself lays down the exception to it, i.e., when the Lieutenant Governor is to act in his discretion under the law and not as per the advice of the Council of Ministers. The proviso to Article 239AA(4), as per the appellant, comes into play where the 'aid and advice' of the Council of Ministers transgresses the areas constitutionally prescribed to it and the proviso does not allow the Lieutenant Governor to have a different view on the merits of the 'aid and advice' that has been tendered by the Council of Ministers. According to the appellant, the proviso to Article 239AA(4) operates only in

exceptional situations and is not a general norm. Any attempt to expand the scope of the proviso beyond exceptional matters is not tenable as it would have the effect of rendering the main part of Article 239AA(4) otiose. To rely upon the proviso to Article 239AA(4) to say that the 'aid and advice' of the Council of Ministers is not binding upon the Lieutenant Governor in areas in which the Delhi Legislative Assembly has competence to legislate would defeat the purpose for which institutions necessary to operationalize democracy in Delhi were created. It is submitted by the appellant that the 1991 Act as well as the Rules themselves cannot be used to interpret the constitutional provisions inasmuch as they only reflect the scheme of governance.

B.2 <u>Submissions on behalf of the respondents</u>:

34. The submissions put forth by Mr. Maninder Singh, learned Additional Solicitor General of India, appearing on behalf of the respondents, Union of India and Lieutenant Governor of Delhi, revolve around the argument that although the insertion of Article 239AA envisages the constitution of a

Legislative Assembly for the National Capital Territory of Delhi, yet the President shall remain its Executive head, acting through the Lieutenant Governor, and that the powers of the Parliament in respect of the Union Territories shall not be derogated in any manner by the insertion of the said Article 239AA.

35. The respondents submit that the constitutional scheme envisaged for the Union Territories has been dealt with in ***New Delhi Municipal Corporation*** (supra) case and although the Court in this case had contemplated three categories of Union Territories, yet it had arrived at the conclusion that those surviving as Union Territories and not having acquired Statehood shall remain so and Delhi, now referred to as "National Capital Territory of Delhi", is still a Union Territory. The respondents further submit that once it has been determined that Delhi continues to be a Union Territory, its governance shall be regulated by the provision of Article 239 which stipulates that all Union Territories shall be

governed by the President of India and neither a plain textual reading nor a contextual reading of Article 239AA stipulates any vertically divided exclusive jurisdiction with the Legislative Assembly or the Council of Ministers.

36. The respondents, thereafter, in their submissions, after citing several authorities, have sought to impress upon this Court that Article 239AA be given its literal and true interpretation as there exists no ambiguity attracting the requirement of purposive interpretation. The respondents have also submitted that since it was on the recommendations made by the Balakrishnan Committee, which had been accepted in toto, that the Sixty-ninth amendment and the 1991 Act came into force, the Court should consider the report of the Committee and the reasons provided therein in order to ascertain the true intention of the exercise of the constituent power of the Parliament for bringing about the said amendment as well as the GNCTD Act.

37. It is also asserted by the respondents that Article 239 is an integral part of the Constitution and the foundation stone of Part VIII and that Article 239AA shall be read conjointly with Article 239 which provides that the ultimate administration with respect to Delhi shall remain with the President acting through its administrator.

38. The respondents also contend that although Article 239AA confers on the Legislative Assembly of Delhi the power to legislate with respect to subject matters provided in List II and List III of the Seventh Schedule, yet the said power is limited by the very same Article when it employs the phrase "in so far as any such matter is applicable to Union Territories...." and also by specifically excluding from the legislative power of the Assembly certain entries as delineated in Article 239AA(3)(a). This restriction, as per the respondents, limits the power of the Legislative Assembly to legislate and this restriction has to be understood in the context of conferment of special status.

39. To reiterate the position that the President remains the Executive head for all Union Territories, Mr. Singh has drawn the attention of the Court to Articles 53 and 73 read with Article 246(4) of the Constitution. It is further urged that nowhere in the Constitution, including Articles 239A or 239AA, it has been stipulated that the executive power of a Union Territory shall vest in the Council of Ministers/Legislative Assembly. It has been argued that the contention of the appellant that on the creation of Legislative Assembly, there was an automatic investiture of executive power on the said Assembly is flawed as the constitutional scheme does not envisage any conferment of automatic power on the Council of Ministers. Further, as the submission is structured, Article 239AA(4) employs the phrase "Lieutenant Governor and his Ministers" which implies that it is the "Lieutenant Governor" and not the "Council of Ministers" who is responsible for the administration of the Union Territory. That apart, the provisions of Articles 298, 299 and 239AB of the Constitution and Section 52 of the 1991 Act also reiterate

the position that the Constitution does not stipulate any automatic conferral of executive power and the same is echoed in the Balakrishnan Committee Report.

40. The respondents contend that the contention of the principle laid down in the judgment of ***Ram Jawaya Kapur*** (supra), that wherever there is existence of legislative power there is co-extensive existence of executive power, is with respect to only the Union and the States and is not applicable to Union Territories as the same would be against the constitutional mandate as laid down in its various provisions.

41. The respondents, to further advance their arguments, have pointed out the distinction between Articles 239AB and 356 of the Constitution and have submitted that Article 356 envisages that the President shall assume to himself the functions of the State Government and the powers vested in the Governor in case of failure of "constitutional machinery" but in the case of Union Territories, this clause would become inapplicable as the executive power of a Union Territory remains vested with the President. The respondents would

further submit that Article 239AB does not stipulate any "assumption of powers" by the President but merely provides for suspension of operation of Article 239AA in the NCT of Delhi in case the President is satisfied that it is necessary to do so for the proper administration of NCT of Delhi.

42. The respondents, in their submissions, also point out that a close reading of Article 239 with Article 239AA along with Section 44 of the GNCTD Act, 1991 would reveal that the expression "Executive action of the Lt. Governor" and not the "Executive action of NCT of Delhi" has been stipulated in the said provisions. The said intention can also be seen from the fact that the phrase Lieutenant Governor "with the Ministers" has been used in Section 44(1)(b) and further Article 239AA(4) also engages the phrase "his functions". This leads to the implication that the extent of contribution/participation to be made by the Council of Ministers is only to render aid and advice to the Lieutenant Governor.

43. It has been further submitted on behalf of the respondents that the aid and advice rendered by the Council

of Ministers is not binding upon the Lieutenant Governor and he is empowered to form an opinion that differs from the opinion of the Council of Ministers. In such a situation, the proviso to Article 239AA(4) comes into play which provides that in case of such difference of opinion, the decision of the President shall be final. Learned Additional Solicitor General has stressed that this is in recognition of the fact that the ultimate responsibility in relation to the administration of the Union Territories lies with the Union and there is clear demarcation of difference as regards the manner of governance between States and Union Territories whereby in case of the former, the Governor is bound by the advice tendered by the Council of Ministers.

44. The respondents further point out that a combined reading of Article 239AA(4) and Section 41(2) of the 1991 Act would suggest that when the question arises if a matter is one where the Lieutenant Governor shall exercise his discretion, the decision of the Lieutenant Governor shall be final. Article 239AA(4) and the proviso thereto is not an exception and,

hence, should not be given a restrictive meaning and the phrase "any matter" has been deliberately kept of the widest import. To bring home the point, reliance has been placed on the dictum laid down in ***Tej Kiran Jain and others v. N. Sanjiva Reddy and others***[11] where the word “anything” has been said to mean "everything". Therefore, the phrase "any matter" has to be interpreted to mean "every matter". The said interpretation, as per the respondents, would be in accord with the objective of the Constitution that the Union shall retain the ultimate authority to legislate on any matter with respect to the National Capital Territory of Delhi.

45. The respondents also submit that Article 239AA does not contemplate a new scheme and it is similar to that envisaged under Article 239A which pertains to the administration and governance of the Union Territory of Puducherry. A comparison of the scheme provided under Article 239, Article 239A read with the 1963 Act for Puducherry on one hand and Article 239, Article 239AA read with the 1991 Act for Delhi on

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11(1970) 2 SCC 272

the other hand would reveal that both the schemes are similar to the extent that the intention is to retain the continuing control of the President and the Parliament for the executive and legislative functioning of the Union Territories.

46. The respondents contend that Article 239AA, and in particular, clause 4 of the said provision, is not the first of its kind and a similar provision in the form of Section 44 existed in the Government of Union Territories Act, 1963 and that the issue of interpretation of this Section had come up before this Court in several cases wherein it has been laid down that the "State Government" with respect to Union Territory would mean "Central Government" in terms of Section 3(60) of the General Clauses Act. Hence, when a similar provision such as Article 239AA(4) has already been given a certain interpretation by this Court, then merely because of the fact that special provisions have been placed in the Constitution for the NCT of Delhi, which is not so in the case of other Union Territories, it shall not bar the Courts from adopting an

interpretation of Article 239AA which is similar to Section 44 of the 1963 Act.

47. The respondents finally submit that as per the constitutional mandate, the ultimate responsibility with respect to all matters governing the NCT of Delhi fall within the domain of the Union Government. To bolster the said stand, the respondents have placed reliance upon relevant portions of the Balakrishnan Committee Report and also various other provisions of the Constitution of India and the 1991 Act. Further, the respondents argue that to devolve exclusive legislative or exclusive executive power on the Legislative Assembly or Council of Ministers of the NCT of Delhi would result in elevating a Union Territory to the status of a State, a demand which has been rejected by the Constitution makers on several instances. That apart, it would be impermissible under any interpretation of the constitutional text and also contrary to the constitutional mandate.

48. Before we dwell upon the submissions, we are of the considered view that we should state certain principles and analyse certain constitutional concepts. Frankly speaking, we feel the necessity as we are really concerned with the interpretation of a constitutional provision having regard to its operational perspective in a democracy. We have said so in the prelude. We do not think and we are not persuaded to think that the present controversy can rest on either of the extremes propagated before us. We are convinced that a holistic approach has to be adopted from a constitutional vision which is bound to encapsulate crystalline realism.

C. Ideals/principles of representative governance:

49. Representative Governance in a Republican form of democracy is a kind of democratic setup wherein the people of a nation elect and choose their law making representatives. The representatives so elected are entrusted by the citizens with the task of framing policies which are reflective of the will of the electorate. The main purpose of a Representative Government is to represent the public will, perception and the

popular sentiment into policies. The representatives, thus, act on behalf of the people at large and remain accountable to the people for their activities as lawmakers. Therefore, representative form of governance comes out as a device to bring to fore the popular will.

50. Bernard Manin in "The Principles of Representative Government"[12] has deliberated on the postulate that the concept of representation has its origin around the Middle ages in the context of the church and in the context of cities in their relation to the king or the emperor. The idea, as Manin says, was to send out delegates having power to connect to those who appointed them in the first place and there lies the kernel of the concept of representation. This technique then got transferred and used for other purposes.

51. Thomas Jefferson, in the United States Declaration of Independence (1776), highlights on the stipulation that governments derive their just powers from the consent of the governed. This idea, simply put, reflects the concept of

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12 Bernard Manin, The Principles of Representative Government, Cambridge University Press, 1997

representative governance. The cogent factors for constituting the representative form of government are that all citizens are regarded as equal and the vote of all citizens, which is the source of governing power, is assigned equal weight. In this sense, the views of all citizens carry the same strength and no one can impose his/her views on others.

52. The Constitution of India has embraced the representative model of governance at all levels, i.e., local, State and the Union. Acknowledging the representative form of governance adopted by our Constitution and the elected representatives being the instruments for conveying the popular will of the people, the Court in ***State of Bihar and another v. Bal Mukund Sah and others***[13] has observed:-

> "...Besides providing a quasi federal system in the country and envisaging the scheme for distribution of legislative powers between the State and the center, it emphasizes the establishment of the rule of law. The form of Government envisaged under a parliamentary system of democracy is a representative democracy in which the people of the country are entitled to exercise their sovereignty through the legislature which is to be elected on the basis of adult franchise and to which the executive, namely, the Council of Ministers

13(2000) 4 SCC 640

> is responsible. The legislature has been acknowledged to be a nerve center of the State activities. It is through parliament that elected representatives of the people ventilate people's grievances.
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> [Emphasis is ours]

53. Thus perceived, the people are the sovereign since they exercise the power of adult franchise that ultimately builds the structure of representative democracy. That apart, every constituent of the sovereign is entitled to air his/her grievances through their elected representatives. The twin idea establishes the cornerstone of the precept of accountability to the public because there rests the origin of power and responsibility.

54. A representative form of government should not become a government by elites where the representatives so elected do nothing to give effect to the will of the sovereign. The elected representatives must not have an ulterior motive for representing their constituents and they should not misuse the popular mandate awarded to them by covertly transforming it into 'own rule'. The inherent value of public accountability can never be brushed aside.

55. Another ideal for representative governance is accessibility and approachability. Since responsiveness to the needs and demands of the people is the basic parameter for evaluating the effectiveness of representative governance, it is necessary that elected representatives develop a sense of belonging with their constituents. The sense of belonging has its limitation also. If the desire of the constituent is rational and draws strength from legal paradigms, it deserves to be given due acceptance but if the aspiration blows from some illogical or unacceptable proposition, the same should not be allowed any space. It is because in a representative form of government, aspirations and desires are canvassed and propounded on the bedrock of constitutional principles. Hence, we may say that inherent constitutional aspirations should draw inspiration from the Constitution. There can never be sacrifice of constitutional conscience.

56. Be it remembered, when elected representatives and constitutional functionaries enter their office, they take oath to bear allegiance to the Constitution and uphold the

Constitution. Thus, it is expected of them not only to remain alive to the provisions of the Constitution but also to concepts like constitutionalism, constitutional objectivity and constitutional trust, etc. The support expressed by the sovereign in the form of votes cannot become an excuse to perform actions which fall foul to the Constitution or are *ultra vires*. Though the elected representatives are expected to act as instruments of transforming popular will into policies and laws, yet they must do so within the contours of the Constitution. They must display constitutional objectivity as a standard of representative governance, for that is ingrained in the conceptual democratic majority which neither tolerates ideological fragmentation nor encourages any kind of utopian fantasy. It lays stress on realizable constitutional ideologies.

D. <u>Constitutional morality</u>:

57. Constitutional morality in its strictest sense of the term implies strict and complete adherence to the constitutional principles as enshrined in various segments of the document. When a country is endowed with a Constitution, there is an

accompanying promise which stipulates that every member of the country right from its citizens to the high constitutional functionaries must idolize the constitutional fundamentals. This duty imposed by the Constitution stems from the fact that the Constitution is the indispensable foundational base that functions as the guiding force to protect and ensure that the democratic setup promised to the citizenry remains unperturbed. The constitutional functionaries owe a greater degree of responsibility towards this eloquent instrument for it is from this document that they derive their power and authority and, as a natural corollary, they must ensure that they cultivate and develop a spirit of constitutionalism where every action taken by them is governed by and is in strict conformity with the basic tenets of the Constitution.

58. In this context, the observations made by Dr. B.R. Ambedkar are of great significance:-

> "Constitutional morality is not a natural sentiment. It has to be cultivated. We must realize that our people are yet to learn it. Democracy in

> India is only a top-dressing on an Indian soil, which is essentially undemocratic."[14]

59. Constitutional morality is that fulcrum which acts as an essential check upon the high functionaries and citizens alike, as experience has shown that unbridled power without any checks and balances would result in a despotic and tyrannical situation which is antithetical to the very idea of democracy. The following passage from ***Manoj Narula v. Union of India***[15] can aptly be quoted to throw some light on the idea:-

> "If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.[16]"

60. In the said case, it has been further observed:-

> "Regard being had to the aforesaid concept, it would not be out of place to state that

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14Constituent Assembly Debates 1989: VII, 38.
15 (2014) 9 SCC 1
16James Madison as Publius, Federalist 51

> institutional respectability and adoption of precautions for the sustenance of constitutional values would include reverence for the constitutional structure. It is always profitable to remember the famous line of Laurence H. Tribe that a Constitution is "written in blood, rather than ink"[17]."

61. Constitutional morality acts as a check against lapses on the part of the governmental agencies and colourable activities aimed at affecting the democratic nature of polity. In ***Krishnamoorthy v. Sivakumar and others***[18], it has been explained thus:-

> "Democracy, which has been best defined as the government of the people, by the people and for the people, expects prevalence of genuine orderliness, positive propriety, dedicated discipline and sanguine sanctity by constant affirmance of constitutional morality which is the pillar stone of good governance."

Constitutional morality, appositely understood, means the morality that has inherent elements in the constitutional norms and the conscience of the Constitution. Any act to garner justification must possess the potentiality to be in

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17Laurence H. Tribe, THE INVISIBLE CONSTITUTION 29 (2008)
18(2015) 3 SCC 467

harmony with the constitutional impulse. We may give an example. When one is expressing an idea of generosity, he may not be meeting the standard of justness. There may be an element of condescension. But when one shows justness in action, there is no feeling of any grant or generosity. That will come within the normative value. That is the test of constitutional justness which falls within the sweep of constitutional morality. It advocates the principle of constitutional justness without subjective exposition of generosity.

E. <u>Constitutional objectivity</u>:

62. Our Constitution, in its grandness, resolutely embraces the theory of "checks and balances". This concept of checks and balances, in turn, gives birth to the principle of "constitutional objectivity". The Constitution expects the organs of the State adorned by high constitutional functionaries that while discharging their duties, they remain alive to the allegiance they bear to the Constitution. Neutrality as envisaged under the constitutional scheme should guide

them in the performance of their duties and functions under the Constitution. This is the trust which the Constitution reposes in them.

63. The founding fathers of our Constitution had a vision for our Nation whose ultimate aim was to make right the upheaval that existed before setting up of the Constituent Assembly. The concept of constitutional objectivity is, by itself, inherent in this vision and it is incumbent upon the organs of the State to make comprehensive efforts towards realization of this vision. But, at the same time, they must remain true to the Constitution by upholding the trust which the Constitution places in them and thereby exhibit constitutional objectivity in its truest sense. In ***Indra Sawhney v. Union of India and others***[19], the Court observed:-

> "...Therefore, the permissible judicial creativity in tune with the Constitutional objectivity is essential to the interpretation of the Constitutional provisions so that the dominant values may be discovered and enforced. At the same time, one has to be very cautious and careful in approaching the issues in a very pragmatic and realistic manner."

19AIR 1993 SC 477

The aforesaid passage tells us in an illuminating manner how the Court is expected to proceed on the path of judicial creativity in consonance with constitutional objectivity having a keen sense of pragmatism.

64. It can be said without inviting any controversy that the concept of constitutional objectivity has to be equally followed by the Executive and the Legislature as it is the Constitution from which they derive their power and, in turn, the Constitution expects them to be just and reasonable in the exercise of such power. The decisions taken by constitutional functionaries, in the discharge of their duties, must be based on normative acceptability. Such decisions, thus, have to be in accord with the principles of constitutional objectivity which, as a lighthouse, will guide the authorities to take a constitutionally right decision. This action, needless to say, would be in the spirit of the Constitution. It may be further noted here that it is not only the decision itself but also the process adopted in such decision making which should be in tune with constitutional objectivity. A decision by a

constitutional functionary may, in the ultimate analysis, withstand scrutiny but unless the process adopted for arriving at such a decision is in tandem with the idea of constitutional objectivity, it invites criticism. Therefore, the decision making process should never by-pass the established norms and conventions which are time tested and should affirm to the idea of constitutionalism.

F. **Constitutional governance and the conception of legitimate constitutional trust:**

65. The concept of constitutional governance in a body polity like ours, where the Constitution is the supreme fundamental law, is neither hypothetical nor an abstraction but is real, concrete and grounded. The word 'governance' encapsulates the idea of an administration, a governing body or organization whereas the word 'constitutional' means something sanctioned by or consistent with or operating under the fundamental organic law, i.e., the Constitution. Thus, the word 'governance' when qualified by the term 'constitutional' conveys a form of governance/government which adheres to the concept of constitutionalism. The said form of governance

is sanctioned by the Constitution itself, its functions are consistent with the Constitution and it operates under the aegis of the Constitution.

66. According to Encyclopedia Britannica, "Constitutional Government" means:-

> "...the existence of a constitution—which may be a legal instrument or merely a set of fixed norms or principles generally accepted as the fundamental law of the polity—that effectively controls the exercise of political power. The essence of constitutionalism is the control of power by its distribution among several state organs or offices in such a way that they are each subjected to reciprocal controls and forced to cooperate in formulating the will of the state...."

67. It is axiomatic that the Constitution of India is the *suprema lex*, i.e., the paramount law of the land. All the three wings of the State, i.e., the legislature, the judiciary and the executive derive their power and authority from the Constitution. It is the Constitution which endows the requisite amount of oxygen and other necessary supplies which, in turn, enable these organs to work for the betterment of the nation and the body polity. In the context of the supremacy of

the Constitution, the Court in ***Kalpana Mehta and others v. Union of India and others***[20] has laid down:-

> "The Constitution of India is the supreme fundamental law and all laws have to be in consonance or in accord with the Constitution. The constitutional provisions postulate the conditions for the functioning of the legislature and the executive and prescribe that the Supreme Court is the final interpreter of the Constitution. All statutory laws are required to conform to the fundamental law, that is, the Constitution. The functionaries of the three wings, namely, the legislature, the executive and the judiciary, as has been stated in *His Holiness Kesavananda Bharati Sripadagalvaru v. State of Kerala and another*[21]. derive their authority and jurisdiction from the Constitution. The Parliament has the exclusive authority to make laws and that is how the supremacy of the Parliament in the field of legislation is understood. There is a distinction between parliamentary supremacy in the field of legislation and constitutional supremacy. The Constitution is the fundamental document that provides for constitutionalism, constitutional governance and also sets out morality, norms and values which are inhered in various articles and sometimes are decipherable from the constitutional silence. Its inherent dynamism makes it organic and, therefore, the concept of —constitutional sovereignty is sacrosanct. It is extremely sacred and, as stated earlier, the authorities get their powers from the Constitution. It is —the source.

20(2018) 7 SCALE 106
21AIR 1973 SC 1461 : (1973) 4 SCC 225

> Sometimes, the constitutional sovereignty is described as the supremacy of the Constitution.
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> [Emphasis is ours]

68. Thus, the concept of constitutional governance is a natural consequent of the doctrine of constitutional sovereignty. The writings of Locke and Montesquieu also throw light on the concept of constitutional governance. Locke lays stress on the fiduciary nature of public power and argues that sovereignty lies with the people. Montesquieu, on the other hand, in his postulate of constitutional governance, has laid more stress on the system of "checks and balances" and "separation of powers" between the executive, legislature and the judiciary. According to the ideas of Montesquieu, it can be said that constitutional governance involves the denial of absolute power to any one organ of the State and a system of checks and balances is the basic foundation of constitutional governance. In constitutional form of Government, power is distributed amongst the three organs of the State in such a way that the constitutional goal as set out in the Preamble of our Constitution is realised.

69. The postulates laid by Locke and Montesquieu are inherent in our constitutional scheme and have also been recognized by the Court. Therefore, it can safely be said that the nomenclature of constitutional governance has at its very base a Constitution which is the supreme law of the land and the conception, in its width, embraces two more ideas, i.e., fiduciary nature of public power and the system of checks and balances.

70. We may hasten to add that the Court, while interpreting various provisions of the Constitution on different occasions, has always been alive to the concept of constitutional governance. In ***B.R. Kapur v. State of T.N. and another***[22], the majority, while dealing with the issue of a writ of quo warranto, ruled that if a non-legislator could be sworn in as the Chief Minister under Article 164 of the Constitution, then he or she must satisfy the qualification of membership of a legislator as provided under Article 173. Recently, in ***Manoj***

22(2001) 7 SCC 231

Narula (supra), while interpreting Article 75(1) of the Constitution, the Court observed:-

> "...In a controlled Constitution like ours, the Prime Minister is expected to act with constitutional responsibility as a consequence of which the cherished values of democracy and established norms of good governance get condignly fructified. The framers of the Constitution left many a thing unwritten by reposing immense trust in the Prime Minister. The scheme of the Constitution suggests that there has to be an emergence of constitutional governance which would gradually grow to give rise to constitutional renaissance."
>
> [Emphasis is ours]

71. The provisions of the Constitution need not expressly stipulate the concepts of constitutionalism, constitutional governance or constitutional trust and morality, rather these norms and values are inherent in various articles of the Constitution and sometimes are decipherable from the constitutional silences as has been held in ***Kalpana Mehta*** (supra).

72. Having discussed about the concept of constitutional governance, in the obtaining situation, we may allude to the

conception of legitimate constitutional trust. In this regard, the speech of Dr. Ambedkar reflects his concern:-

> "I feel that the Constitution is workable; it is flexible and it is strong enough to hold the country together both in peacetime and in wartime. Indeed, if I may say so, if things go wrong under the new Constitution the reason will not be that we had a bad Constitution. What we will have to say is that Man was vile."

73. In ***Re: Dr. Ram Ashray Yadav, Chairman, Bihar Public Service Commission***[23], the Court discussed the role of the members of Public Service Commissions and, treating them as constitutional trustees, observed that the credibility of the institution of Public Service Commission is founded upon the faith of the common man on its proper functioning. The faith would be eroded and confidence destroyed if it appears that the Chairman or the Members of the Commission act subjectively and not objectively. In ***Subhash Sharma and others and Firdauz Taleyarkhan v. Union of India and another***[24], in the context of appointment of Judges, it has

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23(2000) 4 SCC 309
241990 (2) SCALE 836

been stated that it "is essentially a discharge of a constitutional trust of which certain constitutional functionaries are collectively repositories."

74. The framers of the Constitution also did recognize that the adoption of the Constitution would not *ipso facto*, like a magic wand, instill in the countrymen the values of constitutionalism. The founding fathers expected that constitutional functionaries who derive their authority from the Constitution shall always remain sincerely obeisant to the Constitution. The Court in ***Manoj Narula*** (supra), while highlighting the responsibility conferred on the Prime Minister under the Constitution, discussed the doctrine of constitutional trust and, in that context, reproduced what Edmund Burke had said centuries ago:-

> "All persons possessing any portion of power ought to be strongly and awfully impressed with the idea that they act in trust: and that they are to account for their conduct in that trust to the one great Master, Author and Founder of Society."

75. Thereafter, the Court went on to state:-

"This Court, in re Art. 143, Constitution of India and Delhi Laws Act (1912)[25], opined that the doctrine of constitutional trust is applicable to our Constitution since it lays the foundation of representative democracy. The Court further ruled that accordingly, the Legislature cannot be permitted to abdicate its primary duty, viz. to determine what the law shall be. Though it was stated in the context of exercise of legislative power, yet the same has signification in the present context, for in a representative democracy, the doctrine of constitutional trust has to be envisaged in every high constitutional functionary."

76. The Court further observed:-

"... we shall proceed to deal with the doctrine of "constitutional trust". The issue of constitutional trust arises in the context of the debate in the Constituent Assembly that had taken place pertaining to the recommendation for appointment of a Minister to the Council of Ministers. Responding to the proposal for the amendment suggested by Prof. K.T. Shah with regard to the introduction of a disqualification of a convicted person becoming a Minister, Dr. B.R. Ambedkar had replied: -

> "His last proposition is that no person who is convicted may be appointed a Minister of the State. Well, so far as his intention is concerned, it is no doubt very laudable and I do not think any Member of this House would like to differ from him on that proposition. But the whole question is this whether we should introduce all these qualifications and disqualifications in the Constitution itself. Is it

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25AIR 1951 SC 332

> not desirable, is it not sufficient that we should trust the Prime Minister, the Legislature and the public at large watching the actions of the Ministers and the actions of the Legislature to see that no such infamous thing is done by either of them? I think this is a case which may eminently be left to the good- sense of the Prime Minister and to the good sense of the Legislature with the general public holding a watching brief upon them. I therefore say that these amendments are unnecessary."

And again:-

> "98. From the aforesaid, it becomes graphically vivid that the Prime Minister has been regarded as the repository of constitutional trust. The use of the words "on the advice of the Prime Minister" cannot be allowed to operate in a vacuum to lose their significance. There can be no scintilla of doubt that the Prime Minister's advice is binding on the President for the appointment of a person as a Minister to the Council of Ministers unless the said person is disqualified under the Constitution to contest the election or under the 1951 Act, as has been held in *B.R. Kapur case*. That is in the realm of disqualification. But, a pregnant one, the trust reposed in a high constitutional functionary like the Prime Minister under the Constitution does not end there. That the Prime Minister would be giving apposite advice to the President is a legitimate constitutional expectation, for it is a paramount constitutional concern. In a controlled Constitution like ours, the Prime Minister is expected to act with constitutional responsibility as a consequence of which the cherished values of democracy and established norms of good governance get condignly

> fructified. The Framers of the Constitution left many a thing unwritten by reposing immense trust in the Prime Minister. The scheme of the Constitution suggests that there has to be an emergence of constitutional governance which would gradually grow to give rise to constitutional renaissance.
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> 100. Thus, while interpreting Article 75(1), definitely a disqualification cannot be added. However, it can always be legitimately expected, regard being had to the role of a Minister in the Council of Ministers and keeping in view the sanctity of oath he takes, the Prime Minister, while living up to the trust reposed in him, would consider not choosing a person with criminal antecedents against whom charges have been framed for heinous or serious criminal offences or charges of corruption to become a Minister of the Council of Ministers. This is what the Constitution suggests and that is the constitutional expectation from the Prime Minister. Rest has to be left to the wisdom of the Prime Minister. We say nothing more, nothing less."

77. The Constitution of India, as stated earlier, is an organic document that requires all its functionaries to observe, apply and protect the constitutional values spelt out by it. These values constitute the constitutional morality. This makes the Constitution of India a political document that organizes the governance of Indian society through specific functionaries for requisite ends in an appropriate manner. The constitutional

culture stands on the fulcrum of these values. The element of trust is an imperative between constitutional functionaries so that Governments can work in accordance with constitutional norms. It may be stated with definiteness that when such functionaries exercise their power under the Constitution, the sustenance of the values that usher in the foundation of constitutional governance should remain as the principal motto. There has to be implicit institutional trust between such functionaries. We shall elaborate the functional aspect of this principle when we scan the language employed under Article 239AA and other adjunct articles to decipher the true purpose of the said provision from the perspective of the workability of the Constitution in the sphere of governance.

G. <u>Collective responsibility</u>:

78. In the Constituent Assembly Debates, Dr. B.R. Ambedkar spoke thus on collective responsibility:-

> "I want to tell my friend Prof. K.T. Shah that his amendment would be absolutely fatal to the other principle which we want to enact, namely collective responsibility. All Members of the House are very keen that the Cabinet should work on the basis of collective responsibility and all agree that is a very

sound principle. But I do not know how many Members of the House realise what exactly is the machinery by which collective responsibility is enforced. Obviously, there cannot be a statutory remedy. Supposing a Minister differed from other Members of the Cabinet and gave expression to his views which were opposed to the views of the Cabinet, it would be hardly possible for the law to come in and to prosecute him for having committed a breach of what might be called collective responsibility. Obviously, there cannot be a legal sanction for collective responsibility. The only sanction through which collective responsibility can be enforced is through the Prime Minister. In my judgment collective responsibility is enforced by the enforcement of two principles. One principle is that no person shall be nominated to the Cabinet except on the advice of the Prime Minister. Secondly, no person shall be retained as a Member of the Cabinet if the Prime Minister says that he shall be dismissed. It is only when Members of the Cabinet both in the matter of their appointment as well as in the matter of their dismissal are placed under the Prime Minister, that it would be possible to realise our ideal of collective responsibility. I do not see any other means or any other way of giving effect to that principle.

Supposing you have no Prime Minister; what would really happen? What would happen is this, that every Minister will be subject to the control or influence of the President. It would be perfectly possible for the President who is no *ad idem* with a particular Cabinet, to deal with each Minister separately singly, influence them and thereby cause disruption in the Cabinet. Such a thing is not impossible to imagine. Before collective responsibility was introduced in the British

> Parliament you remember how the English King used to disrupt the British Cabinet. He had what was called a Party of King's Friends both in the Cabinet as well as in Parliament. That sort of thing was put a stop to by collective responsibility. As I said, collective responsibility can be achieved only through the instrumentality of the Prime Minister. Therefore, the Prime Minister is really the keystone of the arch of the Cabinet and unless and until we create that office and endow that office with statutory authority to nominate and dismiss Ministers there can be no collective responsibility."

79. In ***State of Karnataka v. Union of India and another***[26], the Court, after reproducing a few passages from Sir Ivor Jennings and Mr. Joseph Chamberlain, observed:-

> "...The following discussion on the subject in "Representative and Responsible Government" by A. H. Birch will be found useful in this connection:-
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> > "Ministerial accountability to Parliament has two aspects : the collective responsibility of Ministers for the policies of the Government and their individual responsibility for the work of their departments. Both forms of responsibility are embodied in conventions which cannot be legally enforced. Both conventions were developed during the nineteenth century, and in both cases the practice was established before the doctrine was announced (page 131).""

26(1978) 2 SCR 1

80. In "Government and Law" by T. C. Hartley and J.A.G. Griffith[27], the position in regard to the collective responsibility of Ministers to the Legislature is tersely stated as under:-

> "Ministers are said to be collectively responsible. This is often elevated by writers to the level of a 'doctrine' but is in truth little more than a political practice which is commonplace and inevitable. Ordinarily, Ministers form the governmental team, all being appointed by the Prime Minister from one political party. A Cabinet Minister deals with his own area of policy and does not normally have much to do with the area of other Ministers. Certainly no Cabinet Minister would be likely to make public statements which impinged on the work of another Minister's department. On a few important issues, policy is determined by the Cabinet after discussion. Collective responsibility means that Cabinet decisions bind all Cabinet Ministers, even if they argued in the opposite direction in Cabinet. But this is to say no more than a Cabinet Minister who finds himself in a minority must either accept the majority view or resign. The team must not be weakened by some of its members making clear in public that they disapprove of the Government's policy. And obviously what is true for Cabinet Ministers is even more true for other Ministers. If they do not like what the team is doing, they must either keep quiet or leave."

81. Speaking on collective responsibility, the Court in the case of ***R.K. Jain v. Union of India and***

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27 Hartley T.C. and Griffith J.A.G., Government and Law; an introduction to the working of the Constitution in Britain 2nd edition, 1981 London; Weidenfeld and Nicholson

others[28] has opined that each member of the Cabinet has personal responsibility to his conscience and also responsibility to the Government. Discussion and persuasion may diminish disagreement, reach unanimity, or leave it unaltered. Despite persistence of disagreement, it is a decision, though some members like less than others. Both practical politics and good government require that those who like it less must still publicly support it. If such support is too great a strain on a Minister's conscience or incompatible with his/her perceptions of commitment and he/she finds it difficult to support the decision, it would be open to him/her to resign. So, the price of acceptance of Cabinet office is the assumption of responsibility to support Cabinet decisions and, therefore, the burden of that responsibility is shared by all.

82. In ***Common Cause, A Registered Society v. Union of India and others***[29], the Court, explaining the concept of collective responsibility, stated:-

> "30. The concept of "collective responsibility" is essentially a political concept. The country is

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[28](1993) 3 SCR 802
[29](1999) 6 SCC 667

> governed by the party in power on the basis of the policies adopted and laid down by it in the Cabinet Meeting. "Collecting Responsibility" has two meanings : The first meaning which can legitimately be ascribed to it is that all members of a Govt, are unanimous in support of its policies and would exhibit that unanimity on public occasions although while formulating the policies, they might have expressed a different view in the meeting of the Cabinet. The other meaning is that Ministers, who had an opportunity to speak for or against the policies in the Cabinet are thereby personally and morally responsible for its success and failure."

83. The principle of collective responsibility is of immense significance in the context of 'aid and advice' of the Council of Ministers. The submission of the learned counsel of the appellant is that when after due deliberation between the Chief Minister and the Council of Ministers a decision is taken, but the same is not given effect to because of interdiction of the Lieutenant Governor, the value of collective responsibility that eventually gets transformed into a Cabinet decision stands absolutely denuded. It is emphatically submitted that if the collective responsibility of the Council of Ministers is not given the expected weightage, there will be

corrosion of the essential feature of representative government.

H. <u>Federal functionalism and democracy</u>:

84. Democracy is a form of government where the people rule. Aristotle viewed democracy as a form of government in which the supreme powers are in the hands of freemen and where people form a majority in an elected sovereign government to exercise some role in decision making. Thomas Jefferson defined democracy as a "government by its citizens in mass, acting directly and personally, according to rules established by the majority". Abraham Lincoln defined democracy as “a government of the people, by the people, and for the people”. The Black's Law Dictionary defines democracy as:-

> "That form of government in which the sovereign power resides in and is exercised by the whole body of free citizens; as distinguished from a monarchy, aristocracy, or oligarchy. According to the theory of a pure democracy, every citizen should participate directly in the business of governing, and the legislative assembly should comprise the whole people."[30]

30Black's Law Dictionary 6th Edition Pg. 432

85. The Preamble to our Constitution, at the outset, proclaims that India is a sovereign democratic republic. The citizens of India are the sovereign and participate in the process of governance by exercising their virtuous right to vote under the system of universal adult suffrage. The citizens elect their representatives and send them to the Parliament and State Legislatures for enacting laws and shaping policies at the Union and State level respectively which are reflective of the popular will of the collective.

86. The parliamentary form of democracy as envisaged by the Constitution has at its very base the power bestowed upon people to vote and make the legislature accountable for their functioning to the people. If the legislature fails to transform the popular will of the people into policies and laws, the people in a democracy like ours have the power to elect new representatives by exercise of their vote. The political equality makes people aware of their right in unison and there is a consistent endeavour to achieve the same.

87. In this context, we may turn to a passage from ***Mohinder Singh Gill and another v. Chief Election Commissioner, New Delhi and others***[31] wherein Krishna Iyer, J. quoted with approval the statement of Sir Winston Churchill which is to the following effect:-

> "At the bottom of all tributes paid to democracy is the little man, walking into a little booth, with a little pencil, making a little cross on a little bit of paper - no amount of rhetoric or voluminous discussion can possibly diminish the overwhelming importance of the point."

88. Thus, democratic set up has its limbs firmly entrenched in the ability of the people to elect their representatives and the faith that the representatives so elected will best represent their interest. Though this right to vote is not a fundamental right, yet it is a right that lies at the heart of democratic form of government. The right to vote is the most cherished value of democracy as it inculcates in the people a sense of belonging. In ***Raghbir Singh Gill v. S. Gurcharan Singh Tohra***[32], the learned Judges, after referring to ***Mohinder Singh Gill's*** case,

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31AIR 1978 SC 851
32AIR 1980 SC 1362

stated that nothing can diminish the overwhelming importance of the cross or preference indicated by the dumb sealed lip voter. That is his right and the trust reposed by the Constitution in him is that he will act as a responsible citizen in choosing his representatives for governing the country.

89. The aforesaid situation warrants for reciprocative functionalism by thought, action and conduct. It requires the elected representatives to uphold the faith which the collective have reposed in them. Any undue interference amounts to betrayal of the faith of the collective in fulfilment of their aspirations of democratic self-governance. In ***Kesavananda Bharati*** (supra), it has been observed that the two basic postulates of democracy are faith in human reason and faith in human nature and that there is no higher faith than faith in democratic process. The Court further stated that democracy on adult suffrage is a great experiment with its roots in the faith in the common man. P. Jaganmohan Reddy, J., in his opinion, stated that the republican and democratic form of government is a part of the basic structure of the Constitution

and the Parliament has no power to abrogate or emasculate the basic elements or fundamental features of the Constitution such as the sovereignty of India and the democratic character of our polity. Further, he stated that the framers of the Constitution adopted a sovereign democratic republic to secure for the citizens of India the objectives of justice, liberty and equality as set out in the Preamble to our Constitution.

90. Dealing with the concept of democracy, the majority in ***Indira Nehru Gandhi v. Raj Narain***[33] ruled that 'democracy' as an essential feature of the Constitution is unassailable. The said principle has been reiterated in ***T.N. Seshan, CEC of India v. Union of India and others.***[34] and ***Kuldip Nayar v. Union of India others.***[35]. When it is conceived that democracy is a part of the basic structure of the Constitution, the essential value of democracy has to be condignly understood and that is why we have referred to certain precedents. The correctness or fallacy of the interpretation of

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33AIR 1975 SC 2299
34(1995) 4 SCC 611
35AIR 2006 SC 3127

Articles 239 to 239AB would depend upon our appreciation of democratic form of government in a mature body polity.

91. The Court in ***Manoj Narula*** (supra), while delineating the concept of democracy, stated that democracy has been best defined as the Government of the People, by the People and for the People, which expects prevalence of genuine orderliness, positive propriety, dedicated discipline and sanguine sanctity by constant affirmance of constitutional morality which is the pillar stone of good governance. Further, it is stated that democracy in India is a product of rule of law which aspires to establish an egalitarian social order and that it is not only a political philosophy but also an embodiment of constitutional philosophy. Democracy being a cherished constitutional value needs to be protected, preserved and sustained and for that purpose, instilment of certain norms in the marrows of the collective is absolutely necessitous. In the said case, the Court, while emphasizing that good governance is a *sine qua non* for a healthy democracy, stated thus:-

> "In a democracy, the citizens legitimately expect that the Government of the day would treat the public interest as primary one and any other interest secondary. The maxim *Salus Populi Suprema Lex,* has not only to be kept in view but also has to be revered. The faith of the people is embedded in the root of the idea of good governance which means reverence for citizenry rights, respect for Fundamental Rights and statutory rights in any governmental action, deference for unwritten constitutional values, veneration for institutional integrity, and inculcation of accountability to the collective at large. It also conveys that the decisions are taken by the decision making authority with solemn sincerity and policies are framed keeping in view the welfare of the people, and including all in a homogeneous compartment. The concept of good governance is not an Utopian conception or an abstraction. It has been the demand of the polity wherever democracy is nourished. <u>The growth of democracy is dependant upon good governance in reality and the aspiration of the people basically is that the administration is carried out by people with responsibility with service orientation</u>."
>
> [Emphasis supplied]

92. Now, we shall proceed to discuss the concept of federalism in the context of the Constitution of India. Encyclopedia Britannica defines federalism as:-

> "Federalism, mode of political organization that unites separate states or other polities within an overarching political system in such a way as to allow each to maintain its own fundamental political integrity. Federal systems do this by requiring that

> basic policies be made and implemented through negotiation in some form, so that all the members can share in making and executing decisions. The political principles that animate federal systems emphasize the primacy of bargaining and negotiated coordination among several power centres; they stress the virtues of dispersed power centres as a means for safeguarding individual and local liberties."

93. In common parlance, federalism is a type of governance in which the political power is divided into various units. These units are the Centre/Union, States and Municipalities. Traditional jurists like Prof. K.C. Wheare lay emphasis on the independent functioning of different governing units and, thus, define federalism as a method of dividing powers so that the general/central and regional governments are each within a sphere co-ordinate and independent. As per Prof. Wheare "the systems of Government embody predominantly on division of powers between Centre and regional authority each of which in its own sphere is coordinating with the other independent as of them, and if so is that Government federal?"[36]

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[36]Prof. K.C. Wheare, Federal Government, 1963 Edn. at page 33

94. However, modern jurists lay emphasis on the idea of interdependence and define federalism as a form of government in which there is division of powers between one general/central and several regional authorities, each within its sphere interdependent and co-ordinate with each other.

95. The framers of our Constitution, during debates in the Constituent Assembly on the draft Constitution, held elaborate discussions on whether to adopt a unitary system of government or federal system of government. During the Constituent Assembly debates, Shri T.T. Krishnamachari said:-

> "...Are we framing a unitary Constitution? Is this Constitution centralizing power in Delhi? Is there any way provided by means of which the position of people in various areas could be safeguarded, their voices heard in regard to matters of their local administration? I think it is a very big charge to make that this Constitution is not a federal Constitution, and that it is a unitary one. We should not forget that this question that the Indian Constitution should be a federal one has been settled by our Leader who is no more with us, in the Round Table Conference in London eighteen years back."
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> "I would ask my honourable friend to apply a very simple test so far as this Constitution is concerned to find out whether it is federal or not. The simple

> question I have got from the German school of political philosophy is that the first criterion is that the State must exercise compulsive power in the enforcement of a given political order, the second is that these powers must be regularly exercised over all the inhabitants of a given territory; and the third is the most important and that is that the activity of the State must not be completely circumscribed by orders handed down for execution by the superior unit. The important words are 'must not be completely circumscribed', which envisages some powers of the State are bound to be circumscribed by the exercise of federal authority. Having all these factors in view, I will urge that our Constitution is a federal Constitution. I urge that our Constitution is one in which we have given power to the Units which are both substantial and significant in the legislative sphere and in the executive sphere."

96. In this context, Dr. B.R. Ambedkar, speaking on the floor of the Constituent Assembly, said:-

> "There is only one point of Constitutional import to which I propose to make a reference. A serious complaint is made on the ground that there is too much of centralization and that the States have been reduced to Municipalities. It is clear that this view is not only an exaggeration, but is also founded on a misunderstanding of what exactly the Constitution contrives to do. As to the relation between the Centre and the States, it is necessary to bear in mind the fundamental principle on which it rests. The basic principle of Federalism is that the legislative and executive authority is partitioned between the Centre and the States not by any law to be made by the Centre but the Constitution itself. This is what the Constitution does. The States, under our Constitution, are in no way dependent

> upon the Centre for their legislative or executive authority. The Centre and the States are co-equal in this matter. It is difficult to see how such a Constitution can be called centralism. It may be that the Constitution assigns to the Centre too large a field for the operation of its legislative and executive authority than is to be found in any other Federal Constitution. It may be that the residuary powers are given to the Centre and not to the States. But these features do not form the essence of federalism. The chief mark of federalism, as I said lies in the partition of the legislative and executive authority between the Centre and the Units by the Constitution. This is the principle embodied in our Constitution."

97. The Court in ***In re: Under Article 143, Constitution of India, (Special Reference No. 1 of 1964)***[37] observed that the essential characteristic of federalism is the distribution of limited executive, legislative and judicial authority among bodies which are coordinate with and independent of each other. Further, the Court stated that the supremacy of the Constitution is fundamental to the existence of a federal State in order to prevent either the legislature of the federal unit or those of the member States from destroying or impairing that delicate balance of power which satisfies the particular requirements of States which are desirous of union, but not

37AIR 1965 SC 745

prepared to merge their individuality in a unity. This supremacy of the Constitution, the Court stated, is protected by the authority of an independent judicial body to act as the interpreter of a scheme of distribution of powers and, thus, the dominant characteristic of the British Constitution cannot be claimed by a Federal Constitution like ours.

98. Gajendragadkar, C.J., in the said case, observed that our Constitution has all the essential elements of a federal structure as was the case in the Government of India Act 1935, the essence of federalism being the distribution of powers between the federation or the Union and the States or the provinces. In ***State of Karnataka v. Union of India*** (supra), Untwalia, J. (speaking for Justice Singhal, Justice Jaswant Singh and for himself) observed that the Constitution is not of a federal character where separate, independent and sovereign States could be said to have joined to form a nation as in the United States of America or as may be the position in some other countries of the world. It is because of this reason

that sometimes it has been characterized as quasi-federal in nature.

99. In ***Shamsher Singh*** (supra), this Court held that our founding fathers accepted the parliamentary system of quasi-federalism while rejecting the substance of Presidential style of Executive. Dr. Ambedkar stated on the floor of the Constituent Assembly that the Constitution is "both unitary as well as federal according to the requirement of time and circumstances". He further stated that the Centre would work for the common good and for the general interest of the country as a whole while the States would work for the local interest. He also refuted the plea for exclusive autonomy of the States.

100. In ***S.R. Bommai v. Union of India***[38], the Court considered the nature of federalism under the Constitution of India. A.M. Ahmadi, J. (as the learned Judge then was) observed:-

> "In order to understand whether our Constitution is truly federal, it is essential to know the true concept of federalism. Dicey calls it a political contrivance

38(1994) 3 SCC 1

> for a body of States which desire Union but not unity. Federalism is, therefore, a concept which unites separate States into a Union without sacrificing their own fundamental political integrity. Separate States, therefore, desire to unite so that all the member-States may share in formulation of the basic policies applicable to all and participate in the execution of decisions made in pursuance of such basic policies. Thus the essence of a federation is the existence of the Union and the States and the distribution of powers between them. Federalism, therefore, essentially implies demarcation of powers in a federal compact."

101. P.B. Sawant, J. (on behalf of himself and Kuldip Singh, J.) opined that the States are constitutionally recognised units and not mere convenient administrative divisions as both the Union and the States have sprung from the provisions of the Constitution. After quoting extensively from H.M. Seervai's commentary - Constitutional Law of India, he expressed thus:-

> "99. The above discussion thus shows that the States have an independent constitutional existence and they have as important a role to play in the political, social, educational and cultural life of the people as the Union. They are neither satellites nor agents of the Centre. The fact that during emergency and in certain other eventualities their powers are overridden or invaded by the Centre is not destructive of the essential federal nature of our Constitution. The invasion of power in such circumstances is not a normal feature of the Constitution. They are exceptions and have to be

resorted to only occasionally to meet the exigencies of the special situations. The exceptions are not a rule.

100. For our purpose, further it is really not necessary to determine whether, in spite of the provisions of the Constitution referred to above, our Constitution is federal, quasi-federal or unitary in nature. It is not the theoretical label given to the Constitution but the practical implications of the provisions of the Constitution which are of importance to decide the question that arises in the present context, viz., whether the powers under Article 356(1) can be exercised by the President arbitrarily and unmindful of its consequences to the governance in the State concerned. So long as the States are not mere administrative units but in their own right constitutional potentates with the same paraphernalia as the Union, and with independent Legislature and the Executive constituted by the same process as the Union, whatever the bias in favour of the Centre, it cannot be argued that merely because (and assuming it is correct) the Constitution is labeled unitary or quasi-federal or a mixture of federal and unitary structure, the President has unrestricted power of issuing Proclamation under Article 356(1)."

102. K. Ramaswami, J., in paragraphs 247 and 248 of his separate judgment, observed:-

"247. Federalism envisaged in the Constitution of India is a basic feature in which the Union of India is permanent within the territorial limits set in Article 1 of the Constitution and is indestructible. The State is the creature of the Constitution and the law made by Articles 2 to 4 with no territorial integrity, but a permanent entity with its

> boundaries alterable by a law made by Parliament. Neither the relative importance of the legislative entries in Schedule VII, Lists I and II of the Constitution, nor the fiscal control by the Union per se are decisive to conclude that the Constitution is unitary. The respective legislative powers are traceable to Articles 245 to 254 of the Constitution. The State qua the Constitution is federal in structure and independent in its exercise of legislative and executive power. However, being the creature of the Constitution the State has no right to secede or claim sovereignty. Qua the Union, State is quasi-federal. Both are coordinating institutions and ought to exercise their respective powers with adjustment, understanding and accommodation to render socio-economic and political justice to the people, to preserve and elongate the constitutional goals including secularism.
> 248. The preamble of the Constitution is an integral part of the Constitution. Democratic form of Government, federal structure, unity and integrity of the nation, secularism, socialism, social justice and judicial review are basic features of the Constitution."

103. B.P. Jeevan Reddy, J., writing a separate opinion (for himself and on behalf of S.C. Agrawal, J.), concluded in paragraph 276 thus:-

> "276. The fact that under the scheme of our Constitution, greater power is conferred upon the Centre vis-a-vis the States does not mean that States are mere appendages of the Centre. Within the sphere allotted to them, States are supreme. The Centre cannot tamper with their powers. More particularly, the courts should not adopt an

> approach, an interpretation, which has the effect of or tends to have the effect of whittling down the powers reserved to the States. It is a matter of common knowledge that over the last several decades, the trend the world over is towards strengthening of Central Governments be it the result of advances in technological/scientific fields or otherwise, and that even In USA the Centre has become far more powerful notwithstanding the obvious bias in that Constitution in favour of the States. All this must put the court on guard against any conscious whittling down of the powers of the States. Let it be said that the federalism in the Indian Constitution is not a matter of administrative convenience, but one of principle the outcome of our own historical process and a recognition of the ground realities. This aspect has been dealt with elaborately by Shri M.C. Setalvad in his Tagore Law Lectures "Union and State relations under the Indian Constitution" (Eastern Law House, Calcutta, 1974). The nature of the Indian federation with reference to its historical background, the distribution of legislative powers, financial and administrative relations, powers of taxation, provisions relating to trade, commerce and industry, have all been dealt with analytically. It is not possible nor is it necessary for the present purposes to refer to them. It is enough to note that our Constitution has certainly a bias towards Centre vis-a-vis the States..."

104. In ***ITC Ltd. v. Agricultural Produce Market Committee***[39], the Court observed that the Constitution of India deserves to be interpreted, language permitting, in a

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39(2002) 9 SCC 23

manner that it does not whittle down the powers of the State Legislature and preserves federalism while also upholding the central supremacy as contemplated by some of its articles.

105. In ***Kuldip Nayar*** (supra), the Court, while dealing with the question of state domicile for elections to the Rajya Sabha, opined that it is true that the federal principle is dominant in our Constitution and the said principle is one of its basic features but it is equally true that federalism under the Indian Constitution leans in favour of a strong Centre, a feature that militates against the concept of strong federalism. Some of the provisions that can be referred to in this context include the power of the Union to deal with extraordinary situations such as during emergency and in the event of a proclamation being issued under Article 356 that the governance of a State cannot be carried on in accordance with the provisions of the Constitution; the power of the Parliament to legislate with respect to a matter in the State List in the national interest in case there is a resolution of the Council of States supported by prescribed majority; the power of the Parliament to provide for

the creation and regulation of All India Services common to the Union and the States in case there is a resolution of the Council of States supported by not less than two-thirds majority; the existence of only one citizenship, namely, the citizenship of India; and, perhaps most important, the power of the Parliament in relation to the formation of new States and alteration of areas, boundaries or names of States.

106. From the foregoing discussion, it is clear as day that both the concepts, namely, democracy, i.e., rule by the people and federalism are firmly imbibed in our constitutional ethos. Whatever be the nature of federalism present in the Indian Constitution, whether absolutely federal or quasi-federal, the fact of the matter is that federalism is a part of the basic structure of our Constitution as every State is a constituent unit which has an exclusive Legislature and Executive elected and constituted by the same process as in the case of the Union Government. The resultant effect is that one can perceive the distinct aim to preserve and protect the unity and

the territorial integrity of India. This is a special feature of our constitutional federalism.

107. It is self-evident that there is a meaningful orchestration between the concepts of federalism and nature of democracy present in our Constitution. It would not be a fallacious metaphor if we say that just as in a fusion reaction two or more atomic nuclei come together to form a bigger and heavier nucleus, the founding fathers of our Constitution envisaged a fusion of federalism and democracy in the quest for achieving an egalitarian social order, a classical unity in a contemporaneous diversity. The vision of diversity in unity and the perception of plurality in eventual cohesiveness is embedded in the final outcome of the desire to achieve the accomplished goal through constitutional process. The meeting of the diversity in unity without losing identity is a remarkable synthesis that the Constitution conceives without even permitting the slightest contrivance or adroitness.

I. <u>Collaborative federalism</u>:

108. The Constituent Assembly, while devising the federal character of our Constitution, could have never envisaged that the Union Government and the State Governments would work in tangent. It could never have been the Constituent Assembly's intention that under the garb of quasi-federal tone of our Constitution, the Union Government would affect the interest of the States. Similarly, the States under our constitutional scheme were not carved as separate islands each having a distinct vision which would unnecessarily open the doors for a contrarian principle or gradually put a step to invite anarchism. Rather, the vision enshrined in the Preamble to our Constitution, i.e., to achieve the golden goals of justice, liberty, equality and fraternity, beckons both the Union Government and the State Governments, alike. The ultimate aim is to have a holistic structure.

109. The aforesaid idea, in turn, calls for coordination amongst the Union and the State Governments. The Union and the States need to embrace a collaborative/cooperative federal architecture for achieving this coordination.

110. Corwin, an eminent thinker, in the context of the United States, coined the term 'Collaborative Federalism' and defined it as:-

> "...the National Government and the States are mutually complementary parts of a single governmental mechanism all of whose powers are intended to realize the current purposes of government."[40]

111. The U.S. Supreme Court in ***Carmichael v. S. Coal & Coke Co.***[41] propounded that a State Unemployment Statute had not been coerced by the adoption of the Social Security Act and the United States and the State of Alabama are not alien governments but they coexist within the same territory. Unemployment within it is their common concern. The U.S. Supreme Court further observed that the two statutes embody a cooperative legislative effort by the State and National governments for carrying out a public purpose common to both, which neither could fully achieve without the cooperation of the other and the Constitution does not prohibit such cooperation.

40Edward S. Corwin, The Passing of Dual Federalism, 36 VA.L.REV. 1, 4 (1950)
41301 U.S. 495, 525 – 26 (1937)

112. Geoffrey Sawer proposes that cooperative federalism is evidenced by the following characteristics: *'each of the parties to the arrangement has a reasonable degree of autonomy, can bargain about the terms of cooperation, and at least if driven too hard, decline to cooperate*'[42].

113. Later, Cameron and Simeon described "collaborative federalism," as:-

> "[T]he process by which national goals are achieved, not by the federal government acting alone or by the federal government shaping provincial behavior through the exercise of its spending power, but by some or all of the governments and the territories acting collectively."[43]

Although the said statement of law may not be strictly applicable, yet the need for co-operation to sustain the federal structure has its own importance as an idea.

114. Thus, the Union and the State Governments should always work in harmony avoiding constitutional discord. In such a collaboration, the national vision as set out in the Preamble to our Constitution gets realized. The methods and

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42 Geoffrey Sawer, Modern Federalism (Pitman Australia, 1976), 1.

43 Cameron, D. and Simeon, R. 2002. Intergovernmental relations in Canada: The emergence of collaborative federalism. Publius , 32(2):49–72

approach for the governments of the Union and the States may sometimes be different but the ultimate goal and objective always remain the same and the governments at different levels should not lose sight of the ultimate objective. This constitutional objective as enshrined in the Constitution should be the guiding star to them to move on the path of harmonious co-existence and interdependence. They are the basic tenets of collaborative federalism to sustain the strength of constitutional functionalism in a Welfare State.

115. In a Welfare State, there is a great necessity of collaborative federalism. Martin Painter, a leading Australian proponent of collaborative federalism, lays more stress on negotiations for achieving common goals amongst different levels of governments and, thus, says:-

> "The practical exigencies in fulfilling constitutionally sanctioned functions should bring all governments from different levels together as equal partners based on negotiated cooperation for achieving the common aims and resolving the outstanding problems." [44]

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44 Martin Painter, Collaborative federalism: Economic reform in Australia in the 1990s. Cambridge University Press, 2009.

116. In the Australian context, Prof. Nicholas Aroney in his book[45] has said:-

> "Rather than displaying a strictly defined distribution of responsibility between two or more "co-ordinate" levels of government, federal systems tend in practice to resemble something more like a "marble cake", in which governmental functions are shared between various governmental actors within the context of an ever-shifting set of parameters shaped by processes of negotiation, compromise and, at times, cooperation."

117. Thus, the idea behind the concept of collaborative federalism is negotiation and coordination so as to iron out the differences which may arise between the Union and the State Governments in their respective pursuits of development. The Union Government and the State Governments should endeavour to address the common problems with the intention to arrive at a solution by showing statesmanship, combined action and sincere cooperation. In collaborative federalism, the Union and the State Governments should express their readiness to achieve the common objective and work together for achieving it. In a functional Constitution, the authorities

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45 Prof. Nicholas Aroney, The Constitution of a Federal Commonwealth: The Making and Meaning of the Australian Constitution, 2009

should exhibit sincere concern to avoid any conflict. This concept has to be borne in mind when both intend to rely on the constitutional provision as the source of authority. We are absolutely unequivocal that both the Centre and the States must work within their spheres and not think of any encroachment. But in the context of exercise of authority within their spheres, there should be perception of mature statesmanship so that the constitutionally bestowed responsibilities are shared by them. Such an approach requires continuous and seamless interaction between the Union and the State Governments. We may hasten to add that this idea of collaborative federalism would be more clear when we understand the very essence of the special status of NCT of Delhi and the power conferred on the Chief Minister and the Council of Ministers on the one hand and the Lieutenant Governor on the other by the Constitution.

118. The idea of cooperative/collaborative federalism is also not new to India. M.P. Jain in his book[46], in a different manner, sets forth the perception thus:-

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[46]M.P. Jain, Some aspects of Indian federalism, 1968

> "Though the Constitution provides adequate powers to the Centre to fulfil its role, yet, in actual practice, the Centre can maintain its dynamism and initiative not through a show of its powers — which should be exercised only as a last resort in a demonstrable necessity — but on the cooperation of the States secured through the process of discussion, persuasion and compromises. All governments have to appreciate the essential point that they are not independent but interdependent, that they should act not at cross- purposes but in union for the maximisation of the common good."

119. In ***State of Rajasthan and others v. Union of India***[47], the Court took cognizance of the concept of cooperative federalism as perceived by G. Austin and A.H Birch when it observed:-

> "Mr. Austin thought that our system, if it could be called federal, could be described as "cooperative federalism." This term was used by another author, Mr. A.H. Birch (see: Federalism, Finance and Social Legislation in Canada, Australia and the United States p. 305), to describe a system in which:
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> > "...the practice of administrative cooperation between general and regional governments, the partial dependence of the regional governments upon payments from the general governments and the fact that the general governments, by the use of conditional grants, frequently promote developments in matters which are constitutionally assigned to the regions"... "

47 (1978) 1 SCR 1

120. We have dealt with the conceptual essentiality of federal cooperation as that has an affirmative role on the sustenance of constitutional philosophy. We may further add that though the authorities referred to hereinabove pertain to Union of India and State Governments in the constitutional sense of the term "State", yet the concept has applicability to the NCT of Delhi regard being had to its special status and language employed in Article 239AA and other articles.

J. <u>Pragmatic federalism</u>:

121. In this context, we may also deal with an ancillary issue, namely, pragmatic federalism. To appreciate the said concept, we are required to analyse the nature of federalism that is conceived under the Constitution. Be it noted, the essential characteristics of federalism like duality of governments, distribution of powers between the Union and the State Governments, supremacy of the Constitution, existence of a written Constitution and most importantly, authority of the

Courts as final interpreters of the Constitution are all present under our constitutional scheme. But at the same time, the Constitution has certain features which can very well be perceived as deviations from the federal character. We may, in brief, indicate some of these features to underscore the fact that though our Constitution broadly has a federal character, yet it still has certain striking unitary features too. Under Article 3 of the Constitution, the Parliament can alter or change the areas, boundaries or names of the States. During emergency, the Union Parliament is empowered to make laws in relation to matters under the State List, give directions to the States and empower Union officers to execute matters in the State List. That apart, in case of inconsistency between the Union and the State laws, the Union Law shall prevail. Additionally, a Governor of a State is empowered to reserve the bill passed by the State Legislature for consideration of the President and the President is not bound to give his assent to such a bill. Further, a State Legislature can be dissolved and President's rule can be imposed in a State either on the report

of the Governor or otherwise when there is failure of the constitutional machinery in the State.

122. We have referred to the above aspects to lay stress on the 'quasi-federal' nature of our Constitution which has been so held by the Court in many a decision. We may state that these theoretical concepts are to be viewed from the practical perspective. In ***S.R. Bommai's*** case, while interpreting Article 356, the Court observed:-

> "That is why the Constitution of India is differently described, more appropriately as 'quasi-federal' because it is a mixture of the federal and unitary elements, leaning more towards the latter but then what is there in a name, what is important to bear in mind is the thrust and implications of the various provisions of the Constitution bearing on the controversy in regard to scope and ambit of the Presidential power under Article 356 and related provisions."

123. Thus, the need is to understand the thrust and implication of a provision. To put it differently, the acceptance of 'pragmatic federalism' is the need of the day. One aspect needs to be clarified. The acceptance of the said principle should not be viewed as a simplistic phenomenon entrenched

in innocence. On the contrary, it would require disciplined wisdom on the part of those who are required to make it meaningful. And, the meaning, in essentiality, shall rest on pragmatic orientation.

124. The expression 'pragmatic federalism' in the Indian context has been used by Justice A.M. Ahmadi in ***S.R. Bommai*** (supra) wherein he observes:-

> "It would thus seem that the Indian Constitution has, in it, not only features of a pragmatic federalism which, while distributing legislative powers and indicating the spheres of Governmental powers of State and Central Governments, is overlaid by strongly 'unitary' features, particularly exhibited by lodging in Parliament the residuary legislative powers, and in the Central Government the executive power of appointing certain Constitutional functionaries including High Court and Supreme Court Judges and issuing appropriate directions to the State Governments and even displacing the State Legislatures and the Government in emergency situations, vide Articles 352 to 360 of the Constitution."

125. The concept of pragmatic federalism is self explanatory. It is a form of federalism which incorporates the traits and attributes of sensibility and realism. Pragmatic federalism, for

achieving the constitutional goals, leans on the principle of permissible practicability.

126. It is useful to state that pragmatic federalism has the inbuilt ability to constantly evolve with the changing needs and situations. It is this dynamic nature of pragmatic federalism which makes it apt for a body polity like ours to adopt. The foremost object of the said concept is to come up with innovative solutions to problems that emerge in a federal setup of any kind.

K. <u>Concept of federal balance</u>:

127. Another complementary concept in this context, we think, is "federal balance". Federalism in contradistinction to centralism is a concept which envisions a form of Government where there is a distribution of powers between the States and the Centre. It has been advocated by the patrons of the federal theory that the States must enjoy freedom and independence as much as possible and at the very least be on an equal footing with the Centre. The Indian Constitution prescribes a federal structure which provides for division of powers

between the States and the Centre, but with a slight tilt towards the Centre. This unique quasi-federal structure is inherent in the various provisions of the Constitution as it was felt by the framers of our Constitution keeping in mind the needs of independent India and that is why, the residuary powers in most, if not all, matters have remained with the Centre. This, however, is not unconditional as the Constitution has provided for a federal balance between the powers of the Centre and the States so that there is no unwarranted or uncalled for interference by the Centre which would entail encroachment by the Centre into the powers of the States. The need is for federal balance which requires mutual respect and deference to actualize the workability of a constitutional provision.

128. Sawer's 'federal principles' reiterate this concept of federal balance when he states:-

> "power of the centre is limited, in theory at least, to those matters which concern the nation as a whole. The regions are intended to be as free as possible to pursue their own local interest."

129. The interest of the States inherent in a federal form of government gains more importance in a democratic form of government as it is absolutely necessary in a democracy that the will of the people is given effect to. To subject the people of a particular State/region to the governance of the Union, that too, with respect to matters which can be best legislated at the State level goes against the very basic tenet of a democracy. The principle of federal balance which is entrenched in our Constitution has been reiterated on several instances holding that the Centre and the States must act within their own spheres. In ***In re: Under Article 143, Constitution of India, (Special Reference No. 1 of 1964)*** (supra), the Constitution Bench observed:-

> "...the essential characteristic of federalism is the distribution of limited executive, legislative and judicial authority among bodies which are coordinate with and independent of each other'. The supremacy of the Constitution is fundamental to the existence of a federal State in order to prevent either the legislature of the federal unit or those of the member States from destroying or impairing that delicate balance of power which satisfies the particular requirements of States which are desirous of union, but not prepared to merge their

> individuality in a unity. This supremacy of the Constitution is protected by the authority of an independent judicial body to act as the interpreter of a scheme of distribution of powers."
>
> [Underlining is ours]

130. In ***UCO Bank v. Dipak Debbarma***[48], the Court has made several observations on the federal character of our Constitution and the need to maintain the federal balance which has been envisaged in our Constitution to prevent any usurpation of power either by the Centre or the States. We reproduce the same with profit:-

> "The federal structure under the constitutional scheme can also work to nullify an incidental encroachment made by the Parliamentary legislation on a subject of a State legislation where the dominant legislation is the State legislation. An attempt to keep the aforesaid constitutional balance intact and give a limited operation to the doctrine of federal supremacy can be discerned in the concurring judgment of Ruma Pal, J. in ITC Ltd. vs. Agricultural Produce Market Committee and Ors., wherein after quoting the observations of this Court in the case of S.R. Bomai v. Union of India (para 276), the learned Judge has gone to observe as follows (para 94 of the report):
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> > "276. The fact that under the scheme of our Constitution, greater power is conferred upon the Centre vis-a-vis the States does not mean that States are mere appendages of the Centre.

48(2017) 2 SCC 585

> Within the sphere allotted to them, States are supreme. The Centre cannot tamper with their powers. More particularly, the courts should not adopt an approach, an interpretation, which has the effect of or tends to have the effect of whittling down the powers reserved to the States.""

131. Thus, the role of the Court in ensuring the federal balance, as mandated by the Constitution, assumes great importance. It is so as the Court is the final arbiter and defender of the Constitution.

L. <u>Interpretation of the Constitution</u>:

132. We have already said that both the parties have projected their view in extremes. The issue deserves to be adjudged regard being had to the language employed in the various articles in Chapter VIII, the context and various constitutional concepts. If the construction sought to be placed by the appellant is accepted, such an acceptation would confer a status on NCT of Delhi which the Parliament in exercise of its constituent power has not conceived. The respondents, per contra, highlight that by the constitutional amendment, introduction of the 1991 Act and the Rules of Business, the Lieutenant Governor functions as the administrator in the

truest sense as the contemporaneous documents leading to the amendment would show. They would submit that though Delhi has been conferred a special status, yet that does not bring any new incarnation. The submission, as we perceive, destroys the fundamental marrows of the conception, namely, special status. It, in fact, adorns the Lieutenant Governor with certain attributes and seeks to convey that NCT of Delhi remains where it was. The approach in extremes is to be adjudged and the adjudication, as it seems to us, would depend upon the concepts we have already adumbrated and further we have to carefully analyse the principles of the interpretation of the Constitution.

133. The task of interpreting an instrument as dynamic as the Constitution assumes great import in a democracy. The Constitutional Courts are entrusted with the critical task of expounding the provisions of the Constitution and further while carrying out this essential function, they are duty bound to ensure and preserve the rights and liberties of the citizens without disturbing the very fundamental principles which form

the foundational base of the Constitution. Although, primarily, it is the literal rule which is considered to be the norm which governs the courts of law while interpreting statutory and constitutional provisions, yet mere allegiance to the dictionary or literal meaning of words contained in the provision may, sometimes, annihilate the quality of poignant flexibility and requisite societal progressive adjustability. Such an approach may not eventually subserve the purpose of a living document.

134. In this regard, we think it appropriate to have a bird's eye view as to how the American jurists and academicians have contextually perceived the science of constitutional interpretation. The most important aspect of modern constitutional theory is its interpretation. Constitutional law is a fundamental law of governance of a politically organised society and it provides for an independent judicial system which has the onerous responsibility of decisional process in the sphere of application of the constitutional norms. The resultant consequences do have a vital impact on the well-

being of the people. The principles of constitutional interpretation, thus, occupy a prime place in the method of adjudication. In bringing about constitutional order through interpretation, the judiciary is often confronted with two propositions — whether the provisions of the Constitution should be interpreted as it was understood at the time of framing of the Constitution unmindful of the circumstances at the time when it was subsequently interpreted or whether the constitutional provisions should be interpreted in the light of contemporaneous needs, experiences and knowledge. In other words, should it be historical interpretation or contemporaneous interpretation.[49] The theory of historical perspective found its votary in Chief Justice Taney who categorically stated in ***Dred Scott v Sanford***[50] that as long as the Constitution continues to exist in the present form, it speaks not only in the same words but also with the same meaning and intent with which it spoke when it came from the hands of the framers. Similar observations have been

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49 *Bodenheimer, Edgar,* Jurisprudence,(Universal Law Publishing Co.Pvt. Ltd,
Fourth Indian Reprint, 2004) p 405

50 60 U.S. (19 How.) 393 (1857)

made by Justice Sutherland[51]. Propagating a different angle, Chief Justice Marshall in ***McCulloch v Maryland***[52] has observed that the American Constitution is intended to serve for ages to come and it should be adopted to various crises of human affairs. Justice Hughes in ***State v. Superior Court***[53] observed that the constitutional provisions should be interpreted to meet and cover the changing conditions of social life and economic life. Justice Holmes observed that the meaning of the constitutional terms is to be gleaned from their origin and the line of their growth.[54] Cardozo once stated:-

> "A Constitution states or ought to state not rules for the passing hour but principles for an expanding future."[55]

It would be interesting to note that Justice Brandeis tried to draw a distinction between interpretation and application of

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51 Home Building and Loan Association v Blaisdell, 290 U.S. 398 (1934) see West Coast Hotel Co., v Parrish, 300 US 379 (1937) where he observed, the meaning of the Constitution does not change with the ebb and flow of economic events that (if)the words of the Constitution mean today what they did not mean when written is to rob that instrument of the essential element...

52 17 US (4Wheat) 316 (1819)

53 State v Superior Court (1944) at 547

54 Gompers v US 233 (1914)

55 Benjamin N. Cardozo, The Nature of the Judicial Process, Yale University Press, 1921

constitutional provisions[56]. The Constitution makers in their wisdom must have reasonably envisaged the future needs and attempted at durable framework of the Constitution. They must not have made the Constitution so rigid as to affect the future. There is a difference between modification and subversion of the provisions of the Constitution through interpretation. The view is that there is sufficient elasticity but fundamental changes are not envisaged by interpretation. Thus, there is a possibility of reading into the provisions certain regulations or amplifications which are not directly dealt with. There is yet another angle that the libertarian's absolutism principle never allows for restrictions to be read into the liberties which are not already mentioned in the Constitution.[57]

135. Our Constitution, to repeat at the cost of repetition, is an organic and living document. It contains words that potentially do have many a concept. It is evident from the

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56Burnett v Coronado Oil and Gas Co., 285 US (1932)

57 The activist libertarians like Justice Black and Douglas never allowed reading such restrictions. See *American Communication Association v Douds* 339 US (1950) and dissenting in *Poulos v New Hamshire,* 345 US(1953)

following passage from ***R.C. Poudyal v. Union of India and others***[58]:-

> "In the interpretation of a constitutional document, "words are but the framework of concepts and concepts may change more than words themselves". The significance of the change of the concepts themselves is vital and the constitutional issues are not solved by a mere appeal to the meaning of the words without an acceptance of the line of their growth. It is aptly said that "the intention of a Constitution is rather to outline principles than to engrave details"".

136. Professor Richard H. Fallon has, in his celebrated work[59], identified five different strands of interpretative considerations which shall be taken into account by judges while interpreting the Constitution. They read thus:-

> "Arguments from the plain, necessary, or meaning of the constitutional text; arguments about the intent of the framers; arguments of constitutional theory that reason from the hypothesized purposes that best explain either particular constitutional provisions or the constitutional text as a whole; arguments based on judicial precedent; and value arguments that assert claims about justice and social policy."[60]

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58 AIR 1993 SC 1804

59 Richard H. Fallon, "A Constructivist Coherence Theory of Constitutional Interpretation", Harvard Law Review Association, 1987

60 100 HARV. L. REV. 1189, 1189-90 (1987).10

137. Comparing the task of interpretation of statute to that of interpretation of musical notes, Judge Hand in the case of ***Helvering v. Gregory***[61] stated:-

> "The meaning of a sentence may be more than that of the separate words, as a melody is more than the words."

138. Jerome N. Frank[62], highlighting the corresponding duty of the public in allowing discretion to the Judges, has observed:-

> "a "wise composer" expects a performer to transcend literal meaning in interpreting his score; a wise public should allow a judge to do the same."

139. The room for discretion while interpreting constitutional provisions allows freedom to the Judges to come up with a formula which is in consonance with the constitutional precepts while simultaneously resolving the conflict in issue. The following observations made in ***S.R. Bommai's case***, throw light on the aforesaid perception:-

> "Constitutional adjudication is like no other decision-making. There is a moral dimension to every major constitutional case; the language of the text is not necessarily a controlling factor. Our

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61 69 F. 2d 809, 810-II (1934)

62 Jerome N. Frank, "Words and Music: Some remarks on Statutory Interpretation," *Columbia Law Review* 47 (1947): 1259-1367

> Constitution works because of its generalities, and because of the good sense of the judges when interpreting it. It is that informed freedom of action of the judges that helps to preserve and protect our basic document of governance."

140. It is imperative that judges must remain alive to the idea that the Constitution was never intended to be a rigid and inflexible document and the concepts contained therein are to evolve over time as per the needs and demands of the situation. Although the rules of statutory interpretation can serve as a guide, yet the constitutional courts should not, for the sake of strict compliance to these principles, forget that when the controversy in question arises out of a constitutional provision, their primary responsibility is to work out a solution.

141. In ***Supreme Court Advocates-on-Record Association*** (supra), this Court, acknowledging the *sui generis* nature of the Constitution, observed thus:-

> "The constitutional provisions cannot be cut down by technical construction rather it has to be given liberal and meaningful interpretation. The ordinary rules and presumptions, brought in aid to interpret the statutes, cannot be made applicable while interpreting the provisions of the Constitution. In

> Minister of Home Affairs v. Fisher (1979) 3 AER 21 dealing with Bermudian Constitution, Lord Wilberforce reiterated that a Constitution is a document "sui generis, calling for principles of interpretation of its own, suitable to its character""

142. Dickson, J., in ***Hunter v. Southam Inc***[63], rendering the judgment of the Supreme Court of Canada, expounded the principle pertaining to constitutional interpretation thus:-

> "The task of expounding a constitution is crucially different from that of construing a statute. A statute defines present rights and obligations. It is easily enacted and as easily repealed. A constitution, by contrast, is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental power and, when joined by a Bill or a Charter of Rights, for the unremitting protection of individual rights and liberties. Once enacted, its provisions cannot easily be repealed or amended. It must, therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers. The judiciary is the guardian of the constitution and must, in interpreting its provisions, bear these considerations in mind. Professor Paul Freund expressed this idea aptly when he admonished the American courts 'not to read the provisions of the Constitution like a last will and testament lest it become one'."

63[1984] 2 SCR 145

143. The Supreme Court of Canada also reiterated this view when it held that the meaning of 'unreasonable' cannot be determined by recourse to a dictionary or, for that matter, by reference to the rules of statutory construction. The Court pointed out that the task of expounding a Constitution is crucially different from that of construing a statute, for a statute defines present rights and obligations and is easily enacted and as easily repealed whereas a Constitution is drafted with an eye to the future and its function is to provide a continuing framework for the legitimate exercise of governmental power. Further, the Court observed that once enacted, constitutional provisions cannot easily be repealed or amended and hence, it must be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers and the judiciary, being the guardian of the Constitution, must bear these considerations in mind while interpreting it. The Court further stated that the judges must take heed to the warning of Professor Paul Freund when he said that the role of the

judges is “not to read the provisions of the Constitution like a last will and testament, lest it becomes one”.

144. This idea had pervaded the legal system way back in 1930 when the Privy Council through Lord Sankey LC in ***Edwards v Attorney General for Canada***[64] had observed that the Constitution must be approached as “a living tree capable of growth and expansion within its natural limits”.

145. Professor Pierre-André Côté in his book[65] has highlighted the action based approach by stating that it must be kept in mind that the end goal of the process of legal interpretation is resolution of conflicts and issues. It would be apt to reproduce his words:-

> “Legal interpretation goes beyond the mere quest for historical truth. The judge, in particular, does not interpret a statute solely for the intellectual pleasure of reviving the thoughts that prevailed at the time the enactment was drafted. He interprets it with an eye to action: the application of the statute. Legal interpretation is thus often an "interpretive operation”, that is, one linked to the resolution of concrete issues.”

M. <u>Purposive interpretation</u>:

64[1930] AC 124, 136

65 Pierre-André *Côté, The Interpretation of Legislation in Canada 2nd Ed* (Cowansville. Quebec:Les Editions Yvon Blais. Inc. 1992)

146. Having stated the principles relating to constitutional interpretation we, as presently advised, think it apt to devote some space to purposive interpretation in the context, for we shall refer to the said facet for understanding the core controversy. It needs no special emphasis that the reference to some precedents has to be in juxtaposition with other concepts and principles. As it can be gathered from the discussion as well as the authorities cited above, the literal rule is not to be the primary guiding factor in interpreting a constitutional provision, especially if the resultant outcome would not serve the fructification of the rights and values expressed in the Constitution. In this scenario, the theory of purposive interpretation has gained importance where the courts shall interpret the Constitution in a purposive manner so as to give effect to its true intention. The Judicial Committee in ***Attorney General of Trinidad and Tobago v. Whiteman***[66] has observed:-

> "The language of a Constitution falls to be construed, not in a narrow and legalistic way, but

66[1991] 2 AC 240, 247

> broadly and purposively, so as to give effect to its spirit…"

147. In ***S.R. Chaudhuri v. State of Punjab and others***[67], a three-Judge Bench has opined that constitutional provisions are required to be understood and interpreted with an object-oriented approach and a Constitution must not be construed in a narrow and pedantic sense. The Court, while holding that the Constituent Assembly debates can be taken aid of, observed the following:-

> "The words used may be general in terms but, their full import and true meaning, has to be appreciated considering the true context in which the same are used and the purpose which they seek to achieve."
> (Emphasis is ours)

148. The Court further highlighted that the Constitution is not just a document in solemn form but a living framework for the government of the people exhibiting a sufficient degree of cohesion and its successful working depends upon the democratic spirit underlying it being respected in letter and in spirit.

67(2001) 7 SCC 126

149. We have duly noted in the earlier part of the judgment that the judiciary must interpret the Constitution having regard to the spirit and further by adopting a method of purposive interpretation. That is the obligation cast on the judges. In ***Ashok Kumar Gupta and another v. State of U.P. and others***[68], the Court observed that while interpreting the Constitution, it must be borne in mind that words of width are both a framework of concepts and means to the goals in the Preamble and concepts may keep changing to expand and elongate the rights. The Court further held that constitutional issues are not solved by mere appeal to the meaning of the words without an acceptance of the line of their growth and, therefore, the judges should adopt purposive interpretation of the dynamic concepts of the Constitution and the Act with its interpretative armoury to articulate the felt necessities of the time. Finally, the Court pointed out:-

> "To construe law one must enter into its spirit, its setting and history."

68(1997) 5 SCC 201

150. In ***Indian Medical Association v. Union of India and others***[69], referring to the pronouncement in ***M. Nagaraj v. Union of India***[70], the Court said:-

> "In M. Nagaraj, Kapadia J., (as he then was) speaking for the Court, recognized that one of the cardinal principles of constitutional adjudication is that the mode of interpretation ought to be the one that is purposive and conducive to ensure that the constitution endures for ages to come. Eloquently, it was stated that the "Constitution is not an ephemeral legal document embodying a set of rules for the passing hour"."
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> (Emphasis is ours)

151. The emphasis on context while interpreting constitutional provisions has burgeoned this shift from the literal rule to the purposive method in order that the provisions do not remain static and rigid. The words assume different incarnations to adapt themselves to the current demands as and when the need arises. The House of Lords in ***Regina (Quintavalle) v. Secretary of State for Health***[71] ruled:-

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69(2011) 7 SCC 179
70 (2006) 8 SCC 202

71(2003) UKHL 13 : (2003) 2 AC 687 : (2003) 2 WLR 692 (HL)

> "The pendulum has swung towards purposive methods of construction. This change was not initiated by the teleological approach of European Community jurisprudence, and the influence of European legal culture generally, but it has been accelerated by European ideas: see, however, a classic early statement of the purposive approach by Lord Blackburn in River Wear Commissioners v. Adamson (1877) LR 2 AC 743 at p. 763 (HL). In any event, nowadays the shift towards purposive interpretation is not in doubt. The qualification is that the degree of liberality permitted is influenced by the context. ..."
>
> [Emphasis is supplied]

152. Emphasizing on the importance of determining the purpose and object of a provision, Learned Hand, J. in ***Cabell v. Markham***[72] enunciated:-

> "Of course it is true that the words used, even in their literal sense, are the primary, and ordinarily the most reliable, source of interpreting the meaning of any writing: be it a statute, a contract, or anything else. But it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning."

72148 F 2d 737 (2d Cir 1945)

153. The components of purposive interpretation have been elucidated by Former President of the Supreme Court of Israel, Aharon Barak, who states:-

> "Purposive interpretation is based on three components: language, purpose, and discretion. Language shapes the range of semantic possibilities within which the interpreter acts as a linguist. Once the interpreter defines the range, he or she chooses the legal meaning of the text from among the (express or implied) semantic possibilities. The semantic component thus sets the limits of interpretation by restricting the interpreter to a legal meaning that the text can bear in its (public or private) language."[73]

154. As per the observations made by Aharon Barak, judges interpret a Constitution according to its purpose which comprises of the objectives, values and principles that the constitutional text is designed to actualize. Categorizing this purpose into objective and subjective purpose, he states[74]:-

> "Subjective component is the goals, values, and principles that the constituent assembly sought to achieve through it, at the time it enacted the constitution. It is the original intent of the founding fathers. Purposive interpretation translates such

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73Aharon Barak, Purposive Interpretation in Law, Princeton University Press, 2005 - Law

74*ibid*

> intent into a presumption about the subjective purpose, that is, that the ultimate purpose of the text is to achieve the (abstract) intent of its authors. There is also, however, the objective purpose of the text - the goals, values, and principles that the constitutional text is designed to achieve in a modern democracy at the time of interpretation. Purposive interpretation translates this purpose into the presumption that the ultimate purpose of the constitution is its objective purpose."
>
> [Emphasis supplied]

155. It is also apt to reproduce the observations made by him in the context of the ever changing nature of the Constitution:-

> "A constitution is at the top of a normative pyramid. It is designed to guide human behavior for a long period of time. It is not easily amendable. It uses many open ended expressions. It is designed to shape the character of the state for the long term. It lays the foundation for the state's social values and aspirations. In giving expression to this constitutional uniqueness, a judge interpreting a constitution must accord significant weight to its objective purpose and derivative presumptions. Constitutional provisions should be interpreted according to society's basic normative positions at the time of interpretation."

156. He has further pointed out that both the subjective as well as the objective purposes have their own significance in the interpretation of constitutional provisions:-

> "The intent of the constitutional founders (abstract subjective intent" remains important. We need the past to understand the present. Subjective purpose confers historical depth, honoring the past and its importance. In purposive interpretation, it takes the form of presumption of purpose that applies immediately, throughout the process of interpreting a constitution. It is not, however, decisive. Its weight is substantial immediately following the founding, but as time elapses, its influence diminishes. It cannot freeze the future development of the constitutional provision. Although the roots of the constitutional provision are in the past, its purpose is determined by the needs of the present, in order to solve problems in the future. In a clash between subjective and objective purposes, the objective purpose of a constitution prevails. It prevails even when it is possible to prove subjective purpose through reliable, certain, and clear evidence. Subjective purpose remains relevant, however, in resolving contradictions between conflicting objective purposes."[75]

N. <u>Constitutional culture and pragmatism</u>:

157. "Constitutional culture" is inherent in the concepts where words are transformed into concrete consequences. It is an interlocking system of practices, institutional arrangements, norms and habits of thought that determine what questions

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75ibid

we ask, what arguments we credit, how we process disputes and how we resolve those disputes.[76]

158. The aforestated definition of the term 'constitutional culture' is to be perceived as set of norms and practices that breathe life into the words of the great document. It is the conceptual normative spirit that transforms the Constitution into a dynamic document. It is the constitutional culture that constantly enables the words to keep in stride with the rapid and swift changes occurring in the society.

159. The responsibility of fostering a constitutional culture falls on the shoulders of the State and the populace. The allegiance to promoting a constitutional culture stems from the crying need of the sovereign to ensure that the democratic nature of our society remains undaunted and the fundamental tenets of the Constitution rest on strong platform.

160. The following observations made by the Court in ***R.C. Poudyal*** (supra) throw light on this duty cast upon the functionaries and the citizens:-

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76 Andrew M. Siegel, Constitutional Theory, Constitutional Culture, 18 U.PA.J. Const. L. 1067 (2016)

> "Mere existence of a Constitution, by itself, does not ensure constitutionalism or a constitutional culture. It is the political maturity and traditions of a people that import meaning to a Constitution which otherwise merely embodies political hopes and ideals."

161. The Constitutional Courts, while interpreting the constitutional provisions, have to take into account the constitutional culture, bearing in mind its flexible and evolving nature, so that the provisions are given a meaning which reflect the object and purpose of the Constitution.

162. History reveals that in order to promote and nurture this spirit of constitutional culture, the Courts have adopted a pragmatic approach of interpretation which has ushered in an era of "constitutional pragmatism".

163. In this context, we may have some perspective from the American approach. The perception is that language is a social and contextual enterprise; those who live in a different society and use language differently cannot reconstruct the original meaning. Justice Brennan observed:-

> "We current Justices read the Constitution in the only way that we can: as Twentieth-Century Americans. We look to the history of the time of

> framing and to the intervening history of interpretation. But the ultimate question must be, what do the words of the text mean in our time? For the genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs. What the constitutional fundamentals meant to the wisdom of other times cannot be their measure to the vision of our time. Similarly, what those fundamentals mean for us, our descendants will learn, cannot be the measure to the vision of their time."[77]

164. In ***Supreme Court Advocates-on-Record-Association and others v. Union of India***[78], the Court, while emphasizing on the aspect of constitutional culture that governs the functioning of any constitutional body, has observed:-

> "The functioning of any constitutional body is only disciplined by appropriate legislation. Constitution does not lay down any guidelines for the functioning of the President and Prime Minister nor the Governors or the Chief Ministers. Performance of constitutional duties entrusted to them is structured by legislation and constitutional culture. The provisions of the Constitution cannot be read like a last will and testament lest it becomes one."

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77 William J. Brennan, Jr., The Constitution of the United States: Contemporary Ratification, in Interpreting The Constitution: The Debate Over Original Intent at 23, 27 (Jack N. Rakove ed., 1990)

78(2016) 5 SCC 1

165. Further, the Court also highlighted that a balance between idealism and pragmatism is inevitable in order to create a workable situation ruling out any absurdity that may arise while adopting either one of the approaches:-

> "The rule of law envisages the area of discretion to be the minimum, requiring only the application of known principles or guidelines to ensure non-arbitrariness, but to that limited extent, discretion is a pragmatic need. Conferring discretion upon high functionaries and, whenever feasible, introducing the element of plurality by requiring a collective decision, are further checks against arbitrariness. This is how idealism and pragmatism are reconciled and integrated, to make the system workable in a satisfactory manner.
>
> xxx xxx xxx
>
> It is this pragmatic interpretation of the Constitution that was postulated by the Constituent Assembly, which did not feel the necessity of filling up every detail in the document, as indeed it was not possible to do so."

166. In ***The State of Karnataka and another v. Shri Ranganatha Reddy and another***[79], the Court had laid stress on the obligation and the responsibility of the judiciary not to limit itself to the confines of rigid principles or textualism and rather adopt an interpretative process which takes into

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79AIR 1978 SC 215

consideration the constitutional goals and constitutional culture:-

> "When cryptic phrases expressive of constitutional culture and aspirational future, fundamental to the governance of the nation, call for interpretative insight, do we merely rest content to consult the O.E.D. and alien precedents, or feel the philosophy and share the foresight of the founding fathers and their telescopic faculty? Is the meaning of meanings an artless art?"

And again,

> "There is a touch of swadeshi about a country's jurisprudence and so our legal notions must bear the stamp of Indian Developmental amplitude linked to constitutional goals."

167. Laying emphasis on the need for constitutional pragmatism, the Court in ***Indra Sawhney*** (supra) noted the observations made by Lord Rockill in his presidential address to the Bentham Club at University College of London on February 29, 1984 on the subject "Law Lords, Reactionaries or Reformers?" which read as follows:-

> "Legal policy now stands enthroned and will I hope remain one of the foremost considerations governing the development by the House of Lords of the common law. What direction should this development now take? I can think of several occasions upon which we have all said to ourselves

"this case requires a policy decision - what is the right policy decision?" The answer is, and I hope will hereafter be, to follow that route which is most consonant with the current needs of the society, and which will be seen to be sensible and will pragmatically thereafter be easy to apply. No doubt the Law Lords will continue to be the targets for those academic lawyers who will seek intellectual perfection rather than imperfect pragmatism. But much of the common law and virtually all criminal law, distasteful as it may be to some to have to acknowledge it, is a blunt instrument by means of which human beings, whether they like it or not, are governed and subject to which they are required to live, and blunt instruments are rarely perfect intellectually or otherwise. By definition they operate bluntly and not sharply.""

[Emphasis is ours]

168. The Court also observed:-

"Be that as it may, sitting as a Judge one cannot be swayed either way while interpreting the Constitutional provisions pertaining to the issues under controversy by the mere reflexes of the opinion of any section of the people or by the turbulence created in the society or by the emotions of the day.

We are very much alive to the fact that the issues with which we are now facing are hypersensitive, highly explosive and extremely delicate. Therefore, the permissible judicial creativity in tune with the Constitutional objectivity is essential to the interpretation of the Constitutional provisions so that the dominant values may be discovered and enforced. At the same time, one has to be very cautious and careful in approaching the issues in a very pragmatic and realistic manner.

> Since this is a constitutional issue it cannot be resolved by clinches founded on fictional mythological stories or misdirected philosophies or odious comparisons without any regard to social and economic conditions but by pragmatic, purposive and value oriented approach to the Constitution as it is the fundamental law which requires careful navigation by political set up of the country and any deflection or deviation disturbing or threatening the social balance has to be restored, as far as possible, by the judiciary."
>
> [Emphasis is supplied]

169. Earlier, in ***Union of India v. Sankalchand Himatlal Sheth and another***[80], the Court had observed that:-

> "...in a dynamic democracy, with goals of transformation set up by the Constitution, the Judge, committee to uphold the founding faiths and fighting creeds of the nation so set forth, has to act heedless of executive hubris, socio-economic pressures and die-hard obscurantism. This occupational heroism, professionally essential, demands the inviolable independence woven around the judiciary by our Constitution. Perfection baffles even the framers of a Constitution, but while on statutory construction of an organic document regulating and coordinating the relations among instrumentalities, the highest Court must remember that law, including the *suprema lex, is a principled, pragmatic, holistic recipe* for the behavioral needs and norms of life in the raw-of individuals, instrumentalities and the play of power and freedom"

80(1978) 1 SCR 423

170. The aforesaid passages set two guidelines. First, it permits judicial creativity and second, it mentions one to be conscious of pragmatic realism of the obtaining situation and the controversy. That apart, there is a suggestion to take note of the behavioural needs and norms of life. Thus, creativity, practical applicability and perception of reality from the societal perspective are the warrant while engaging oneself with the process of interpretation of a constitutional provision.

O. <u>Interpretation of Articles 239 and 239A</u>:

171. To settle the controversy at hand, it is imperative that we dig deep and perform a meticulous analysis of Articles 239, 239A, 239AA and 239AB all of which fall in Part VIII of the Constitution bearing the heading, 'The Union Territories'. For this purpose, let us reproduce the aforesaid Articles one by one and carry out the indispensable and crucial task of interpreting them.

172. Article 239 provides for the administration of Union Territories. It reads as follows:-

> ***"239. Administration of Union Territories.***—(1) Save as otherwise provided by Parliament by law,

> every Union territory shall be administered by the President acting, to such extent as he thinks fit, through an administrator to be appointed by him with such designation as he may specify.
>
> (2) Notwithstanding anything contained in Part VI, the President may appoint the Governor of a State as the administrator of an adjoining Union territory, and where a Governor is so appointed, he shall exercise his functions as such administrator independently of his Council of Ministers."
>
> (Emphasis is ours)

173. The said Article was brought into existence by the Constitution (Seventh Amendment) Act, 1956. Clause (1) of Article 239, by employing the words 'shall', makes it abundantly clear that every Union territory is mandatorily to be administered by the President through an administrator unless otherwise provided by Parliament in the form of a law. Further, clause (1) of Article 239 also stipulates that the said administrator shall be appointed by the President with such designation as he may specify.

174. Clause (2) thereafter, being a non-obstante clause, lays down that irrespective of anything contained in Part VI of the Constitution, the President may appoint the Governor of a

State to act as an administrator of a Union Territory which is adjacent and/or contiguous to the State of which he is the Governor. The Governor of a State who is so appointed as an administrator of an adjoining UT shall exercise his functions as an administrator of the said UT independently and autonomously and not as per the aid and advice of the Council of Ministers of the State of which he is the Governor.

175. In this regard, the Court, in the case of ***Shamsher Singh*** (supra), has observed thus:-

> "The provisions of the Constitution which expressly require the Governor to exercise his powers in his discretion are contained in Articles to which reference has been made. To illustrate, Article 239(2) states that where a Governor is appointed an Administrator of an adjoining Union Territory he shall exercise his functions as such administrator independently of his Council of Ministers."

176. Again, the Court, while interpreting Article 239 in ***Union of India and others v. Surinder S***[81], observed:-

> "The unamended Article 239 envisaged administration of the States specified in Part C of the First Schedule of the Constitution by the President through a Chief Commissioner or a Lieutenant Governor to be appointed by him or

81 (2013) 1 SCC 403

through the Government of a neighbouring State. This was subject to other provisions of Part VIII of the Constitution. As against this, amended Article 239 lays down that subject to any law enacted by Parliament every Union Territory shall be administered by the President acting through an Administrator appointed by him with such designation as he may specify. In terms of Clause (2) of Article 239 (amended), the President can appoint the Governor of a State as an Administrator of an adjoining Union territory and on his appointment, the Governor is required to exercise his function as an Administrator independently of his Council of Ministers. The difference in the language of the unamended and amended Article 239 makes it clear that prior to 1.11.1956, the President could administer Part C State through a Chief Commissioner or a Lieutenant Governor, but, after the amendment, every Union Territory is required to be administered by the President through an Administrator appointed by him with such designation as he may specify. In terms of Clause 2 of Article 239 (amended), the President is empowered to appoint the Governor of State as the Administrator to an adjoining Union Territory and once appointed, the Governor, in his capacity as Administrator, has to act independently of the Council of Ministers of the State of which he is the Governor."

177. Now, let us proceed to scan Article 239A of the Constitution which deals with the creation of local legislatures or Council of Ministers or both for certain Union Territories. It reads as follows:-

> **"239A. Creation of local Legislatures or Council of Ministers or both for certain Union territories**. —(1) Parliament may by law create for the Union territory of Puducherry—
>
> (a) a body, whether elected or partly nominated and partly elected, to function as a Legislature for the Union territory, or
>
> (b) a Council of Ministers, or both with such constitution, powers and functions, in each case, as may be specified in the law.
>
> (2) Any such law as is referred to in clause (1) shall not be deemed to be an amendment of this Constitution for the purposes of article 368 notwithstanding that it contains any provision which amends or has the effect of amending this Constitution."

178. The aforesaid Article was brought into force by the Constitution (Fourteenth Amendment) Act, 1962. Prior to the year 1971, under Article 239A, the Parliament had the power to create by law legislatures and/or Council of Ministers for the then Union territories of Himachal Pradesh, Tripura, Manipur, Goa and Daman and Diu. Thereafter, on 25th January, 1971, Himachal Pradesh acquired statehood and consequently, Himachal Pradesh was omitted from Article 239A. Subsequently, on 21st January 1972, Tripura and

Manipur were granted statehood as a consequence of which both Manipur and Tripura were omitted from Article 239A.

179. Likewise, with the enactment of the Goa, Daman and Diu Reorganisation Act, 1987 on 30th May 1987, both Goa and Daman and Diu were omitted from Article 239A. The Parliament, under the Government of Union Territories Act, 1963, created legislatures for the then Union Territories and accordingly, even after 30th May, 1987, the applicability of Article 239A stands limited to UT of Puducherry.

180. As a natural corollary, the Union Territory of Puducherry stands on a different footing from other UTs of Andaman and Nicobar Islands, Daman and Diu, Dadar and Nagar Haveli, Lakshadweep and Chandigarh. However, we may hasten to add that Puducherry cannot be compared with the NCT of Delhi as it is solely governed by the provisions of Article 239A.

P. Interpretation of Article 239AA of the Constitution

181. We shall now advert to the interpretation of Articles 239AA and 239AB of the Constitution which are the gravamen of the present batch of appeals. The said Articles require an

elaborate interpretation and a thorough analysis to unearth and discover the true intention of the Parliament while inserting the said Articles, in exercise of its constituent power, by the Constitution (Sixty-ninth Amendment) Act, 1991. The said articles read as follows:-

> "**239AA. Special provisions with respect to Delhi**.—(1) As from the date of commencement of the Constitution (Sixty-ninth Amendment) Act, 1991, the Union territory of Delhi shall be called the National Capital Territory of Delhi (hereafter in this Part referred to as the National Capital Territory) and the administrator thereof appointed under article 239 shall be designated as the Lieutenant Governor.
>
> (2) (a) There shall be a Legislative Assembly for the National Capital Territory and the seats in such Assembly shall be filled by members chosen by direct election from territorial constituencies in the National Capital Territory.
>
> (b) The total number of seats in the Legislative Assembly, the number of seats reserved for Scheduled Castes, the division of the National Capital Territory into territorial constituencies (including the basis for such division) and all other matters relating to the functioning of the Legislative Assembly shall be regulated by law made by Parliament.
>
> (c) The provisions of articles 324 to 327 and 329 shall apply in relation to the National Capital Territory, the Legislative Assembly of the National

Capital Territory and the members thereof as they apply, in relation to a State, the Legislative Assembly of a State and the members thereof respectively; and any reference in articles 326 and 329 to "appropriate Legislature" shall be deemed to be a reference to Parliament.

(3) (a) Subject to the provisions of this Constitution, the Legislative Assembly shall have power to make laws for the whole or any part of the National Capital Territory with respect to any of the matters enumerated in the State List or in the Concurrent List in so far as any such matter is applicable to Union territories except matters with respect to Entries 1, 2 and 18 of the State List and Entries 64, 65 and 66 of that List in so far as they relate to the said Entries 1, 2 and 18.

(b) Nothing in sub-clause (a) shall derogate from the powers of Parliament under this Constitution to make laws with respect to any matter for a Union territory or any part thereof.

(c) If any provision of a law made by the Legislative Assembly with respect to any matter is repugnant to any provision of a law made by Parliament with respect to that matter, whether passed before or after the law made by the Legislative Assembly, or of an earlier law, other than a law made by the Legislative Assembly, then, in either case, the law made by Parliament, or, as the case may be, such earlier law, shall prevail and the law made by the Legislative Assembly shall, to the extent of the repugnancy, be void:

Provided that if any such law made by the Legislative Assembly has been reserved for the consideration of the President and has received his

assent, such law shall prevail in the National Capital Territory:

Provided further that nothing in this sub-clause shall prevent Parliament from enacting at any time any law with respect to the same matter including a law adding to, amending, varying or repealing the law so made by the Legislative Assembly.

(4) There shall be a Council of Ministers consisting of not more than ten per cent, of the total number of members in the Legislative Assembly, with the Chief Minister at the head to aid and advise the Lieutenant Governor 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:

Provided that in the case of difference of opinion between the Lieutenant Governor and his Ministers on any matter, the Lieutenant Governor shall refer it to the President for decision and act according to the decision given thereon by the President and pending such decision it shall be competent for the Lieutenant Governor in any case where the matter, in his opinion, is so urgent that it is necessary for him to take immediate action, to take such action or to give such direction in the matter as he deems necessary.

(5) The Chief Minister shall be appointed by the President and other Ministers shall be appointed by the President on the advice of the Chief Minister and the Ministers shall hold office during the pleasure of the President.

(6) The Council of Ministers shall be collectively responsible to the Legislative Assembly.

(7) (a) Parliament may, by law, make provisions for giving effect to, or supplementing the provisions contained in the foregoing clauses and for all matters incidental or consequential thereto.

(b) Any such law as is referred to in sub-clause (a) shall not be deemed to be an amendment of this Constitution for the purposes of article 368 notwithstanding that it contains any provision which amends or has the effect of amending, this Constitution.

(8) The provisions of article 239B shall, so far as may be, apply in relation to the National Capital Territory, the Lieutenant Governor and the Legislative Assembly, as they apply in relation to the Union territory of Puducherry, the administrator and its Legislature, respectively; and any reference in that article to "clause (1) of article 239A" shall be deemed to be a reference to this article or article 239AB, as the case may be.

239AB. Provision in case of failure of constitutional machinery.—If the President, on receipt of a report from the Lieutenant Governor or otherwise, is satisfied—

(a) that a situation has arisen in which the administration of the National Capital Territory cannot be carried on in accordance with the provisions of article 239AA or of any law made in pursuance of that article; or

(b) that for the proper administration of the National Capital Territory it is necessary or expedient so to do, the President may by order suspend the operation of any provision of article 239AA or of all or any of the provisions of any law made in pursuance of that article for such period

> and subject to such conditions as may be specified in such law and make such incidental and consequential provisions as may appear to him to be necessary or expedient for administering the National Capital Territory in accordance with the provisions of article 239 and article 239AA."
>
> [Emphasis supplied]

182. We deem it appropriate to refer to the Statement of Objects and Reasons for the amendment which reads thus:-

> "The question of re-organisation of the Administrative set-up in the Union territory of Delhi has been under the consideration of the Government for some time. The Government of India appointed on 24-12-1987 a Committee to go into the various issues connected with the administration of Delhi and to recommend measures inter alia for the streamlining of the administrative set-up. The Committee went into the matter in great detail and considered the issues after holding discussions with various individuals, associations, political parties and other experts and taking into account the arrangements in the national Capitals of other countries with a federal set-up and also the debates in the Constituent Assembly as also the reports by earlier Committees and Commissions. After such detailed inquiry and examination, it recommended that Delhi should continue to be a Union territory and provided with a Legislative Assembly and a Council of Ministers responsible to such Assembly with appropriate powers to deal with matters of concern to the common man. The Committee also recommended that with a view to ensure stability and permanence the arrangements should be incorporated in the

> Constitution to give the National Capital a special status among the Union territories.
>
> 2. The Bill seeks to give effect to the above proposals."

The aforesaid, as we perceive, really conceives of conferring special status on Delhi. This fundamental grammar has to be kept in view when we penetrate into the interpretative dissection of Article 239AA and other articles that are pertinent to understand the said provision.

Q. Status of NCT of Delhi:

183. The first proposition that has been built centering around the conferment of special status on NCT of Delhi is that it is a State for all purposes except the bar created pertaining to certain legislative matters. The bedrock has been structured by placing heavy reliance on the purpose of the constitutional amendment, the constitutional assurance to the inhabitants of Delhi and the language employed in sub-article 3(a) of Article 239AA of the Constitution. We have already referred to the

historical background and also the report submitted by the Balakrishnan Committee.

184. Mr. Maninder Singh, learned Additional Solicitor General, would contend that the aid and assistance of the Committee Report can be taken into consideration to interpret the constitutional provisions and also the statutory provisions of the 1991 Act. He has referred to certain authorities for the said purpose. We shall refer to the said authorities at a later stage. First, we think it seemly to advert to the issue whether the NCT of Delhi can be called a State in the sense in which the Constitution expects one to understand. The said maze has to be cleared first.

185. We may now focus on the decision in ***Shamsher Singh*** (supra). The issue centered around the role and the constitutional status of the President. In that context, it has been held that the President and the Governor act on the aid and advice of the Council of Ministers and the Constitution does not stipulate that the President or the Governor shall act personally without or against the aid and advice of the Council

of Ministers. Further, the Court held that the Governor can act on his own accord in matters where he is required to act in his own discretion as specified in the Constitution and even while exercising the said discretion, the Governor is required to act in harmony with the Council of Ministers. We may hasten to add that the President of India, as has been held in the said case, has a distinguished role on certain occasions. We may, in this context, reproduce below certain passages from the opinion of Krishna Iyer, J.:-

> "The omnipotence of the President and of the Governor at State level — is euphemistically inscribed in the pages of our Fundamental Law with the obvious intent that even where express conferment of power or functions is written into the articles, such business has to be disposed of decisively by the Ministry answerable to the Legislature and through it vicariously to the people, thus vindicating our democracy instead of surrendering it to a single summit soul whose deification is incompatible with the basics of our political architecture — lest national elections become but Dead Sea fruits, legislative organs become labels full of sound and fury signifying nothing and the Council of Ministers put in a quandary of responsibility to the House of the People and submission to the personal decision of the head of State. A Parliamentary-style Republic like ours could not have conceptualised its self-liquidation by this process. On the contrary,

democratic capital-formation to strengthen the people's rights can be achieved only through invigoration of the mechanism of Cabinet-House-Elections.

We declare the law of this branch of our Constitution to be that the President and Governor, custodians of all executive and other powers under various articles shall, by virtue of these provisions, exercise their formal constitutional powers only upon and in accordance with the advice of their Ministers save in a few well-known exceptional situations. Without being dogmatic or exhaustive, these situations relate to (a) the choice of Prime Minister (Chief Minister), restricted though this choice is by the paramount consideration that he should command a majority in the House; (b) the dismissal of a Government which has lost its majority in the House, but refuses to quit office; (c) the dissolution of the House where an appeal to the country is necessitous, although in this area the head of State should avoid getting involved in politics and must be advised by his Prime Minister (Chief Minister) who will eventually take the responsibility for the step. We do not examine in detail the constitutional proprieties in these predicaments except to utter the caution that even here the action must be compelled by the peril to democracy and the appeal to the House or to the country must become blatantly obligatory. We have no doubt that de Smith's statement regarding royal assent holds good for the President and Governor in India:

> "Refusal of the royal assent on the ground that the Monarch strongly disapproved of a Bill or that it was intensely controversial would nevertheless- be unconstitutional. The only

> circumstances in which the withholding of the royal assent might be justifiable would be if the Government itself were to advise such a course — a highly improbable contingency — or possibly if it was notorious that a Bill had been passed in disregard to mandatory procedural requirements; but since the Government in the latter situation would be of the opinion that the deviation would not affect the validity of the measure once it had been assented to. prudence would suggest the giving of assent."
>
> [Emphasis supplied]

186. That apart, A.N. Ray, C.J., in ***Shamsher Singh*** (supra), has stated thus:-

> "Article 163(1) states that there shall be a Council of Ministers with the Chief Minister at the head to aid and advice the Governor in the exercise of Was functions, except in so far as he is by or under this Constitution, required to exercise his functions or any of them in his discretion. Article 163(2) states that if any question arises whether any matter is or is not a matter as respects which the Governor is by or under this Constitution required to act in his discretion, the decision of the Governor in his discretion shall be final and the validity of anything done by the Governor shall not be called in question on the ground that ought or ought not to have acted in his discretion. Extracting the words "in his discretion" in relation to exercise of functions, the appellants contend that the Council of Ministers may aid and advise the Governor in Executive functions but the Governor individually and personally in his discretion will exercise the constitutional functions of appointment and

removal of officers in State Judicial Service and other State Services. It is noticeable that though in Article 74 it is stated that there shall be a Council of Ministers with the Prime Minister at the head to aid and advise the President in the exercise of his functions, there is no provision in Article 74 comparable to Article 163 that the aid and advice is except in so far as he is required to exercise his functions or any of them in his discretion. It is necessary to find out as to why the words, in his discretion' are used in relation to some powers of the Governor and not in the case of the President. Article 143 in the Draft Constitution became Article 163 in the Constitution. The draft constitution in Article 144(6) said that the functions of the Governor under Article with respect to the appointment and dismissal of Ministers shall be exercised by him in his discretion. Draft Article 144(6) was totally omitted when Article 144 became Article 164 in the Constitution. Again Draft Article 153(3) said that the functions of the Governor under clauses (a) and (c) of clause (2) of the Article shall be exercised by him in his discretion. Draft Article 153(3) was totally omitted when it became Article 174 of our Constitution. Draft Article 175 (proviso) said that the Governor "may in his discretion return the Bill together with a message requesting that the House will reconsider the Bill". Those words that "the Governor may in his discretion" were omitted when it became Article 200. The Governor under Article 200 may return the Bill with a message requesting that the House will reconsider the Bill. Draft Article 188 dealt with provisions in case of grave emergencies, clauses (1) and (4) in Draft Article 188 used to words "in his discretion in relation to exercise of power by the Governor. Draft Article 188 was totally omitted Draft Article 285(1) and (2) dealing with composition and staff of Public

> Service Commission used the expression "in his discretion" in relation to exercise of power by the Governor in regard to appointment of the Chairman and Members and making of regulation. The words "in his discretion" in relation to exercise of power by the Governor were omitted when it became Article 316. In Paragraph 15 (3) of the Sixth Schedule dealing with annulment or suspension of acts or suspension of acts and resolutions of District and Regional Councils it was said that the functions of the Governor under the Paragraph shall be exercised by him in his discretion. Subparagraph 3 of Paragraph 15 of the Sixth Schedule was omitted at the time of enactment of the Constitution.
>
> It is, therefore, understood in the background of these illustrative draft articles as to why Article 143 in the Draft Constitution which became Article 163 in our Constitution used the expression "in his discretion" in regard to some powers of the Governor."
>
> [Emphasis supplied]

187. Thereafter, A.N. Ray, C.J. discussed the provisions of the Constitution as well as a couple of paragraphs of the Sixth Schedule wherein the words "in his discretion" are used in relation to certain powers of the Governor to highlight the fact that a Governor can act in his discretion only when the provisions of the Constitution so permit.

188. In this context, we may refer with profit to the authority in ***Devji Vallabhbhai Tandel and others v. Administrator***

of Goa, Daman and Diu and another[82]. In the said case, the issue that arose for consideration was whether the role and functions of the Administrator stipulated under the Union Territories Act, 1963 is similar to those of a Governor of a State and as such, whether the Administrator has to act on the "aid and advice" of the Council of Ministers. The Court considered the relevant provisions and after comparing the language of Articles 74 and 163 of the Constitution with the language of Section 44 of the Union Territories Act, 1963, it observed that the Administrator, even in matters where he is not required to act in his discretion under the Act or where he is not exercising any judicial or quasi-judicial functions, is not bound to act according to the advice of the Council of Ministers and the same is manifest from the proviso to Section 44(1). The Court went on to say:-

> "It transpires from the proviso that in the event of a difference of opinion between the Administrator and his Ministers on any matter, the Administrator shall refer the matter to the President for decision and act according to the decision given thereon by the President. If the President in a given situation agrees with what the Administrator opines contrary

82 (1982) 2 SCC 222

to the advice of the Council the Administrator would be able to override the advice of the Council of Ministers and on a reference to the President under the proviso, obviously the President would not according to the advice of the Council of Ministers given under Article 74. Virtually, therefore, in the event of a difference of opinion between the Council of Ministers of the Union territory and the Administrator, the right to decide would vest in the Union Government and the Council of Ministers of the Union territory would be bound by the view taken by the Union Government. Further, the Administrator enjoys still some more power to act in derogation of the advice of the Council of Ministers. The second limb of the proviso to Section 44(1) enables the Administrator that in the event of a difference of opinion between him and the Council of Ministers not only he can refer the matter to the President but during the interregnum where the matter is in his opinion so urgent that it is necessary for him to take immediate action, he has the power to take such action or to give such directions in the matter as he deems necessary. In other words, during the interregnum he can completely override the advice of the Council of Ministers and act according to his light. Neither the Governor nor the President enjoys any such power. This basic functional difference in the powers and position enjoyed by the Governor and the President on the one hand and the Administrator on the other is so glaring that it is not possible to hold on the analogy of the decision in Shamsher Singh's case that the Administrator is purely a constitutional functionary bound to act on the advice of the Council of Ministers and cannot act on his own."

[Emphasis supplied]

189. Be it noted, ***Devji Valabhbhai Tandel*** (supra) depicts a pre Sixty-ninth amendment scenario. On that foundation, it is submitted by the learned counsel for the appellant to buttress the submission that after the amendment, the status of NCT of Delhi is that of State and the role of the Lieutenant Governor is equivalent to that of the Governor of State who is bound by the aid and advice of the Council of Ministers.

190. Now, let us allude to the post Sixty-ninth amendment nine-Judge Bench decision in ***New Delhi Municipal Corporation*** (supra) wherein B.P. Jeevan Reddy, J., speaking for the majority after taking note of the rivalised submissions pertaining to "Union Taxation", referred to the decisions in ***Sea Customs Act, Re***[83] and came to hold thus:-

> "152. ... In the year 1991, the Constitution did provide for a legislature for the Union Territory of Delhi [National Capital Territory of Delhi] by the Sixty-Ninth (Amendment) Act (Article 239-AA) but even here the legislature so created was not a full-fledged legislature nor did it have the effect of — assuming that it could — lift the National Capital Territory of Delhi from Union Territory category to the category of States within the meaning of Chapter I of Part XI of the Constitution. All this

83 AIR 1963 SC 1760 : (1964) 3 SCR 787

necessarily means that so far as the Union Territories are concerned, there is no such thing as List I, List II or List III. The only legislative body is Parliament — or a legislative body created by it. Parliament can make any law in respect of the said territories — subject, of course, to constitutional limitations *other than* those specified in Chapter I of Part XI of the Constitution."

And again:-

"155. ... it is necessary to remember that all the Union Territories are not situated alike. There are certain Union territories (i.e., Andaman and Nicobar Islands and Chandigarh) for which there can be no legislature at all-as on today. There is a second category of Union Territories covered by Article 239-A (which applied to Himachal Pradesh, Manipur, Tripura, Goa, Daman and Diu and Pondicherry - now, of course, only Pondicherry survives in this category, the rest having acquired Statehood) which have legislatures by courtesy of Parliament. The Parliament can, by law, provide for Constitution of legislatures for these States and confer upon these legislatures such powers, as it may think appropriate. The Parliament had created legislatures for these Union territories under the "The Government of India Territories Act, 1963", empowering them to make laws with respect to matters in List-II and List-Ill, but subject to its over-riding power. The third category is Delhi. It had no legislature with effect from November 1, 1956 until one has been created under and by virtue of the Constitution Sixty-Ninth (Amendment) Act, 1991 which introduced Article 239-AA. We have already dealt with the special features of Article 239-AA and need not repeat it. Indeed, a reference to Article 239-B read with Clause (8) of Article 239-AA shows

> how the Union Territory of Delhi is in a class by itself but is certainly not a State within the meaning of Article 246 or Part-VI of the Constitution. In sum, it is also a territory governed by Clause (4) of Article 246. ..."
>
> [Emphasis supplied]

191. Thus, ***New Delhi Municipal Corporation*** (supra) makes it clear as crystal that all Union Territories under our constitutional scheme are not on the same pedestal and as far as the NCT of Delhi is concerned, it is not a State within the meaning of Article 246 or Part- VI of the Constitution. Though the NCT of Delhi partakes a unique position after the Sixty-Ninth Amendment, yet in sum and substance, it remains a Union Territory which is governed by Article 246(4) of the Constitution and to which the Parliament, in the exercise of its constituent power, has given the appellation of the 'National Capital Territory of Delhi'.

192. For ascertaining the binding nature of aid and advice upon the President and the Governor on one hand and upon the Lieutenant Governor of Delhi on the other, let us conduct a comparative analysis of the language employed in Articles 74 and 163 on one hand and Article 239AA on the other. For

this purpose, we may reproduce Articles 74 and 163 which read thus:-

> **"74. Council of Ministers to aid and advise President**
> (1) There shall be a Council of Ministers with the Prime Minister at the head to aid and advise the President who shall, in the exercise of his functions, act in accordance with such advice:
>
> Provided that the President may require the council of Ministers to reconsider such advice, either generally or otherwise, and the President shall act in accordance with the advice tendered after such reconsideration.
>
> (2) The question whether any, and if so what, advice was tendered by Ministers to the President shall not be inquired into in any court.
>
> **163. Council of Ministers to aid and advise Governor's**
>
> (1) There shall be a council of Ministers with the chief Minister at the head to aid and advise the Governor in the exercise of his functions, except in so far as he is by or under this constitution required to exercise his functions or any of them in his discretion.
>
> (2) If any question arises whether any matter is or is not a matter as respects which the Governor is by or under this Constitution required to act in his discretion, the decision of the Governor in his discretion shall be final, and the validity of anything done by the Governor shall not be called in question

> on the ground that he ought or ought not to have acted in his discretion
>
> (3) The question whether any, and if so what, advice was tendered by Ministers to the Governor shall not be inquired into in any court."

193. It is vivid from Article 74 that the President is always bound by the aid and advice of the Union Council of Ministers except a few well known situations which are guided by constitutional conventions. The Constitution, however, does not lay down any express provision which allows the President to act as per his discretion.

194. The Governor of a State, as per Article 163, is bound by the aid and advice of his Council of Ministers in the exercise of his functions except where he is, by or under the Constitution, required to exercise his functions or any of them in his discretion. Thus, the Governor may act in his discretion only if he is so permitted by an express provision of the Constitution.

195. As far as the Lieutenant Governor of Delhi is concerned, as per Article 239AA(4), he is bound by the aid and advice of his Council of Ministers in matters for which the Delhi Legislative Assembly has legislative powers. However, this is

subject to the proviso contained in Clause (4) of Article 239AA which gives the power to the Lieutenant Governor that in case of any difference between him and his Ministers, he shall refer the same to the President for a binding decision. This proviso to clause (4) has retained the powers for the Union even over matters falling within the legislative domain of the Delhi Assembly. This overriding power of the Union to legislate qua other Union Territories is exposited under Article 246(4).

196. In the light of the aforesaid analysis and the ruling of the nine-Judge Bench in ***New Delhi Municipal Corporation*** (supra), it is clear as noon day that by no stretch of imagination, NCT of Delhi can be accorded the status of a State under our present constitutional scheme and the status of the Lieutenant Governor of Delhi is not that of a Governor of a State, rather he remains an Administrator, in a limited sense, working with the designation of Lieutenant Governor.

R. <u>Executive power of the Council of Ministers of Delhi</u>:

197. We may note here that there is a serious contest with regard to the appreciation and interpretation of Article 239AA

and Chapter VIII where it occurs. The learned counsel for the appellant would submit that the Government of NCT of Delhi has been conferred the executive power that co-exists with its legislative power and the role of the Lieutenant Governor is controlled by the phrase 'aid and advice' of the Council of Ministers. The learned counsel for the respondents would submit with equal force that the Lieutenant Governor functions as the administrator of NCT of Delhi and the constitutional amendment has not diminished his administrative authority.

198. Analysing the provision, it is submitted by Dr. Dhawan and other senior counsel that the Government of Delhi is empowered under the Constitution to aid and advise the Lieutenant Governor in the exercise of its functions in relation to matters in respect of which the Delhi Legislative Assembly has the legislative power to make laws and the said aid and advice is binding on the Lieutenant Governor. Commenting on the proviso, it is earnestly canvassed that the words 'difference on any matter' has to be restricted to the field of

any legislation or, at best, the difference in relation to the three excepted matters. For the said argument, inspiration has been drawn from Articles 73 and 163 of the Constitution. Elaborating the argument, it is contended that the reference of the matter to the President is made where there is doubt as to whether the aid and advice touches the realm of the excepted entries as stipulated under Article 239AA(3)(a) and nothing beyond. To buttress the point, heavy reliance has been laid on ***Ram Jawaya Kapur*** (supra) wherein the Court, while interpreting the provisions of Article 162 of the Constitution and delineating on the issue of the extent of the executive powers of the State, observed:-

> "7. Article 73 of the Constitution relates to the executive powers of the Union, while the corresponding provision in regard to the executive powers of a State is contained in article 162. The provisions of these articles are analogous to those of section 8 and 49 respectively of the Government of India Act, 1935 and lay down the rule of distribution of executive powers between the Union and the States, following the same analogy as is provided in regard to the distribution of legislative powers between them. Article 162, with which we are directly concerned in this case, lays down :

"Subject to the provisions of this Constitution, the executive power of a State shall extend to the matters with respect to which the Legislature of the State has power to make laws :

Provided that in any matter with respect to which the Legislature of a State and Parliament have power to make laws, the executive power of the State shall be subject to, and limited by, the executive power expressly conferred by this Constitution or by any law made by Parliament upon the Union or authorities thereof."

Thus under this article the executive authority of the State is exclusive in respect to matters enumerated in List II of Seventh Schedule. The authority also extends to the Concurrent List except as provided in the Constitution itself or in any law passed by the Parliament. Similarly, article 73 provides that the executive powers of the Union shall extend to matters with respect to which the Parliament has power to make laws and to the exercise of such rights, authority and jurisdiction as are exercisable by the Government of India by virtue of any treaty or any agreement. The proviso engrafted on clause (1) further lays down that although with regard to the matters in the Concurrent List the executive authority shall be ordinarily left to be State it would be open to the Parliament to provide that in exceptional cases the executive power of the Union shall extend to these matters also.

Neither of these articles contains any definition as to what the executive function is and what activities would legitimately come within its scope. They are concerned primarily with the distribution of the executive power between the Union on the one hand and the States on the

> other. They do not mean, as Mr. Pathak seems to suggest, that it is only when the Parliament or the State Legislature has legislated on certain items appertaining to their respective lists, that the Union or the State executive, as the case may be, can proceed to function in respect to them. On the other hand, the language of article 162 clearly indicates that the powers of the State executive do extend to matters upon which the state Legislature is competent to legislate and are not confined to matters over which legislation has been passed already. The same principle underlies article 73 of the Constitution..."
>
> [Underlining is ours]

199. Drawing an analogy while interpreting the provisions of Article 239AA(3)(a) and Article 239AA(4) would reveal that the executive power of the Government of NCT of Delhi is conterminous with the legislative power of the Delhi Legislative Assembly which is envisaged in Article 239AA(3) and which extends over all but three subjects in the State List and all subjects in the Concurrent List and, thus, Article 239AA(4) confers executive power on the Council of Ministers over all those subjects for which the Delhi Legislative Assembly has legislative power.

200. The legislative power conferred upon the Delhi Legislative Assembly is to give effect to legislative enactments as per the needs and requirements of Delhi whereas the executive power is conferred on the executive to implement certain policy decisions. This view is also strengthened by the fact that after the Seventh Amendment of the Constitution by which the words 'Part C States' were substituted by the words 'Union Territories', the word 'State' in the proviso to Article 73 cannot be read to mean Union Territory as such an interpretation would render the scheme and purpose of Part VIII (Union Territories) of the Constitution infructuous.

S. <u>Essence of Article 239AA of the Constitution</u>:

201. It is perceptible that the constitutional amendment conceives of conferring special status on Delhi. This has to be kept in view while interpreting Article 239AA. Both the Statement of Objects and Reasons and the Balakrishnan Committee Report, the relevant extracts of which we have already reproduced in the earlier part of this judgment, serve as an enacting history and corpus of public knowledge relative

to the introduction of Articles 239AA and 239AB and would be handy external aids for construing Article 239AA and unearthing the real intention of the Parliament while exercising its constituent power.

202. At the outset, we must declare that the insertion of Articles 239AA and 239AB which specifically pertain to NCT of Delhi is reflective of the intention of the Parliament to accord Delhi a *sui generis* status from the other Union Territories as well as from the Union Territory of Puducherry to which Article 239A is singularly applicable as on date. The same has been authoritatively held by the majority judgment in the ***New Delhi Municipal Corporation case*** to the effect that the NCT of Delhi is a class by itself.

203. The Legislative Assembly, Council of Ministers and the Westminster style cabinet system of government brought by the Sixty-ninth amendment highlight the uniqueness attributed to Delhi with the aim that the residents of Delhi have a larger say in how Delhi is to be governed. The real purpose behind the Constitution (Sixty-ninth Amendment)

Act, 1991, as we perceive, is to establish a democratic setup and representative form of government wherein the majority has a right to embody their opinion in laws and policies pertaining to the NCT of Delhi subject to the limitations imposed by the Constitution. For paving the way to realize this real purpose, it is necessary that we give a purposive interpretation to Article 239AA so that the principles of democracy and federalism which are part of the basic structure of our Constitution are reinforced in NCT of Delhi in their truest sense.

204. The exercise of establishing a democratic and representative form of government for NCT of Delhi by insertion of Articles 239AA and 239AB would turn futile if the Government of Delhi that enjoys the confidence of the people of Delhi is not able to usher in policies and laws over which the Delhi Legislative Assembly has power to legislate for the NCT of Delhi.

205. Further, the Statement of Objects and Reasons for the Constitution (Seventy-fourth Amendment) Bill, 1991 which

was enacted as the Constitution (Sixty-ninth Amendment) Act, 1991 also lends support to our view as it clearly stipulates that in order to confer a special status upon the National Capital, arrangements should be incorporated in the Constitution itself.

206. We may presently carefully peruse each clause of Article 239AA for construing the meaning. A cursory reading of clause (1) of Article 239AA shows that on 1st February, 1992, the Union Territory of Delhi was renamed as the National Capital Territory of Delhi and it was to be administered by a Lieutenant Governor from the date of coming into force of the Sixty-ninth Amendment Act.

207. Sub-clause (a) of clause (2) specifies that the National Capital Territory of Delhi shall have a Legislative Assembly, the seats of which shall be filled by members chosen by direct election from territorial constituencies in the National Capital Territory of Delhi. Sub-clause (b) of clause (2) stipulates that the total number of seats in the Legislative Assembly of the National Capital Territory of Delhi so established under sub-

clause (a), the number of seats reserved for Scheduled Castes in the said Legislative Assembly, the division of the National Capital Territory of Delhi into territorial constituencies (including the basis for such division) and all other matters relating to the functioning of the said Legislative Assembly shall be regulated by law made by Parliament. Thereafter, sub-clause (c) of clause (2) simply provides that the provisions of Articles 324 to 327 and 329 which pertain to elections and fall under Part XV of the Constitution shall also apply to the National Capital Territory of Delhi, its Legislative Assembly and the members thereof in the same manner as the said provisions apply to the States. Further, sub-clause (c) provides that the phrase "appropriate legislature" in Articles 326 and 329 shall, in the context of the National Capital Territory of Delhi, mean the Parliament.

208. We must note here the stark difference in the language of Article 239A clause (1) and that of Article 239AA clause (2). Article 239A clause (1) uses the word 'may' which makes it a mere directory provision with no obligatory force. Article 239A

gives discretion to the Parliament to create by law for the Union Territory of Puducherry a Council of Ministers and/or a body which may either be wholly elected or partly elected and partly nominated to perform the functions of a Legislature for the Union Territory of Puducherry.

209. On the other hand, Article 239AA clause (2), by using the word 'shall', makes it mandatory for the Parliament to create by law a Legislative Assembly for the National Capital Territory of Delhi. Further, sub-clause (a) of clause (2) declares very categorically that the members of the Legislative Assembly of the National Capital Territory of Delhi shall be chosen by direct election from the territorial constituencies in the National Capital Territory of Delhi. Unlike Article 239A clause (1) wherein the body created by the Parliament by law to perform the functions of a Legislature for the Union Territory of Puducherry may either be wholly elected or partly elected and partly nominated, there is no such provision in the context of the Legislative Assembly of the NCT of Delhi as

per which members can be nominated to the Legislative Assembly. This was a deliberate design by the Parliament.

210. We have highlighted this difference to underscore and emphasize the intention of the Parliament, while inserting Article 239AA in the exercise of its constituent power, to treat the Legislative Assembly of the National Capital Territory of Delhi as a set of elected representatives of the voters of the NCT of Delhi and to treat the government of the NCT of Delhi as a representative form of government.

211. The Legislative Assembly is wholly comprised of elected representatives who are chosen by direct elections and are sent to Delhi's Legislative Assembly by the voters of Delhi. None of the members of Delhi's Legislative Assembly are nominated. The elected representatives and the Council of Ministers of Delhi, being accountable to the voters of Delhi, must have the appropriate powers so as to perform their functions effectively and efficiently. This is also discernible from the Balakrishnan Committee Report which recommended that though Delhi should continue to be a Union Territory, yet

it should be provided with a Legislative Assembly and a Council of Ministers responsible to such Assembly with appropriate powers to deal with matters of concern to the common man.

212. Sub-clause (a) of clause (3) of Article 239AA establishes the power of the Delhi Legislative Assembly to enact laws for the NCT of Delhi with respect to matters enumerated in the State List and/or Concurrent list except in so far as matters with respect to and which relate to entries 1, 2 and 18 of the State List.

213. Sub-clause (b) of clause (3) lays down that the Parliament has the powers to make laws with respect to any matter for a Union Territory including the NCT of Delhi or any part thereof and sub-clause (a) shall not derogate such powers of the Parliament. Sub-clause (c) of clause (3) gives the Parliament the overriding power to the effect that where any provision of any law made by the Legislative Assembly of Delhi is repugnant to any provision of law made by the Parliament, then the law made by the Parliament shall prevail and the law

made by the Delhi Legislative Assembly shall be void to the extent of repugnancy.

214. Thus, it is evident from clause (3) of Article 239AA that the Parliament has the power to make laws for the NCT of Delhi on any of the matters enumerated in the State List and the Concurrent List and at the same time, the Legislative Assembly of Delhi also has the legislative power with respect to matters enumerated in the State List and the Concurrent List except matters with respect to entries which have been explicitly excluded from Article 239AA(3)(a).

215. Now, it is essential to analyse clause (4) of Article 239AA, the most important provision for determination of the controversy at hand. Clause (4) stipulates a Westminster style cabinet system of government for the NCT of Delhi where there shall be a Council of Ministers with the Chief Minister at the head to aid and advise the Lieutenant Governor in the exercise of his functions in relation to matters with respect to which the Delhi Legislative Assembly has power to enact laws except

in matters in respect of which the Lieutenant Governor is required to act in his discretion.

216. The proviso to clause (4) stipulates that in case of a difference of opinion on any matter between the Lieutenant Governor and his Ministers, the Lieutenant Governor shall refer it to the President for a binding decision. Further, pending such decision by the President, in any case where the matter, in the opinion of the Lieutenant Governor, is so urgent that it is necessary for him to take immediate action, the proviso makes him competent to take such action and issue such directions as he deems necessary.

217. A conjoint reading of Article 239AA (3) (a) and Article 239AA(4) reveals that the executive power of the Government of NCT of Delhi is co-extensive with the legislative power of the Delhi Legislative Assembly which is envisaged in Article 239AA(3) and which extends over all but three subjects in the State List and all subjects in the Concurrent List and, thus, Article 239AA(4) confers executive power on the Council of

Ministers over all those subjects for which the Delhi Legislative Assembly has legislative power.

218. Article 239AA(3)(a) reserves the Parliament's legislative power on all matters in the State list and Concurrent list, but clause (4) nowhere reserves the executive powers of the Union with respect to such matters. On the contrary, clause (4) explicitly grants to the Government of Delhi executive powers in relation to matters for which the Legislative Assembly has power to legislate. The legislative power is conferred upon the Assembly to enact whereas the policy of the legislation has to be given effect to by the executive for which the Government of Delhi has to have co-extensive executive powers. Such a view is in consonance with the observation in the case of ***Ram Jawaya Kapur*** (supra) which has been discussed elaborately in the earlier part of the judgment.

219. Article 239AA(4) confers executive powers on the Government of NCT of Delhi whereas the executive power of the Union stems from Article 73 and is co-extensive with the Parliament's legislative power. Further, the ideas of pragmatic

federalism and collaborative federalism will fall to the ground if we are to say that the Union has overriding executive powers even in respect of matters for which the Delhi Legislative Assembly has legislative powers. Thus, it can be very well said that the executive power of the Union in respect of NCT of Delhi is confined to the three matters in the State List for which the legislative power of the Delhi Legislative Assembly has been excluded under Article 239 AA (3) (a). Such an interpretation would thwart any attempt on the part of the Union Government to seize all control and allow the concepts of pragmatic federalism and federal balance to prevail by giving the NCT of Delhi some degree of required independence in its functioning subject to the limitations imposed by the Constitution.

220. Another important aspect is the interpretation of the phrase 'aid and advise' in Article 239AA(4). While so interpreting, the authorities in ***Shamsher Singh*** (supra) and ***Devji Ballabhbhai Tandel*** (supra) have to be kept in mind. Krishna Iyer, J., in ***Shamsher Singh*** (supra), has

categorically held that the President and the Governor, being custodians of all executive powers, shall act only upon and in accordance with the aid and advice of their Ministers save in a few well known exceptional situations. ***Devji Ballabhbhai Tandel*** (supra), on the other hand, has observed that there is a functional difference in the powers and the position enjoyed by the President and Governor on one hand and the Administrator on the other hand. It has also been observed that it is not possible to hold to the view laid down in ***Shamsher Singh*** (supra) in the context of Governor and President to mean that the Administrator is also purely a constitutional functionary who is bound to act on the 'aid and advice' of the Council of Ministers and cannot act on his own.

221. It is necessary to note with immediacy that ***Devji Ballabhbhai Tandel*** (supra) represents a pre—Sixty-ninth Amendment view and that too in the context of a Union Territory which does not have a unique position as the NCT of Delhi does. Presently, the scheme of Article 239AA(4) is different. It requires the Lieutenant Governor to act as per the

'aid and advice' of the Council of Ministers with respect to all matters for which the Legislative Assembly of Delhi has the power to enact laws except what has been stated in the proviso which requires a thoughtful interpretation.

222. The language employed in the proviso has to be understood keeping in view the concepts which we have elaborately adumbrated hereinbefore. As noted earlier, the submission of the learned counsel for the appellant is that the Lieutenant Governor can only exercise the power or take refuge to the proviso to Article 239AA(4) where the said 'aid and advice' of the Council of Ministers transgresses the area constitutionally prescribed to them by virtue of Article 239AA(3)(a).

223. We may note here that a narrow or restricted meaning in respect of the words, namely, "on any matter" as is suggested by the appellant, takes away the basic concept of interpretative process, for the said expression does not remotely convey that it is confined to the excepted legislative fields. Similarly, a broad or unrestricted interpretation of the

term to include every difference would obstruct the idealistic smooth stream of governance. Therefore, the Court has the duty to place such a meaning or interpretation on the phrase that is workable and the need is to establish the norm of fine constitutional balance.

224. The counsel for the respondents has sought to impress upon this Court that the term "any" occurring in the proviso to clause (4) of Article 239AA should be given widest import in order to include everything within its ambit and for the said purpose, reliance has been placed upon ***Tej Kiran*** (supra). It has been highlighted in the earlier part of this judgment that while interpreting a constitutional provision and construing the meaning of specific word(s) occurring in a constitutional provision, the Court must read the same in the context in which the word(s) occurs by referring to the annexing words of the said provision and also bearing in mind the concepts that we have adverted to. As regards the importance of context while deciphering the true meaning and importation of a term, Austin has made the following observations:-

> "When I see the word "any" in a statute, I immediately know it's unlikely to mean "anything" in the universe. Any" will have a limitation on it, depending on the context. When my wife says, "there isn't any butter." I understand that she's talking about what is in our refrigerator, not worldwide. We look at context over and over, in life and in law."[84]

225. In this context, the observations made in the case of ***Small v. United States***[85] are relevant to be noted:-

> "The question before us is whether the statutory reference "convicted in any court" includes a conviction entered in a foreign court. The word "any" considered alone cannot answer this question. In ordinary life, a speaker who says, "I'll see any film," may or may not mean to include films shown in another city. In law a legislature that uses the statutory phrase "'any person'" may or may not mean to include "'persons'" outside "the jurisdiction of the state."

226. Further, words of wide import must be construed by placing reliance upon the intention with which the said words have been used. Elucidating the importance of intention, Marshall, C.J. of the Supreme Court of U.S. in the case of ***United States v. Palmer***[86] observed:-

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84 J.L Austin, How to do things with words, The William James Lectures delivered at Harvard University, 1955

85 544 U.S. 385 (2005)

86 16 U.S. 3 Wheat .610610(1818)

> "The words "any person or persons" are broad enough to comprehend every human being. But general words must not only be limited to cases within the jurisdiction of the state, but also to those objects to which the legislature intended to apply them. Did the legislature intend to apply these words to the subjects of a foreign power who in a foreign ship may commit murder or robbery on the high seas?
>
> The 8th section also commences with the words "any person or persons." But these words must be limited in some degree, and the intent of the legislature will determine the extent of this limitation. For this intent we must examine the law"."

227. At home, it has also been acknowledged that the word 'any' can have different meanings depending on the context in which it has been used and the Courts must not mechanically interpret it to mean 'everything'. In ***Shri Balaganesan Metals v. M.N. Shanmugham Chetty and others***[87], this Court has observed:-

> "The word "any" has the following meaning:-
>
> Some; one out of many; an indefinite number. One indiscriminately of whatever kind or quantity."
>
> Word "any" has a diversity of meaning and may be employed to indicate "all" or "every" as well as "some" or "one" and its meaning in a given statute

87 (1987) 2 SCC 707

> depends upon the context and the subject matter of the statute."
>
> It is often synonymous with "either", "every" or "all". Its generality may be restricted by context; (Black's Law Dictionary; Fifth Edition)."

228. In ***Kihoto Hollohan v. Zachillhu and others***[88], the Court has stated:-

> "...the words "any direction" would cost it its constitutionality' does not commend to us. But we approve the conclusion that these words require to be construed harmoniously with the other provisions and appropriately confined to the objects and purposes of the Tenth Schedule. Those objects and purposes define and limit the contours of its meaning. The assignment of a limited meaning is not to read it down to promote its constitutionality but because such a construction is a harmonious construction in the context. There is no justification to give the words the wider meaning."

229. In ***A.V.S. Narasimha Rao and Ors. v. The State of Andhra Pradesh and another***[89], while interpreting the expressions "any law" and "any requirement", the Court has refused to give a wide import to the said phrases. The observations in that regard read thus:-

> "The words 'any requirement' cannot be read to warrant something which could have been said

88AIR 1993 SC 412
89(1969) 1 SCC 839

> more specifically. These words bear upon the kind of residence or its duration rather than its location within the State. We accept the argument of Mr. Gupte that the Constitution, as it stands, speaks of a whole State as the venue for residential qualification and it is impossible to think that the Constituent Assembly was thinking of residence in Districts, Taluqas, cities, towns or villages. The fact that this clause is an exception and came as an amendment must dictate that a narrow construction upon the exception should be placed as indeed the debates in the Constituent Assembly also seem to indicate. We accordingly reject the contention of Mr. Setalvad seeking to put a very wide and liberal construction upon the words 'any law' and any requirement'. These words are obviously controlled by the words 'residence within the State or Union territory' which words mean what they say, neither more nor less. It follows, therefore, that Section 3 of the Public Employment (Requirement as to Residence) Act, 1957, in so far as it relates to Telengana (and we say nothing about the other parts) and Rule 3 of the Rules under it are ultra vires the Constitution."

230. To lend support to this view, we can refer to the observations made by Lindley LJ in ***Warburton v. Huddersfield Industrial Society***[90] wherein he has stated:-

> "I cannot myself avoid coming to the conclusion that 'any lawful purpose' in sub-s (7) means any lawful purpose which is consistent with the rules. It cannot mean anything inconsistent with the rules...can it mean 'any lawful purpose' under the sun', or is it 'any lawful purpose of the society? If

90 [1892] 1 QB 817, pp 821-22

> you look at the context, that which precedes and that which follows, I do not think 'anybody, certainly (I do not think any lawyer would construe any lawful purpose, in the wide way in which Mr Cohen invites us to construe it."

231. That apart, the Court in ***Workmen of Dimakuchi Tea Estate v. The Management of Dimakuchi Tea Estate***[91] held:-

> "A little careful consideration will show, however, that the expression "any person" occurring in the third part of the definition clause cannot mean anybody and everybody in this wide world. First of all. the subject matter of dispute must relate to (i) employment or non-employment or (ii) terms of employment or conditions of labour of any person; these necessarily import a limitation in the sense that a person in respect of whom the employer-employee relation never existed or can never possibly exist cannot be the subject matter of a dispute between employers and workmen. Secondly, the definition clause must be read in the context of the subject matter and scheme of the Act, and consistently with the objects and other provisions of the Act."

232. From the foregoing discussion, it is clear that the words 'any matter' occurring in the proviso to Article 239AA(4) does not necessarily need to be construed to mean 'every matter'. As highlighted in the authorities referred to hereinabove, the

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word ‘any’ occurring in a statute or constitutional provision is not to be mechanically read to mean 'every' and the context in which the word has been used must be given due weightage so as to deduce the real intention and purpose in which the word has been used.

233. It has to be clearly understood that though ‘any’ may not mean ‘every’, yet how it should be understood is extremely significant. Let us elaborate. The power given to the Lieutenant Governor under the proviso to Article 239AA(4) contains the rule of exception and should not be treated as a general norm. The Lieutenant Governor is to act with constitutional objectivity keeping in view the high degree of constitutional trust reposed in him while exercising the special power ordained upon him unlike the Governor and the President who are bound by the aid and advice of their Ministers. The Lieutenant Governor need not, in a mechanical manner, refer every decision of his Ministers to the President. He has to be guided by the concept of constitutional morality. There has to be some valid grounds for the Lieutenant

Governor to refer the decision of the Council of Ministers to the President in order to protect the interest of the NCT of Delhi and the principle of constitutionalism. As per the 1991 Act and Rules of Business, he has to be apprised of every decision taken by the Council of Ministers. He cannot change the decision. That apart, there is no provision for concurrence. He has the authority to differ. But it cannot be difference for the sake of difference. It cannot be mechanical or in a routine matter. The power has been conferred to guide, discuss and see that the administration runs for the welfare of the people and also NCT of Delhi that has been given a special status. Therefore, the word 'any' has to be understood treating as a guidance meant for the constitutional authority. He must bear in mind the constitutional objectivity, the needed advice and the realities.

234. The proviso to Article 239AA(4), we say without any fear of contradiction, cannot be interpreted in a strict sense of the mere words employed treating them as only letters without paying heed to the thought and the spirit which they intend to

convey. They are not to be treated as bones and flesh without nerves and neurons that make the nerves functional. We feel, it is necessary in the context to read the words of the provision in the spirit of citizenry participation in the governance of a democratic polity that is republican in character. We may hasten to add that when we say so, it should not be construed that there is allowance of enormous entry of judicial creativity, for the construction one intends to place has its plinth and platform on the Preamble and precedents pertaining to constitutional interpretation and purposive interpretation keeping in view the conception of sense and spirit of the Constitution. It is, in a way, exposition of judicial sensibility to the functionalism of the Constitution. And we call it constitutional pragmatism.

235. The authorities in power should constantly remind themselves that they are constitutional functionaries and they have the responsibility to ensure that the fundamental purpose of administration is the welfare of the people in an ethical manner. There is requirement of discussion and

deliberation. The fine nuances are to be dwelled upon with mutual respect. Neither of the authorities should feel that they have been lionized. They should feel that they are serving the constitutional norms, values and concepts.

236. Interpretation cannot ignore the conscience of the Constitution. That apart, when we take a broader view, we are also alive to the consequence of such an interpretation. If the expressions "in case of difference" and "on any matter" are construed to mean that the Lieutenant Governor can differ on any proposal, the expectation of the people which has its legitimacy in a democratic set up, although different from States as understood under the Constitution, will lose its purpose in simple semantics. The essence and purpose should not be lost in grammar like the philosophy of geometry cannot be allowed to lose its universal metaphysics in the methods of drawing. And that is why, we deliberated upon many a concept. Thus, the Administrator, as per the Rules of Business, has to be apprised of each decision taken by a Minister or Council of Ministers, but that does not mean that

the Lieutenant Governor should raise an issue in every matter. The difference of opinion must meet the standards of constitutional trust and morality, the principle of collaborative federalism and constitutional balance, the concept of constitutional governance and objectivity and the nurtured and cultivated idea of respect for a representative government. The difference of opinion should never be based on the perception of "right to differ" and similarly the term "on any matter" should not be put on such a platform as to conceive that as one can differ, it should be a norm on each occasion. The difference must meet the concept of constitutional trust reposed in the authority and there has to be objective assessment of the decision that is sent for communication and further the rationale of difference of opinion should be demonstrable and it should contain sound reason. There should not be exposition of the phenomenon of an obstructionist but reflection of the philosophy of affirmative constructionism and a visionary. The constitutional amendment does not perceive a situation of constant friction

and difference which gradually builds a structure of conflict. At the same time, the Council of Ministers being headed by the Chief Minister should be guided by values and prudence accepting the constitutional position that the NCT of Delhi is not a State.

T. The Government of National Capital Territory of Delhi Act, 1991 and the Transaction of Business of the Government of National Capital Territory of Delhi Rules, 1993

237. Our attention, in the course of the proceedings, has also been drawn to the Government of National Capital Territory of Delhi Act, 1991 (for brevity, "the 1991 Act') which came into force with effect from 2nd January, 1992. The 1991 Act was enacted by the Parliament by virtue of the power conferred upon it by clause (7)(a) of Article 239AA. We think it appropriate to refer to the Statement of Objects and Reasons of the said enactment. It is as follows:-

> "**STATEMENT OF OBJECTS AND REASONS**
>
> Under the new article 239-AA proposed to be inserted by the Constitution (Seventy-fourth Amendment) Bill, 1991, a Legislative Assembly and Council of Ministers will be established for the National Territory. Clause (7) (a) of the said article provides that Parliament may by law make

provisions for giving effect to or supplementing the provisions contained in that article and for all that matters incidental or consequential thereto.

2. In pursuance of the said clause, this bill seeks necessary provisions in respect of the legislative Assembly and its functioning including the provisions relating to the Speaker, Deputy Speaker, qualifications or disqualifications for membership, duration, summoning, prorogation or dissolution of the House privileges, legislative procedures, procedure in financial matters, adders by the Lieutenant Governor to the Legislative Assembly, constitution of Consolidated Fund for the National Capital Territory, Contingency Fund. etc. These are on the; lines of the provisions made in respect of a legislative Assembly of a State with suitable modifications.

3. Under the bill the delimitation of constituencies will be made by the Election Commission in accordance with the Procedure set out therein. Having regard to the special conditions prevailing in Delhi, it has been provided that in respect of the frost constitution of the Assembly, such delimitation will be on the basis of provisional figures of population in relation to 1991 census, if final figures of population in relation to 1991 census, if final figures have not been published by them.

4. The Bill seeks to give effect to the above proposals."

238. From the aforesaid, it is clear as crystal that the 1991 Act was conceived to be brought into existence for supplementing the constitutional provision and also to take care of incidental matters that are germane to Article 239AA.

239. Upon scanning the anatomy of the 1991 Act, we find that the Act contains fifty six Sections and is divided into five Parts, each dealing with different fields. Now, we may refer to some of the provisions contained in Part IV of the 1991 Act titled 'Certain Provisions relating to Lieutenant Governor and Ministers' which are relevant to the case at hand. Section 41 deals with matters in which the Lieutenant Governor may act in his discretion and reads thus:-

> "**Section 41- Matters in which Lieutenant Governor to *act in his discretion.***-(l) The Lieutenant Governor shall act in his discretion in a matter-
>
> (i) which falls outside the purview of the powers conferred on the Legislative Assembly but in respect of which powers or functions are entrusted or delegated to him by the President; or
>
> (ii) in which he is required by or under any law to act in his discretion or to exercise any judicial or quasi-judicial functions.
>
> (2) If any question arises as to whether any matter is or is not a matter as respects which the Lieutenant Governor is by or under any law required to act in his discretion, the decision of the Lieutenant Governor thereon shall be final.
>
> (3) If any question arises as to whether any matter is or is not a matter as respects which the

> Lieutenant Governor is required by any law to exercise any judicial or quasi- judicial functions, the decision of the Lieutenant Governor thereon shall be final."

240. A careful perusal of Section 41 of the 1991 Act shows that the Lieutenant Governor can act in his discretion only in matters which fall outside the legislative competence of the Legislative Assembly of Delhi or in respect of matters of which powers are entrusted or delegated to him by the President or where he is required by law to act in his discretion or to exercise any judicial or quasi-judicial functions and, therefore, it is clear that the Lieutenant Governor cannot exercise his discretion in each and every matter and by and large, his discretionary powers are limited to the three matters over which the legislative power of the Delhi Legislative Assembly stand excluded by clause (3)(a) of Article 239AA.

241. Section 42 deals with the aid and advice tendered by the Council of Ministers to the Lieutenant Governor and reads as under:-

> ***"Section 42 Advice by Ministers:***-The question whether any. and if so what, advice was tendered by

> Ministers to the Lieutenant Governor shall not be inquired into in any court."

242. The wordings and phraseology of Section 42 of the 1991 Act is identical to that of clause (2) of Article 74 of the Constitution which also is an indication that the expression 'aid and advice' should receive a uniform interpretation subject to other constitutional provisions in the form of the proviso to clause (4) of Article 239AA of the Constitution of India. In other words, the 'aid and advice' given by the Council of Ministers is binding on the Lieutenant Governor so long as the Lieutenant Governor does not exercise the power conferred upon him by the proviso to clause (4) of Article 239AA and refer the matter to the President in exercise of that power for his ultimate binding decision.

243. Section 44 that deals with the conduct of business in the NCT of Delhi reads thus:-

> "**Section 44 Conduct of business.--**(1) the President shall make rules -
>
> (a) for the allocation of business to the Ministers in so far as it is business with respect to which the Lieutenant Governor is required to act on the aid and advice of his Council of Ministers; and

(b) for the more convenient transaction of business with the Ministers, including the procedure to be adopted in the case of a difference of opinion between the Lieutenant Governor and the Council of Ministers or a Minister.

(2) Save as otherwise provided in this Act, all executive action of the Lieutenant Governor whether taken on the advice of his Ministers or otherwise shall be expressed to be taken in the name of the Lieutenant Governor.

(3) Orders and other instruments made and executed in the name of the Lieutenant Governor shall be authenticated in such manner as may be specified in rules to be made by the Lieutenant Governor and the validity of an order or instrument which is so authenticated shall not be called in question on the ground that it is not an order or instrument made or executed by the Lieutenant Governor."

244. Section 44 of the 1991 Act has made it mandatory for the President to frame rules for the allocation of business to the Ministers and also the procedure to be adopted in case of a difference of opinion between the Lieutenant Governor and the Council of Ministers.

245. In exercise of the powers conferred under the aforesaid provision, the President has framed the Transaction of Business of the Government of National Capital Territory of

Delhi Rules, 1993 (for brevity, 'TBR, 1993'). The 1991 Act and the TBR, 1993, when read together, reflect the scheme of governance for the NCT of Delhi. We will scrutinize and analyze the relevant rules from the TBR, 1993 after analyzing the other relevant provisions of the 1991 Act.

246. Now, Section 45 deals with the duties of the Chief Minister of Delhi regarding furnishing of information to the Lieutenant Governor and reads as below:-

> "**Section 45. Duties of Chief Minister as respect the furnishing of information to the Lieutenant Governor, etc.** - ***It shall be the duty of the Chief Minister*** -
>
> (a) to communicate to the Lieutenant Governor all decisions of the Council of Ministers relating to the administration of the affairs of the Capital and proposals for legislation;
>
> (b) To furnish such information relating to the administration of the affairs of the Capital and proposals for legislation as Lieutenant Governor may call for; and
>
> (c) If the Lieutenant Governor so requires, to submit for the consideration of the Council of Ministers any matter on which a decision has been taken by a Minister but which has not been considered by the Council."

247. Again, Section 45 of the 1991 Act is identical and analogous to Article 167 of the Constitution which makes it

obligatory for the Chief Minister of the NCT of Delhi to communicate to the Lieutenant Governor all decisions of the Council of Ministers relating to the administration of the affairs of the NCT of Delhi and proposals for legislation. Having said that, the real purpose of such communication is not to obtain concurrence of the Lieutenant Governor on all decisions of the Council of Ministers relating to the administration of the affairs of the NCT of Delhi and on proposals for legislation, but in actuality, the objective is to have the Lieutenant Governor in synergy, to keep him in the loop and to make him aware of all decisions of the Council of Ministers relating to the administration of the affairs of the NCT of Delhi and proposals for legislation so as to enable the Lieutenant Governor to exercise the power conferred upon him by the proviso to clause (4) of Article 239AA.

248. Another important provision is Section 49 of the 1991 Act which falls under Part V of the Act titled 'Miscellaneous and Transitional Provisions" and stipulates the relation of the

Lieutenant Governor and his Ministers to the President. Section 49 reads thus:-

> ***"Section 49. Relation of Lieutenant Governor and his Ministers to President:*** Notwithstanding anything in this Act, the Lieutenant Governor and his Council of Ministers shall be under the general control of, and comply with such particular directions, if any, as may from time-to-time be given by the President."

249. Section 49 of the 1991 Act discloses that the set up in the NCT of Delhi is one where the Council of Ministers headed by the Chief Minister on one hand and the Lieutenant Governor on the other are a team, a pair on a bicycle built for two with the President as its rider who retains the general control. Needless to say, the President, while exercising this general control, acts as per the aid and advice of the Union Council of Ministers.

250. Let us, in the obtaining situation, refer to the various rules in TBR, 1993 which are necessary for dealing with the present case and for discerning the real intention of the Parliament for inserting Articles 239AA and 239AB. Rule 4

of the TBR, 1993 very categorically underscores the collective responsibility of the Council of Ministers:-

> "Rule 4(1) The Council shall be collectively responsible for all the execution orders issued by any Department in the name of the Lieutenant Governor and contracts made in the name of the President in connection with the administration of the Capital whether such orders or contracts are authorised by an individual Minister in respect of a matter pertaining to the Department under his charge or as a result or discussions at a meeting of the Council."

251. Chapter III of the TBR, 1993 deals with 'Disposal of Business allocated among Ministers'. Rule 9 falling under Chapter III provides for circulation of proposals amongst the Council of Ministers and reads as under:-

> "Rule 9(1) The Chief Minister may direct that any proposal submitted to him under rule 8 may. instead of being placed for discussion in a meeting of the Council, be circulated to the Ministers for opinion, and if all the Ministers are unanimous and the Chief Minister is of the opinion that discussions in a meeting of the Council is not required, the proposal shall be treated as finally approved by the Council. In case. Ministers are not unanimous or if the Chief Minister is of the opinion that discussions in a meeting is required, the proposal shall be discussed in a meeting of the Council.
>
> (2) If it is decided to circulate any proposal, the Department to which it belongs, shall prepare a

> memorandum setting out in brief the facts of the proposal, the points for decision and the recommendations of the Minister in charge and forward copies thereof to the Secretary to the Council who shall arrange to circulate the same among the Ministers and simultaneously send a copy thereof to the Lieutenant Governor."
>
> [Emphasis supplied]

Rule 9(2) stipulates that if it is decided that a proposal is to be circulated, the department to which it belongs shall prepare a memo setting out in brief its facts, points for decision and recommendations of the Minister-in-charge. The said memo has to be forwarded to the Secretary to the Council who shall circulate the same amongst the Ministers and at the same time send its copy to the Lieutenant Governor.

252. Rule 10, which is relevant, is reproduced below:-

> "Rule 10. (1) While directing that a proposal shall be circulated, the Chief Minister may also direct, if the matter be of urgent nature, that the Ministers shall communicate their opinion to the Secretary to the Council by a particular date, which shall be specified in the memorandum referred to in rule 9.
> (2) If any Minister fails to communicate his opinion to the Secretary to the Council by the date so specified in the memorandum, it shall be assumed that he has accepted the recommendations contained therein.

> (3) If the Minister has accepted the recommendations contained in the memorandum or the date by which he was required to communicate his opinion has expired, the Secretary to the Council shall submit the proposal to the Chief Minister.
>
> (4) If the Chief Minister accepts the recommendations and if he has no observation to make, he shall return the proposal with his orders thereon to the Secretary to the Council.
>
> (5) On receipt of the proposal, the Secretary to the Council shall communicate the decision to the Lieutenant Governor and pass on the proposal to the Secretary concerned who shall thereafter take necessary steps to issue the orders unless a reference to the Central Government is required in pursuance of the provisions of Chapter V.
>
> [Underlining is ours]

Rule 10(5) stipulates that when a decision has been taken by the Council of Ministers on a proposal as per the preceding sub-rules of Rule 10, then the Secretary to the Council shall communicate the decision to the Lieutenant Governor and pass on the proposal to the Secretary concerned for taking necessary steps to issue the orders unless the Lieutenant Governor decides to refer the decision to the Central Government in pursuance of the provisions of Chapter V of the TBR, 1993.

253. Rule 11 of the TBR, 1993 states thus:-

> "Rule 11. When it has been decided to place a proposal before the Council, the Department to which it belongs, shall, unless the Chief Minister otherwise directs, prepare a memorandum indicating precisely the salient facts of the proposal and the points for decision. Copies of the memorandum and such other documents, as are necessary to enable the proposal to be disposed of shall be forwarded to the Secretary to the Council who shall arrange to circulate the memorandum to the Ministers and simultaneously send a copy thereof to the Lieutenant Governor."
>
> [Emphasis added]

Basically, Rule 11 of the TBR, 1993 deals with the procedure to be adopted for placing a proposal before the Council of Ministers. The said rule stipulates that the proposal shall be forwarded to the Secretary to the Council who shall arrange to circulate a memorandum indicating the salient facts of the proposal and the points for decision to the Ministers and simultaneously send a copy thereof to the Lieutenant Governor.

254. The procedure is further detailed in Rule 13 which stipulates as under:-

> "Rule 13 (1) The council shall meet at such place and time as the Chief Minister may direct.

(2) Except with the permission of the Chief Minister, no case shall be placed on the agenda of a meeting unless papers relating thereto have been circulated as required under rule 11.

(3) After an agenda showing the proposals to be discussed in a meeting of the Council has been approved by the Chief Minister, copies thereof, together with copies of such memoranda as have not been circulated under rule 11, shall be sent by the Secretary to the Council, to the Lieutenant Governor, the Chief Minister and other Ministers, so as to reach them at least two days before the date of such meeting. The Chief Minister may, in case of urgency, curtail the said period of two days.

(4) If any Minister is on tour, the agenda shall be forwarded to the Secretary in the Department concerned who, if he considers that the discussion on any proposal should await the return of the Minister may request the Secretary to the Council to take the orders of the Chief Minister for a postponement of the discussion on the proposal until the return of the said Minister.

(5) The Chief Minister or in his absence any other Minister nominated by the Chief Minister shall preside at the meeting of the Council.

(6) If the Chief Minister so directs, the Secretary of the Department concerned may be required to attend the meeting of the Council.

(7) The Secretary to the Council shall attend all the meetings of the Council and shall prepare a record of the decisions. He shall forward a copy of such record to Ministers and the Lieutenant Governor."

[Emphasis supplied]

Rule 13, thus, deals with the meeting of Council of Ministers and sub-rule (3) of Rule 13 stipulates that the

agenda of the proposals to be discussed in the meeting of the Council shall be sent by the Secretary to the Lieutenant Governor amongst others.

255. Again, Rule 14 states as below:-

> "Rule 14 (1) The decision of the Council relating to each proposal shall be separately recorded and after approval by the Chief Minister, or the Minister presiding, shall be placed with the records of the proposal. After approval by the Chief Minister or the Minister presiding, the decision of the Council as approved, shall be forwarded by the Secretary to the Council to the Lieutenant Governor.
> (2) Where a proposal has been approved by the Council and the approved record of the decision has been communicated to the Lieutenant Governor, the Minister concerned shall take necessary action to give affect to the decision."
>
> [Underlining is ours]

Rule 14 deals with the decision of the Council on different proposals. Sub-rule (1) of Rule 14 provides that once a decision of the Council has been approved by the Chief Minister or the Minister presiding, the said approved decision shall be forwarded by the Secretary to the Council to the Lieutenant Governor.

256. Rule 23, elaborating on the classes of proposals or matters, enumerates as under:-

"Rule (23) The following classes of proposals or matters shall essentially be submitted to the Lieutenant Governor through the Chief Secretary and the Chief Minister before issuing any orders thereon, namely:

(i) matters which affect or are likely to affect the peace and tranquility of the capital;

(ii) matters which affect or are likely to affect the interest of any minority community. Scheduled Castes and backward classes;

(iii) matters which affect the relations of the Government with any State Government , the Supreme Court of India or the High Court of Delhi;

(iv) proposals or matters required to be referred to the Central Government under the Act or under Chapter V;

(v) matters pertaining to the Lieutenant Governor's Secretariat and personnel establishment and other matters relating to his office;

(vi) matters on which Lieutenant Governor is required to make order under any law or instrument in force;

(vii) petitions for mercy from persons under sentence for death and other important cases in which it is proposed to recommend any revision of a judicial sentence;

(viii) matters relating to summoning, prorogation and dissolution of the Legislative Assembly, removal of disqualification of voters at elections to the Legislative Assembly, Local Self Government Institutions and other matters connected with those: and

(ix) any other proposals or matters of administrative importance which the Chief Minister may consider necessary."

Rule 23 lays down a list of proposals or matters which are essential to be submitted to the Lieutenant Governor through the Chief Secretary and the Chief Minister before issuing any orders.

257. Rule 25 of the TBR, 1993 states thus:-

> "Rule 25. The Chief Minister shall:
> (a) cause to be furnished to the Lieutenant Governor such information relating to the administration of the Capital and proposals for legislation as the Lieutenant Governor may call for: and
> (b) if the Lieutenant Governor so requires, submit for the consideration of the Council any matter on which a decision has been taken by a Minister but which has not been considered by the Council.

Sub-rule (a) of Rule 25 requires the Chief Minister to furnish to the Lieutenant Governor information relating to the administration of the Capital and proposals for legislation as the Lieutenant Governor may call for.

258. Further, Rule 42 prescribes the procedure after a Bill is passed by the Legislative Assembly. It reads as under:-

> "Rule 42. (1) When a Bill has been passed by the Legislative Assembly it shall be examined in the Department concerned and the Law Department and shall be presented to the Lieutenant Governor with:-
>
> (a) A report of the Secretary of the Department concerned as to the reason, if any, why the Lieutenant Governor's assent should not be given: and
>
> (b) A report of the Law Secretary as to the reasons, if any, why the Lieutenant Governor's assent should not be given or the Bill should not be reserved for consideration of the President."

Rule 42 basically stipulates that when a bill has been passed by the Legislative Assembly of Delhi, the same shall be presented to the Lieutenant Governor along with a report of the Secretary of the department concerned and a report of the Law Secretary.

259. It is also pertinent to refer to Rules 49 and 50 falling under Chapter V titled 'Referring to Central Government' which read as follows:-

> "**CHAPTER-V**
>
> **Referring to the Central Government**
>
> **Rule 48** ***(Omitted)***
>
> ***Rule 49*** In case of difference of opinion between the Lieutenant Governor and a Minister in regard to any matter, the Lieutenant Governor shall endeavour bv

> discussion on the matter to settle any point on which such difference of opinion has arisen. Should the difference of opinion persist, the Lieutenant Governor may direct that the matter be referred to the Council.
>
> ***Rule 50*** In case of difference of opinion between the Lieutenant Governor and the Council with regard to any matter, the Lieutenant Governor shall refer it to the Central Government for the decision of the President and shall act according to the decision of the President."

260. Rule 49 stipulates the procedure to be adopted in case of difference of opinion between the Lieutenant Governor and a Minister in regard to any matter. In such a scenario, as per Rule 49, the Lieutenant Governor shall endeavour by discussion on the matter to settle any point on which such difference of opinion has arisen. If such an approach and attempt to settle a point of difference by discussion turns out to be futile and the difference of opinion persists, then the Lieutenant Governor may direct the matter to be referred to the Council. Rule 49 shows that settlement can be achieved by way of discussion. It further highlights how, by discussion and dialogue, a conflict can be avoided by

adopting an ideology of harmonious co-existence which would again be in tune with the concepts of collaborative federalism, pragmatic federalism, federal balance and constitutional objectivity.

261. Rule 50, on the other hand, provides the procedure to the effect that in case of difference of opinion between the Council and the Lieutenant Governor with regard to any matter, the Lieutenant Governor is required to refer it to the Central Government for the decision of the President and shall act according to the decision of the President.

262. The approach of dialogue, settlement by discussion and suppressing conflicts by harmonious co-existence as delineated by Rule 49 should also be adopted in case of difference of opinion between the Lieutenant Governor on one hand and the Council on the other. Such an approach would not only result in acceptance of the role of the Lieutenant Governor but also help the NCT of Delhi to cherish the fruits of a responsive government as intended by the Sixty-ninth Constitutional Amendment.

263. We have referred to the relevant rules of TBR, 1993 which require that the Lieutenant Governor has to be apprised and kept in the loop of the various proposals, agendas and decisions taken by the Council of Ministers. However, a careful perusal of these rules nowhere suggests that the communication to the Lieutenant Governor is to obtain his concurrence or permission. The TBR, 1993 simply reflect the scheme envisaged for the governance of NCT of Delhi wherein just as an administrator in other UTs has to be apprised, likewise the Lieutenant Governor in Delhi is also to be informed and notified about the business being conducted.

264. The idea behind the aforesaid rules is just to keep the Lieutenant Governor notified of the proposals, agendas and decisions so that he is acquainted with the business carried out by the Council of Ministers. The said view is evident from the various rules which employ the words 'send a copy thereof to the Lieutenant Governor', 'forwarded to the Lieutenant Governor', 'submitted to the Lieutenant Governor and 'cause to be furnished to the Lieutenant Governor'.

265. Thus, the irresistible conclusion is that the Council is only required to communicate and inform its various proposals, agendas and decisions to the Lieutenant Governor so as to keep him apprised and to enable him to scrutinize the said proposals, agendas and decisions in order to exercise his powers as bestowed upon him under clause (4) of Article 239AA of the 1991 Act read with Rule 50 of the TBR, 1993.

266. It has to be clearly stated that requiring prior concurrence of the Lieutenant Governor would absolutely negate the ideals of representative governance and democracy conceived for the NCT of Delhi by Article 239AA of the Constitution. Any view to the contrary would not be in consonance with the intention of the Parliament to treat Delhi Government as a representative form of government.

267. The said interpretation is also in tune with our constitutional spirit which ensures that the voice of the citizens does not go unrecognized while making laws and this is only possible if the agency enacting and enforcing the laws comprises of the elected representatives chosen by the free

will of the citizens. It is a well recognized principle of a true democracy that the power shall not remain vested in a single person and it is absolutely essential that the ultimate say in all matters shall vest with the representative Government who are responsible to give effect to the wishes of the citizens and effectively address their concerns.

268. A conjoint reading of the 1991 Act and the TBR, 1993 formulated in pursuance of Section 44 of the 1991 Act divulges that the Lieutenant Governor of Delhi is not a titular head, rather he enjoys the power of that of an administrator appointed by the President under Article 239AA. At the cost of repetition, we may reiterate that the constitutional scheme adopted for the NCT of Delhi conceives of the Council of Ministers as the representatives of the people on the one hand and the Lieutenant Governor as the nominee and appointee of the President on the other, who are required to function in harmony within the constitutional parameters. In the said scheme of things, the Lieutenant Governor should not emerge

as an adversary having a hostile attitude towards the Council of Ministers of Delhi, rather he should act as a facilitator.

269. We had earlier stated that Mr. Maninder Singh, learned Additional Solicitor General, had urged that the report of the Balakrishnan Committee should be taken aid of to interpret the constitutional provision and for the said purpose, he had placed reliance on ***Maumsell v. Olins***[92], ***Eastman Photographic Materials Company v. Comptroller-General of Patents, Designs and Trademarks***[93], ***Tikri Banda Dullewe v. Padma Rukmani Dullewe***[94], ***Black Clawson International Ltd. v. Papierwerke Waldhof-Aschaffenburg***[95], ***R.S. Nayak v. A.R. Antulay***[96], ***Shrimant Shamrao Suryavanshi v. Pralhad Bhairoba Suryavanshi***[97] and ***TMA Pai Foundation v. State of Karnataka***[98]. He had laid emphasis on paragraph 34 of the

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92 [1975] AC 373
93 (1989) AC 571
94 (1969) 2 AC 313
95 (1975) AC 591
96 (1984) 2 SCC 183
97 (2002) 3 SCC 676
98 (2002) 8 SCC 481

judgment in ***A.R. Antulay*** (supra). The relevant part of the said paragraph reads as follows:-

> "34. ...the basic purpose underlying all canons of construction is the ascertainment with reasonable certainty of the intention of Parliament in enacting the legislation. Legislation is enacted to achieve a certain object. The object may be to remedy a mischief or to create some rights, obligations or impose duties. Before undertaking the exercise of enacting a statute, Parliament can be taken to be aware of the constitutional principle of judicial review meaning thereby the legislation would be dissected and subjected to microscopic examination. More often an expert committee or a joint parliamentary committee examines the provisions of the proposed legislation. But language being an inadequate vehicle of thought comprising intention, the eyes scanning the statute would be presented with varied meanings. If the basic purpose underlying construction of a legislation is to ascertain the real intention of the Parliament, why should the aids which Parliament availed of such as report of a special committee preceding the enactment, existing state of law, the environment necessitating enactment of legislation, and the object sought to be achieved, be denied to court whose function is primarily to give effect to the real intention of the Parliament in enacting the legislation. Such denial would deprive the Court of a substantial and illuminating aid to construction. Therefore, departing from the earlier English decisions we are of the opinion that reports of the committee which preceded the enactment of a legislation, reports of joint parliamentary committee, report of a commission set up for collecting

> information leading to the enactment are permissible external aids to construction."

270. There can be no quarrel about the proposition that the reports of the Committee enacting a legislation can serve as an external aid for construing or understanding the statute. However, in the instant case, as we have elaborately dealt with the meaning to be conferred on the constitutional provision that calls for interpretation, there is no necessity to be guided by the report of the Committee.

U. <u>Constitutional renaissance</u>:

271. Before we proceed to record our conclusions, we think it apposite to reflect on a concept that illumines the basic tenet of constitutional governance having requisite veneration for constitutional philosophy and its applicability in the present context.

272. Though ordinarily the term 'renaissance' is used in the context of renewed activity especially pertaining to art and literature, yet the said word is not alien to the fundamental meaning of life in a solid civilized society that is well cultivated

in culture. And, life, as history witnesses, gets entrenched in elevated civilization when there is fair, appropriate, just and societal interest oriented governance. In such a situation, no citizen feels like a subject and instead has the satisfaction that he is a constituent of the sovereign. When the citizens feel that there is participatory governance in accordance with the constitutionally envisaged one, there is prevalence of constitutional governance.

273. This prevalence is the recognition and acceptance of constitutional expectation from the functionaries created by it. It is to remain in a constant awakening as regards the text, context, perspective, purpose and the rule of law. Adherence to rationality, reverence for expected pragmatic approach on the bedrock of the constitutional text, context and vision and constant reflection on the valid exercise of the power vested tantamounts to resurgent constitutionalism. It may be understood in a different manner. Our Constitution is a constructive one. There is no room for absolutism. There is no space for anarchy. Sometimes it is argued, though in a

different context, that one can be a "rational anarchist", but the said term has no entry in the field of constitutional governance and rule of law. Fulfillment of constitutional idealism ostracizing anything that is not permissible by the language of the provisions of the Constitution and showing veneration to its spirit and silence with a sense of reawakening to the vision of the great living document is, in fact, constitutional renaissance.

274. Let us come to the present context and elaborate the concept. The said concept garners strength when there is rational difference by the Lieutenant Governor on a constitutional prism, any statutory warrant, executive disharmony between the Centre and NCT of Delhi on real justifiable grounds, when an executive decision runs counter to the legislative competence and the decision of the Council of Ministers defeats the national interest. These are only a few illustrations. The Constitution does not state the nature of the difference. It leaves it to the wisdom of the Council of Ministers who have the collective responsibility and the Lieutenant

Governor. That is the constitutional trust which expects the functionaries under the Constitution to be guided by constitutional morality, objective pragmatism and the balance that is required to sustain proper administration. The idea of obstinance is not a principle of welfare administration. The constitutional principles do not countenance a nomadic perception. They actually expect governance for the betterment of society, healthy relationship and mutual respect having an open mind for acceptance.

275. The goal is to avoid any disharmony and anarchy. Sustenance of constitutionally conferred trust, recognition and acceptance of the principle of constitutional governance, adherence to the principles and norms which we have discussed earlier and the constitutional conduct having regard to the elevated guiding precepts stated in the Preamble will tantamount to realization of the feeling of constitutional renaissance. When we say renaissance, we do not mean revival of any classical note with a sense of nostalgia but true blossoming of the constitutional ideals, realization and

acceptance of constitutional responsibility within the boundaries of expression and silences and sincerely accepting the summon to be obeisant to the constitutional conscience with a sense of reawakening to the constitutional vision.

276. That is why, the 1991 Act and the TBR, 1993 conceive of discussion, deliberation and dialogue. The exercise of entitlement to differ has to be based on principle and supported by cogent reasons. But, the primary effort has to be to arrive at a solution. That is the constitutional conduct of a constitutional functionary.

V. **The conclusions in seriatim:**

277. In view of our aforesaid analysis, we record our conclusions in seriatim:-

(i) While interpreting the provisions of the Constitution, the safe and most sound approach for the Constitutional Courts to adopt is to read the words of the Constitution in the light of the spirit of the Constitution so that the quintessential

democratic nature of our Constitution and the paradigm of representative participation by way of citizenry engagement are not annihilated. The Courts must adopt such an interpretation which glorifies the democratic spirit of the Constitution.

(ii) In a democratic republic, the collective who are the sovereign elect their law making representatives for enacting laws and shaping policies which are reflective of the popular will. The elected representatives being accountable to the public must be accessible, approachable and act in a transparent manner. Thus, the elected representatives must display constitutional objectivity as a standard of representative governance which neither tolerates ideological fragmentation nor encourages any utopian fantasy, rather it lays stress on constitutional ideologies.

(iii) Constitutional morality, appositely understood, means the morality that has inherent elements in

the constitutional norms and the conscience of the Constitution. Any act to garner justification must possess the potentiality to be in harmony with the constitutional impulse. In order to realize our constitutional vision, it is indispensable that all citizens and high functionaries in particular inculcate a spirit of constitutional morality which negates the idea of concentration of power in the hands of a few.

(iv) All the three organs of the State must remain true to the Constitution by upholding the trust reposed by the Constitution in them. The decisions taken by constitutional functionaries and the process by which such decisions are taken must have normative reasonability and acceptability. Such decisions, therefore, must be in accord with the principles of constitutional objectivity and symphonious with the spirit of the Constitution.

(v) The Constitution being the supreme instrument envisages the concept of constitutional governance which has, as its twin limbs, the principles of fiduciary nature of public power and the system of checks and balances. Constitutional governance, in turn, gives birth to the requisite constitutional trust which must be exhibited by all constitutional functionaries while performing their official duties.

(vi) Ours is a parliamentary form of government guided by the principle of collective responsibility of the Cabinet. The Cabinet owes a duty towards the legislature for every action taken in any of the Ministries and every individual Minister is responsible for every act of the Ministry. This principle of collective responsibility is of immense significance in the context of 'aid and advice'. If a well deliberated legitimate decision of the Council of Ministers is not given effect to due to an attitude to differ on the part of the Lieutenant Governor, then

the concept of collective responsibility would stand negated.

(vii) Our Constitution contemplates a meaningful orchestration of federalism and democracy to put in place an egalitarian social order, a classical unity in a contemporaneous diversity and a pluralistic milieu in eventual cohesiveness without losing identity. Sincere attempts should be made to give full-fledged effect to both these concepts.

(viii) The constitutional vision beckons both the Central and the State Governments alike with the aim to have a holistic edifice. Thus, the Union and the State Governments must embrace a collaborative federal architecture by displaying harmonious co-existence and interdependence so as to avoid any possible constitutional discord. Acceptance of pragmatic federalism and achieving federal balance has become a necessity requiring disciplined wisdom on the part of the Union and the

State Governments by demonstrating a pragmatic orientation.

(ix) The Constitution has mandated a federal balance wherein independence of a certain required degree is assured to the State Governments. As opposed to centralism, a balanced federal structure mandates that the Union does not usurp all powers and the States enjoy freedom without any unsolicited interference from the Central Government with respect to matters which exclusively fall within their domain.

(x) There is no dearth of authorities with regard to the method and approach to be embraced by Constitutional Courts while interpreting the constitutional provisions. Some lay more emphasis on one approach over the other, while some emphasize that a mixed balance resulting in a unique methodology shall serve as the best tool. In spite of diverse views on the said concept, what

must be kept primarily in mind is that the Constitution is a dynamic and heterogeneous instrument, the interpretation of which requires consideration of several factors which must be given their due weightage in order to come up with a solution harmonious with the purpose with which the different provisions were introduced by the framers of the Constitution or the Parliament.

(xi) In the light of the contemporary issues, the purposive method has gained importance over the literal approach and the Constitutional Courts, with the vision to realize the true and ultimate purpose of the Constitution not only in letter but also in spirit and armed with the tools of ingenuity and creativity, must not shy away from performing this foremost duty to achieve constitutional functionalism by adopting a pragmatic approach. It is, in a way, exposition of judicial sensibility to the functionalism of the Constitution which we call

constitutional pragmatism. The spirit and conscience of the Constitution should not be lost in grammar and the popular will of the people which has its legitimacy in a democratic set up cannot be allowed to lose its purpose in simple semantics.

(xii) In the light of the ruling of the nine-Judge Bench in ***New Delhi Municipal Corporation*** (supra), it is clear as noon day that by no stretch of imagination, NCT of Delhi can be accorded the status of a State under our present constitutional scheme. The status of NCT of Delhi is *sui generis*, a class apart, and the status of the Lieutenant Governor of Delhi is not that of a Governor of a State, rather he remains an Administrator, in a limited sense, working with the designation of Lieutenant Governor.

(xiii) With the insertion of Article 239AA by virtue of the Sixty-ninth Amendment, the Parliament envisaged a representative form of Government for

the NCT of Delhi. The said provision intends to provide for the Capital a directly elected Legislative Assembly which shall have legislative powers over matters falling within the State List and the Concurrent List, barring those excepted, and a mandate upon the Lieutenant Governor to act on the aid and advice of the Council of Ministers except when he decides to refer the matter to the President for final decision.

(xiv) The interpretative dissection of Article 239AA(3)(a) reveals that the Parliament has the power to make laws for the National Capital Territory of Delhi with respect to any matters enumerated in the State List and the Concurrent List. At the same time, the Legislative Assembly of Delhi also has the power to make laws over all those subjects which figure in the Concurrent List and all, but three excluded subjects, in the State List.

(xv) A conjoint reading of clauses (3)(a) and (4) of Article 239AA divulges that the executive power of the Government of NCTD is co-extensive with the legislative power of the Delhi Legislative Assembly and, accordingly, the executive power of the Council of Ministers of Delhi spans over all subjects in the Concurrent List and all, but three excluded subjects, in the State List. However, if the Parliament makes law in respect of certain subjects falling in the State List or the Concurrent List, the executive action of the State must conform to the law made by the Parliament.

(xvi) As a natural corollary, the Union of India has exclusive executive power with respect to the NCT of Delhi relating to the three matters in the State List in respect of which the power of the Delhi Legislative Assembly has been excluded. In respect of other matters, the executive power is to be exercised by the Government of NCT of Delhi. This,

however, is subject to the proviso to Article 239AA(4) of the Constitution. Such an interpretation would be in consonance with the concepts of pragmatic federalism and federal balance by giving the Government of NCT of Delhi some required degree of independence subject to the limitations imposed by the Constitution.

(xvii) 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 the Lieutenant Governor does not exercise his power under the proviso to clause (4) of Article 239AA. The Lieutenant Governor has not been entrusted with any independent decision-making power. He has to either act on the 'aid and advice' of Council of Ministers or he is bound to implement the decision

taken by the President on a reference being made by him.

(xviii) The words “any matter” employed in the proviso to clause (4) of Article 239AA cannot be inferred to mean “every matter”. The power of the Lieutenant Governor under the said proviso represents the exception and not the general rule which has to be exercised in exceptional circumstances by the Lieutenant Governor keeping in mind the standards of constitutional trust and morality, the principle of collaborative federalism and constitutional balance, the concept of constitutional governance and objectivity and the nurtured and cultivated idea of respect for a representative government. The Lieutenant Governor should not act in a mechanical manner without due application of mind so as to refer every decision of the Council of Ministers to the President.

(xix) The difference of opinion between the Lieutenant Governor and the Council of Ministers should have a sound rationale and there should not be exposition of the phenomenon of an obstructionist but reflection of the philosophy of affirmative constructionism and profound sagacity and judiciousness.

(xx) The Transaction of Business Rules, 1993 stipulates the procedure to be followed by the Lieutenant Governor in case of difference between him and his Ministers. The Lieutenant Governor and the Council of Ministers must attempt to settle any point of difference by way of discussion and dialogue. By contemplating such a procedure, the TBR, 1993 suggest that the Lieutenant Governor must work harmoniously with his Ministers and must not seek to resist them every step of the way. The need for harmonious resolution by discussion is recognized especially to sustain the representative

form of governance as has been contemplated by the insertion of Article 239AA.

(xxi) The scheme that has been conceptualized by the insertion of Articles 239AA and 239AB read with the provisions of the GNCTD Act, 1991 and the corresponding TBR, 1993 indicates that the Lieutenant Governor, being the Administrative head, shall be kept informed with respect to all the decisions taken by the Council of Ministers. The terminology “send a copy thereof to the Lieutenant Governor”, “forwarded to the Lieutenant Governor”, “submitted to the Lieutenant Governor” and “cause to be furnished to the Lieutenant Governor” employed in the said rules leads to the only possible conclusion that the decisions of the Council of Ministers must be communicated to the Lieutenant Governor but this does not mean that the concurrence of the Lieutenant Governor is required. The said communication is imperative so as to keep

him apprised in order to enable him to exercise the power conferred upon him under Article 239AA(4) and the proviso thereof.

(xxii) The authorities in power should constantly remind themselves that they are constitutional functionaries and they have the responsibility to ensure that the fundamental purpose of administration is the welfare of the people in an ethical manner. There is requirement of discussion and deliberation. The fine nuances are to be dwelled upon with mutual respect. Neither of the authorities should feel that they have been lionized. They should feel that they are serving the constitutional norms, values and concepts.

(xxiii) Fulfillment of constitutional idealism ostracizing anything that is not permissible by the language of the provisions of the Constitution and showing veneration to its sense, spirit and silence is constitutional renaissance. It has to be remembered

that our Constitution is a constructive one. There is no room for absolutism. There is no space for anarchy. Sometimes it is argued, though in a different context, that one can be a "rational anarchist", but the said term has no entry in the field of constitutional governance and rule of law. The constitutional functionaries are expected to cultivate the understanding of constitutional renaissance by realization of their constitutional responsibility and sincere acceptance of the summon to be obeisant to the constitutional conscience with a sense of reawakening to the vision of the great living document so as to enable true blossoming of the constitutional ideals. The Lieutenant Governor and the Council of Ministers headed by the Chief Minister are to constantly remain alive to this idealism.

278. The Reference is answered accordingly. Matters be placed before the appropriate regular Bench.

.....CJI
(Dipak Misra)

.....J.
(A.K. Sikri)

.....J.
(A.M. Khanwilkar)

New Delhi;
July 04, 2018

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL/CRIMINAL APPELLATE/ORIGINAL JURISDICTION

CIVIL APPEAL No. 2357 OF 2017

GOVT OF NCT OF DELHI .....APPELLANT

Versus

UNION OF INDIA ....RESPONDENT

WITH

CONTEMPT PETITION (C) No.175/2016
In

WRIT PETITION (Crl.) No.539/1986,

CIVIL APPEAL No.2360/2017,

CIVIL APPEAL No.2359/2017,

CIVIL APPEAL No.2363/2017,

CIVIL APPEAL No.2362/2017,

CIVIL APPEAL No.2358/2017,

CIVIL APPEAL No.2361/2017,

CRIMINAL APPEAL No.277/2017,

AND

CIVIL APPEAL No.2364/2017

J U D G M E N T

Dr D Y CHANDRACHUD, J

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A Introduction

1 A batch of petitions in the Delhi High Court addressed unresolved issues between the Lieutenant Governor of the National Capital Territory and its Council of Ministers headed by the Chief Minister. The judgment of the Delhi High Court, delivered on 4 August 2016, travelled to this Court. When

the Civil Appeals were heard, a Bench consisting of Hon'ble Mr Justice A K Sikri and Hon'ble Mr Justice R K Agrawal, in an order dated 15 February 2017 was of the opinion that the appeals should be heard by a Constitution Bench as substantial questions of law about the interpretation of Article 239AA of the Constitution are involved.

2 This batch of cases is about the status of Delhi, after the Sixty-ninth constitutional amendment[1], but more is at stake. These cases involve vital questions about democratic governance and the role of institutions in fulfilling constitutional values. The Constitution guarantees to every individual the freedom to adopt a way of life in which liberty, dignity and autonomy form the core. The Constitution pursues a vision of fulfilling these values through a democratic polity. The disputes which led to these cases tell us how crucial institutions are to the realization of democracy. It is through them that the aspirations of a democratic way of life, based on the rule of law, are fulfilled. Liberty, dignity and autonomy are constraining influences on the power of the state. Fundamental human freedoms limit the authority of the State. Yet the role of institutions in achieving democracy is as significant. Nations fail when institutions of governance fail. The working of a democratic institution is impacted by the statesmanship (or the lack of it) shown by those in whom the electorate vests the trust to govern. In a society such as ours, which is marked by a plurality of cultures, a diversity of tradition, an intricate web of social identity and a clatter of ideologies, institutional governance to be robust

[1] The Constitution (Sixty Ninth Amendment) Act, 1991

must accommodate each one of them. Criticism and dissent form the heart of democratic functioning. The responsiveness of institutions is determined in a large measure by their ability to be receptive to differences and perceptive to the need for constant engagement and dialogue. Constitutional skirmishes are not unhealthy. They test the resilience of democracy. How good a system works in practice must depend upon the statesmanship of those who are in decision making positions within them. Hence, these cases are as much about interpreting the Constitution as they are about the role of institutions in the structure of democratic governance and the frailties of those who must answer the concerns of citizens.

3 In the first of a series of articles in the New York Times of 14 December 2017, David Brooks laments events which occurred in various parts of the world, casting a shadow on democracy. Liberal democracy seemed to triumph with the fall of the Berlin wall in 1989 and the dismantling of apartheid in South Africa. Many of those aspirations are continuously under challenge. The foundation for addressing the aspirations of a democratic spring are reflected in Brooks'
article titled – ironically – "the Glory of Democracy". Drawing from Thomas Mann's "The Coming Victory of Democracy" (1938), he has this to say:

> "Democracy, Mann continues, is the only system built on respect for the infinite dignity of each individual man and woman, on each person's moral striving for freedom, justice and truth. It would be a great error to think of and teach democracy as a procedural or political system, or as the principle of majority rule.

> It is a "spiritual and moral possession." It is not just rules; it is a way of life. It encourages everybody to make the best of their capacities – holds that we have a moral responsibility to do so. It encourages the artist to seek beauty, the neighbour to seek community, the psychologist to seek perception, the scientist to seek truth.
>
> Monarchies produce great paintings, but democracy teaches citizens to put their art into action, to take their creative impulses and build a world around them. "Democracy is thought; but it is thought related to life and action." Democratic citizens are not just dreaming; they are thinkers who sit on the town council. He quotes the philosopher Bergson's dictum: "Act as men of thought, think as men of action."[}]

While we have to interpret the Constitution in deciding this reference, it is well to remind ourselves that how citizens respond to their statesmen has a powerful role in giving meaning to the fine print of law.

B Constitutional Morality

4 The Constitution was adopted in an atmosphere of expectation and idealism. The members of the Constituent Assembly had led the constitutional project with a commitment to the future of a nascent nation. "India's founding fathers and mothers", Granville Austin observes, "established in the Constitution both the nation's ideals and the institutions and processes for achieving them".[}] These ideals were "national unity and integrity and a

} David Brooks, "The Glory of Democracy", The New York Times December 14, 2017), available at https://www.nytimes.com/2017/12/14/opinion/democracy-thomas-mann.html

} Granville Austin, The Indian Constitution: Cornerstone of a Nation, Oxford University Press (1966), page xi

democratic and equitable society"[1]. The Constitution was designed "to break the shackles of traditional social hierarchies and to usher in a new era of freedom, equality, and justice"[2]. All this was to be achieved through a democratic spirit using constitutional and democratic institutions.[3]

5 Democracy is not limited to electing governments. It generates aspirations and inspires passions. Democracy is based on "the recognition that there is no natural source of authority that can exercise power over individuals".[4] When India attained independence, it faced a major dilemma. Democracy as an ideal had developed in the course of the nationalist struggle against colonial rule. Democratic political institutions were still to develop, at any rate fully:

> "Democracy emerged in India out of a confrontation with a power imposed from outside rather than an engagement with the contradictions inherent in Indian society … In the West, the democratic and industrial revolutions emerged together, reinforcing each other and slowly and steadily transforming the whole of society. The economic and social preconditions for the success of democracy grew along with, and sometimes in advance of, the political institutions of democracy. In India, the political argument for democracy was adopted by the leaders of the nationalist movement from their colonial rulers and adapted to their immediate objective which was freedom from colonial rule. The building of new political institutions took second place, and the creation of the economic and social conditions for the successful operation of those institutions, such as education, health care, and other social services, lagged well behind."[5]

[1] Ibid
[2] Rajiv Bhagava (ed.), Politics and Ethics of the Indian Constitution, Oxford University Press (2008), at page 15
[3] Granville Austin (Supra Note 3)
[4] Pratap Bhanu Mehta, The Burden of Democracy, Penguin Books (2003), at pages 35-36
[5] Andre Beteille, Democracy and its Institutions, Oxford University Press (2012)

6 The framers of the Constitution were aware of the challenges which the newly instituted democracy could face. In his address to the Constituent Assembly, Dr Ambedkar stated: “Democracy in India is only a top-dressing on an Indian soil, which is essentially undemocratic”.[1] To tackle these challenges, the Constitution envisaged the existence of a responsible and representative government. Provisions regarding administration of democracy were incorporated, in detail, into the Constitution by the members of the Constituent Assembly. Dr Ambedkar made an impassioned plea that the core values of Indian democracy, to be protected and sustained, ought to be guided by the presence of constitutional morality.

7 While moving the Draft Constitution in the Constituent Assembly on November 4, 1948[2], Dr Ambedkar quoted the Greek historian, Grote:

> “By constitutional morality, Grote meant… a paramount reverence for the forms of the constitution, enforcing obedience to authority and acting under and within these forms, yet combined with the habit of open speech, of action subject only to definite legal control, and unrestrained censure of those very authorities as to all their public acts combined, too with a perfect confidence in the bosom of every citizen amidst the bitterness of party contest that the forms of constitution will not be less sacred in the eyes of his opponents than his own.”

Dr Ambedkar made it clear that constitutional morality was to be cultivated and learned. Constitutional morality was not a “natural sentiment” and its diffusion could not be presumed. While highlighting that the diffusion of constitutional

[1] Constituent Assembly Debates, Vol. 7 (4th November 1948)
[2] Ibid

morality is indispensable for "the *peaceful working of the democratic constitution",* Dr Ambedkar observed that the form of the Constitution had to be in harmony with the form of its administration:

> "One is that the form of administration must be appropriate to and in the same sense as the form of the Constitution. The other is that **it is perfectly possible to pervert the Constitution, without changing its form by merely changing its form of administration and to make it inconsistent and opposed to the spirit of the Constitution.**" (emphasis added)

8 If the moral values of our Constitution were not upheld at every stage, the text of the Constitution may not be enough to protect its democratic values. In order to truly understand what constitutional morality reflects, it is necessary to answer "what it is that the Constitution is trying to say" and to identify "the broadest possible range… to fix the meaning of the text"[}]. Bhargava's work titled "Politics and Ethics of the Indian Constitution"[}] focuses on the necessity to identify the moral values of the Constitution:

> "There is… a pressing need to excavate the moral values embedded in the Constitution, to bring out their connections, and to identify the coherent or not-so-coherent ethical worldviews within it. It is not implausible to believe that these values are simply out there, holding their breath and waiting to be discovered. The Constitution is a socially constructed object, and therefore it does not possess the hard objectivity of natural objects. This element of the Constitution is the ground for contesting interpretations. It is high time we identified these interpretations and debated their moral adequacy."[}]

} Rajiv Bhagava (Supra note 5), at page 6
} Ibid
} Ibid, at page 9

9 Constitutional morality does not mean only allegiance to the substantive provisions and principles of the Constitution. It signifies a constitutional culture which each individual in a democracy must imbibe. Pratap Bhanu Mehta identifies certain features of constitutional morality– chief amongst them being liberal values– which governed the making of India's Constitution and created expectations from the polity:

> "The Constitution was made possible by a constitutional morality that was liberal at its core. Not liberal in the eviscerated ideological sense, but in the deeper virtues from which it sprang: **an ability to combine individuality with mutual regard, intellectualism with a democratic sensibility, conviction with a sense of fallibility, deliberation with decision, ambition with a commitment to institutions, and hope for a future with due regard for the past and present.**"[1] (Emphasis supplied)

One of the essential features of constitutional morality, thus, is the ability and commitment to arrive at decisions on important issues consensually. It requires that "despite all differences we are part of a common deliberative enterprise."[2] It envisages partnership and coordination between various institutions created by the Constitution. Mehta has underlined the importance of constitutional partnerships by referring to the working of the Constituent Assembly:

> "The ability to work with difference was augmented by another quality that is rarer still: the ability to acknowledge true value. This may be attributed to the sheer intellectualism of so many of the members. Their collective philosophical depth, historical knowledge, legal and forensic acumen and sheer command over language is enviable. It ensured that the

[1] Pratap Bhanu Mehta, "What is constitutional morality?", Seminar (2010), available at http://www.india-seminar.com/2010/615/615_pratap_bhanu_mehta.htm.

[2] Ibid

> grounds of discussion remained intellectual. Also remarkable was their ability to acknowledge greatness in others. It was this quality that allowed Nehru and Patel, despite deep differences in outlook and temperament, to acknowledge each other. Their statesmanship was to not let their differences produce a debilitating polarization, one that could have wrecked India. They combined loyalty and frankness."[8]

10 Constitutional morality places responsibilities and duties on individuals who occupy constitutional institutions and offices. Frohnen and Carey formulate the demands of the concept thus:

> "Constitutional moralities… can be understood as anticipated norms of behavior or even duties primarily on the part of individuals within our constitutional institutions. We use the term morality and refer to constitutional morality with regard to these norms or duties principally because of the purpose they serve; they can be viewed as imposing an obligation on individuals and institutions to ensure that the constitutional system operates in a coherent way, consistent with its basic principles and objectives."[9]

11 Another major feature of constitutional morality is that it provides in a Constitution the basic rules which prevent institutions from turning tyrannical. It warns against the fallibility of individuals in a democracy, checks state power and the tyranny of the majority. Constitutional morality balances popular morality and acts as a threshold against an upsurge in mob rule:

> "It is important not to forget that human beings are fallible, that they sometimes forget what is good for them in the long run, and that they yield to temptations which bring them pleasure now but pain later. It is not unknown for people to acquire the mentality of the mob and act on the heat of the moment only to rue the consequences of the decision later. By providing a framework of law culled over from years of collective experience and wisdom, constitutions prevent people from succumbing to currently fashionable whims and

[8] Ibid

[9] Bruce P. Frohnen and George W. Carey, "Constitutional Morality and the Rule of Law", Journal of Law and Politics (2011), Vol. 26, at page 498

> fancies. Constitutions anticipate and try to redress the excessively mercurial character of everyday politics. They make some dimensions of the political process beyond the challenge of ordinary politics."[}]

12 No explanation of constitutional morality will be complete without understanding the uniquely revolutionary character of the Constitution itself. Granville Austin has referred to the Indian Constitution as a "social revolutionary" document, the provisions of which are aimed at furthering the goals of social revolution.[}] Austin described the main features of the Indian Constitution as follows:

> "It was to be a modernizing force. **Social revolution and democracy were to be the strands of the seamless web most closely related. Democracy, representative government, personal liberty, equality before law, were revolutionary for the society.** Social-economic equitableness as expressed in the Directive Principles of State Policy was equally revolutionary. So were the Constitution's articles allowing abolishing untouchability and those allowing for compensatory discrimination in education and employment for disadvantaged citizens."[}] (Emphasis supplied)

The core of the commitment to social revolution, Austin stated, lies in the Fundamental Rights and in the Directive Principles of State Policy, which are the "conscience of the Constitution" and connect India's future, present, and past.[}] Constitutional morality requires the existence of sentiments and dedication for realizing a social transformation which the Indian Constitution seeks to attain.

} Rajiv Bhagava (Supra note 5), at pages 14-15
} Granville Austin (Supra note 3), at page 63
} Ibid, at page xiii
} Ibid, at page 63.

13 Constitutional morality highlights the need to preserve the trust of the people in institutions of democracy. It encompasses not just the forms and procedures of the Constitution, but provides an "enabling framework that allows a society the possibilities of self-renewal"[1]. It is the governing ideal of institutions of democracy which allows people to cooperate and coordinate to pursue constitutional aspirations that cannot be achieved single-handedly. Andre Beteille in "Democracy and its Institutions" (2012) speaks of the significance of constitutional morality:

> "To be effective, constitutional laws have to rest on a substratum of constitutional morality… In the absence of constitutional morality, the operation of a Constitution, no matter how carefully written, tends to become arbitrary, erratic, and capricious. It is not possible in a democratic order to insulate completely the domain of law from that of politics. A Constitution such as ours is expected to provide guidance on what should be regulated by the impersonal rule of law and what may be settled by the competition for power among parties, among factions, and among political leaders. It is here that the significance of constitutional morality lies. Without some infusion of constitutional morality among legislators, judges, lawyers, ministers, civil servants, writers, and public intellectuals, the Constitution becomes a plaything of power brokers."[2]

14 Constitutional morality underscores the ethics of politics in a country. It gives politics the identity to succeed. In his last address to the Constituent Assembly on November 25, 1949, Dr Ambedkar discussed the importance of the role of the people and political parties in a constitutional democracy:

[1] Pratap Bhanu Mehta (Supra note 14)
[2] Andre Beteille, Democracy and its Institutions, Oxford University Press (2012)

> "I feel, however good a Constitution may be, it is sure to turn out bad because those who are called to work it, happen to be a bad lot. However bad a Constitution may be, it may turn out to be good if those who are called to work it, happen to be a good lot. The working of a Constitution does not depend wholly upon the nature of the Constitution. The Constitution can provide only the organs of State such as the Legislature, the Executive and the Judiciary. The factors on which the working of those organs of the State depend are the people and the political parties they will set up as their instruments to carry out their wishes and their politics."}

He also invoked John Stuart Mill to caution the nascent Indian democracy of the perils of personifying institutions or laying down liberty "at the feet of even a great man, or to trust him with power which enables him to subvert their institutions". In Dr Ambedkar's words:

> "[I]n India, Bhakti or what may be called the path of devotion or hero-worship, plays a part in its politics unequalled in magnitude by the part it plays in the politics of any other country in the world. Bhakti in religion may be a road to the salvation of the soul. But in politics, Bhakti or hero-worship is a sure road to degradation and to eventual dictatorship."}

Institution building is thus a facet of constitutional morality. It envisages an institutional basis for political behaviour. It involves that the political parties and the political process address issues affecting the public at large. Constitutional morality reduces the gap between representation and legitimacy.} Justice Dipak Misra (as the learned Chief Justice then was) held in **Manoj Narula** v **Union of India**} that:

} Constituent Assembly Debates, Vol. 11 (25th November, 1949)
} Ibid
} Sujit Choudhry, Madhav Khosla and Pratap Bhanu Mehta, The Oxford Handbook of the Indian Constitution, Oxford University Press (2016), at page 12
} (2014) 9 SCC 1

> "The democratic values survive and become successful where the people at large and the persons-in-charge of the institution are strictly guided by the constitutional parameters without paving the path of deviancy and reflecting in action the primary concern to maintain institutional integrity and the requisite constitutional restraints".

It is only when political conflicts are regulated through negotiations and accommodation that the enforcement of constitutional principles can be achieved.

15 Constitutional morality requires filling in constitutional silences to enhance and complete the spirit of the Constitution. A Constitution can establish a structure of government, but how these structures work rests upon the fulcrum of constitutional values. Constitutional morality purports to stop the past from

tearing the soul of the nation apart by acting as a guiding basis to settle constitutional disputes:

> "Of necessity, constitutions are unfinished. What is explicit in the text rests on implicit understandings; what is stated rests on what is unstated."[}]

16 Constitutional morality provides a principled understanding for unfolding the work of governance. It is a compass to hold in troubled waters. It specifies norms for institutions to survive and an expectation of behaviour that will meet

} Martin Loughlin, "The Silences of Constitutions", International Journal of Constitutional Law (2019, In Press), available at https://www.jura.uni-freiburg.de/de/institute/rphil/freiburger_vortraege/silences-of-constitutions-m.-loughlin-manuskript.pdf

not just the text but the soul of the Constitution. Our expectations may be well ahead of reality. But a sense of constitutional morality, drawn from the values of that document, enables us to hold to account our institutions and those who preside over their destinies. Constitutional interpretation, therefore, must flow from constitutional morality.

C Constitutional Interpretation

17 The primary task before the Court here, as in other constitutional cases, is to interpret the Constitution. This reflects a truism. For, while deciding what the Constitution means, we must understand what it says. First and foremost, in understanding the text of the Constitution, it must be borne in mind that the Constitution is not merely a legal document. The Constitution embodies a political vision of a plural democratic polity. This political vision combines with the values which the founding fathers infused to provide a just social compact in which individual aspirations for dignity and liberty would be achieved. Hence, any interpretation of the Constitution must be unabashed in accepting the importance of the Constitution as a political document which incorporates a blue print for democratic governance. The values which the Constitution as a political document incorporates, provide the foundation for understanding its text. It is in that sense that successive generations of judges have reminded themselves that it is, after all, a Constitution that we are expounding. The words of the Constitution cannot be construed merely by alluding to what a dictionary of the language would explain. While its language is of relevance to

the content of its words, the text of the Constitution needs to be understood in the context of the history of the movement for political freedom. Constitutional history embodies events which predate the adoption of the Constitution. Constitutional history also incorporates our experiences in the unfolding of the Constitution over the past sixty eight years while confronting complex social and political problems. Words in a constitutional text have linkages with the provisions in which they appear. It is well to remember that each provision is linked to other segments of the document. It is only when they are placed in the wide canvas of constitutional values that a true understanding of the text can emerge. The principle that the text has to be deduced from context reflects the limitations in understanding the Constitution only as a legal document. To perceive the Constitution as a purely legal document would be an injustice to the aspirations of those who adopted it and a disservice to the experience of our society in grappling with its intractable problems. Justice HR Khanna in **Kesavananda Bharati** v **State of Kerala**[}] **("Kesavananda")** held thus:

> "A Constitution encompasses within itself the broad indications as to how the nation is to march forward in times to come. A Constitution cannot be regarded as a mere legal document... A Constitution must of necessity be the vehicle of the life of a nation. It has also to be borne in mind that a Constitution is not a gate but a road. Beneath the drafting of a Constitution is the awareness that things do not stand still but move on, that life of a progressive nation, as of an individual, is not static and stagnant but dynamic and dashful."

} AIR (1973) SC 1461

18 The second value which must be borne in mind is that the Constitution recognises the aspirations of popular sovereignty. As its Preamble tells us, the document was adopted by “We the People of India”. The Preamble sets forth at the outset the creation of a “sovereign... democratic, republic”. It is through the expression of the sovereignty of the people and on the cornerstone of a democratic and republican form of government that the Constitution seeks to achieve justice, liberty, equality and fraternity. The width of our constitutional aspirations finds abundant reflection in the plurality and diversity of the elements which it comprehends within justice, liberty, equality and fraternity. Justice incorporates its social, economic, and political manifestations. Liberty incorporates freedom of thought, expression, belief, faith and worship. Equality is defined in its substantive sense to include equality of status and opportunity. Fraternity seeks to assure dignity to the individual while, at the same time, ensuring the unity and integrity of the nation.

19 There are four abiding principles which are essential to understanding the content of the Constitution. The first is that as a political document, the Constitution is an expression of the sovereignty of the people. The second is that the Constitution seeks to achieve its vision of a political and social ordering on the basis of democracy. A democratic form of government recognises that sovereignty resides within the people. Popular sovereignty can exist when democracy is meaningful. The third principle is that the Constitution adopts a republican form of government in which the powers of sovereignty are vested in the people and are exercised directly or through

their elected representatives. The fourth, which is not the least in importance, is the secular ideology of the Constitution. For, it is on the foundation of a secular order that freedom, liberty, dignity and equality to every citizen is achieved.

20 These principles, it is well to remind ourselves, are not just political exhortations. They constitute the essence and substance of the Constitution and provide the foundation for the fine print of governance. It is through the expression of popular sovereignty that the Constitution has provided an assurance for the enforcement of equality and of equal protection of the law. The four founding principles constitute the means of achieving accountability and amenability to the rule of law. The democratic method of governing the country is a value which is intrinsic to the Constitution. Democracy as a way of life is also instrumental in achieving fundamental freedoms which the Constitution assures to each individual. Each of the four principles has an inseparable connect. They provide the basis on which the Constitution has distributed legislative and executive power between the Union and the states. They provide the foundation for ensuring basic human freedoms in the realisation of dignity, liberty and autonomy. They embody the architecture for the governance of the nation. In many respects, the complexity of our Constitution is a reflection of the intricate cultural and social structures within Indian society. The Constitution has attempted to bring about an equilibrium in which a diversity of tradition, plurality of opinion and variations of culture can

co-exist in one nation. To ignore the infinite variety which underlies our constitutional culture is to risk its cohesion. The integrity of the nation is founded on accepting and valuing co-existence. Constitutional doctrine must be evolved keeping in mind these principles.

21 Unlike many other constitutional texts in the democratic world, the Indian Constitution has lived through a multitude of amendments. In **Puttaswamy**[}], this Court had held:

> "The Constitution was drafted and adopted in a historical context. The vision of the founding fathers was enriched by the histories of suffering of those who suffered oppression and a violation of dignity both here and elsewhere. Yet, it would be difficult to dispute that many of the problems which contemporary societies face would not have been present to the minds of the most perspicacious draftsmen. No generation, including the present, can have a monopoly over solutions or the confidence in its ability to foresee the future."

The exercise of the amendatory power cannot be construed as a reflection of the deficiency of its original text, as much as it is a reflection of the felt need to create new institutions of governance, recognize new rights and to impose restraints upon the assertion of majoritarian power. Over time, the Constitution was amended to provide constitutional status to local self-governing bodies, such as the Panchayats in Part IX, the municipalities in Part IXA and co-operative societies in Part IXB. These structures of governance have been constitutionally entrenched to enhance participatory and representative democracy. In other amendments, new rights have been expressly recognized

} (2017) 10 SCC 1

such as the right to free and compulsory education for children between the ages of six and fourteen in Article 21A. As the nation gained sobering experiences about the excess of political power during the Emergency, the constituent power responded by introducing limitations (through the Forty Fourth Amendment) on the exercise of the emergency powers under Article 352 and by circumscribing the power to override elected governments in the states under Article 356.

22 The basic structure doctrine was evolved by judicial interpretation in **Kesavananda** to ensure that the fundamentals of constitutional governance are not effaced by the exercise of the constituent power to amend the Constitution. The postulate of the doctrine is that there are values which are so fundamental and intrinsic to the democratic way of life, a republican form of government and to the preservation of basic human freedoms, that these must lie outside the power of legislative majorities to override by the exercise of constituent powers. The doctrine was a warning to "a fledgling democracy of the perils of brute majoritarianism"[}]. The basic structure doctrine and the power of judicial review have ensured (in the course of the previous thirty four years) the preservation of basic constitutional safeguards and the continuance of constitutional institutions accountable to the sovereignty of the people. The basic structure doctrine imposes a restraint on the exercise of the constituent power. Equally, it is necessary to remember that the exercise of the

} Raju Ramchandran, "The Quest and the Questions", Outlook (25 August, 2014), available at https://www.outlookindia.com/magazine/story/the-quest-and-the-questions/291655

constituent power may in certain cases be regarded as enhancing the basic structure. The constituent power enhances the basic structure when it recognizes new sets of human freedoms, sets up new structures of representative governance in the constitutional text or imposes restraints on the power of the state to override popularly elected institutions. Secularism, which is inherent in the entire constitutional framework and flows from fundamental rights guaranteed in Part III, is a part of the basic structure of the Constitution.[}] Secularism is based on the foundations of constitutional morality and reflects the idea of our democracy. The insertion of the word “Secular” into the Preamble of the Constitution, by the 42nd amendment, did not redefine the Constitution’s identity. The amendment formally recognized the bedrock of the constitutional scheme. The amendment solidified the basic structure of the Constitution.

23 Democracy has been held, by a Constitution Bench of this Court in **Kihoto Hollohan** v **Zachillhu**[}], to be a part of the basic structure of our Constitution. The insertion of Article 239AA by the exercise of the constituent power is an instance of an amendment elevating a democratic form of governance to a constitutional status for the National Capital Territory. In interpreting such exercises of the constituent power which fortify the basic structure, the meaning of the constitutional text must be guided by the intent

} Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225; SR Bommai v. Union of India, (1994) 3 SCC 1
} 1992 SCC Supl. (2) 651

underlying such exercises of the constituent power. A nine-judge Bench of this Court in **I.R. Coelho** v **State of Tamil Nadu**[}] had held thus:

> "**The Constitution is a living document. The constitutional provisions have to be construed having regard to the march of time and the development of law. It is, therefore, necessary that while construing the doctrine of basic structure due regard be had to various decisions which led to expansion and development of the law.** The principle of constitutionalism is now a legal principle which requires control over the exercise of Governmental power to ensure that it does not destroy the democratic principles upon which it is based. These democratic principles include the protection of fundamental rights. The principle of constitutionalism advocates a check and balance model of the separation of powers, it requires a diffusion of powers, necessitating different independent centers of decision making. The principle of constitutionalism advocates a check and balance model of the separation of powers, it requires a diffusion of powers, necessitating different independent centers of decision making." (emphasis supplied)

It is in this background that it would be necessary to turn to the provisions of Part VIII of the Constitution.

D Part VIII of The Constitution: The Union Territories

24 Part VIII of the Indian Constitution, prior to 1956, dealt with Part C of the First Schedule. Part VIII was amended by the Seventh Amendment to the Constitution in 1956. Simultaneously, the First Schedule was amended by the Seventh Amendment (together with Article 1). In place of the Part A, B and C States, the Constitution now provides a division of the territory of the nation between the States and the Union Territories. While clause 1 of Article 1 stipulates that India is a Union of States, clause 2 incorporates the States and

} (2007) 2 SCC 1

the Union Territories of the First Schedule. The territory of India, as Clause 3 of Article 1 provides, comprises of :

(i) The territories of the States;
(ii) The Union territories; and
(iii) Territories which may be acquired.

25 Article 239 provides thus:

> "239. (1) Save as otherwise provided by Parliament by law, every Union territory shall be administered by the President acting, to such extent as he thinks fit, through an administrator to be appointed by him with such designation as he may specify.
>
> (2) Notwithstanding anything contained in Part VI, the President may appoint the Governor of a State as the administrator of an adjoining Union territory, and where a Governor is so appointed, he shall exercise his functions as such administrator independently of his Council of Ministers."

Clause 1 of Article 239 has several elements, which are significant to understanding its content:

(i) Clause 1, as its opening words indicate, is subject to Parliament providing "otherwise… by law";
(ii) Every Union territory is administered by the President;
(iii) Administration of a Union territory by the President is to such extent as the President "thinks fit";
(iv) Administration by the President is through the office of an Administrator; and
(v) The Administrator is appointed by the President with a designation as he will specify.

Article 239A, which was inserted by the fourteenth amendment to the Constitution in 1962, provides as follows:

> "239A. Creation of local Legislatures or Council of Ministers or both for certain Union territories.—
>
> (1) Parliament may by law create for the Union territory of Puducherry—
>
> (a) a body, whether elected or partly nominated and partly elected, to function as a Legislature for the Union territory, or
>
> (b) a Council of Ministers,
>
> or both with such constitution, powers and functions, in each case, as may be specified in the law.
>
> (2) Any such law as is referred to in clause (1) shall not be deemed to be an amendment of this Constitution for the purposes of article 368 notwithstanding that it contains any provision which amends or has the effect of amending this Constitution."

Article 239A applies to the Union territory of Puducherry (Goa, Daman and Diu were excluded with effect from 1987 by the Goa, Daman and Diu Reorganisation Act, 1987).

26 Article 239A is enabling. It enables Parliament to enact a law for the Union territory so as to create a legislature or a Council of Ministers or both. In creating a legislature, Parliament is left free to determine whether the legislative body should be entirely elected or should consist of a certain number of nominated legislators. Parliament, in its legislative power, may decide either to create a legislature or a Council of Ministers. Whether to do so, in the first place, is left to its discretion. Whether one or both of such bodies should be created is also left to the legislative authority of Parliament. If it decides to enact a law, Parliament is empowered to specify the constitutional powers and functions of the legislature and of the Council of

Ministers. While the Constitution provides an enabling provision, the setting up of a legislature, the creation of a Council of Ministers and the ambit of their authority are to be governed by an ordinary law to be enacted by Parliament. Such a law, clause 2 clarifies, would not constitute an amendment of the Constitution under Article 368 even if it were to contain provisions which amend or have the effect of amending the Constitution. Creating democratic institutions for governing Union territories under Article 239A was left to the legislative will of Parliament.

27 In contrast to the provisions of Article 239A is the text which the Constitution has laid down to govern Delhi. The marginal note to Article 239AA provides that the Article makes "special provisions with respect to Delhi". Article 239AA provides thus:

> "239AA. Special provisions with respect to Delhi.—
>
> (1) As from the date of commencement of the Constitution (Sixty-ninth Amendment) Act, 1991, the Union territory of Delhi shall be called the National Capital Territory of Delhi (hereafter in this Part referred to as the National Capital Territory) and the administrator thereof appointed under article 239 shall be designated as the Lieutenant Governor.
>
> (2) (a) There shall be a Legislative Assembly for the National Capital Territory and the seats in such Assembly shall be filled by members chosen by direct election from territorial constituencies in the National Capital Territory.
>
> (b) The total number of seats in the Legislative Assembly, the number of seats reserved for Scheduled Castes, the division of the National Capital Territory into territorial constituencies (including the basis for such division) and all other matters relating to the functioning of the Legislative Assembly shall be regulated by law made by Parliament.

(c) The provisions of articles 324 to 327 and 329 shall apply in relation to the National Capital Territory, the Legislative Assembly of the National Capital Territory and the members thereof as they apply, in relation to a State, the Legislative Assembly of a State and the members thereof respectively; and any reference in articles 326 and 329 to "appropriate Legislature" shall be deemed to be a reference to Parliament.

(3) (a) Subject to the provisions of this Constitution, the Legislative Assembly shall have power to make laws for the whole or any part of the National Capital Territory with respect to any of the matters enumerated in the State List or in the Concurrent List in so far as any such matter is applicable to Union territories except matters with respect to Entries 1, 2 and 18 of the State List and Entries 64, 65 and 66 of that List in so far as they relate to the said Entries 1, 2 and 18.

(b) Nothing in sub-clause (a) shall derogate from the powers of Parliament under this Constitution to make laws with respect to any matter for a Union territory or any part thereof.

(c) If any provision of a law made by the Legislative Assembly with respect to any matter is repugnant to any provision of a law made by Parliament with respect to that matter, whether passed before or after the law made by the Legislative Assembly, or of an earlier law, other than a law made by the Legislative Assembly, then, in either case, the law made by Parliament, or, as the case may be, such earlier law, shall prevail and the law made by the Legislative Assembly shall, to the extent of the repugnancy, be void : Provided that if any such law made by the Legislative Assembly has been reserved for the consideration of the President and has received his assent, such law shall prevail in the National Capital Territory :

Provided further that nothing in this sub-clause shall prevent Parliament from enacting at any time any law with respect to the same matter including a law adding to, amending, varying or repealing the law so made by the Legislative Assembly.

(4) There shall be a Council of Ministers consisting of not more than ten per cent. of the total number of members in the Legislative Assembly, with the Chief Minister at the head to aid and advise the Lieutenant Governor 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 : Provided that in the case of difference of opinion between the Lieutenant Governor and his Ministers on any matter, the Lieutenant Governor shall refer it to the President for decision and act according to the decision given thereon by the President and pending such decision it shall be competent for the Lieutenant Governor in any case where the matter, in his opinion, is so urgent that it is necessary for him to take immediate action, to take such action or to give such direction in the matter as he deems necessary.

(5) The Chief Minister shall be appointed by the President and other Ministers shall be appointed by the President on the advice of the Chief Minister and the Ministers shall hold office during the pleasure of the President.

(6) The Council of Ministers shall be collectively responsible to the Legislative Assembly.

(7) (a) Parliament may, by law, make provisions for giving effect to, or supplementing the provisions contained in the foregoing clauses and for all matters incidental or consequential thereto.

(b) Any such law as is referred to in sub-clause (a) shall not be deemed to be an amendment of this Constitution for the purposes of article 368 notwithstanding that it contains any provision which amends or has the effect of amending, this Constitution.

(8) The provisions of article 239B shall, so far as may be, apply in relation to the National Capital Territory, the Lieutenant Governor and the Legislative Assembly, as they apply in relation to the Union territory of Puducherry, the administrator and its Legislature, respectively; and any reference in that article to "clause (1) of article 239A" shall be deemed to be a reference to this article or article 239AB, as the case may be."

Article 239AA is a product of the exercise of the constituent power, tracing its origins to the sixty ninth amendment which was brought into force on 1 February 1992. Under clause 1, with the commencement of the Constitution (Sixty Ninth Amendment) Act 1991, the Union Territory of Delhi is called the National Capital Territory of Delhi. Its Administrator, who is appointed under

Article 239, is designated as the Lieutenant Governor. The administrator appointed by the President under Article 239(1) is designated as the Lieutenant Governor for the National Capital Territory. The source of the power to appoint the Lieutenant Governor is traceable to Article 239(1).

28 Clause 2 of Article 239AA contains a constitutional mandate that there shall be a legislative assembly for the NCT. This is unlike Article 239A which left it to the discretion of Parliament to create a legislature by enacting a law for the Union territories governed by that provision. Article 239AA imprints the legislative assembly for the NCT with a constitutional status. Its representative character is reflected in the mandate that the members of the legislative assembly shall be "chosen by direct election from territorial constituencies" in the NCT. The necessity of direct election underlines the rule of participatory democracy and of the members of the legislative assembly being representatives of the people residing in the territorial constituencies comprised in the NCT. Parliament has been assigned the role of regulating through a law, the number of seats in the legislative assembly, reservation for the scheduled castes, defining the division of the NCT into territorial constituencies and of elucidating the functioning of the assembly in all matters. The importance which the Constitution ascribes to the status of the legislative assembly is evinced by the adoption of the provisions of Articles 324 to 327 and 329 in relation to the NCT as they apply in the case of the legislative assembly of a state. These articles (which are contained in Part XV

of the Constitution) ascribe constitutional status to the Election Commission of India and assign to it the task of superintending, directing and controlling the conduct of all elections. Article 325 is a guarantee against discrimination based on religion, race, caste or sex. Article 326 embodies the principle of adult suffrage. Article 327 empowers Parliament to enact a law in regard to the elections to the legislatures. Article 329 imposes a restraint on interference by courts in electoral matters. The Constitution has considered the institutional existence of a legislative assembly for Delhi to be a matter of such importance as to be elevated to a constitutional requirement in clause 2 of Article 239AA and to warrant the guarantee of free and fair elections which is enforced through the constitutionally entrenched position of the Election Commission of India.

29 Clause 3 of Article 239 AA defines the legislative powers of the legislative assembly for the NCT. Sub clause (a) empowers the legislative assembly for the NCT to enact law with respect to any of the matters contained in the State or Concurrent lists to the Seventh Schedule of the Constitution. The ability of the legislative assembly is circumscribed “insofar as any such matter is applicable to Union territories”. The legislative assembly can hence enact legislation in regard to the entries in the State and Concurrent lists to the extent to which they apply to a Union territory. Of equal significance is the exception which has been carved out : Entries 1, 2 and 18 of the State List (and Entries 64, 65 and 66 insofar as they relate to Entries

1,2 and 18) lie outside the legislative powers of the legislative assembly of NCT. Entries 1, 2, and 18 of the State List are thus:

> "1. Public order (but not including the use of any naval, military or air force or any other armed force of the Union or of any other force subject to the control of the Union or of any contingent or unit thereof in aid of the civil power).
> 2. Police (including railway and village police) subject to the provisions of entry 2A of List I.
> 18. Land, this is to say, rights in o over land, land tenures including the relation of landlord and tenant, and the collection of rents; transfer and alienation of agricultural land; and improvement and agricultural loans; colonization."

The subjects of public order, police and land do not lie within the domain of the legislative assembly. Entries 64, 65 and 66 provide thus :

> "64. Offences against laws with respect to any of the matters in this List.
> 65. Jurisdiction and powers of all courts, except the Supreme Court, with respect to any of the matters in this List.
> 66. Fees in respect of any of the matters in this List, but not including fees taken in any court."

The legislative assembly is disabled from enacting laws governing the above entries (which deal with offences against laws referable to the State List, jurisdiction of courts and fees) insofar as they relate to public order, the police and land. This is a constitutional indication of the fact that the NCT has been considered to be of specific importance from the perspective of the nation to exclude three important areas which have a vital bearing on its status as a national Capital. Apart from the exclusions, the over-arching importance of the regulatory power of Parliament is underlined by the conferment upon Parliament of legislative power over State as well as Concurrent List subjects in the Seventh Schedule. Unlike state legislative assemblies which wield legislative power exclusively over the State List, under the provisions of Article

246(3), the legislative assembly for NCT does not possess exclusive legislative competence over State List subjects. By a constitutional fiction, as if it were, Parliament has legislative power over Concurrent as well as State List subjects in the Seventh Schedule. Sub clause (c) of clause 3 of Article 239AA contains a provision for repugnancy, similar to Article 254. A law enacted by the legislative assembly would be void to the extent of a repugnancy with a law enacted by Parliament unless it has received the assent of the President. Moreover, the assent of the President would not preclude Parliament from enacting legislation in future to override or modify the law enacted by the
legislative assembly. Hence, the provisions of clause 2 and clause 3 of Article 239AA indicate that while conferring a constitutional status upon the legislative assembly of NCT, the Constitution has circumscribed the ambit of its legislative
Powers firstly, by carving out certain subjects from its competence (vesting them in Parliament) and secondly, by enabling Parliament to enact law on matters falling both in the State and Concurrent lists. Moreover, in the subjects which have been assigned to it, the legislative authority of the Assembly is not exclusive and is subject to laws which are enacted by Parliament.

E Cabinet Form of Government

30 Before deliberating upon the nature and extent of the executive power of the NCT, it is necessary to discuss the essential features of the cabinet form of government, which are of paramount importance in the current context.

Collective Responsibility

31 Collective responsibility is a cornerstone of the Westminster model. Initially developed[1] as a constitutional convention in Britain between 1780 and 1832, it began to appear[2] in text-books in the 1860s and 1870s. In 1867, Walter Bagehot, in his classic work titled “The English Constitution”, called the “House of Commons” as “a real choosing body”, which decides the path that the nation

would follow.[3] The consequence of such a systemic expectation in the British Parliamentary system, Bagehot declared, was that the public can, “through Parliament, turn out an administration which is not doing as it likes, and can put in an administration which will do as it likes”[4]. The responsibility of Ministers was set as their liability “to have all their public acts discussed in Parliament”[5]. The Cabinet was defined as “a collective body bound together by a common responsibility”.[6] Later, Lord Salisbury formulated this common responsibility thus:

> “**[F]or all that passes in a Cabinet, each Member of it who does not resign is absolutely and irretrievably responsible,** and that he has no right afterwards to say that he agreed in one case to a compromise, while in another he was persuaded by one of his Colleagues... It is only on the principle that absolute responsibility is undertaken by every Member of a Cabinet who, after a decision is arrived at, remains a Member of it, that the joint responsibility of Ministers to Parliament can be upheld, and one of the most essential conditions of Parliamentary responsibility established.”[7] (Emphasis supplied)

[1] AH Birch, Representative and Responsible Government, George Allen & Unwin Ltd (1964), at page 131
[2] Ibid, at page 136
[3] Walter Bagehot, The English Constitution, 2nd Edition (1873), at page 118, available at https://socialsciences.mcmaster.ca/econ/ugcm/3ll3/bagehot/constitution.pdf
[4] Ibid, at page 34
[5] Edward A. Freeman, The Growth of the English Constitution (1872)
[6] Ibid
[7] HL Deb vol 239 cc 833-4, 8 April 1878

Ministers were liable to lose their offices, if they failed to retain the confidence of the House of Commons or the Parliament.

In the 1880s, Dicey, “Law of the Constitution”, propounded that:

> “[It] is now well-established law that the Crown can act only through Ministers and according to certain prescribed forms which absolutely require the co-operation of some Minister, such as a Secretary of State or the Lord Chancellor, who thereby becomes not only morally but legally responsible for the legality of the act in which he takes part. Hence, indirectly but surely, the action of every servant of the Crown, and therefore, in effect of the Crown itself, is brought under the supremacy of the land. Behind parliamentary responsibility lies legal liability, and the acts of Ministers no less than the acts of subordinate officials are made subject to the rule of law.”}

This fixed the responsibility of the Cabinet for the “general conduct of affairs”} of the government.

32 In the twentieth century, Sir Ivor Jennings conceptualized collective responsibility of a Cabinet Government, thus:

> “A Government that cannot make up its mind on a fundamental issue ought not to be the Government and will be so regarded in the constituencies. Its fall may be regarded as imminent.”}

The conduct of the cabinet determines the fate of the government.

} Ibid, at page 327
} Ibid, at page 420
} Ivor Jennings, Cabinet Government, Cambridge University Press (1959), 3rd Edition, at page 279

33 Collective responsibility of Ministers to the Parliament is comprehended in two aspects: (i) collective responsibility of Ministers for the policies of the government; and (ii) individual responsibility of Ministers for the work of their governments.[1] The idea behind this bifurcation, as explained by Birch, is to hold a government "continuously accountable for its actions, so that it always faces the possibility that a major mistake may result in a withdrawal of Parliamentary support."[2] In the British system, collective responsibility work on basis of certain precepts which define and regulate the existence of government. Geoffrey Marshall (1989) identifies three strands within the principle[3]:

i) *The confidence principle*: a government can only remain in office for so long as it retains the confidence of the House of Commons, a confidence which can be assumed unless and until proven otherwise by a confidence vote;
ii) *The unanimity principle*: all members of the government speak and vote together in Parliament, save in situations where the Prime Minister and the Cabinet themselves make an exception such as a free vote or an 'agreement to differ'; and
iii) *The confidentiality principle*: unanimity, as a universally applicable situation, is a constitutional fiction, but one which must be maintained, and is said to allow frank ministerial discussion within the Cabinet and the Government.

[1] AH Birch (Supra note 35), at page 131
[2] Ibid, at page 137
[3] G Marshall, Ministerial responsibility, Oxford University Press (1989), at pages 2-4

34 A study conducted by the London School of Economics and Political Science in 2007 examined the individual and collective performance of Ministers between 1945-1997. The findings of the study revealed that though the principle acted "as a form of protection for an individual Minister when policies pursued in his department are deemed to have failed", it also induced a cost for being a member of the government. All the Ministers of the government, as a consequence of the principle of solidarity, were perceived as jointly sharing the responsibility of policy failure.}

The doctrine of collective responsibility has evolved as one of the indispensable features of the parliamentary system of government and reflects the political engagement between government and Parliament. In a parliamentary democracy, the nuances of the doctrine are political.[1] To maintain the notion of "collegiality and coherence", the ministers work as a team. In the Australian context, **Wanna** (2012) postulates that collective responsibility thereby acts as an under-flowing current necessary for the survival of a government:

> "To survive as a government, ministries must show they can maintain the confidence of the house, put up a credible front to their political opponents and the media, and as a working ministry find ways to deal with the business of state, much of which will involve making collective decisions and imposing collegial executive authority."}

} Samuel Berlinski, Torun Dewan and Keith Dowding, "Individual and Collective Performance and the Tenure of British Ministers 1945-1997", London School of Economics & Political Science (February 2007), available at http://eprints.lse.ac.uk/19281/1/Individual_and_Collective_Performance_and_the_Tenure_of_British_Ministers_1945-1997.pdf

1 V Sudheesh Pai, "Is The River Rising Higher Than The Source? Nature Of Rules Business – Directory Or Mandatory?" Journal of Indian Law Institute (2011), at page 513

35 Granville Austin observes that the framers of India's Constitution conceived that the democratic values of the Constitution would be achieved in "the institutions of direct, responsible government"}. The members of the Constituent Assembly borrowed the Parliamentary–Cabinet form of government from British constitutional theory and adopted it into our Constitution.} Though the Constituent Assembly did not adopt British constitutional conventions in the written form, collective responsibility of the Cabinet was specifically incorporated into India's constitutional framework.}

There is a direct relationship between the principle of collective responsibility and government accountability. This relationship is conceptualized in "The Oxford Companion to Politics in India":

> "[A]ccountability can be defined in terms of outcomes rather than processes of government… It also includes the criterion of responsiveness to changes in circumstances that alter citizen needs and abilities… In other words, accountability refers to the extent to which actual policies and their implementation coincide with a normative ideal in terms of what they ought to be… In this broad sense, accountability amounts to evaluating the nature of governance itself, in outcome-oriented terms."}

} John Wanna, "Ministers as Ministries and the Logic of their Collective Action", in Keith Dowding & Chris Lewis (eds.), Ministerial Careers and Accountability in the Australian Commonwealth Government, ANU Press (2012), available at http://press-files.anu.edu.au/downloads/press/p191121/pdf/ch023.pdf

} Granville Austin (Supra note 3), at page 145

} Ibid, at page 166

} Ibid, at page 172

} Dilip Mookherjee, "Government Accountability" in Niraja Gopal Jayal and Pratap Bhanu Mehta (eds.), The Oxford Companion to Politics in India, Oxford University Press (2010), at page 477

The Oxford Handbook of the Indian Constitution[1] (2016) adverts to several facets of collective responsibility:

> "Collective responsibility has several facets. First, ministers act as a common unit; cabinet decisions are binding on all ministers. Disagreements, if any, may be aired in private. Ministers, however, speak in one voice and stand by one another in Parliament and in public. Those that cannot reconcile themselves with particular government policies, or are unwilling to defend them in public, must resign. Conversely, decisions of particular ministers, unless overruled, are decisions of the government."

The principle has also been considered as a political component which political parties in power invoke to maintain party discipline.[2]

Collective responsibility also exists in practice in situations where ministers have no knowledge of the actions taken by the subordinate officers of their respective departments:

> "Governing is a complex affair; hundreds of officials in dozens of departments make many decisions on a daily basis… These officials are also part of the executive, and ministers are responsible for those that serve in their departments… Ordinarily, ministers busy themselves with policy issues; matters of implementation are usually left to officials over whom ministers command little or no oversight. Yet, when they act, subordinates notionally do so on behalf of ministers. Ministers, therefore, cannot seek refuge in ignorance. Nor can they absolve themselves by pointing to their officers. Both inside and outside Parliament, they are accountable for their departmental shortcomings."[3]

36 Collective responsibility, as a principle and practice, has been given effect authoritatively in several judgments of this Court. The Constitution

[1] Shubhankar Dam, "Executive" in Sujit Choudhry, Madhav Khosla and Pratap Bhanu Mehta (eds.), The Oxford Handbook of the Indian Constitution, Oxford University Press (2016), at page 319

[2] Ibid

[3] Ibid, at page 320

Bench of this Court, in **Rai Sahib Ram Jawaya Kapur** v **The State of Punjab**[}], examined the functions of the executive. The Court held that the President is "a formal or constitutional head of the executive" and that the "real executive powers" are vested in the Ministers or the Cabinet:

> "Our Constitution, though federal in its structure, is modelled on the British Parliamentary system where the executive is deemed to have the primary responsibility for the formulation of governmental policy and its transmission into law though the condition precedent to the exercise of this responsibility is its retaining the confidence of the legislative branch of the State… In the Indian Constitution, therefore, we have the same system of parliamentary executive as in England and the council of Ministers consisting, as it does, of the members of the legislature is, like the British Cabinet, "a hyphen which joins, a buckle which fastens the legislative part of the State to the executive part". **The Cabinet enjoying, as it does, a majority in the legislature concentrates in itself the virtual control of both legislative and executive functions; and as the Ministers constituting the Cabinet are presumably agreed on fundamentals and act on the principle of collective responsibility, the most important questions of policy are all formulated by them."** (Emphasis supplied)

The relationship between the responsibility of the Cabinet and individual Ministers was dealt with in a Constitution Bench decision in **A Sanjeevi Naidu** v **State of Madras**[}]:

> "The cabinet is responsible, to the legislature for every action taken in any of the ministries. That is the essence of joint responsibility. That does not mean that each and every decision must be taken by the cabinet. The political responsibility of the Council of Ministers does not and cannot predicate the personal responsibility of the Ministers to discharge all or any of the governmental functions. Similarly an individual Minister is responsible to the legislature for every action taken or omitted to be taken in his ministry. This

} (1955) 2 SCR 225
} (1970) 1 SCC 443

> again is a political responsibility and not personal responsibility."

In **Samsher Singh** v **State of Punjab**[1], Chief Justice AN Ray (speaking for the majority) opined that Ministers must accept responsibility for every executive act:

> "In England, the sovereign never acts on his own responsibility. The power of the sovereign is conditioned by the practical rule that the Crown must find advisers to bear responsibility for his action. Those advisers must have the confidence of the House of Commons. This rule of English Constitutional law is incorporated in our Constitution. The Indian Constitution envisages a parliamentary and responsible form of Government at the Centre and in the States and not a Presidential form of Government. The powers of the Governor as the Constitutional head are not different."

A seven-judge Bench decision of this Court in **State of Karnataka** v **Union of India**[2] explained the substance of a government's collective responsibility. All the Ministers are treated as one entity. A government could stay in office only so long as it commands the support and confidence of a majority of the Members of the Legislature. The government is politically responsible for the decisions and policies of each of the Ministers and of his department. The sanction against any government action was held to be embodied in the principle of collective responsibility, which is enforced by the "pressure of public opinion" and expressed specifically in terms of withdrawal of political support:

[1] (1974) 2 SCC 831
[2] (1977) 4 SCC 608

> "The object of collective responsibility is to make the whole body of persons holding Ministerial office collectively, or, if one may so put it, "vicariously" responsible for such acts of the others is are referable to their collective volition so that, even if an individual may not be personally responsible for it, yet, he will be deemed to share the responsibility with those who may have actually committed some wrong."

The decision in **Common Cause, A Registered Society** v **Union of India**[1] delivered by a three-judge Bench held that the concept of collective responsibility is essentially a "political concept" and that the country is governed by the party in power on the basis of the policies endorsed by its Cabinet. The Court held that the concept of collective responsibility has two meanings:

> "The first meaning which can legitimately be ascribed to it is that all members of a Govt. are unanimous in support of its policies and would exhibit that unanimity on public occasions although while formulating the policies, they might have expressed a different view in the meeting of the Cabinet. The other meaning is that Ministers, who had an opportunity to speak for or against the policies in the Cabinet are thereby personally and morally responsible for its success and failure."

The decision in **Subramanian Swamy** v **Manmohan Singh**[2] theorises that collective responsibility may be enforced only politically, thereby making its legal implications unclear. In this case, a Minister was charged with committing grave irregularities in the grant of telecom licenses. The appellant had provided documents to the Prime Minister's Office (PMO) for the grant of

[1] (1999) 6 SCC 667
[2] (2012) 3 SCC 64

sanction to prosecute under the Prevention of Corruption Act, 1988. This Court held:

> "In our view, the officers in the PMO and the Ministry of Law and Justice, were duty bound to apprise Respondent No. 1 [Prime Minister] about seriousness of allegations made by the Appellant… By the very nature of the office held by him, Respondent No. 1 is not expected to personally look into the minute details of each and every case placed before him and has to depend on his advisers and other officers. Unfortunately, those who were expected to give proper advice to Respondent No. 1 and place full facts and legal position before him failed to do so. We have no doubt that if Respondent No. 1 had been apprised of the true factual and legal position regarding the representation made by the Appellant, he would have surely taken appropriate decision and would not have allowed the matter to linger for a period of more than one year."

The decision implied that "individual ministerial decisions… do not always generate collective legal responsibilities"}.

37 Collective responsibility represents a seminal principle for modern parliamentary democracies.} Collective responsibility of the Council of Ministers ensures accountability to the legislature and to the electorate. Collective responsibility governs the democratic process, as it makes a government liable for every act it does. It envisages that a government works effectively to ensure and fulfil the interests of the public. It purports to ensure transparency in government decisions. Collective responsibility rests on the foundations of constitutional morality, which reflects constitutional ethics.

} The Oxford Handbook of the Indian Constitution (Supra note 52), at page 320

} See also Amarinder Singh v Special Committee, Punjab Vidhan Sabha, (2010) 6 SCC 113; Krishna Kumar Singh v State of Bihar, (2017) 3 SCC 1; State of Himachal Pradesh v. Satpal Saini, 2017(2) SCALE 292

Aid and Advice

38 Collective responsibility under our Constitution is based on a "slightly modified version"[3] of the British cabinet system. There is a direct relationship between collective responsibility and the form of government envisaged by the Constitution. The President was designated as the titular head of government. The founding fathers and mothers of the Constitution adopted the convention which made the President generally bound by the advice of the Council of Ministers. This was explained by Dr B R Ambedkar, while introducing the Draft Constitution on 4th November 1948.

> "Under the Draft Constitution the President occupies the same position as the King under the English Constitution. He is the head of the State but not of the Executive. He represents the Nation but does not rule the Nation. He is the symbol of the nation. His place in the administration is that of a ceremonial device on a seal by which the nation's decisions are made known… **The President of the Indian Union will be generally bound by the advice of his Ministers. He can do nothing contrary to their advice nor can he do anything without their advice. The President of the United States can dismiss any Secretary at any time. The President of the Indian Union has no power to do so long as his Ministers command a majority in Parliament…**
>
> A democratic executive must satisfy two conditions - (1) It must be a stable executive and (2) it must be a responsible executive. Unfortunately it has not been possible so far to devise a system which can ensure both in equal degree…
>
> In England, where the Parliamentary system prevails, the assessment of responsibility of the Executive is both daily and periodic. The daily assessment is done by members of Parliament, through questions, Resolutions, No-confidence motions, Adjournment motions and Debates on Addresses… The daily assessment of responsibility which is not available under the American system is it is felt far more effective than the periodic assessment and far more necessary in a country

[3] Granville Austin (Supra note 3), at page 145

like India. **The Draft Constitution in recommending the Parliamentary system of Executive has preferred more responsibility to more stability.**"[1] (Emphasis supplied)

Shri Alladi Krishnaswami Ayyar agreed with Dr Ambedkar:

"…that the Council of Ministers shall be collectively responsible to the House of the People. If a President stands in the way of the Council of Ministers discharging that responsibility to the House he will be guilty of violation of the Constitution and he will be even liable to impeachment. Therefore **it is merely a euphemistic way of saying that the President shall be guided by the advice of his Ministers in the exercise of his functions. This Council of Ministers will be collectively responsible to the House of the People, and the House of the People must meet all situations in regard to the budget, in regard to legislation, in regard to every matter connected with the administration of the country. Therefore, if the Council of Ministers is to discharge their responsibility, it will be the duty of the President to see that the Constitution is obeyed**…"[2](Emphasis supplied)

As the Chairman of the Constituent Assembly, Dr Rajendra Prasad expected the convention to be developed into a healthy practice in independent India:

"We have had to reconcile the position of an elected President with an elected Legislature and, in doing so, we have adopted more or less the position of the British Monarch for the President… [H]is position is that of a Constitutional President.

Then we come to the Ministers. They are of course responsible to the Legislature and tender advice to the President who is bound to act according to that advice. Although there are no specific provisions, so far as I know, in the Constitution itself making it binding on the President to accept the advice of his Ministers, **it is hoped that the convention under which in England the King acts always on the advice of his Ministers will be established in this country also and, the President, not so much on account of the written word in the Constitution, but as the result**

[1] Constituent Assembly Debates, Vol. 7 (4th November 1948)
[2] Ibid

> **of this very healthy convention, will become a Constitutional President in all matters.**"[1] (Emphasis supplied)

The Constitution makers envisaged and adopted a limited role for the President as the nominal head of the Indian State and imposed sanctions on his or her constitutional authority by making them bound by the decisions of the Council of Ministers generally. A similar role was adopted for the Governor in the States.

39 After the Constitution had come into force, this Court gave judicial sanction to the convention. In **U.N.R. Rao** v **Smt. Indira Gandhi**[2], the Constitution Bench held:

> "It will be noticed that Article 74(1) is mandatory in form. We are unable to agree with the appellant that in the context the word "shall" should be read as "may". Article 52 is mandatory. In other words there shall be a President of India.... The Constituent Assembly did not choose the Presidential system of Government. If we were to give effect to this contention of the appellant we would be changing the whole concept of the Executive. It would mean that the President need not have a Prime Minister and Ministers to aid and advise in the exercise of his functions. As there would be no 'Council of Ministers' nobody would be responsible to the House of the People. With the aid of advisers he would be able to rule the country at least till he is impeached under Article 61… Article 74(1) is mandatory and, therefore, the President cannot exercise the executive power without the aid and advice of the Council of Ministers. We must then harmonise the provisions of Article 75(3) with Article 74(1) and Article 75(2). Article 75(3) brings into existence what is usually called "Responsible Government"."

[1] Constituent Assembly Debates, Vol. 11 (26th November, 1949)
[2] (1971) 2 SCC 63

In **Samsher Singh** v **State of Punjab**[}], while dealing with the question whether the Governor as the Constitutional or the formal head of the State can exercise powers and functions of appointment and removal of members of the subordinate judicial service personally, Chief Justice AN Ray delivered the majority judgment, holding that:

> "The President as well as the Governor is the constitutional or formal head. The President as well as the Governor exercises his powers and functions conferred on him by or under the Constitution on the aid and advice of his Council of Ministers, save in spheres where the Governor is required by or under the Constitution to exercise his functions in his discretion. Wherever the Constitution requires the satisfaction of the President or the Governor for the exercise by the President or the Governor of any power or function, the satisfaction required by the Constitution is not the personal satisfaction of the President or Governor but the satisfaction of the President or Governor in the Constitutional sense in the Cabinet system of Government, that is, satisfaction of his Council of Ministers on whose aid and advice the President or the Governor generally exercise all his powers and functions. The decision of any Minister or officer under rules of business made under any of these two Articles 77(3) and 166(3) is the decision of the President or the Governor respectively. These articles did not provide for any delegation. Therefore, the decision of Minister or officer under the rules of business is the decision of the President or the Governor."

The Court summed up the position of law as follows:

> "[W]e hold that the President or the Governor acts on the aid and advice of the Council of Ministers with the Prime Minister at the head in the case of the Union and the Chief Minister at the head in the case of State in all matters which vests in the executive whether those functions are executive or legislative in character. Neither the President nor the Governor is to exercise the executive functions personally… Where the Governor has any discretion the Governor acts on his own judgment. The Governor exercises his discretion in harmony with his Council of Ministers."

} (1974) 2 SCC 831

Justice Krishna Iyer, on behalf of himself and Justice PN Bhagwati, delivered a concurring opinion.

40 The convention that the President shall be bound by the aid and advice tendered by the Council of Ministers was explicitly made a part of the Constitution by the forty-second constitutional amendment. By the amendment, Article 74(1) was amended to ensure that the President shall, in the exercise of his functions, act in accordance with the advice tendered by the Council of Ministers. Article 74(1) reads thus:

> "There shall be a Council of Ministers with the Prime Minister at the head to aid and advise the President who shall, in the exercise of his functions, act in accordance with such advice."

The Forty-fourth Constitution Amendment added another proviso to Article 74 (1) so that the "President may require the Council of Ministers to reconsider such advice, either generally or otherwise, and the President shall act in accordance with the advice tendered after such reconsideration". Therefore, the position which emerges is that where it has not been expressly provided, the executive head shall be bound by the advice tendered by the Council of Ministers. This constitutional scheme, after the forty-second and forty-fourth amendments, has been judicially reaffirmed. Authoring the judgment of the Constitution Bench in **PU Myllai Hlychho** v **State of Mizoram**[}], Justice KG Balakrishnan (as he then was) held that the "satisfaction" of the Governor

} (2005) 2 SCC 92

required by the Constitution for the exercise of any power or function is not the personal satisfaction of the Governor but a satisfaction in the constitutional sense under the Cabinet system of Government, i.e. on the aid and advice of the Council of Ministers.

Justice Madan B Lokur, while delivering the concurring opinion in the five-judge Constitution Bench decision in **Nabam Rebia and Bamang Felix** v **Deputy Speaker, Arunachal Pradesh Legislative Assembly**[}], opined that the absence of the expression "his individual judgment" makes it apparent that the Governor would always be bound by the aid and advice of the Council of Ministers, except in matters where he/she is permitted under the Constitution to act "in his discretion".

41 Collective responsibility and aid and advice are mutually reinforcing principles. Each of them and both in conjunction affirm and enhance the democratic values on which the Cabinet form of government is founded. Collective responsibility ensures that government speaks as one political entity which owes allegiance to the elected representatives of the people. By ensuring that government is responsible in its decision making to the legislature, the principle of collective responsibility fosters a responsive and accountable government. Modern government, with its attendant complexities, comprises of several components and constituent elements. They include Ministers who are also elected as members of the legislature and unelected

} (2016) 8 SCC 1

public officials who work on issues of daily governance. Discussion and dialogue are accepting of dissent. In a system of constitutional governance, collective decision making must allow room for differences. A synthesis can emerge in government, when political maturity and administrative wisdom combine in arriving at acceptable solutions to the problems of governance. Collective responsibility allows for and acknowledges differences in perception and ideology. Yet, what the doctrine does is to place a decision taken by a constituent part of the government as a decision of the government. All Ministers are bound by a decision taken by one of them or their departments. In terms of its accountability to the legislature, government is treated as one decision making unit so that the politics of decision making and administrative divergences do not dilute from the responsibility which government owes as a political unit to the legislature. This is crucial to ensuring that government is responsive to the aspirations of the people in whom political sovereignty resides.

42 In **Kihoto Hollohan** v **Zachillhu**[}], Chief Justice Venkatachaliah speaking for this Court had held thus:

> "Parliamentary democracy envisages that matters involving implementation of policies of the Government should be discussed by the elected representatives of the people. Debate, discussion and persuasion are, therefore, the means and essence of the democratic process. During the debates the Members put forward different points of view. Members belonging to the same political party may also have, and may give expression to, differences of opinion on a matter. Not often the view expressed by the Members in the House have

} 1992 SCC Supp. (2) 651

> resulted in substantial modification, and even the withdrawal, of the proposals under consideration. Debate and expression of different points of view, thus, serve an essential and healthy purpose in the functioning of Parliamentary democracy."

43 The doctrine of aid and advice enhances the commitment to the same democratic values which form the basis of collective responsibility. The mandate that a titular head of government must act on the aid and advice of the Council of Ministers ensures that the form of democratic governance (decision making in the name of a titular head) is subservient to its substance, which

mandates that the real authority to take decisions must reside in the elected arm of the government. The doctrine of aid and advice enhances accountability and responsive government – besides representative government – by ensuring that the real authority to take decisions resides in the Council of Ministers, which owes ultimate responsibility to the people, through a legislature to whom the Council is responsible. Collective responsibility and the aid and advice doctrine must not be construed as disjunctive but together constitute integral parts of the discourse in ensuring the strength of and commitment to democracy.

F The Nature of Executive Power

44 While the legislative power in relation to the NCT is defined in clauses 2 and 3, its executive power forms the subject matter of clause 4 of Article

239AA. Clause 4 institutionalises the position of the Council of Ministers with a Chief Minister as its head. The constitutional role which is ascribed to the Council of Ministers is to aid and advise the Lieutenant Governor “in the exercise of his functions in relation to matters with respect to which the legislative assembly has power to make laws”. There are three salient features of the executive power which is vested in the Council of Ministers. Firstly, the executive power is co-extensive with the legislative power of the legislative assembly. The executive power extends to all subjects upon which the assembly can legislate. The executive power of the Council of Ministers does not extend to matters on which the legislative assembly cannot legislate. What is beyond the legislative competence of the Assembly is *ultra vires* the executive powers of the Council of Ministers. Secondly, the delineation of the executive power in clause 4 defines, at the same time, the relationship between the Council of Ministers (headed by the Chief Minister) and the Lieutenant Governor. The Council of Ministers aids and advises the Lieutenant Governor; the corollary being that the Lieutenant Governor has to act on the basis of the aid and advise tendered by the Council. Thirdly, the exception to the aid and advice principle in the substantive part of clause 4 is in respect of those matters in which the Lieutenant Governor is required to act in its discretion “by or under any law”. In other words, save and except in regard to areas which are reserved for the exercise of his discretion, the Lieutenant Governor must act on the aid and advice tendered to him by the Council of Ministers.

45 The proviso to clause 4 forms the bone of contention. The proviso envisages a situation where the Lieutenant Governor has a difference of opinion with the Council of Ministers “on any matter”. In such a case, the proviso entails the course of action which the Lieutenant Governor must follow. The Lieutenant Governor is under a constitutional mandate to refer the difference of opinion to the President for decision. As a consequence, the Lieutenant Governor must necessarily act according to the decision “given thereon” by the President. Pending a decision by the President, the Lieutenant Governor is empowered to take action or to issue directions where the matter is of such an emergent nature as to require immediate action. The heart of the matter turns upon interpreting the expression “difference of opinion” and the words “on any matter”. Clause 4 does not specify what kind of a difference of opinion would warrant a reference to the President. Nor for that matter, does it explain the nature of the matter on which a difference of opinion is contemplated. Before we interpret the ambit of the proviso to clause 4, one facet is clear. Where a difference of opinion has arisen, warranting a reference to the President, the proviso leaves the course of action to be followed by the Lieutenant Governor beyond doubt. In a situation where the conditions under the proviso exist, the Lieutenant Governor has to refer the matter to the President and must abide by the decision of the President. Reading the substantive part of clause 4 and the proviso, it is thus evident that the Lieutenant Governor has two courses of action to follow. Primarily, under the substantive part of clause 4, the Lieutenant Governor is bound by the aid and

advice of the Council of Ministers (the only exception being where under a provision of law, he has to act according to his own discretion). However, the embargo upon the Lieutenant Governor acting otherwise than on the aid and advice of the Council of Ministers is lifted only to enable him to refer a difference of opinion on any matter for a decision by the President. In other words, the Lieutenant Governor must either abide by the aid and advice tendered by the Council of Ministers or, in the event of a difference of opinion, reserve it for a decision by the President and thereupon be bound to act in accordance with the decision which has been rendered by the President. Pending the decision by the President, the proviso enables the Lieutenant Governor to attend to a situation requiring immediate action.

46 Before elucidating the nature and ambit of the relationship between the (i) Council of Ministers and the Lieutenant Governor; and (ii) the Lieutenant Governor and the President, it would be necessary to advert to some of the other provisions of Article 239AA which have a bearing on those relationships. The Lieutenant Governor, as we have noted earlier, is appointed by the President under Article 239(1) read with Article 239AA(1). The Chief Minister is appointed by the President, while the other ministers are appointed by the President on the advice of the Chief Minister. They hold office during the pleasure of the President (clause 5). The concept of collective responsibility of the Council of Ministers to the legislative assembly is expressly embodied in clause 6. A comparative analysis of the provisions of the Constitution relating to the Council of Ministers in the Union and the States indicates that in the case of the NCT, Article 239AA has engrafted the fundamental precept of the

collective responsibility of an elected government in a cabinet form of government to the elected legislature. Creating an executive power in government which is co-extensive with the legislative power of the elected legislature and the collective responsibility of the Council of Ministers to the legislature are intrinsic to the cabinet form of government.

47 Parliament has, by clause 7 of Article 239AA, been empowered to make provisions to implement and to supplement the other provisions of that Article. Any law enacted by Parliament to do so would not amount to a constitutional amendment within the meaning of Article 368 even if it amends or has the effect of amending any provision of the Constitution.

48 Article 239AB enunciates the course of action which the President is empowered to follow where there has been a failure of constitutional machinery in the NCT. Article 239AB provides as follows:

> "239AB. Provision in case of failure of constitutional machinery.—If the President, on receipt of a report from the Lieutenant Governor or otherwise, is satisfied—
>
> (a) that a situation has arisen in which the administration of the National Capital Territory cannot be carried on in accordance with the provisions of article 239AA or of any law made in pursuance of that article; or
>
> (b) that for the proper administration of the National Capital Territory it is necessary or expedient so to do, the President may by order suspend the operation of any provision of article 239AA or of all or any of the provisions of any law made in pursuance of that article for such period and subject to such conditions as may be specified in such law and make such incidental and consequential provisions as may appear to him to be necessary or expedient for administering the National Capital Territory in accordance with the provisions of article 239 and article 239AA."

Under Article 239AB, the President is empowered to suspend the operation of (i) any provision of Article 239AA; and of (ii) any provisions of law made in pursuance of that Article and to make provisions to administer the NCT, in accordance with Articles 239 and 239AA where, upon a report from the Lieutenant Governor, the President is satisfied that: (a) A situation has arisen where the administration of the NCT cannot be carried on in accordance with Article 239AA or a law made in pursuance of it; or (b) For the proper administration of the NCT.

Article 239B as already noted confers power upon the administrator of Puducherry to promulgate ordinances during the recess of the legislature. This power is also conferred upon the Lieutenant Governor of the NCT by clause 8 of Article 239AA. Under Article 241, Parliament is empowered to constitute a High Court for a Union territory.

49 In understanding the nature of the executive power in relation to the NCT of Delhi and the relationship between the Council of Ministers and the Lieutenant Governor on one hand, and the Lieutenant Governor and the President on the other, it is necessary to draw a comparison with the provisions of the Constitution governing the Union and the States. Part V of the Constitution (consisting of Articles 52 to 151) deals with the Union; Part VI (comprising of Articles 152 to 237) deals with the States and Part VIII (comprising of Articles 239 to 241) deals with the Union territories. Parts V and VI contain similar elucidations with some important variations. Both Part V and

Part VI deal with the executive, the legislative power of the President, and the judiciary. Part V covers the Union judiciary, while Part VI cover the High Courts and the subordinate courts in the States.

50 Article 52 provides for the President. Article 53 stipulates that the executive power of the Union shall be vested in the President and shall be exercised by him directly or through subordinate officers in accordance with the Constitution. Under Article 73, the executive power of the Union extends (a) to matters with respect to which Parliament has power to make laws; and (b) to the exercise of rights, authority and jurisdiction exercisable by the Union government under a treaty or agreement. Article 73 provides thus:

> "73. Extent of executive power of the Union.—
>
> (1) Subject to the provisions of this Constitution, the executive power of the Union shall extend—
>
> (a) to the matters with respect to which Parliament has power to make laws; and
>
> (b) to the exercise of such rights, authority and jurisdiction as are exercisable by the Government of India by virtue of any treaty or agreement:
>
> Provided that the executive power referred to in sub-clause (a) shall not, save as expressly provided in this Constitution or in any law made by Parliament, extend in any State to matters with respect to which the Legislature of the State has also power to make laws.
>
> (2) Until otherwise provided by Parliament, a State and any officer or authority of a State may, notwithstanding anything in this article, continue to exercise in matters with respect to which Parliament has power to make laws for that State such executive power or functions as the State or officer or authority thereof could exercise immediately before the commencement of this Constitution."

The proviso to Article 73(1) stipulates that except as may be expressly provided by Constitution or in any law which has been enacted by Parliament, the executive power of the Union under sub clause (a) of clause 1 does not extend in a State to matters with respect to which the legislature of the State has *also* power to make laws. The effect of the proviso is that the executive power of the Union does not extend to matters in the Concurrent List, since these are matters on which State legislatures *also* have the power to make laws. Article 74(1) provides for a Council of Ministers with the Prime Minister as the head. The function of the Council of Ministers is "to aid and advice the President". The President is, in the exercise of his functions, under a mandate to "act in accordance with such advice". Article 74 provides as follows:

> "74. Council of Ministers to aid and advise President.—
>
> (1) There shall be a Council of Ministers with the Prime Minister at the head to aid and advise the President who shall, in the exercise of his functions, act in accordance with such advice: Provided that the President may require the Council of Ministers to reconsider such advice, either generally or otherwise, and the President shall act in accordance with the advice tendered after such reconsideration.
>
> (2) The question whether any, and if so what, advice was tendered by Ministers to the President shall not be inquired into in any court."

Article 77 provides for the conduct of the business of the Union government:

> "77. Conduct of business of the Government of India.—
>
> (1) All executive action of the Government of India shall be expressed to be taken in the name of the President.

(2) Orders and other instruments made and executed in the name of the President shall be authenticated in such manner as may be specified in rules to be made by the President, and the validity of an order or instrument which is so authenticated shall not be called in question on the ground that it is not an order or instrument made or executed by the President.

(3) The President shall make rules for the more convenient transaction of the business of the Government of India, and for the allocation among Ministers of the said business."

By and under Article 77(1) the executive action of the Union government is expressed to be taken in the name of the President. Under clause 2, orders and instruments made and executed in the name of the President are to be authenticated in such a manner as may be specified in the rules made by the President. Clause 3 enables the President to make rules for the transaction of the business of the government and for the allocation of governmental business among ministers. Article 78 embodies the basic duty of the head of the elected government in a Cabinet form of government to communicate with and to furnish information to the President. Article 78 provides as follows :

"78. Duties of Prime Minister as respects the furnishing of information to the President, etc.—

It shall be the duty of the Prime Minister—

(a) to communicate to the President all decisions of the Council of Ministers relating to the administration of the affairs of the Union and proposals for legislation;

(b) to furnish such information relating to the administration of the affairs of the Union and proposals for legislation as the President may call for; and

(c) if the President so requires, to submit for the consideration of the Council of Ministers any matter on which a decision has been taken by a Minister but which has not been considered by the Council."

These provisions of the Constitution institutionalise the relationship between the President and the Union Cabinet and re-affirm the position of the President as the titular head of state. The President must act on the aid and advise tendered by the Union Cabinet. The executive power of the Union is co-extensive with the legislative power of Parliament. In a cabinet form of government, it is the Council of Ministers which owes collective responsibility to the House of the People. Collective responsibility, as a constitutional doctrine, ensures accountability to the sovereign will of the people who elect the members of the legislature. Though all executive action is expressed to be taken in the name of the President and orders and instruments made and executed in the name of the President are authenticated in the manner prescribed by rules, the constitutional position of the President is of a titular head. The use of the expression “in the exercise of his functions” in Article 74(1) is formalistic in nature since the substance of executive power is vested in and conferred upon the government constituted through the Council of Ministers which owes collective responsibility to Parliament. The proviso to Article 74(1) stipulates that while the President may require the Council of Ministers to reconsider his advice, once that has been done, the President is bound to act on the advice tendered after reconsideration.

51 The position of the President as a titular head of State is evidenced in the constitutional provisions which define the relationship between the President and Parliament. Under Article 111, a Bill is presented to the

President for assent upon being passed by the Houses of Parliament. Under the proviso to Article 111, the President is empowered to return a Bill for reconsideration (if it is not a Money Bill). Upon being reconsidered, if the Bill is passed again by the Houses of Parliament (with or without amendment) the President shall, thereafter, not withhold assent.

52 In Part VI of the Constitution, the provisions which define the role of the Governor in relation to the states indicate that the Governor is also a titular head of government in each state. The executive power of the State is vested in the Governor under Article 154. The Governor is appointed by the President under Article 155 and holds office during the pleasure of the President under Article 156. The executive power of the state is co-extensive with the legislative power, by virtue of Article 162. However, in relation to matters on which both the legislature of a State and Parliament can enact law, the executive power of the state is subject to and limited by the conferment of executive power upon the Union by the Constitution or by a law enacted by Parliament. In the States, Article 163 postulates a Council of Ministers with the Chief Ministers as its head to aid and advice the Governor in the exercise of his functions, except where the Governor is under the Constitution required to exercise any of the functions in his own discretion. Where a question arises as to whether the Governor is required to act in his discretion, Article 163(2) makes the decision of the Governor final. While the Chief Minister is appointed by the Governor under Article 164, other ministers are appointed by the

Governor on the advice of the Chief Minister and hold office during the pleasure of the Governor. Article 164(2) incorporates the principle of collective responsibility of the Council of Ministers to the legislative assembly of the State. Article 166 contains a provision dealing with the conduct of the business of the government of the State which is *pari materia* with Article 77. Similarly, Article 167 incorporates the duty of the Chief Minister to communicate with and to furnish information on the affairs of the state to the Governor, in terms similar to Article 78.

53 While assessing the status of the National Capital Territory under Article 239AA, certain significant aspects need to be borne in mind:

(i) Article 239AA is a result of the exercise of the constituent power under Article 368 of the Constitution. By and as a result of Article 239AA, special provisions have been made for the National Capital Territory of Delhi. These provisions are not an emanation of an act of ordinary legislation;

(ii) For the NCT of Delhi, the exercise of the constituent power has resulted in a constitutionally entrenched status both for the legislature and for the Council of Ministers. The legislative assembly is elected by the process of direct election. The legislative assembly has the power to enact law in respect of matters in the State List of the Seventh Schedule (save for the excepted matters in Entries 1, 2 and 18 and Entries 64, 65 and 66 insofar as they relate to entries 1, 2 and 18). Yet, while the legislative

powers which have been conferred on the legislative assembly extend to the State List (save for the excepted entries) and the Concurrent List, Parliament has been empowered to legislate both on matters falling within the State and the Concurrent lists. Parliament possesses overriding legislative powers over matters falling in both the State and Concurrent lists for the NCT; and

(iii) Article 239AA(4) provides constitutional status to the Council of Ministers and embodies the entrenched principle in a cabinet form of government that a titular head of state acts on the aid and advice tendered by his ministers, who owe collective responsibility to the legislature. In setting up a structure of governance in which there is a legislature elected through the process of direct election and an executive arm which is collectively responsible to the legislature and which, in the discharge of its functions, tenders aid and advise to Lieutenant Governor on matters which are co-extensive with legislative power, the Constitution has incorporated the basic principles of the cabinet form of government. The adoption of these special features of the cabinet form of government in relation to the NCT must weigh while interpreting Article 239AA.

54 At the same time, 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. They include the following :

(a) The position of the National Capital Territory is subsumed under Part VIII which applies to Union territories. Delhi is and continues to be a Union territory governed by Part VIII;

(b) Every Union territory is, under Article 239(1), administered by the President acting through an Administrator. The Administrator appointed under Article 239(1) is designated as the Lieutenant Governor for the NCT under Article 239AA(1). Article 239 is the source of the constitutional power to appoint the Lieutenant Governor for the NCT;

(c) The position that the application of Article 239 is not excluded in relation to the NCT is made evident by Article 239AB. In a situation in which the President is empowered to suspend the provisions of Article 239AA, where the administration of the NCT cannot be carried on in accordance with Article 239AA, or of any law made in pursuance of that Article, the President is empowered to make consequential provisions for administering the territory in accordance with Article 239 as well as Article 239AA. Hence, the provisions of Article 239AA cannot be read disjunctive from Article 239(1);

(d) The administration of a Union territory by the President acting through an Administrator is firstly subject to Parliamentary law and secondly, to such extent as he thinks fit. Hence the nature of

the administration of a Union territory, including NCT is subject to these two provisions;

(e) The position of the NCT as distinguished with the constitutional position of a State finds expression in the contrast between Article 239AB and Article 356 on the other. Upon the exercise of the power under Article 356, the President “can assume to himself” the functions of the government of the State and declare that the powers of the legislature of the State shall be exercisable by or under the authority of Parliament. In contrast, Section 239AB empowers the President to suspend the operation of Article 239AA or of any provision of law made under it and to thereupon make consequential provisions for the administration of the NCT in accordance with Articles 239 and 239AA; and

(f) While emphasising the binding character of the aid and advise tendered to the President, or as the case may be, the Governor, the constitutional position in relation to the Lieutenant Governor contains a distinct variation. Article 74(1) embodies, in relation to the President of India, the binding character of the aid and advice tendered by the Council of Ministers by specifying that the President shall, in the exercise of his functions, act in accordance with such advice. Upon the President requiring the Council of Ministers to reconsider their advice, the President is bound to act upon the advice which is tendered after reconsideration. Similarly,

in the case of Governors in the states, Article 163(1) provides for a Council of Ministers “to aid and advise the Governor in the exercise of his functions”, except where the Governor is required by the Constitution to exercise his functions in his discretion. Article 239AA(4) incorporates in its substantive segment the constitutional principle of aid and advice which the Council of Ministers tenders to the Lieutenant Governor in the exercise of his functions. But, in relation to the advice tendered by the Council of Ministers, the proviso to Article 239AA(4) has engrafted a special provision which does not have a corollary in Article 163. While under Article 163(1), the Governor is required to act upon the aid and advice tendered (save in matters which the Constitution entrusts to the discretion of the Governor), the proviso to Article 239AA(4) contemplates an area where the binding character of the aid and advice tendered to the Lieutenant Governor is lifted in the event of a “difference of opinion.. on any matter”.

55 In resolving the area within which the Lieutenant Governor can refer the difference of opinion with the Council of Ministers of the NCT to the President, it would be necessary to balance on the one hand the constitutional principles of the cabinet form of government adopted in Article 239AA, while on the other hand leaving open the latitude, which has been created by the proviso to clause 4 considering the special status of the NCT. The former consideration

would need the court to pursue a line of interpretation which does not detract from the fundamental principles of representative government. An elected government reflects in a democracy, the aspirations of the people who vote to elect their representatives. The elected representatives carry the responsibility of giving expression to the political will of the electorate. In a democratic form of government, real power must subsist in the elected arms of the State. Ministers of government are elected representatives of the people. They are accountable to the people through their collective responsibility to the legislature. As a collective entity, the Council of Ministers owes responsibility to the legislature. The relationship between the Council of Ministers and the titular head of State is governed by the over-arching consideration that real power and substantive accountability is vested in the elected representatives of the people. The principle of aid and advice is in a constitutional sense intended to strengthen the constitutional value of representative government and of governance which is accountable and responsive to the electorate. While bearing these fundamental constitutional principles of a democracy in mind, a balance has to be struck with the second of the above elements which recognises the special status of the NCT. The NCT represents the aspirations of the residents of its territory. But it embodies, in its character as a capital city the political symbolism underlying national governance. The circumstances pertaining to the governance of the NCT may have a direct and immediate impact upon the collective welfare of the nation. This is the rationale for the exclusion of the subjects of public order, police and land from

the legislative power and necessarily from the executive power of the NCT. These considerations would necessarily require a careful balance between the two principles. Each of the two principles must be given adequate weight in producing a result which promotes the basic constitutional values of participatory democracy, while at the same time preserving fundamental concerns in the secure governance of the nation.

G Constitutional History of the NCT

56 Mr Gopal Subramanium, learned Senior Counsel, appearing on behalf of the NCT, has submitted that the NCT occupies a unique position in our constitutional jurisprudence. It has been contended by Mr Subramanium that the NCT, though it remains a Union Territory, has come to acquire various characteristics that were, prior to the 69th constitutional amendment, considered under the Constitution to be characteristics solely of States. As a consequence, the learned Senior Counsel has further contended, NCT has become a constitutional hybrid with powers that were formerly only found in full-fledged States of the Union and therefore enjoys far more powers than the government of any other Union Territory. On the contrary, Mr Maninder Singh, the learned Additional Solicitor General has submitted that the NCT finds its place as a Union Territory in Part II of Schedule I of the Constitution. It has been contended on his behalf that the NCT has historically remained a centrally administered territory with the status of a Union Territory in the Constitution and that it continues to remain a Union Territory even after the 69th constitutional amendment.

57 In order to interpret the constitutional scheme envisaged for the NCT, this Court must analyze the constitutional history and the evolution of the structure of governance for the NCT as brought into existence, by various enactments, from time to time.

The Government of Part C States Act, 1951

58 The first Schedule to the Constitution originally contained Part A, Part B and Part C States. After the adoption of the Constitution, The Government of Part C States Act, 1951 was enacted. Section 2(c) defined the expression Delhi thus:

> "Section 2(c) "Delhi", except where it occurs in the expression "State of Delhi", means such area in the State of Delhi as the Central Government may by notification in the Official Gazette specify."

Section 3 provided for the constitution of a legislative assembly for each state governed by the law. It provided for the establishment of legislative assemblies for the states of Ajmer, Bhopal, Coorg, Delhi, Himachal Pradesh and Vindhya Pradesh. The Chief Commissioner was entrusted with the power, under Section 8(2), to prorogue and dissolve the assembly. Section 12 conferred upon the Chief Commissioner the right to address and send messages to the assembly. Section 21 of the Act defined the extent of legislative power:

> "Section 21- Extent of legislative power

"(1) Subject to the provisions of this Act, the Legislative Assembly of a State may make laws for the whole or any part of the State with respect to any of the matters enumerated in the State List or in the Concurrent List:

Provided that the Legislative Assembly of the State of Delhi shall not have power to make laws with respect to any of the following matters, namely:-

(a) Public order;

(b) Police including railway police;

(c) The constitution and powers of municipal corporations and other local authorities, of improvement trusts and of water supply, drainage, electricity, transport and other public utility authorities in Delhi or in New Delhi;

(d) Lands and buildings vested in or in the possession of the Union which are situated in Delhi or in New Delhi including all rights in or over such lands and buildings, the collection of rents therefrom and the transfer and alienation thereof;

(e) Offences against laws with respect to any of the matters mentioned in the foregoing clauses; (f) Jurisdiction and powers of all courts, with respect to any of the said matters; and

(g) Fees in respect of any of the said matters other than fees taken in any court."

However, sub Section 2 of Section 21 provided that sub section 1 will not derogate from the power conferred upon Parliament by the Constitution to make laws with respect to any matter for a state. The sanction of the Chief Commissioner was required under Section 23 for certain legislative proposals, these being:

"(a) Constitution and organisation of the court of the Judicial Commissioner;

(b)Jurisdiction and powers of the court of the Judicial Commissioner with respect to any of the matters in the State List or in the Concurrent List;

(c) State Public Service Commission."

59 A Bill passed by the legislative assembly was, under Section 26, required to be presented to the Chief Commissioner. The Chief Commissioner in turn was obligated to reserve the Bill for consideration of the President. If the President directed the Chief Commissioner to submit the Bill to the Assembly for reconsideration, the Assembly was required to consider the suggestions and, if the Bill was passed, it had to be presented again to the President for reconsideration.

60 Section 36 provided for a Council of Ministers:

"Council of Ministers

(1) There shall be a Council of Ministers in each State with the Chief Minister at the head to aid and advise the Chief Commissioner in the exercise of his functions in relation to matters, with respect to which the Legislative Assembly of the State has power to make law except in so far as he is required by any law to exercise any judicial or quasi-judicial functions:

Provided that, in case of difference of opinion between the Chief Commissioner and his Ministers on any matter, the Chief Commissioner shall refer it to the President for decision and act according to the decision given thereon by the President, and pending such decision it shall be competent for the Chief Commissioner in any case where the matter is in his opinion so urgent that it is necessary for him to take immediate action, to take such action or to give such direction in the matter as he deems necessary:

Provided further that in the State of Delhi every decision taken by a Minister or by the Council in relation to any matter concerning New Delhi shall be subject to the concurrence of the Chief Commissioner, and nothing in this sub-section shall be construed as preventing the Chief Commissioner in case of any difference of opinion

between him and his Ministers from taking such action in respect of the administration of New Delhi as he in his discretion considers necessary.

(2) The Chief Commissioner shall, when he is present, preside at meetings of the Council of Ministers, and, when the Chief Commissioner is not present, the Chief Minister or, if he is also not present, such other Minister as may be determined by the rules made under sub-section (1) of section 38 shall preside over meetings of the Council.

(3) If any question arises as to whether any matter is or is not a matter as respects which the Chief Commissioner is required by any law to exercise-any judicial or quasi-judicial functions, the decision of the Chief Commissioner thereon shall be final.

(4) If in the State of Delhi any question arises as to whether any matter is or is not a matter concerning New Delhi, the decision of the Chief Commissioner thereon shall be final:

Provided that in case of any difference of opinion between the Chief Commissioner and his Ministers on such question, it shall be referred for the decision of the President and his decision shall be final.

(5) The question whether any, and if so what, advice was tendered by Ministers to the Chief Commissioner shall not be inquired into in any court."

Section 36(1) incorporated the aid and advice principle. But where there was a difference of opinion between the Chief Commissioner and his ministers "on any matter", the Chief Commissioner was required to refer it to the President and to act in accordance with the decision of the President. Insofar as the State of Delhi was concerned, under the second proviso every decision of a Minister or the Council of Ministers in relation to New Delhi was subject to the concurrence of the Chief Commissioner. In the event there was a difference of opinion, the Chief Commissioner had the authority to take such action for the administration of New Delhi "as he in his discretion considers necessary". The

Chief Commissioner would also preside over the meetings of the Council of Ministers. If a question arose as to whether any matter concerned New Delhi, the decision of the Chief Commissioner was to be final and if there was a difference of opinion, it was to be referred to the President for his decision.

61 Section 36 assumes significance in the context of the present controversy, because its provisions must be distinguished from the position which was adopted when the sixty ninth amendment was introduced in Article 239AA into the Constitution. Four features of Section 36 stand out : first, the requirement of the concurrence of the Chief Commissioner to every decision concerning New Delhi; second, empowerment of the Chief Commissioner, in the event of a difference of opinion to act in his discretion for the administration of New Delhi; third, the mandate of the Chief Commissioner being required to preside over meetings of the Council of Ministers; and fourth, the requirement of referring any difference of opinion on whether a matter concerned New Delhi to the President whose decision would be final. Article 239AA has made a departure in critical matters from the position as it obtained under Section 36. First, (unlike the second proviso to Section 36(1)), Article 239AA(4) does not mandate that every decision of the Council of Ministers should be subject to the concurrence of the Lieutenant Governor; second, the provision (in the second proviso to Section 36(1)) empowering the Chief Commissioner to act in his discretion on the administration of New Delhi is absent in Article 239AA(4) except where the Lieutenant Governor on a

reference of a difference of opinion to the President has to deal with an emergent situation; and third, neither in Article 239AA nor in the GNCTD Act (and for that matter in the Transaction of Business Rules) has it been provided that the Lieutenant Governor would preside over meetings of the Council of Ministers. Section 36 of the erstwhile Act of 1951 created a hierarchical structure which placed the Chief Commissioner as an authority superior to the Council of Ministers in the exercise of its executive power. Every decision of the Council of Ministers concerning New Delhi was subject to the concurrence of the Chief Commissioner. The absence of such a provision in Article 239AA cannot be regarded as a matter of no constitutional significance. Historically the constituent body had before it a model which was created by the parliamentary enactment of 1951 but advisedly did not choose to engraft it into the provisions of Article 239AA when the sixty ninth amendment was adopted.

62 The provisions of the Constitution relating to Part A, Part B and Part C States were abrogated with the adoption of the seventh amendment[}] in 1956. Section 130 of the States Reorganization Act 1956 repealed the 1951 Act. The result has been explained in the Statement of Objects and Reasons for the 1956 Act.

> "… The main features of the reorganization proposed are the abolition of the existing constitutional distinction between Part A, Part B and Part C States, the establishment of two categories for the component units of the Union to be called the States and the abolition of the institution of the Raj

} The Constitution (Seventh Amendment) Act 1956

> Pramukh consequent on the disappearance of the Part B States…".

Consequent upon the seventh amendment to the Constitution, the expression "the Union territories specified in the First Schedule" was inserted into the Constitution. Delhi came to be described as a Union territory upon being included as an entry in the First Schedule. By virtue of Section 12 of the 1956 Act, as from the appointed day, in the First Schedule to the Constitution for Part A, Part B and Part C States, the parts which followed were substituted. Delhi was described in serial number 1 of Part C as "the territory which immediately before commencement of the Constitution was comprised in the Chief Commissioner's Province of Delhi". Delhi became a Union Territory governed by the Union government through an Administrator who was appointed by the President.

63 Article 239A was introduced by the fourteenth amendment[}] in 1962, as a result of which Parliament was authorized to create, for certain Union territories, local legislatures and/ or a Council of Ministers.

The Government of Union Territories Act, 1963

} The Constitution (Fourteenth Amendment) Act 1962

64 On 10 May 1963, the Government of Union Territories Act 1963 was enacted. The Act of 1963 defined the expression Administrator in Section 2(a) as :

> “(a) "Administrator" means the administrator of the Union territory appointed by the President under article 239;”

Section 3 provided for a legislative assembly. Section 18 provided for the extent of legislative power in the following terms:

> “18. Extent of legislative power. (1) Subject to the provisions of this Act, the Legislative Assembly of the Union territory may make laws for the whole or any part of the Union territory with respect to any of the matters enumerated in the State List or the Concurrent List in the Seventh Schedule to the Constitution in so far as any such matter is applicable in relation to Union territories.
>
> (2) Nothing in sub-section (1) shall derogate from the powers conferred on Parliament by the Constitution to make laws with respect to any matter for the Union territory or any part thereof.”

Sub Section 1 of Section 18 was similar in language to Article 239AA(3)(a), without the exclusion of matters relating to Entries 1, 2 and 18 and Entries 64, 65 and 66. Sub Section 2 was similar in language to Article 239AA(3)(b). Section 21 provided that if there was any inconsistency between a law made by Parliament and a law made by the legislative assembly, the law made by Parliament would prevail to the extent of repugnancy (this provision is similar in nature to Article 239AA(3)(c). Section 44 contained the following provision for the Council of Ministers:

> “44. Council of Ministers.

> (1) There shall be a Council of Ministers in each Union territory with the Chief Minister at the head to aid and advise the Administrator in the exercise of his functions in relation to matters with respect to which the Legislative Assembly of the Union territory has power to make laws except in so far as he is required by or under this Act to act in his discretion or by or under any law to exercise any judicial or quasi-judicial functions:
>
> Provided that, in case of difference of opinion between the Administrator and his Ministers on any matter, the Administrator shall refer it to the President for decision and act according to the decision given thereon by the President, and pending such decision it shall be competent for the Administrator in any case where the matter is in his opinion so urgent that it is necessary for him to take immediate action, to take such action or to give such direction in the matter as he deems necessary:
>
> …
>
> (3) If and in so far as any special responsibility of the Administrator is involved under this Act, he shall, in the exercise of his functions, act in his discretion."

Section 44 (1) and Article 239AA are *pari materia* (with the difference that clause 4 of Article 239AA pegs the strength of the Council of Ministers to not more than ten per cent of the total number of members of the legislative assembly). At the same time, it must also be noted that sub section 3 of Section 44 recognised the power of the Administrator, to act in his discretion where "any special responsibility" of the Administrator was involved under the Act. This provision in sub section 3 of Section 44 was in addition to the reservation made in Section 44(1) in respect of those matters where the administrator was under the Act, required to act in his discretion or was to exercise judicial or quasi-judicial functions under any law. The "special

responsibility" provision of sub-section 3 of Section 44 does not find a parallel in Article 239AA.

The Delhi Administration Act, 1966

65 On 2 June 1966, Parliament enacted the Delhi Administration Act 1966, "to provide for the administration of the Union territory of Delhi". The Act, in Section 3, constituted a Metropolitan Council, consisting of 56 persons to be directly elected. However, the Central government was empowered to nominate five persons to the Metropolitan Council. The tenure of the Metropolitan Council, unless it was sooner dissolved, was to be five years. Under Section 22 the Metropolitan Council could make recommendations, on certain matters, insofar as they related to Delhi. Section 22 provided as follows:

> "(1) Subject to the provisions of this Act, the Metropolitan Council shall have the right to discuss, and make recommendations with respect to, the following matters in so far as they relate to Delhi, namely: -
>
> (a) proposals for undertaking legislation with respect to any of the matters enumerated in the State List or the Concurrent List in the Seventh Schedule to the Constitution in so far as any such matter is applicable in relation to Union territories (hereafter referred to as the State List and the Concurrent List);
>
> (b) proposals for extension to Delhi of any enactment in force in a State relatable to any matter enumerated in the State List or the Concurrent List;
>
> (c) proposals for legislation referred to it by the Administrator with respect to any of the matters enumerated in the State List or the Concurrent List;

(d) the estimated receipts and expenditure pertaining to Delhi to be credited to and to be made from, the Consolidated Fund of India; and notwithstanding anything contained in the Delhi Development Act, 1957, the estimated receipts and expenditure of the Delhi Development Authority;

(e) matters of administration involving general policy and schemes of development in so far as they relate to matters enumerated in the State List or the Concurrent List;

(f) any other matter referred to it by the Administrator.

(2) The recommendations of the Metropolitan Council, after having been duly considered by the Executive Council, shall, wherever necessary, be forwarded by the Administrator to the Central Government with the views, if any, expressed thereon by the Executive Council."

The recommendations of the Metropolitan Council after they were considered by the Executive Council were to be forwarded to the Central government. The function of the Executive Council was to "assist and advise" the Administrator in the exercise of his functions in relation to matters in the State List or Concurrent List. Conscious as Parliament was of the use of the expression "aid and advise" in Articles 74 and 163 of the Constitution; and in Section 36(1) of the Government of Part C States Act 1951; Section 44 of the Government of Union Territories Act 1963, carefully adopted the expression "assist and advise" in Section 27. Section 27 was in the following terms:

"(1) There shall be an Executive Council, consisting of not more than four members one of whom shall be designated as the Chief Executive Councilor and others as the Executive Councilors, to assist and advise the Administrator in the exercise of his functions in relation to matters enumerated in the State List or the Concurrent List, except in so far as he is required by or under this Act to exercise his functions or any of them in his discretion or by or under any law to exercise any judicial or quasi-judicial functions:

Provided that, in case of difference of opinion between the Administrator and the members of the Executive Council on any matter, other than a matter in respect of which he is required by or under this Act to act in his discretion, the Administrator shall refer it to the President for decision and act according to the decision given thereon by the President, and pending such decision, it shall be competent for the Administrator in any case where the matter is in his opinion so urgent that it is necessary for him to take immediate action, to take such action or to give such direction in the matter as he deems necessary:

Provided further that every decision taken by a member of the Executive Council or by the Executive Council in relation to any matter concerning New Delhi shall be subject to the concurrence of the Administrator, and nothing in this sub-section shall be construed as preventing the Administrator in case of any difference of opinion between him and the members of the Executive Council from taking any action in respect of the administration of New Delhi as he, in his discretion, considers necessary.

(2) The Administrator shall preside at every meeting of the Executive Council, but if he is obliged to absent himself from any meeting of the Council owing to illness or any other cause, the Chief Executive Councilor shall preside at the meeting of the Council.

(3) The functions of the Administrator with respect to law and order in Delhi including the organization and discipline of police force, and with respect to such other matters as the President may it from time to time specify in this behalf, shall be exercised by him in his discretion.

(4) If any question arises as to whether any matter is or is not a matter as respects which the Administrator is by or under this Act required to act in his discretion, the decision of the Administrator thereon shall be final.

(5) If any question arises as, to whether any matter is or is not a matter as respects which the Administrator is required by or under any law to exercise any judicial or quasi-judicial functions, the decision of the Administrator thereon shall be final.

(6) If any question arises as to whether any matter is or is not a matter concerning New Delhi, the decision of the Administrator thereon shall be final.

(7) The question whether any, and if so, what advice was tendered by any member of the Executive Council to the Administrator shall not be enquired into in any court."

Every decision of the Executive Council in relation to any matter concerning New Delhi was subject to the concurrence of the Administrator. A provision similar to the second proviso to Section 27(1) does not find a reference in Article 239AA. Moreover, under sub section 2 of Section 27, the Administrator was to preside at every meeting of the Executive Council. The members of the Executive Council were, under Section 28, appointed by the President and held office during the pleasure of the President. A member of the Executive Council could not hold office beyond a period of six months if he was not a member of Metropolitan Council.

66 The Act of 1966 continued to apply to the Union Territory of Delhi until the adoption of the sixty ninth amendment to the Constitution and the GNCTD Act 1991.

The Balakrishnan Committee

67 On 14 December 1989 the Committee constituted by the Ministry of Home Affairs for making recommendations on the reorganization of the structure for the governance of Delhi submitted its report. The report of the Committee, which was chaired by Mr S Balakrishnan (Adviser, Ministry of Home Affairs) observed that there is a conflict of interest between the need to

develop the national capital for the nation as a whole and the desires of the local population for a greater autonomy in the conduct of their own affairs. This conflict was described in the report thus:

> "..The main difficulty lies in reconciling the two conflicting requirements, namely, the requirement of satisfying the democratic aspirations over the citizens of the capital to govern themselves in consonance with the spirit of their national Constitution and the requirement that the national Government should have sufficient control over the capital city and its administration for discharging its national and international responsibilities and commitments."

The Committee considered the following five options:

> "(1) The existing structure under the Delhi Administration Act, 1966 may be retained with such modifications as may be found necessary.
>
> (2) The administration of Delhi may be the direct responsibility of the Central Government except for municipal functions to be left with the Municipal Corporation or other municipal bodies; there is no need for any Legislative Assembly or Council of Ministers.
>
> (3) Delhi may be made a full-fledged State of the Union.
>
> (4) Delhi may be made a Union territory with a Legislative Assembly and Council of Ministers.
>
> (5) Delhi may be given a special status and dispensation under the Constitution itself."

The Committee indicated the reasons which had weighed with it in rejecting the claim for full statehood to Delhi. Firstly, the Committee noted that the conferment of full statehood would result in a constitutional division of

legislative power between the Union and the State and to that extent, the Union Executive would be denuded of executive powers in relation to matters governed by the State list. In the view of the Committee:

> "..This constitutional prohibition on the exercise of powers and functions will make it virtually impossible for the Union to discharge its special responsibilities in relation to the national capital as well as to the nation itself. We have already indicated in an earlier chapter the special features of the national capital and the need for keeping it under the control of the Union Government. Such control is vital in the national interests irrespective of whether the subject matter is in the State field or Union field. If the administration of the national capital is divided into rigid compartments of State field and Union field, conflicts are likely to arise in several vital matters, particularly if the two Governments are run by different political parties. Such conflicts may, at times, prejudice the national interest. We have given careful thought to the matter and we are of the considered opinion that any arrangement for Delhi that involves constitutional division of powers, functions and responsibilities between the Union and the government of the national capital will be against the national interest and should not be made."

The Committee opined that "**the national capital belongs to the nation as a whole**" and hence a demand for full statehood could not be entertained. Consistent with its view, the Committee opined that Delhi should have a Legislative Assembly and a Council of Ministers, while continuing to be a Union territory for the purposes of the Constitution. The legislative powers conferred upon the Legislative Assembly were to exclude certain specific subjects, having due regard to the special responsibility of the Union in respect of Delhi. The Committee recommended that the subjects of public order and police should be excluded from the purview of the Legislative Assembly. The report of the Committee recommended that the Administrator

for the Union Territory should be expressly required to perform his functions on the aid and advice of the Council of Ministers. The expression “aid and advice”, the Committee noted, is a term of art based on the cabinet form of government adopted by the Constitution. However, the principle of aid and advice would be subject to three modifications: (i) it would not apply in respect of those matters where the Administrator exercises judicial or quasi-judicial functions; (ii) the Administrator would act on aid and advice in respect of matters where the legislative Assembly has the power to make laws; and (iii) a special provision would be made to resolve differences between the Administrator and his Council of Ministers on any matter concerning the administration of Delhi.

The Committee was of the following view:

> “..by virtue of article 239 of the Constitution, the ultimate responsibility for good administration of Delhi is vested in the President acting through the Administrator. Because of this, the Administrator has to take a somewhat more active part in the administration than the Governor of a State. It is, therefore, necessary to reconcile between the need to retain the responsibility of the Administrator to the Centre in this regard and the need for enforce the collective responsibility of the Council of Ministers to the Legislature. The best way of doing this is to provide that in case of difference of opinion which cannot be resolved between the Administrator and his Council of Ministers, he should refer the question to the President and the decision of the President thereon will be final..”

The Committee considered whether the administration of Delhi should be provided for under a law enacted by Parliament, as was the case earlier. The Committee recommended a constitutional amendment in preference to a

statute governing the administration of the national capital as a measure of **stability and permanence**:

> "..any arrangement providing for the structure of government for the national capital is of great importance and significance to the nation and, as such, it is desirable that any such arrangement should ensure a measure of stability and permanence: The fluid situation which existed at the time when the Constitution came into force and which was the ground relied upon at that time for making a flexible arrangement no longer exists. We, therefore, consider that the time has come for making specific constitutional provisions for the structure of government for the national capital at least in regard to the core features thereof. If the provisions are incorporated in the Constitution an amendment can be made only by a two-thirds majority in parliament which may not always be available. To that extent a scheme incorporated in the Constitution would be more permanent than one in a law of parliament. We have no doubt that this will go a long way in assuring the people of Delhi that the governmental structure will be stable and will not suffer by the play of political forces."

The Committee thus recommended a constitutional amendment, with the above core features, with parliamentary legislation supplementing them in details.

68 The Statement of Objects and Reasons for the sixty ninth amendment to the Constitution explains its rationale in the following terms :

> "After such detailed inquiry and examination, it recommended that Delhi should continue to be a Union Territory and provided with a Legislative Assembly and a Council of Ministers responsible to such Assembly **with appropriate powers to deal with matters of concern to the common man.** The Committee also recommended that with a view to ensure stability and permanence, the arrangements should be incorporated in the Constitution to give the National Capital a **special status among the Union Territories**." (Emphasis supplied)

The avowed object of the sixty ninth amendment was to ensure that while Delhi would continue to be a Union territory, it would have a legislative assembly and a Council of Ministers responsible to it. This was to vest “appropriate powers” to deal with the matters of concern to the common man. The object of the constitutional amendment was to attribute “stability and permanence” to the arrangements to govern the Union territory and to confer “a special status among the Union territories” to the national Capital. In other words, while the status of the NCT would be of a Union territory, it nonetheless had a special status within the class of Union Territories.

69 Having regard to this history and background, it would be fundamentally inappropriate to assign to the NCT a status similar to other Union territories. Article 239AA(4) is a special provision which was adopted to establish a special constitutional arrangement for the governance of the NCT, albeit within the rubric of Union territories. In interpreting the provisions of Article 239AA, this Court cannot adopt a blinkered view, which ignores legislative and constitutional history. While adopting some of the provisions of the Acts of 1963 and 1966, Parliament in its constituent capacity omitted some of the other provisions of the legislative enactments which preceded the sixty ninth amendment. The relationship between the Council of Ministers and the Administrator of the Union territory evolved as Delhi progressed from a Part C State (before the Seventh Amendment) to a Union Territory governed by

legislation. As a Union territory, the position of Delhi has evolved from being administered by an Administrator under Article 239A following the fourteenth amendment and from governance under the earlier enactments of Parliament to its present-day status as a national capital territory governed by a specific constitutional provision: Article 239AA. We have noticed how, when Delhi was within the purview of the Part C States Act, every decision of the Council of Ministers on any matter concerning New Delhi was subject to the concurrence of the Chief Commissioner and any difference of opinion was to be resolved by the Chief Commissioner himself acting in his discretion to administer New Delhi. Under the Act of 1963, besides matters which the Administrator was required to act in his discretion or where he was to exercise judicial or quasi-judicial functions under law there were matters vested in the Administrator in his “special responsibility” where he could act in his discretion. Under the Act of 1966, the Executive Council was to “assist

and advice” the Administrator and each one of its decisions in relation to any matter concerning New Delhi was subject to the concurrence of the Administrator. The absence of similar provisions in Article 239AA cannot be ignored while defining the nature of the relationship between the Council of Ministers and the Lieutenant Governor and the authority of the Lieutenant Governor.

H NCT : A Special Class among Union Territories?

70 All Union territories are grouped together in Part VIII of the Constitution. While bringing them under the rubric of one constitutional pairing, there is an unmistakable distinction created between them by the Constitution. Such a distinction originates in Article 239(1) itself. While setting out the basic premise that “every Union territory shall be administered by the President”, Article 239(1) conditions it upon two important qualifications. The first is provided by the language with which Article 239(1) opens, which is: “save as otherwise provided by Parliament by law”. The second qualification is that the President may exercise the power of administering each Union territory “to such extent as he thinks fit” through an Administrator. The opening words essentially leave it to Parliament to determine the nature and extent to which the administration of a Union territory would be exercised through the President. The President may exercise that power through the office of an Administrator to such extent as he thinks fit. The expression “to such extent as he thinks fit” enunciates a constitutional discretion by which the limits of the exercise by the President of the power of administration through an Administrator are to be set. Both these qualifications have significant constitutional implications because they leave open the nature and extent of the administration of the Union territory by the President, through the auspices of an Administrator, to the determination by Parliamentary legislation.

71 The provisions of Article 239 result in significant consequences for the position of Union territories. Article 239 does not elucidate the nature or extent

of administrative or regulatory control over the Union territory. Article 239A (which presently applies to Puducherry), Article 239AA (which has special provisions for Delhi) and Article 240 leave no manner of doubt that the relationship of the Union government with every Union and the extent of Presidential control over the administration is not intended to be uniform. These three Articles indicate that a distinction has been made between the status of Union territories at least in terms of the exercise of legislative powers in relation to executive functions.

72 This distinction would emerge from a close reading of the provisions of Article 240 which governs :

(i) The Andaman and Nicobar Islands;
(ii) Lakshadweep;
(iii) Daman and Diu;
(iv) Dadar and Nagar Haveli; and
(v) Puducherry.

Clause 1 of Article 240 enables the President to make regulations for “the peace, progress and good government” of the Union territories mentioned above. Article 239A as we have noticed earlier, empowers Parliament to create a local legislature or a Council of Ministers (or both) for Puducherry. Once Parliament enacts legislation under clause 1 of Article 239A, it would be incongruous to have a duality of governance with the President making regulations for peace, progress and good government as well. Hence, the proviso to Article 240(1) states that the President shall not make any such regulation after the legislature for the Union territory of Puducherry has first

convened, when a Parliamentary legislation under Article 239A creates a body to function as a legislature. However, when the legislature is dissolved or its functioning is eclipsed pursuant to a Parliamentary legislation, the Presidential power to make regulations for peace, progress and good government is revived. Puducherry was therefore grouped together with the other Union territories under Article 240(1) but in contemplation of a law made by Parliament under Article 239A, a specific constitutional mandate allows for the entrustment of legislative and executive functions to the extent that they are transferred under the law to the local legislature or, as the case may be, to the Council of Ministers. If Parliament were to enact no law at all, the President would continue to retain the power to frame regulations. Moreover, even upon the enactment of Parliamentary legislation, the Presidential power to frame regulations for Puducherry is revived where the legislature stands dissolved or its functioning is suspended.

73 Delhi presents a special constitutional status under Article 239AA. This is fortified when those provisions are read in contrast with Articles 239A and 240. Article 239AA does not incorporate the language or scheme of Article 240(1), which enables the President to frame regulations for peace, progress and good government of the Union territories referred to in Article 240(1). This proviso to Article 240(1) indicates that once a Parliamentary law has been framed, the President shall not frame regulations for Puducherry. In the case of Delhi, Article 239AA does not leave the constitution of a legislature or the Council of Ministers to a law to be framed by Parliament in future. Article

239AA mandates that there shall be a legislative assembly for the NCT and there shall be a Council of Ministers, with the function of tendering aid and advice to the Lieutenant Governor. The “there shall be” formulation is indicative of a constitutional mandate. Bringing into being a legislative assembly and a Council of Ministers for the NCT was not relegated by Parliament (in its constituent power) to its legislative wisdom at a future date upon the enactment of enabling legislation. Clause 7(a) of Article 239AA enables Parliament by law to make provisions to give effect to or to supplement the provisions contained in that Article. Parliament’s power is to enforce, implement and fortify Article 239AA and its defining norms.

74 The above analysis would indicate that while Part VIII brings together a common grouping of all Union territories, the Constitution evidently did not intend to use the same brush to paint the details of their position, the institutions of governance (legislative or executive), the nature of democratic participation or the extent of accountability of those entrusted with governance to their elected representatives. Hence, in defining the ambit of the constitutional powers entrusted to the Council of Ministers for the NCT and their relationship with Lieutenant Governor as a delegate of the President, the Court cannot be unmindful of the constitutional importance which has to be assigned to representative government. Representative government is a hallmark of a Constitution which is wedded to democracy for it is through a democratic form of governance that the aspirations of those who elect their

representatives are met. Undoubtedly, governance of the NCT involves national imperatives. They must also weigh in the balance. The proviso to clause 4 of Article 239AA is constitutional indicator of the national concerns which were borne in mind when the constituent power was exercised to establish the NCT as a political arm of governance by a special constitutional provision. Those national imperatives have led to the carving out of the areas of police, public order and land from the sphere of legislative authority of the legislative assembly and their entrustment to Parliament. Again, it is the sense of a national imperative which led to the constituent power being so modulated in relation to the NCT as to allow Parliamentary legislative authority over all entries in the State list, in addition to the Concurrent list. Parliament does not exercise legislative authority in relation to State list entries as regards the states in India unless a matter falls within the ambit of Articles 252 or 253. Parliamentary legislative control over Union territories has been broadened precisely as a manifestation of national imperatives or concerns. The executive power of the Council of Ministers being co-extensive with legislative power, this aspect has to be borne in mind. The true challenge is to maintain that delicate balance in a federating Union, such as ours, which ensures that national concerns are preserved in the interest of the unity and integrity of the nation, while at the same time local aspirations exercised through the democratic functioning of elected governments find expression in our polity.

75 The constitutional principle which emerges is that while Delhi presents a special case, quite unlike the other Union territories, the constitutional provisions governing it are an amalgam between national concerns (reflected in control by the Union) and representative democracy (expressed through the mandate of a Council of Ministers which owes collective responsibility to a directly elected legislature). There is no gainsaying the fact that the control by the Union, is also control of the President acting on the aid and advice of the Union Council of Ministers which in turn owes collective responsibility to Parliament. Constitutional statesmanship between the two levels of governance, the Centre and the Union territory, ought to ensure that practical issues are resolved with a sense of political maturity and administrative experience. This Court has to step in only because skirmishes between the two have raised constitutional issues of the proper distribution of executive control over the National Capital Territory.

I The Government of National Capital Territory of Delhi Act, 1991

76 Parliament enacted the Government of National Capital Territory of Delhi Act 1991[}] "to supplement the provisions of the Constitution relating to the legislative assembly and a Council of Ministers for the National Capital Territory of Delhi". The legislation has been enacted in pursuance of the provisions of clause 7(a) of Article 239AA.

} Act 1 of 1992 (Referred hereinafter as the "GNCTD Act")

77 Some of the salient features of the law merit reference. The law mandates direct election from territorial constituencies to the legislative assembly[}]. The duration of the assembly is fixed at five years[}]. The Lieutenant Governor has the right to address and to communicate messages to the assembly[}]. The law provides special provisions for financial bills[}]. A recommendation of the Lieutenant Governor, prior to the introduction of a Bill or amendment in the legislative assembly is mandatory, where it incorporates a provision for any of the following :

> "(a) the imposition, abolition, remission, alteration or regulation of any tax ;
>
> (b) the amendment of the law with respect to any financial obligations undertaken or to be undertaken by the Government of the Capital;
>
> (c) the appropriation of moneys out of the Consolidated Fund of the Capital;
>
> (d) the declaring of any expenditure to be expenditure charged on the Consolidated fund of the Capital or the increasing of the amount of any such expenditure;"[}]

Similarly, if a Bill, when enacted into law, would involve an expenditure from the consolidated fund of the Capital, it requires the prior recommendation of the Lieutenant Governor before being passed by the legislative assembly. Assent of the Lieutenant Governor to Bills passed by the legislative assembly is mandated in the following terms:

} Section 3, GNCTD Act
} Section 5, GNCTD Act
} Section 9, GNCTD Act
} Section 22, GNCTD Act
} Section 22(1), GNCTD Act

"Section 24. Assent to Bills : - When a Bill has been passed by the Legislative Assembly, it shall be presented to the Lieutenant Governor and the Lieutenant Governor shall declare either that he assents to the Bill or that he withholds assent therefrom or that he reserves the Bill for the consideration of the President :

Provided that the Lieutenant Governor may, as soon as possible after the presentation of the Bill to him for assent, return the Bill if it is not a Money Bill together with a message requesting that the Assembly will consider the Bill or any specified provisions thereof, and, in particular, will consider the desirability of introducing any such amendments as he may recommend in his message and, when a Bill is so returned, the Assembly will reconsider the Bill accordingly, and if the Bill is passed again with or without amendment and presented to the Lieutenant Governor for assent, the Lieutenant Governor shall declare either that he assents to the Bill or that he reserves the Bill for the consideration of the President:

Provided further that the Lieutenant Governor shall not assent to, but shall reserve for the consideration of the President, any Bill which, -

(a) in the opinion of the Lieutenant Governor would, if it became law, so derogate from the powers of the High Court as to endanger the position which that court is, by the Constitution, designed to fill; or

(b) the President may, by order, direct to be reserved for his consideration; or
(c) relates to matters referred to in sub-section (5) of section 7 or section 19 or section 34 or sub-section (3) of section 43.

Explanation :- For the purposes of this section and section 25, a Bill shall be deemed to be a Money Bill if it contains only provisions dealing with all or any of the matters specified in sub-section (1) of section 22 or any matter incidental to any of those matters and, in either case, there is endorsed thereon the certificate of the Speaker of the Legislative Assembly signed by him that it is a Money Bill."

As the above provisions indicate, the Lieutenant Governor can assent to a Bill, withhold assent or reserve the Bill for consideration of the President. Where

the Bill is not a Money Bill, the Lieutenant Governor is permitted to return it for reconsideration to the Assembly. Thereafter, if the Bill is passed again by the Assembly, the Lieutenant Governor can either assent to the Bill or reserve it for consideration of the President. The second proviso sets out three categories of Bills which the Lieutenant Governor must reserve for the consideration of the President. Where the Bill has been reserved for the consideration of the President, Section 25 stipulates that the President may either assent or withhold assent to the Bill. The President may, if it is not a Money Bill, direct the Lieutenant Governor to return the Bill to the assembly for reconsideration and if it is again passed, the Bill has to be presented again to the President for consideration.

78 The power of the Lieutenant Governor is wider than the power of the Governor of a State under Article 200 of the Constitution. Article 200 provides as follows:

> "Article 200. When a Bill has been passed by the Legislative Assembly of a State or, in the case of a State having a Legislative Council, has been passed by both Houses of the Legislature of the State, it shall be presented to the Governor and the Governor shall declare either that he assents to the Bill or that he withholds assent therefrom or that he reserves the Bill for the consideration of the President:
>
> Provided that the Governor may, as soon as possible after the presentation to him of the Bill for assent, return the Bill if it is not a Money Bill together with a message requesting that the House or Houses will reconsider the Bill or any specified provisions thereof and, in particular, will consider the desirability of introducing any such amendments as he may recommend in his message and, Assent to Bills. When a Bill is so returned, the House or Houses shall reconsider the Bill accordingly, and if the Bill is passed again by the House or

> Houses with or without amendment and presented to the Governor for assent, the Governor shall not withhold assent therefrom: Provided further that the Governor shall not assent to, but shall reserve for the consideration of the President, any Bill which in the opinion of the Governor would, if it became law, so derogate from the powers of the High Court as to endanger the position which that Court is by this Constitution designed to fill."

Under Article 200, where the Governor has returned a Bill (not being a Money Bill) to the legislative assembly of the State for reconsideration and the Bill is passed by the legislature, the Governor is precluded from withholding assent. In contrast, Section 24 confers authority upon the Lieutenant Governor, even if a Bill has been reconsidered and passed by the legislative assembly of the NCT, to either assent to it or reserve it for consideration of the President. Moreover, the second proviso to Section 24 widens the categories of Bills which the Lieutenant Governor must necessarily reserve for the consideration of the President. Clause (a) of the second proviso corresponds to the second proviso to Article 200. In addition, clause (b) of the second proviso to Section 24 empowers the President to direct the Lieutenant Governor to reserve a Bill for his consideration. Similarly, under clause (c), Bills relating to salaries payable to the Speaker, Deputy Speaker and the members of the legislative assembly of NCT, the official language of the Capital and of the legislative assembly and the salaries and the allowances of the Ministers, are matters upon which the Lieutenant Governor has to reserve a Bill for the consideration of the President. These provisions indicate a greater degree of interface between the President and the Lieutenant Governor.

79 Section 27 provides for the laying of an annual financial statement by the Lieutenant Governor before the legislative assembly with the previous sanction of the President, containing the estimated receipts and expenditure of the Capital for that year. Section 29 makes a provision for appropriation Bills. Section 30 provides for supplementary, additional or excess grants. Here again, a provision has been made for the previous sanction of the President. Section 33 empowers the legislative assembly to make rules for regulating, subject to the Act, its procedure and conduct of business. The Lieutenant Governor upon consulting the Speaker of legislative assembly and with the approval of the President may make rules for the timely completion of financial business; for regulating the procedure of and the conduct of business in the legislative assembly in relation to financial matters of Bills; for the appropriation of moneys within the consolidated fund of the Capital; and for prohibiting any discussion on matters where the Lieutenant Governor is to act in his discretion. Under Section 34, the President has been empowered to direct that the official language of the Union shall be adopted for such of the official purposes of the Capital as may be specified, and that any other language shall also be adopted.

80 Part IV of the GNCTD Act has *inter alia* made provisions for matters which lie in the discretion of the Lieutenant Governor, the conduct of business,

and the duty of the Chief Minister to communicate with and share information with the Lieutenant Governor. Section 41 provides thus:

> "Section 41. Matters in which Lieutenant Governor to act in his discretion:-
> (1) The Lieutenant Governor shall act in his discretion in a matter –
>
> (i) which falls outside the purview of the powers conferred on the Legislative Assembly but in respect of which powers or functions are entrusted or delegated to him by the President ; or
> (ii) in which he is required by or under any law to act in his discretion or to exercise any judicial functions.
>
> (2) If any question arises as to whether any matter is or is not a matter as respects with the Lieutenant Governor is by or under any law required to act in his discretion, the decision of the Lieutenant Governor thereon shall be final.
>
> (3) If any question arises as to whether any matter is or is not a matter as respects which the Lieutenant Governor is by or under any law required by any law to exercise any judicial or *quasi-judicial* functions, the decision of the Lieutenant Governor thereon shall be final."

81 The Lieutenant Governor acts in his discretion in two classes of matters. The first consists of those which are outside the powers conferred upon the legislative assembly but in respect of which the President has delegated powers and functions to the Lieutenant Governor. The second category consists of those matters where the Lieutenant Governor is required to act in his discretion by or under any law or under which he exercises judicial or *quasi-judicial* functions. Matters falling within the ambit of Section 41 lie outside the realm of the aid and advice mandate. Where a subject or matter lies outside the purview of the legislative assembly, it necessarily lies outside

the executive powers of the government of the NCT. Such matters stand excepted from the ambit of the aid and advice which is tendered by the Council of Ministers to the Lieutenant Governor.

82 Section 44 stipulates that the President may make rules for the conduct of business:

> "Section 44. Conduct of business:
>
> (1) The President shall make rules -
>
> (a) for the allocation of business to the Ministers in so far as it is business with respect to which the Lieutenant Governor is required to act on the aid and advice of his Council of Ministers; and
>
> (b) for the more convenient transaction of business with the Ministers, including the procedure to be adopted in the case of a difference of opinion between the Lieutenant Governor and the Council of Ministers or a Minister.
>
> (2) Save as otherwise provided in this Act, all executive action of the Lieutenant Governor whether taken on the advice of his Ministers or otherwise shall be expressed to be taken in the name of the Lieutenant Governor.
>
> (3) Orders and other instruments made and executed in the name of the Lieutenant Governor shall be authenticated in such manner as may be specified in rules to be made by the Lieutenant Governor and the validity of an order or instrument which is so authenticated shall not be called in question on the ground that it is not an order or instrument made or executed by the Lieutenant Governor."

Under Section 44, the allocation of business amongst ministers in the government on matters where the Lieutenant Governor is to act on the aid and advice of the Council of Ministers has to be prescribed by the rules framed by the President. Similarly, rules for the convenient transaction of business with Ministers and for the modalities to be followed where there is a difference

between the Lieutenant Governor and the Council of Ministers or a Minister are framed by the President. All executive action is under sub-section 2 expressed in the name of the Lieutenant Governor. Sub-Section 3 provides for the authentication of orders and instruments made and executed in the name of the Lieutenant Governor.

83 Section 44 may be distinguished from the provisions of the Constitution in relation to the conduct of business of the Union government (under Article 77) and the conduct of business of the States (under Article 166). Article 77 *inter alia* stipulates that all executive action of the Union government shall be expressed in the name of the President and that orders or instruments in the name of the President shall be authenticated in accordance with the rules framed by the President. The President is empowered to make rules for the convenient transaction of business and for allocation of that business among ministers. Article 166 is *pari materia* (with the substitution of the Governor, for the President in relation to a State). Unlike in the case of a State, where rules of business are prescribed by the Governor, Section 44 requires that the rules in relation to the conduct of business in the NCT be framed by the President. Moreover, there is no provision analogous to the proviso to Article 239AA(4) in relation to the affairs of a State under the Constitution. Article 167 does not contain a provision for the procedure to be adopted where there is a difference of opinion between the Governor and the Council of Ministers.

84 Section 45 provides for the duty of the Chief Minister to communicate with and share information with the Lieutenant Governor:

> "Section 45. Duties of Chief Minister as respects the furnishing of information to the Lieutenant Governor, etc,- It shall be the duty of the Chief Minister –
>
> (a) to communicate to the Lieutenant Governor all decisions of the Council of Ministers relating to the administration of the affairs of the Capital and proposals for legislation;
> (b) to furnish such information relating to the administration of the affairs of the Capital and proposals for legislation as Lieutenant Governor may call for; and
> (c) If the Lieutenant Governor so requires, to submit for the consideration of the Council of Ministers any matter on which a decision has been taken by a Minister but which has not been considered by the Council."

Section 45 is similar in terms to Article 78 (in relation to the Prime Minister) and Article 167 (in relation to a Chief Minister of a State). Articles 78 and 167 embody the fundamental duty of the elected head of government in a cabinet form of government to communicate with the titular head of state and to furnish information in regard to the affairs of the state. The duty to keep the head of State informed in relation to the affairs of State arises because real decision making vests in the elected executive. Since decisions are taken by the executive, the head of State is kept apprised in reference to his constitutional position as titular head.

85 Section 46 provides for the Consolidated Fund of the Capital. Section 47 provides for contingency funds. Section 47(A) provides that the executive power of the Union extends to borrowing upon the security of the

Consolidated Fund of the Capital within the limits determined by Parliamentary legislation.

86 Section 49 establishes the principle of the "general control" of the President over the Lieutenant Governor and the Council of Ministers.

> "Section 49. Relation of Lieutenant Governor and his Ministers to President – Notwithstanding anything in this Act, the Lieutenant Governor and his Council of Ministers shall be under the general control of, and comply with such particular directions, if any, as may from time to time be given by the President."

As an incident of control, the Lieutenant Governor and Council of Ministers must comply with the particular directions issued by the President. Such directions are obviously issued on the aid and advise of the Union Council of Ministers.

Section 52 stipulates that all contracts relating to the administration of the Capital are made in exercise of the executive power of the Union and suits and proceedings in connection with the administration can be instituted by or against the Union government.

87 This survey of the provisions of the GNCTD Act 1991 indicates that there is a significant interface between the President and the Lieutenant Governor in matters relating to the administration of the Capital. The

Lieutenant Governor has been conferred with certain specific powers by the provisions of the Act including, among them, requirements of seeking the prior recommendation of the President to the introduction of financial Bills. As we have seen, the Lieutenant Governor has been subjected to a wider obligation to reserve Bills for the consideration of the President and in regard to withholding of his assent to a Bill which has been passed by the legislative assembly in comparison with the duties of a Governor of a State. Matters such as the presentation of the annual financial statement or supplementary, additional or excess grants require previous sanction of the President. The President has been conferred with the power to issue directions in regard to the official language of the National Capital Territory. The Lieutenant Governor has been vested with the power to act in his own discretion in matters which fall outside the ambit and power of the legislative assembly and which have been delegated to him by the President as well as in regard to those matters where he is required under law to exercise his own discretion or to act in exercise of judicial or quasi judicial functions. Rules for the conduct of business are framed by the President in relation to the National Capital Territory, including for the allocation of business. They would include the procedure to be followed where there is a difference of opinion between the Lieutenant Governor and the Council of Ministers. Section 49, which has a non-obstante provision, subjects the Lieutenant Governor and the Council of Ministers to the general control of the President and to such directions as may be issued from time to time.

J The Transaction of Business Rules, 1993

88 The Transaction of Business of the Government of National Capital Territory of Delhi Rules, 1993 (“Transaction of Business Rules”) have been formulated by the President in exercise of powers conferred by Section 44 of the GNCTD Act 1991. Rule 4(1) embodies the principle of collective responsibility. According to the Rule 4(1):

> “4. (1) The Council shall be collectively responsible for all the execution orders issued by any Department in the name of the Lieutenant Governor and contracts made in the name of the President in connection with the administration of the Capital whether such orders or contracts are authorised by an individual Minister in respect of a matter pertaining to the Department under his charge or as a result or discussions at a meeting of the Council.”

89 Rule 7 stipulates that all proposals which are referred to in the Schedule must be placed before the Council of Ministers in accordance with the provisions contained in Chapter 3. All such proposals after consideration by the Minister-in-charge have to be submitted to the Chief Minister. Rule 8 envisages orders of the Chief Minister either for circulation of a proposal under Rule 9 or for placing it for consideration of the Ministers. Rule 9 empowers the Chief Minister to circulate proposals to the Ministers for opinion instead of placing them before the Council of Ministers. A proposal can be passed by circulation only if there is unanimity of opinion among the Ministers.

90 The Transaction of Business Rules contain elaborate provisions for the Lieutenant Governor to be kept informed right from the stage of a proposal. Rule 9(2), stipulates that where a proposal is circulated, a memorandum explaining the proposal has to be prepared for circulation among the Ministers and simultaneously a copy has to be forwarded to the Lieutenant Governor. According to the Rule 9(2):

> "If it is decided to circulate any proposal, the Department to which it belongs, shall prepare a memorandum setting out in brief the facts of the proposal, the points for decision and the recommendations of the Minister in charge and forward copies thereof to the Secretary to the Council who shall arrange to circulate the same among the Ministers and simultaneously send a copy thereof to the Lieutenant Governor."

Under Rule 10(4), if the Chief Minister accepts the recommendations, he is to return the proposal with his orders to the Secretary to the Council of Ministers. Thereupon, Rule 10(5) stipulates that :

> "On receipt of the proposal, the Secretary to the Council shall communicate the decision to the Lieutenant Governor and pass on the proposal to the Secretary concerned who shall thereafter take necessary steps to issue the orders unless a reference to the Central Government is required in pursuance of the provisions of Chapter V."

Rule 10(5) requires that on receipt of a proposal, the Secretary to the Council is to communicate the decision to the Lieutenant Governor and to share the proposal with the Secretary of the concerned department. The Secretary of the department concerned would proceed to issue orders, unless a reference to the Central government is required under Chapter V. Chapter V, as we shall

note hereafter, deals with a situation where there has been a difference of opinion between the Lieutenant Governor and the Council of Ministers.

91 Proposals which are required to be placed before the Council of Ministers are dealt with in Rule 11, which provides thus :

> "When it has been decided to place a proposal before the Council, the Department to which it belongs, shall, unless the Chief Minister otherwise directs, prepare a memorandum indicating precisely the salient facts of the proposal and the points for decision. Copies of the memorandum and such other documents, as are necessary to enable the proposal to be disposed of shall be forwarded to the Secretary to the Council who shall arrange to circulate the memorandum to the Ministers and simultaneously send a copy thereof to the Lieutenant Governor."

A memorandum explaining the proposal is placed by the department to which the proposal belongs before the Secretary to the Council. The latter circulates the memorandum to the Ministers and simultaneously sends a copy to the Lieutenant Governor. Rule 13(3) requires that the agenda, upon being approved by the Chief Minister, must be forwarded by the Secretary to the Council to the Lieutenant Governor, the Chief Minister and other Ministers. A record of the decisions taken in the meetings of the Council is prepared and, under Rule 13(7), the Secretary to the Council is required to forward a copy to the Ministers and to the Lieutenant Governor. Rule 14 provides thus:

> "(1) The decision of the Council relating to each proposal shall be separately recorded and after approval by the Chief Minister, or the Minister presiding , shall be placed with the records of the proposal. After approval by the Chief Minister or the Minister presiding , the decision of

> the Council as approved, shall be forwarded by the Secretary to the Council to the Lieutenant Governor.
>
> (2) Where a proposal has been approved by the Council and the approved record of the decision has been communicated to the Lieutenant Governor, the Minister concerned shall take necessary action to give effect to the decision."

After a decision has been taken by the Council on a proposal and upon the approval by the Chief Minister, the decision is forwarded to the Lieutenant Governor. After the decision has been communicated to the Lieutenant Governor, the Minister concerned is empowered to give effect to the decision.

92 Rule 15 empowers the Minister in charge of a department to dispose of proposals or matters in the department in accordance with the Standing Orders. Copies of the Standing Orders have to be forwarded to the Lieutenant Governor and to the Chief Minister. Under Rule 16, the Minister can provide, by means of Standing Orders, for matters to be brought to his personal notice. Copies of the Standing Orders have to be forwarded to the Lieutenant Governor and the Chief Minister. Rule 17 requires a weekly submission of statements containing particulars of important proposals or matters disposed of in the department both to the Lieutenant Governor and the Chief Minister.

93 Rule 19(5) confers authority upon the Lieutenant Governor to call for papers of a proposal or matter from any department. Rule 19(5) is in the following terms:

> "The Lieutenant Governor may call for papers relating to any proposal or matter in any Department and such requisition shall be complied with by the Secretary to the Department concerned, he shall simultaneously inform the Minister-in-charge of the department of the action taken by him."

Rule 22 provides for a class of matters which shall be brought to the attention of the Lieutenant Governor and the Chief Minister:

> "Any matter which is likely to bring the Government of the Capital into controversy with the Central Government or with any State Government, shall, as soon as possible, be brought to the notice of the Lieutenant Governor and the Chief Minister."

Rule 23 provides for classes of proposals or matters which must be submitted to the Lieutenant Governor before orders are issued. Rule 23 is in the following terms:

> "The following classes of proposals or matters shall essentially be submitted to the Lieutenant Governor through the Chief Secretary and the Chief Minister before issuing any orders thereon, namely:
>
> (i) matters which affect or are likely to affect the peace and tranquillity of the capital;
> (ii) matters which affect or are likely to affect the interest of any minority community, Scheduled Castes and backward classes;
> (iii) matters which affect the relations of the Government with any State Government , the Supreme Court of India or the High Court of Delhi;
> (iv) proposals or matters required to be referred to the Central Government under the Act or under Chapter V;

(v) matters pertaining to the Lieutenant Governor's Secretariat and personnel establishment and other matters relating to his office;

(vi) matters on which Lieutenant Governor is required to make order under any law or instrument in force;

(vii) petitions for mercy from persons under sentence for death and other important cases in which it is proposed to recommend any revision of a judicial sentence;

(viii) matters relating to summoning, prorogation and dissolution of the Legislative Assembly, removal of disqualification of voters at elections to the Legislative Assembly, Local Self Government Institutions and other matters connected with those; and

(ix) any other proposals or matters of administrative importance which the Chief Minister may consider necessary."

Rule 24 provides thus:

> "Where the Lieutenant Governor is of the opinion that any further action should be taken or that action should be taken otherwise than in accordance with the orders passed by the Minister in-charge, he may require the proposal or matter to be placed before the Council for consideration: Provided that the notes, minutes or comments of the Lieutenant Governor in any such case shall not be brought on the Secretariat record unless the Lieutenant Governor so directs."

Rule 25 casts a duty on the Chief Minister to furnish to the Lieutenant Governor information on certain matters pertaining to the administration of the Capital. According to Rule 25:

> "The Chief Minister shall:
>
> (a) cause to be furnished to the Lieutenant Governor such information relating to the administration of the Capital and proposals for legislation as the Lieutenant Governor may call for; and
>
> (b) if the Lieutenant Governor so requires, submit for the consideration of the Council any matter on which a decision has been taken by a Minister but which has not been considered by the Council."

Rule 45 of the Transaction of Business Rules deals with the disposal of business relating to the executive functions of the Lieutenant Governor. Under Rule 45:

> "The Lieutenant Governor, may by standing orders in writing, regulate the transaction and disposal of the business relating to his executive functions:
>
> Provided that the standing orders shall be consistent with the provisions of this Chapter, Chapter V and the instructions issued by the Central Government for time to time.
>
> Provided further that the Lieutenant Governor shall in respect of matters connected with 'public order', 'police' and 'land' exercise his executive functions to the extent delegated to him by the President in consultation with the Chief Minister, if it is so provided under any order issued by the President under article 239 of the Constitution. Provided further that 'standing orders' shall not be inconsistent with the rules concerning transaction of business."

The second proviso deals with the class of subjects (public order, police and law) which stand carved out of the legislative powers of the Assembly and hence lie outside the executive powers of the NCT government. On such matters, to the extent to which functions are delegated to the Lieutenant Governor by the President, the Lieutenant Governor will consult the Chief Minister if the President has so provided in an order under Article 239.

Rule 46 makes provisions in regard to persons serving in connection with the administration of the National Capital Territory:

> "(1) With respect to persons serving in connection with the administration of the National Capital Territory, the Lieutenant Governor shall, exercise such powers and perform such functions as may be entrusted to him under the provisions of the rules and orders regulating the conditions of service of such persons or by any other

order of the President in consultation with the Chief Minister, if it is so provided under any order issued by the President under article 239 of the Constitution.

(2) Notwithstanding anything contained in sub-rule (1) the Lieutenant Governor shall consult the Union Public Service Commission on all matters on which the Commission is required to be consulted under clause(3) of article 320 of the Constitution; and in every such case he shall not make any order otherwise than in accordance with the advice of the Union Public Services Commission unless authorised to do so by the Central Government.

(3) All correspondence with Union Public Service Commission and the Central Government regarding recruitment and conditions of service of persons serving in connection with the administration of National Capital Territory shall be conducted by the Chief Secretary or Secretary of the Department concerned under the direction of the Lieutenant Governor."

Under Rule 47, the Lieutenant Governor has to consult the Union government before exercising his powers or discharging his functions in respect of any matter for which no specific provision is contained in the Rules.

94 Chapter V of the Transaction of Business Rules sets out the procedure to be followed by the Lieutenant Governor in making a reference to the Central government in the event of a difference of opinion with the Council of Ministers. Rules 49, 50 and 51 provide as follows:

"49. In case of difference of opinion between the Lieutenant Governor and a Minister in regard to any matter, the Lieutenant Governor shall endeavour by discussion on the matter to settle any point on which such difference of opinion has arisen. Should the difference of opinion persist, the Lieutenant Governor may direct that the matter be referred to the Council."

"50. In case of difference of opinion between the Lieutenant Governor and the Council with regard to any matter, the

> Lieutenant Governor shall refer it to the Central Government for the decision of the President and shall act according to the decision of the President."
>
> "51. Where a case is referred to the Central Government in pursuance of rule 50, it shall be competent for the Lieutenant Governor to direct that action shall be suspended pending the decision of the President on such case or in any case where the matter, in his opinion, is such that it is necessary that immediate action should be taken to give such direction or take such action in the matter as he deems necessary."

Where a direction has been issued by the Lieutenant Governor under Rule 51, the Minister concerned must take action to give effect to the direction.

95 Under Rule 53, an annual plan for each financial year is to be prepared under the directions of the Lieutenant Governor which has to be referred to the Central government for approval. The form of the annual financial statement and the procedure for obtaining the approval of the President have to be prescribed by the Central government under Rule 54.

96 Rule 55(1) provides for certain categories of legislative proposals which must be referred to the Central government by the Lieutenant Governor. Rule 55(2) enunciates those matters upon which the Lieutenant Governor shall make a prior reference to the Union government in the Ministry of Home Affairs or through the appropriate ministry. According to Rule 55:

> "(1) The Lieutenant Governor shall refer to the Central Government every legislative proposal, which

(a) if introduced in a Bill form and enacted by the Legislative Assembly, is required to be reserved for the consideration of the President under the proviso to subclause (c) of clause (3) of article 239 AA or, as the case may be, under the second proviso to section 24 of the Act;

(b) attracts provisions of articles 286, 287, 288 and 304 of the Constitution as applicable to the Capital;

(c) relates to any matter which may ultimately necessitate additional financial assistance from the Central Government through substantive expenditure from the Consolidated Fund of the Capital or abandonment of revenue or lowering of rate of any tax.

(2) Subject to any instructions which may from time to time be issued by the Central Government, the Lieutenant Governor shall make a prior reference to the Central Government in the Ministry of Home Affairs or to the appropriate Ministry with a copy to the Ministry of Home Affairs in respect of the following matters:-

(a) proposals affecting the relations of the Central Government with any State Government, the Supreme Court of India or any other High Court;

(b) proposals for the appointment of Chief Secretary and Commissioner of Police, Secretary (Home) and Secretary (Lands);

(c) important cases which affect or are likely to affect the peace and tranquillity of the National Capital Territory; and

(d) cases which affect or are likely to affect the interests of any minority community, Scheduled Castes or the backward classes."

Rule 56 stipulates that where a matter has been referred by the Lieutenant Governor to the Central government under the Rules, further action shall not be taken except in accordance with the decision of the Central government.

97 Analysing the Transaction of Business Rules, it becomes evident that the Lieutenant Governor is required to be kept informed of governmental

business. The duty of the Council of Ministers, with the Chief Minister at its head, to do so begins at the stage of a proposal. When a proposal is circulated under the directions of the Chief Minister to the Council of Ministers, a copy of the explanatory memorandum has to be forwarded to the Lieutenant Governor. After the proposal has been approved, the decision is communicated to the Lieutenant Governor. The decision is forwarded to the Secretary of the department concerned for issuing orders unless a reference to the Central government is warranted under Chapter V. Where a proposal is placed before the Council of Ministers, an explanatory memorandum has to be forwarded to the Lieutenant Governor. Copies of the agenda, upon approval of the Chief Minister, are required to be submitted to the Lieutenant Governor. A record of the decisions of the Council of Ministers is forwarded to the Lieutenant Governor. After the decisions of the Council have been approved by the Chief Minister, they are forwarded by the Secretary to the Council to the Lieutenant Governor. Rule 14(2) stipulates that after a proposal has been approved by the Council of Ministers and the approved record of the decision has been communicated to the Lieutenant Governor, the minister concerned "shall take necessary action to give effect to the decision". Communication of the approved record of the decision to the Lieutenant Governor is mandatory and it is only thereafter that the decision can be implemented. The Lieutenant Governor is empowered to call for papers relating to any proposal or matter in any department under Rule 19(5). The power conferred upon the Lieutenant Governor to do so is independent of and does not detract from the duty of the

Council of Ministers to keep him informed at every stage. Matters which are likely to bring the government of the NCT into controversy with the Central government or with any state government must be bought to the notice of the Lieutenant Governor. As distinguished from Rule 14, Rule 23 sets out those classes of proposals or matters which have to be submitted to the Lieutenant Governor before orders are issued thereon. Rule 14(2), as noted earlier, stipulates that upon being approved by the Council, the record of the decision is communicated to the Lieutenant Governor upon which the minister will take necessary action to give effect to the decision. However, Rule 23 elucidates specified situations where proposals or matters must be essentially submitted to the Lieutenant Governor before issuing orders thereon. These matters are considered to be important enough to warrant a mandatory prior submission to the Chief Minister as well as to the Lieutenant Governor before orders are issued. These provisions in the Transaction of Business Rules ensure that the Lieutenant Governor is kept informed of the affairs and administration of the National Capital Territory at every stage. The rules leave no element of discretion in the Council of Ministers to not comply with the obligation. The obligation to keep the Lieutenant Governor informed at every stage brooks no exceptions.

98 The Transaction of Business Rules set out a careful defined procedure to enable the Lieutenant Governor to counsel the Ministers. This is to facilitate a further reflection or reconsideration in certain situations. Rule 24 deals with

one such situation where the Lieutenant Governor is of the opinion “that any further action should be taken or that action should be taken otherwise than in accordance with the orders passed by the minister in charge”. The Lieutenant Governor may in either case require that the proposal or matter be placed before the Council of Ministers for consideration. The duty of keeping the Lieutenant Governor abreast of the administration of the affairs of the National Capital Territory is amplified by Rule 25. Under the Rule, a duty has been cast on the Chief Minister to furnish to the Lieutenant Governor information on the administration of the Capital and proposals for legislation as the latter may summon. The Lieutenant Governor may also require the submission to the Council of a matter on which the Minister has taken a decision but it has not been placed before the Council.

99 Chapter IV enables the Lieutenant Governor to formulate standing orders regulating the transaction and disposal of business relating to his executive functions. The second proviso to Rule 45 specifically deals with matters connected with public order, police and land. These are subjects which lie outside the ambit of legislative powers of the legislative assembly, since they fall under Entries 1, 2 and 18 of the State List. Since there is an absence of legislative power in relation to these subjects, they lie outside the realm of matters covered by the aid and advice of the Council of Ministers. On these excepted subjects, the Lieutenant Governor has to exercise his executive function to the extent to which there is a delegation by the

President. The Lieutenant Governor has to consult the Chief Minister if it is so provided in an order of the President under Article 239. Clearly, therefore, in regard to the excepted matters, the exercise of the executive functions by the Lieutenant Governor must be in accord with the delegation, if any, by the President. The Lieutenant Governor can exercise only such executive functions, to the extent to which a delegation has been made. The requirement of consulting the Chief Minister would be subject to the contents of an order issued by the President under Article 239.

100 As regards persons who are in the service connected to the administration of the NCT, the Lieutenant Governor has been assigned under Rule 46 such powers and functions as are entrusted to him by the Rules and orders regulating the conditions of service of such persons or an order of the President made under Article 239. The Lieutenant Governor is mandated to consult the Union Public Service Commission on matters on which it is required to be consulted under Article 320(3). The Lieutenant Governor has to act in accordance with the advice of the Commission unless authorized by the Central government.

101 The Transaction of Business Rules elaborately define the modalities which the Lieutenant Governor must follow in the event of a difference of opinion with the Council of Ministers. The proviso to Article 239AA(4), Section

44(1)(b) of the GNCTD Act and Chapter V of the Transaction of Business Rules provide a composite and holistic perspective. They elucidate the modalities which must be followed when there is a difference of opinion. Chapter V supplements and gives effect to the proviso to Article 239AA(4). If a difference of opinion arises between the Lieutenant Governor and a Minister on any matter, the first and primary endeavour must be to resolve it by discussion. Before the matter escalates to the next stage all efforts have to be devoted to a mutual resolution with the Minister. If the difference of opinion continues to persist, the Lieutenant Governor is empowered to direct that the matter in difference be referred to the Council of Ministers. It is when a difference persists between the Lieutenant Governor and the Council of Ministers that a reference is contemplated by Rule 50 to the Central government for a decision of the President. These provisions provide a road map for the exercise of constitutional statesmanship. The differences between the Lieutenant Governor and a Minister or the Council of Ministers must in good faith be attempted to be resolved. Differences constitute the heart of democracy. Reason and dialogue are the essence of a democratic government. The affairs of government do admit of variations in perspective and opinion. The problems of governance are complex. The institutional process of decision making must be mature and tolerant. The theatrics which accompany the rough and tumble of politics ought not to disrupt the necessity for institutional governance which is marked by constitutional sobriety and administrative wisdom.

102 Settlement of a difference between a Minister and the Lieutenant Governor by discussion obviates a reference to the President and provides a flexible and expeditious solution where there is a difference of opinion. The first stage at which a resolution is attempted is between the Lieutenant Governor and the Minister in question. If that does not result in a satisfactory solution, the second stage involves the Council of Ministers as a collective entity. It is when the dispute has failed to meet a satisfactory resolution with the Council of Ministers that the Lieutenant Governor is empowered to make a reference to the Central government. The power of the Lieutenant Governor under Rule 55(2) stands independent of the area of difference of opinion covered by Rules 49, 50 and 51. Rule 55(2) brings into focus certain specified areas where certain matters have to be referred to the Union government either in the Union Ministry of the Home Affairs or in the appropriate ministry. The matters covered by Rule 55(2) are considered to be important enough to warrant a prior reference to the Central government.

103 The feature which stands out from the Transaction of Business Rules is that an obligation and duty has been cast upon the elected government and its officers to duly keep the Lieutenant Governor informed of proposals relating to governmental business. The duty to keep the Lieutenant Governor informed is a necessary element of the process and essential for the exercise of the

constitutional authority which has been vested in the Lieutenant Governor. It is only when the Lieutenant Governor is kept duly apprised of matters relating to the administration of the National Capital Territory that a decision can be taken on whether a reference should be made to the Union government under Chapter V. If the Lieutenant Governor were to be kept in the dark, it would not be possible for him as a constitutional authority to determine as to whether the matter is of such a nature as would warrant a reference to the Central government. Sharing of information and the process of communication ensures a dialogue which promotes harmony in administration. The Rules are founded upon the need to maintain constitutional comity rather than strife.

104 A significant aspect of the Rules is that on matters which fall within the ambit of the executive functions of the government of NCT, decision making is by the government comprised of the Council of Ministers with the Chief Minister at its head. The role of the Lieutenant Governor is evinced by the duty which is cast upon the government to keep him duly apprised on matters relating to the administration of the Union territory. On matters of executive business which lie within the constitutional functions assigned to the executive government of the NCT, such a role is elaborated in the functions assigned to the Lieutenant Governor under Rule 24. Rule 24 deals with an eventuality when the Lieutenant Governor may be of the opinion that any further action should be taken or that action should be taken otherwise than in accordance with an order which has been passed by a Minister. In such a case, the

Lieutenant Governor does not take his own decision. He has to refer the proposal or matter to the Council of Minister for consideration. Under Rule 25, Lieutenant Governor may require the Council to consider a matter on which a decision has been taken by a Minister but which has not been considered by the Council. Rule 23 enunciates matters which have to be submitted to the Lieutenant Governor before issuing any orders thereon. If the Lieutenant Governor disagrees with a decision or proposal, recourse has to be taken to the procedure which has been enunciated in Rules 49, 50 and 51. If there is a difference of opinion, the Lieutenant Governor must refer it to the Union government after following the procedure which has been laid down. After the decision of the President has been communicated, the Lieutenant Governor must follow that decision and implement it. In other words, the Lieutenant Governor has not been conferred with the authority to take a decision independent of and at variance with the aid and advice which is tendered to him by the Council of Ministers. If he differs with the aid and advice, the Lieutenant Governor must refer the matter to the Union government (after attempts at resolution with the Minister or Council of Ministers have not yielded a solution). After a decision of the President on a matter in difference is communicated, the Lieutenant Governor must abide by that decision. This principle governs those areas which properly lie within the ambit and purview of the executive functions assigned to the government of the National Capital Territory. Matters under Section 41 which fall under the discretion of the Lieutenant Governor stand at a different footing. The Lieutenant Governor

may be required to act in his discretion where a matter falls outside the powers conferred on the legislative assembly but in respect of which powers or functions have been delegated to him by the President. The Lieutenant Governor may also be required to act in his discretion under a specific provision of law or where he exercises judicial or *quasi judicial* functions. Matters pertaining to public order, police and land lie outside the ambit of the legislative powers of the Assembly and hence are outside the executive functions of the government of NCT. These are matters where the Lieutenant Governor would act in the exercise of his functions at his discretion if and to the extent to which there has been a delegation or entrustment by the President to him under Article 239 of the Constitution. Hence, a distinction exists between matters which lie within the domain of the legislative powers of the Assembly and of the executive powers of the NCT government, and those which lie outside. On the former, the Lieutenant Governor must abide by the aid and advice tendered by the Council of Ministers and, in the event of a difference of opinion, refer the matter to the President for decision. In matters which lie outside the legislative powers of the legislative assembly, the Lieutenant Governor has to act in accordance with the entrustment or delegation that has been made to him by the President under Article 239.

105 Section 49 of the GNCTD Act confers an overriding power of control upon the President and the power to issue directions. Upon the exercise of

Presidential powers under Section 49, the Lieutenant Governor would have to abide by the directions of the President.

K Precedents

Literal Interpretation

106 The Learned Additional Solicitor General has relied on certain decisions of this Court to support his submission that while interpreting the Constitution, the Court must read its words in a strictly textual manner. It is his contention that the provisions of Article 239AA, the GNCTD Act and Transaction of Business Rules must be given plain and literal interpretation.

107 The first case relied by the Learned ASG is the decision in **Keshavan Madhava Menon** v **State of Bombay**[1] **("Keshavan Madhava Menon")**. A Full Bench of the Bombay High Court had held that assuming that the provisions of the Indian Press (Emergency Powers) Act, 1931 were inconsistent with Article 19(1)(a) of the Constitution, proceedings which had been commenced and were pending at the date of the commencement of the Constitution were not affected even if the Act was inconsistent with the fundamental rights and had become void under Article 13(1). The appeal against the judgment of the High Court was adjudicated by a seven-Judge

[1] (1951) 2 SCR 228

Constitution Bench of this Court. Justice S R Das, speaking for a majority of this Court held that:

> "An argument founded on what is claimed to be the spirit of the Constitution is always attractive, for it has a powerful appeal to sentiment and emotion; but a court of law has to gather the spirit of the Constitution from the language of the Constitution. What one may believe or think to be spirit of the Constitution cannot prevail if the language of the Constitution does not support that view. Article 372(2) gives power to the President to adapt and modify existing laws by way of repeal or amendment. There is nothing to prevent the President, in exercise of the powers conferred on him by that article, from repealing, say the whole or any part of the Indian Press (Emergency Powers) Act, 1931. If the President does so, then such repeal will at once attract Section 6 of the General Clauses Act. In such a situation all prosecutions under the Indian Press (Emergency Powers) Act, 1931, which were pending at the date of its repeal by the President would be saved and must be proceeded with notwithstanding the repeal of that Act unless an express provision was otherwise made in the repealing Act. It is therefore clear that the idea of the preservation of past inchoate rights or liabilities and pending proceedings to enforce the same is not foreign or abhorrent to the Constitution of India. We are, therefore, unable to accept the contention about the spirit of the Constitution as invoked by the learned counsel in aid of his plea that pending proceedings under a law which has become void cannot be proceeded with. Further, if it is against the spirit of the Constitution to continue the pending prosecutions under such a void law, surely it should be equally repugnant to that spirit that men who have already been convicted under such repressive law before the Constitution of India came into force should continue to rot in jail. It is, therefore, quite clear that the court should construe the language of Article 13(1) according to the established rules of interpretation and arrive at its true meaning uninfluenced by any assumed spirit of the Constitution."

Applying the standard, the majority held that Article 13 of the Constitution "is entirely prospective in operation and rendered inconsistent existing laws ineffectual on and after the date of the commencement of the Constitution". The view of the majority was that there is no fundamental right that a person

shall not be prosecuted and punished for an offence committed before the Constitution came into force. Justice Fazal Ali in his dissenting judgment, however, held that:

> "..Evidently, the framers of the Constitution did not approve of the laws which are in conflict with the fundamental rights, and, in my judgment, it would not be giving full effect to their intention to hold that even after the Constitution has come into force, the laws which are inconsistent with the fundamental rights will continue to be treated as good and effectual laws in regard to certain matters, as if the Constitution had never been passed. How such a meaning can be read into the words used in Article 13(1), it is difficult for me to understand. There can be no doubt that Article 13(1) will have no retrospective operation, and transactions which are past and closed, and rights which have already vested, will remain untouched. But with regard to inchoate matters which were still not determined when the Constitution came into force, and as regards proceedings whether not yet begun, or pending at the time of enforcement of the Constitution and not yet prosecuted to a final judgment, the very serious question arises as to whether a law which has been declared by the Constitution to be completely ineffectual can yet be applied. On principle and on good authority, the answer to this question would appear to me to be that the law having ceased to be effectual can no longer be applied."

108 The next judgment on which reliance has been placed by the ASG is in **Tej Kiran Jain** v **N Sanjiva Reddy**[}]. A Bench of six judges of this Court was considering an appeal from the judgment of a Full Bench of the Delhi High Court rejecting a plaint claiming a decree for damages for statements made on the floor of the Lok Sabha during a Calling Attention Motion. Such an action was clearly barred under Article 105(2) of the Constitution. This Court rejected the contention that the immunity granted by Article 105(2) in respect of anything said or any vote given in Parliament would apply only to words

} (1970) 2 SCC 272

relevant to the business of Parliament and not to something which was irrelevant. In that context, the Court held that:

> "In our judgment it is not possible to read the provisions of the article in the way suggested. The article means what it says in language which could not be plainer. The article confers immunity inter alia in respect of "anything said …. In Parliament". The word 'anything' is of the widest import and is equivalent to 'everything'. The only limitation arises from the words 'in Parliament' which means during the sitting of Parliament and in the course of the business of Parliament. We are concerned only with speeches in Lok Sabha. Once it was proved that Parliament was sitting and its business was transacted, anything said during the course of that business was immune from proceedings in any Court. This immunity is not only complete but is as it should be…"

109 The third decision is of a Constitution Bench in **G Narayanaswami** v **G Pannerselvam**[}] **("Narayanaswami")**. In that case, Article 171 of the Constitution came up for interpretation and the submission which was urged was that in order to be qualified to stand for election to a graduate constituency of the Legislative Council of a State, a person must also possess the qualification of being a graduate. Repelling the contention, this Court held that it was not open to the Court to add to the qualifications prescribed by the Constitution:

> "..The concept of such representation does not carry with it, as a necessary consequence, the further notion that the representative must also possess the very qualifications of those he represents… the view contained in the Judgment under appeal, necessarily results in writing some words into or adding them to the relevant statutory provisions to the effect that the candidates from graduates' constituencies of Legislative Councils must also possess the qualification of having graduated. This contravenes the rule of "plain

} (1972) 3 SCC 717

> meaning" or "literal" construction which must ordinarily prevail."

110 In support of the above contention, reliance has also been placed on two other Constitution Bench decisions of this Court in **Kuldip Nayar** v **Union of India**[} **("Kuldip Nayar")** and **Manoj Narula** v **Union of India**[} **("Manoj Narula")**. In **Kuldip Nayar**, an amendment made in the Representation of People Act, 1951 was challenged. By the said amendment, the requirement of "domicile" in the State concerned for getting elected to the Council of States was deleted. It was contended by the petitioner that removing the said requirement violated the principle of federalism, a basic feature of the Constitution. The Court rejected the contention of the petitioner. While endorsing and reiterating the view taken in the judgment in **Narayanaswami**, the Court held:

> "It may be desirable to give a broad and generous construction to the Constitutional provisions, but while doing so the rule of "plain meaning" or "literal" interpretation, which remains "the primary rule", has also to be kept in mind. In fact the rule of "literal construction" is the safe rule unless the language used is contradictory, ambiguous, or leads really to absurd results… The "representative" of the State is the person chosen by the electors who can be any person who, in the opinion of the electors, is fit to represent them. There is absolutely no basis for the contention that a person who is an elector in the State concerned is more "representative" in character than one who is not. We do not find any contradiction, ambiguity, or absurdity in the provisions of the law as a result of the impugned amendment. Even while construing the provisions of the Constitution and the RP Acts in the broadest or most generous manner, the rule of "plain meaning" or "literal" interpretation compels us not to accept the contentions of the petitioners."

} (2006) 7 SCC 1
} (2014) 9 SCC 1

In **Manoj Narula**, a writ petition under Article 32 of the Constitution assailed the appointment of some of the original Respondents as Ministers to the Council of Ministers of Union of India despite their involvement in serious and heinous crimes. The question before the Court was whether a categorical prohibition can be read to the words contained in Article 75(1) of the Constitution so that the Prime Minister is constitutionally prohibited to give advice to the President in respect of a person for becoming a Minister who is facing a criminal trial for a heinous and serious offence and charges have been framed against him by the trial Judge. The Constitution Bench held that it cannot re-write a constitutional provision:

> "Reading such an implied limitation as a prohibition would tantamount to adding a disqualification at a particular stage of the trial in relation of a person. This is neither expressly stated nor is impliedly discernible from the provision."

111 These judgments do not advance the proposition which is sought to be urged on behalf of the Union of India that anything but the literal meaning of the words used is irrelevant to the interpretation of the Constitution. The judgment in **Keshavan Madhava Menon** held that the Court has to gather the spirit of the Constitution from its language and that the language of Article 13 had to be interpreted in accordance with the established rules of interpretation "uninfluenced by any assumed spirit of the Constitution". These observations of the seven-judge Bench are not intended to adopt a principle of interpretation which requires the Court to ignore the basic values which the Constitution seeks to enhance, while interpreting the words used in the text.

The words contained in the text of the Constitution have to be attributed a purposive interpretation which advances fundamental constitutional values. In **Keshavan Madhava Menon**, the Court found the 'spirit of the Constitution' to be perhaps too vague or amorphous (though it was not articulated specifically thus). After the evolution of the basic structure doctrine post **Kesavananda**, the interpretation of the Constitution must be guided by those fundamental tenets which constitute the foundation and basic features of the document. Where a provision of the Constitution is intended to facilitate participatory governance, the interpretation which the Court places must enhance the values of democracy and of republican form of government which are part of the basic features.

112 The judgment in **Tej Kiran Jain** rejects the attempt to dilute the immunity conferred by Article 105 in respect of statements made on the floor of the House. The judgment in **Narayanaswami** rejected the attempt to read a qualification for being elected to the Legislative Council which was not found in the text of Article 171. The Court in **Manoj Narula** refused to read a disqualification into the words of Article 75 for being appointed as a Minister of the Union Cabinet. The Constitution of India is an embodiment of multiple values. The Constitution preserves national unity. Yet it also nurtures regional autonomy and decentralization. As discussed in the beginning of this judgment, the approach of a constitutional court must be to interpret the Constitution so as "to arbitrate between contesting interpretations of the many

core values on which our polity is believed to be based."[1] Each provision of the Constitution must therefore be studied "as an expression of values" and has to be interpreted "against the background of an overarching constitutional order".[2] Representative democracy underlines the essence of our Constitution. Collective responsibility of the Council of Ministers is the most essential component of the Cabinet form of government as envisaged under the Constitution. The trust reposed in the Council of Ministers of the NCT is based on its constitutional status. These moral values of the Constitution must therefore be upheld.

113 In **Kuldip Nayar**'s case, the Court had held that in order to interpret the intention behind the enactment of a provision, "one needs to look into the historical legislative developments". Placing the structure of governance in the NCT to a constitutional pedestal (while making divergences from previous statutory schemes, as discussed earlier in this judgment) provided a special status to the NCT, which this Court cannot ignore.

This Court must interpret the Constitution on the basis of the principles elucidated in the beginning of this judgment.

Relationship between Centre and Union Territories

[1] Rajiv Bhagava (ed.), Politics and Ethics of the Indian Constitution, Oxford University Press (2008), at page 9

[2] Martin Loughlin, "The Silences of Constitutions", International Journal of Constitutional Law (2019, In Press) https://www.jura.uni-freiburg.de/de/institute/rphil/freiburger_vortraege/silences-of-constitutions-m.-loughlin-manuskript.pdf

114 The relationship between the Union government and a Union territory has in varying contexts been the subject matter of decided cases. In **Satya Dev Bushahri** v **Padam Dev**[}] **("Satya Dev Bushahri")**, the election of the first respondent was questioned, among other grounds, for the reason that he was interested in contracts with the government and was disqualified for being chosen to the legislative assembly of Himachal Pradesh. The Election Tribunal rejected the contention holding that Representation of the People Act, 1951 was not applicable to elections in Part C States. The appellant contended that the contracts in which the elected candidate had interest were in fact contracts with the Central government, which disqualified him from becoming a member of the legislative assembly. It was urged that since the executive action of the Central government is vested in the President, the President was also the executive head of Part C States and a contract entered into with the then state of Himachal Pradesh was in law a contract with the Central government. Dealing with the submission, Justice T L Venkatarama Ayyar speaking for a Bench of three judges of this Court held thus :

> "9…The fallacy of this reasoning is obvious. The President who is the executive head of the Part C States is not functioning as the executive head of the Central Government, but as the head of the State under powers specifically vested in him under Article 239. The authority conferred under Article 239 to administer Part C States has not the effect of converting those States into the Central Government. Under Article 239, the President occupies in regard to Part C States, a position analogous to that of a Governor in Part A States and of a Rajpramukh in Part B States. Though the Part C States are centrally administered under the provisions of Article 239, they do not cease to be States and become merged with the Central Government."

} (1955) 1 SCR 549

The Court consequently rejected the contention that a contract with a Part C State should be construed as a contract with the Central government. This decision was subject to a review. In the application for review, reliance was sought to be placed on the provisions of Section 3(8)(b)(2) of the General Clauses Act which define the expression “Central Government” as follows :

> “3…Central Government’ shall in relation to anything done or to be done after the commencement of the Constitution, mean the President; and shall include in relation to the administration of a Part C State, the Chief Commissioner or Lieutenant-Governor or Government of a neighbouring State or other authority acting within the scope of the authority given to him or it under Article 239 or Article 243 of the Constitution, as the case may be.”

On this basis, it was urged that a contract with the Chief Commissioner of Himachal Pradesh must be treated as a contract with the Central government and in consequence the elected candidate was disqualified under the relevant legislation. On the other hand, the elected candidate relied upon the provisions of Section 3(60)(b) which read as follows:

> “State Government” as respects anything done or to be done after the commencement of the Constitution, shall mean, in a Part A State, the Governor, in a Part B State the Rajpramukh, and in a Part C State the Central Government.”

This Court, in the course of the judgment in review, held that in view of the provisions of Section 3(8), a contract with the Chief Commissioner in a Part C State is a contract with the Central government, which would be a disqualification for election to the legislative assembly under Section 17 of

Government of Part C States Act 1951 read with Section 7(d) of Representation of the People Act, 1951. In the view of the Court:

> "4…We are unable to agree that Section 3(8) has the effect of putting an end to the status of Part C States as independent units, distinct from the Union Government under the Constitution. It merely recognises that those States are centrally administered through the President under Article 239, and enacts that the expression "Central Government "should include the Chief Commissioner administering a Part C State under the authority given to him under Article 239. Section 3(8) does not affect the status of Part C States as distinct entities having their own Legislature and judiciary, as provided in Articles 239 and 240. Its true scope will be clear if, adapting it, we substitute for the words "Central Government" in Section 9 of Act 43 of 1951 the words "the Chief Commissioner acting within the scope of the authority given to him under Article 239". A contract with the Chief Commissioner would, therefore, under Section 9 read with Section 3(8) of the General Clauses Act, be a contract with the Central Government, and would operate as a disqualification for election to either House of Parliament under Sections 7(*d*) and 9 of Act 43 of 1951, and it would be a disqualification under Section 17 of Act 49 of 1951, for election to the Legislative Assembly of the State."

115 The subsequent decision in **Devji Vallabhbhai Tandel** v **Administrator of Goa, Daman & Diu**} **("Tandel")** involved an order of detention issued under the COFEPOSA} by the Administrator of Goa, Daman and Diu. One of the grounds of challenge before the Bench of three Judges of this Court was that an order of detention could be made only by the Chief Minister in the name of the Administrator, and not by the Administrator. Section 2(f) defined the expression "state government", in relation to a Union territory, to mean the Administrator. An order of detention could be issued under Section 3(1) by the Central government or the state government or officers of a certain rank who

} (1982) 2 SCC 222

} The Conservation of Foreign Exchange and Prevention of Smuggling Activities Act 1974

were duly empowered. Justice Baharul Islam speaking for this Court noted that comparing the provisions of Articles 74 and 163, on the one hand and Section 44 of the Government of Union Territories Act 1963, there was a manifest difference between the position of the President or Governor and the Administrator of a Union territory. In the view of the Court:

> "14…The Administrator even in matters where he is not required to act in his discretion under the Act or where he is not exercising any judicial or quasi-judicial function, is not bound to act according to the advice of the Council of Ministers. This becomes manifest from the proviso to Section 44(1). It transpires from the proviso that in the event of a difference of opinion between the Administrator and his Ministers on any matter, the Administrator shall refer the matter to the President for decision and act according to the decision given thereon by the President. If the President in a given situation agrees with what the Administrator opines contrary to the advice of the Council of Ministers, the Administrator would be able to override the advice of the Council of Ministers and on a reference to the President under the proviso, obviously the President would act according to the advice of the Council of Ministers given under Article 74. Virtually, therefore, in the event of a difference of opinion between the Council of Ministers of the Union Territory and the Administrator, the right to decide would vest in the Union Government and the Council of Ministers of the Union Territory would be bound by the view taken by the Union Government. Further, the Administrator enjoys still some more power to act in derogation of the advice of the Council of Ministers."

The Court adverted to the fact that when the Administrator makes a reference to the President on a difference of opinion arising with the Council of Ministers, he may "during the interregnum...completely override the advice of the Council of Ministers and act according to his light". This Court observed that neither the Governor nor the President enjoys such a power:

> "15…This basic functional difference in the powers and position enjoyed by the Governor and the President on the one hand and the Administrator on the other is so glaring that it is not possible to hold on the analogy of the decision in *Samsher Singh case* is that the Administrator is purely a constitutional functionary bound to act on the advice of the Council of Ministers and cannot act on his own. Therefore, for this additional reason also the submission... must be rejected."

116 The learned Additional Solicitor General has placed reliance on the above observations to submit that since the proviso to Section 44 was "bodily lifted" (as he describes it) and placed in Article 239AA(4), the construction placed by the Bench of three Judges in **Tandel** on the ambit of the powers of the Administrator will govern the construction of the proviso to Article 239AA. On the other hand, Mr Gopal Subramanium urged that the above interpretation of the proviso to Section 44(1) of the 1963 Act will not apply *proprio vigore* to Article 239AA. In his submission, the constitutional amendment resulting in the introduction of Article 239AA is a significant expression of people's sovereignty and the intention underlying it must receive a purposive interpretation. While not detracting from the importance of the NCT, Mr Subramanium submitted that the area of control with the Administrator which is "an exceptional residual power" must not set at naught a democratically elected Cabinet form of government in the Union territory. We will return to the proper construction to be placed upon the proviso. However, at this stage we find it difficult to subscribe to the view that the content of the constitutional provision engrafted in Article 239AA must be read on the same pedestal as the content of the statutory provision in Section 44 of the 1963

Act. The fact that the proviso to Article 239AA(4) is similar in terms to the proviso to Section 44(1) of the 1963 Act may be one aspect of relevance to the construction of the former. Yet, to our mind, in construing a constitutional provision, the considerations which weigh with the Court would not be constricted by the principles underlying the interpretation of the provisions of a statute. Ordinarily while construing a statute, the Court would be guided by the plain and grammatical meaning of the words used. The literal or golden rule of interpretation gives way where its consequence would lead to an absurdity or perpetuate an evil which the legislature had intended to avoid. The Court, even while interpreting a statute, may adopt a purposive interpretation. An interpretation is purposive because it facilitates the object which the legislature intended to achieve by enacting the law. Even a purposive interpretation seeks to fulfil the aim and object of the legislature which enacted the law. While construing the provisions of the Constitution, the Court cannot be oblivious either to the nature of the document which it construes or to its task as an institution created by the Constitution to interpret its provisions. Ordinary law is susceptible to alteration by legislative majorities. Legislative amendments to statutory provisions are often a response to the predicaments of the moment. The object of elevating rights, duties and modes of governance into the protective terrain of a constitutional document is to precisely elevate them to a status of stability and permanence which we attribute to a constitutional provision. Constitutional provisions are also subject to the amendatory process under Article 368 so long as the basic features of

the Constitution are not abridged. The restraints on the constituent power in the form of the special majorities required for the passage of an amendment, the requirement in certain cases of ratification by the state legislatures and the substantive limits imposed by the basic structure doctrine make the distinction between ordinary legislation and a constitutional amendment evident. Interpretation of a constitutional text is therefore governed by the precept that the Court is embarking upon the task of construing an organic document which defines the basic compact for society. It is in that sense that the Court will bear in mind that it is the Constitution which the Court is expounding. These considerations must apply with significant force when an amendment to the Constitution has (as in the present case) strengthened the basic structure by entrenching the principle of democratic governance. Consequently, the line of thought which requires us to read the proviso to Article 239AA(4) in terms of the proviso to Section 44(1), and to follow the line of interpretation of the latter in **Tandel's** case is to place words above the heart and soul of the Constitution. **Tandel's** case did not have to go into the issues which arise before us in relation to the exercise of constitutional powers. **Tandel** does not explain what is the nature of the difference of opinion which will warrant a reference to the President. The COFEPOSA, as we have noticed, defined the expression "state government" in relation to a Union territory to mean 'the Administrator thereof'. The Court did not have to consider the effect of the proviso, in any event not in the context of a constitutional provision. There are more fundamental issues which the Court must resolve while interpreting the

text of the Constitution which lie beyond the mere question of whether the Administrator of Goa (as in that case) was authorised to issue an order of detention. While construing the text of Article 239AA, the endeavour of the Court must be to facilitate the strengthening of democratic institutions. Constitutional liberties survive and democracies remain vibrant when the institutions of governance created by the Constitution are capable of withstanding the challenges of the times. As an expounder of constitutional principle, it is the foremost duty of the Court to adopt an interpretation which gives expression to democratic values. Truth, justice and freedom are cardinal values in the democratic quest of achieving the dignity of citizens. The ability of citizens to participate in the formation of governments and to expect accountable and responsive government constitutes the backbone of a free society. In interpreting constitutional text, history should remind us how fragile liberty and democracy can be, unless citizens fiercely protect their foundations. We can ignore them only at our peril.

117 Another decision of this Court which must be adverted to is in **Goa Sampling Employees' Association** v **General Superintendence Co. of India Pvt. Ltd.**} **("Goa Sampling")**. A reference was made by the Central government of an industrial dispute for adjudication under the Industrial Disputes Act 1947. It was sought to be urged that in relation to a Union Territory, the Central government is the appropriate government. The Tribunal

} (1985) 1 SCC 206

held that the workmen were dock workers governed by an Act of Parliament and since they were working in a major port, it was the Central government which was the appropriate government. The Tribunal also held that even if the state government is the appropriate government, since Goa was then a Union territory and its administration was carried on by an Administrator appointed by the President under Article 239, the Central government was the appropriate government. The High Court held that the industrial dispute in which the workmen were involved did not concern a major port and hence the Central government was not the appropriate government. Moreover, the High Court also held that the Central government is not the state government for the Union territory of Goa under the Act but it was the Administrator appointed under Article 239 who is the state government. The Administrator being the appropriate government, the High Court held that the Central government had no jurisdiction to make the reference. It was the second limb of the finding of the High Court which was considered by this Court in the course of its judgment. In order to appreciate the controversy, it is necessary to consider the expressions "Central government" as defined in Section 3(8) of the General Clauses Act, 1897 which reads as follows:

> "(8) 'Central Government' shall—
> (a) * * *
> (b) in relation to anything done or to be done after the commencement of the Constitution, mean the President; and shall include,
> (i)-(ii) * * *
> (iii) in relation to the administration of a Union Territory, the Administrator thereof acting within the scope of the authority given to him under Article 239 of the Constitution."

The expression “state government” is defined in Section 3(60), insofar as is material thus:

> “ ‘State Government’,—
> (a)-(b) * * *
> (c) as respects anything done or to be done after the commencement of the Constitution (Seventh Amendment) Act, 1956, shall mean, in a State, the Governor, and in a Union Territory, the Central Government;”

“Union territory” is defined in Section 3(62) to mean the Union territories specified in the First Schedule to the Constitution and to include any other territory comprised within the territory of India but not specified in that Schedule.

Dealing with the provisions of Section 44(1) of the 1963 Act, this Court observed thus:

> “12…According to the proviso in the event of a difference of opinion between the Administrator and the Ministers on any matter, the Administrator shall refer it to the President for decision given therein by the President etc. Thus the executive power of the Administrator extends to all subjects covered by the legislative power. But in the event of a difference of opinion the President decides the point. When President decides the point, it is the Central Government that decides the point.”

The Court noticed that the provisions of Part VI of the Constitution which deal with the States clearly indicate that a Union territory administration is not a state government. The Court observed that the Constitution makes a distinction between a State and its government (called the state government)

on one hand and the Union territory and its administration on the other hand. This distinction, the Court observed, was carried in the definition contained in the General Clauses Act:

> "14…Now if we recall the definition of three expressions "Central Government" [Section 3(8),] "State Government" [Section 3(60)] and "Union Territory" [Section 3(62-A)] in the General Clauses Act, it would unmistakably show that the framers of the Constitution as also the Parliament in enacting these definitions have clearly retained the distinction between State Government and Administration of Union Territory as provided by the Constitution. It is especially made clear in the definition of expression "Central Government" that in relation to the Administration of a Union Territory, the Administrator thereof acting within the scope of the authority given to him under Article 239 of the Constitution, would be comprehended in the expression "Central Government". When this inclusionary part is put in juxtaposition with exclusionary part in the definition of the expression "State Government" which provides that as respects anything done or to be done after the commencement of the Constitution (Seventh Amendment) Act, 1956, it shall mean, in a State, the Governor, and in a Union Territory, the Central Government, the difference conceptually speaking between the expression "State Government" and the "Administration of a Union Territory" clearly emerges. Therefore, there is no room for doubt that the expression "Administration of a Union Territory", Administrator howsoever having been described, would not be comprehended in the expression "State Government" as used in any enactment."

The view of the High Court that the Administrator is the state government insofar as the Union territory is concerned under Section 3(60) was held to be in error. The decisions in **Satya Dev Bushahari** and in **The State of Madhya Pradesh** v **Shri Moula Bux**} were distinguished since they were rendered prior to the amendment of Part VIII of the Constitution in 1956 and before the insertion of Articles 239A and 239B. The position in law was set out as follows:

} (1962) 2 SCR 794

> "17…On a conspectus of the relevant provisions of the Constitution and the 1963 Act, it clearly transpires that the concept of State Government is foreign to the administration of Union Territory and Article 239 provides that every Union Territory is to be administered by the President. The President may act through an Administrator appointed by him. Administrator is thus the delegate of the President. His position is wholly different from that of a Governor of a State. Administrator can differ with his Minister and he must then obtain the orders of the President meaning thereby of the Central Government. Therefore, at any rate the Administrator of Union Territory does not qualify for the description of a State Government. Therefore, the Central Government is the "appropriate Government"."

The decision of the two judge Bench in **Goa Sampling** explains that under the General Clauses Act 1897, the expression "Central government" will include the Administrator of a Union territory acting within the scope of his authority under Article 239, in relation to the administration of the Union territory. Similarly, the expression "state government" means in relation to the Union territory, the Central government. The Central government was held to be the appropriate government to make a reference under the Industrial Disputes Act, 1947. The judgment in **Goa Sampling** dealt with the limited scope as to which is the appropriate Government under the Industrial Disputes Act.

118 The issue as to whether the Lieutenant Governor of the NCT is competent to accord sanction for prosecution under the Prevention of Terrorism Act and the Code of Criminal Procedure was considered by a two judge Bench of this Court in **State (NCT of Delhi)** v **Navjot Sandhu**[}] **("Navjot Sandhu")**. In that case, sanctions under both the statutes were accorded "by

} (2005) 11 SCC 600

order and in the name of the Lieutenant Governor". The sanction under Section 50 of the POTA was urged to be a nullity on the ground that in relation to the Union Territory only the Central government was competent to accord it. Section 2(1)(h) of POTA defined the expression "State" in relation to a Union territory, to mean the Administrator thereof. Rejecting the challenge, this Court held that under Article 239AA, the Administrator appointed under Article 239 does not lose his status as such and it is only his designation which is merged into the new designation of Lieutenant Governor "in keeping with the upgraded status of this particular Union territory". The Lieutenant Governor, who continues to be an Administrator, was held to derive authority to grant sanction under Section 50 by reason of the legislative fiction under Section 2(1)(h), the Administrator being deemed to be the state government for the purpose of Section 50. Hence :

> "..by virtue of specific statutory delegation in favour of the Administrator who is constitutionally designated as the Lieutenant Governor as well, the sanction accorded by the said authority is a valid sanction under Section 50 of POTA.."

The decision in **Navjot Sandhu** turned upon a specific statutory delegation in favour of the Administrator to grant sanction. It is hence of no assistance to the present constitutional context.

Decision in NDMC

119 A nine-judge Bench of this Court in **New Delhi Municipal Council** v **State of Punjab**} **("NDMC")** dealt with the issue as to whether properties owned and occupied by various states in the NCT are exempt from the levy of local taxes under Article 289(1) of the Constitution. Allied to this was the question as to whether the states are entitled to exemption from the levy of taxes imposed by Parliamentary legislation under Article 246(4) upon their properties situated within the Union territories. Article 246(4) provides thus:

> "Parliament has power to make laws with respect to any matter for any part of the territory of India not included [in a State] notwithstanding that such matter is a matter enumerated in the State List."

Justice B P Jeevan Reddy spoke for the majority of five judges. The minority view of four judges was rendered by Chief Justice Ahmadi.

120 The judgment of the majority notes that the States, put together, do not exhaust the territory of India. Parliament has the power to make laws with respect to any matter for any part of territory of India not included in a State. Since the Union territories are not included in the territory of any State, Parliament was the only law making body. Dealing with the provisions of Article 239 AA, the Court held :

> "..In the year 1991, the Constitution did provide for a legislature for the Union Territory of Delhi [National Capital Territory of Delhi] by the Sixty-Ninth (Amendment) Act (Article 239-AA) but even here the legislature so created was not a full-fledged legislature nor did it have the effect of – assuming that it could – lift the National Capital Territory of Delhi from Union Territory category to the category of States within the

} (1997) 7 SCC 339

> meaning of Chapter I of Part XI of the Constitution. All this necessarily means that so far as the Union Territories are concerned, there is no such thing as List I, List II or List III. The only legislative body is Parliament – or a legislative body created by it. Parliament can make any law in respect of the said territories – subject, of course, to constitutional limitations *other than* those specified in Chapter I of Part XI of the Constitution. Above all, the Union Territories are not "States" as contemplated by Chapter I of Part XI; they are the territories of the Union falling outside the territories of the States. Once the Union Territory is a part of the Union and not part of any State, it follows that any tax levied by its legislative body is Union taxation. Admittedly, it cannot be called "State taxation" – and under the constitutional scheme, there is no third kind of taxation. Either it is Union taxation or State taxation.."

121 The judgment of the majority also holds that all Union territories are not situated alike. The first category consists of Union territories which have no legislature at all. The second category has legislatures created by a law enacted by Parliament under the Government of Union Territories Act, 1963. The third category is Delhi which has "special features" under Article 239 AA. Though the Union territory of Delhi "is **in a class by itself**", it "**is certainly not a State within the meaning of Article 246 or part VI of the Constitution**". Various Union territories- the Court observed - are in different stages of evolution. However, the position remains that these Union territories, including the NCT are yet Union territories and not a State.

General Clauses Act

122 Article 367 (1) of the Constitution provides that:

> "367(1) Unless the context otherwise requires, the General Clauses Act, 1897, shall, subject to any adaptations and modifications that may be made therein under article 372, apply for interpretation of this Constitution as it applies for the

interpretation of an Act of the Legislature of the Dominion of India."

123 As we have noticed, the inclusive definition of the expression 'State' in Section 3(58) of the General Clauses Act, 1897 provides that as respects any period after the commencement of the Constitution (Seventh Amendment) Act, 1956, the expression State shall mean the States specified in the First Schedule to the Constitution and shall include a Union territory. If this inclusive definition was made applicable for the purpose of construing Article 246(4), an anomaly would arise because Parliament would have no power to legislate in respect of the Union territories with respect to matters governed by the State list. Until a legislature which is empowered to legislate on matters in the State list is created under Article 239A for the Union territories, there would be no legislature with competence to legislate on those matters. The consequences which would result from reading the provisions of Section 3(58) of the General Clauses Act while interpreting Article 246(4) were noticed in a judgment of a Constitution Bench in **TM Kanniyan** v **Income Tax Officer, Pondicherry**} **("Kanniyan")**. The Constitution Bench held that such a construction would be repugnant to the context of Article 246 and hence, Parliament would have under Article 246(4) plenary powers to make laws for all Union Territories in respect of all matters. The decision in **Kanniyan** was followed in the judgment of the majority in the nine-judge bench decision in **NDMC**. Even the judgment of the minority noted that while certain Union territories have legislative assemblies of their own, "they are very much under

} (1968) 2 SCR 103

the supervision of the Union Government and cannot be said to have an independent status". Notably, the minority view also accepted the principle that the definition of the expression "State" in Section 3(58) of the General Clauses Act is inapplicable to Article 246(4).

124 A Constitution Bench of this Court in **Management of Advance Insurance Co. Ltd.** v **Shri Gurudasmal**[}] **("Advance Insurance")** while construing Entry 80 of the Union list held that the definitions contained in the General Clauses Act may not always apply in relation to the expression "State" in the Constitution and much would depend upon the context. Entry 80 of the Union list provides as follows:

> "80. Extension of the powers and jurisdiction of members of a police force belonging to any State to any area outside that State, but not so as to enable the police of one State to exercise powers and jurisdiction in any area outside that State without the consent of the Government of the State in which such area is situated; extension of the powers and jurisdiction of members of a police force belonging to any State to railway areas outside that State"

In that case, on a complaint by an Income Tax Officer of the commission of offences by the appellant under Sections 409, 477A and 120B of the Penal Code, a case was registered by the Superintendent of Police in the Special Police Establishment, New Delhi. The appellant filed a writ petition challenging the right of the Special Police Establishment to investigate the case in the State of Maharashtra but it was dismissed by the High Court. In appeal before this Court, it was urged that the Delhi Special Police Establishment constituted

} (1970) 1 SCC 633

under the Act XV of 1946 was not constitutional and had no jurisdiction to investigate cases in other states. The submission was that Entry 80 speaks of a police force belonging to any state and not of a police force belonging to a Union territory. Chief Justice Hidayatullah speaking for a Constitution Bench held that Section 3(58) of the General Clauses Act (which defines State in respect of any period after the commencement of the seventh constitution amendment to include a Union territory) “furnishes a complete answer to the difficulty which is raised since Entry 80 must be read so as to include Union territory”. Hence, the members of a police force belonging to a Union territory could have their powers and jurisdiction extended to another state with the consent of that State. The Constitution Bench held that the definitions in the General Clauses Act “cannot always be read” in interpreting the constitutional text and “the definitions apply unless there is anything repugnant in the subject or context”.

The Constitution Bench held that:

> “After the Seventh Amendment India is a Union of States (Article 1) and the territories thereof are specified in the First Schedule. Then there are Union Territories which are mentioned separately. There is thus a distinction between “States” and “Union Territories” which cannot be lost sight of. When the definition cannot be made applicable owing to the context or the subject, the word “State” refers to States in the First Schedule only. Such an occasion arose in I.M Kanniyan v Income-Tax Officer, Pondicherry and Another, and Bachawat, J., explained Article 246 by holding that the definition of “State” in two parts in the adapted Section 3(58) of the General Clauses Act was repugnant to the subject and context of Article 246. There is nothing in the subject or context of Entry 80 of the Union List which can be said to exclude the application of the definition in Section 3(58). Indeed the Part C States were expressly mentioned in Entry No. 39 of the Federal List of the Government of India Act,

> 1935 (after its amendment in 1947) and thus before the Seventh Amendment the definition of State (subject to the subject or context) included Part C States. Therefore, the definition of "State" in Section 3(58) in the General Clauses Act after the adaptation in 1956 applies and includes Union Territories in Entry 80 of the Union List"

The Constitution Bench in **Advance Insurance** did not find anything repugnant in the subject or context of Entry 80 of the Union list. Hence, Entry 80 was held to include Union territories.

125 In **Union of India** v **Prem Kumar Jain**[}], a Bench of four judges of this Court dealt with an appeal from a decision of the Delhi High Court which had quashed a notification of the Union government and a scheme for the formation of a joint cadre of the Indian Administrative Service. The High Court had held the formation of a Delhi – Himachal Cadre of service to be *ultra vires*. The creation of a joint cadre for all Union territories on 1 January 1968 under Rule 3(1) of the IAS (Cadre) Rules 1954 was challenged as being contrary to Article 312 and the All India Services Act 1951, as it was not common to the Union and a State, a Union territory not being a State. The High Court held that Union territories not being States, the action was *ultra vires*. In appeal, this Court observed that it was not necessary for Parliament to make a law providing for the creation of a service common to the Union and the States under Article 312(1), in view of clause 2, which provided as follows :

> "312 (2) The services known at the commencement of this Constitution as the Indian Administrative Service and the

} (1976) 3 SCC 743

> Indian Police Service shall be deemed to be services created by Parliament under this article".

Section 3(1) of the All India Services Act had a provision for making rules for the regulation of recruitment and conditions of service of persons appointed to an All India Service "after consultation with the governments of the States concerned". The issue was whether Union territories could be States for the purpose of such consultation. This Court held that the expression "State" having been defined in Section 3(58), from the commencement of the seventh amendment to the Constitution in 1956, and the President having substituted a new clause 58 in Section 3, there was nothing repugnant to the subject or context to make that definition inapplicable. The High Court was held to have been in error in holding that Union territories were not States for that purpose.

126 Whether the expression "State" in the Constitution would cover a Union territory is a matter to be deduced from the context. The Constitution in the First Schedule makes a clear distinction between States and Union territories. Hence, the inclusive definition of the expression "State" in Section 3(58) of the General Clauses Act cannot apply to the First Schedule. Similarly, in Article 246(4), which enables Parliament to make laws with respect to any matter for any part of the territory of India not included in a State, the definition in Section 3(58) would have no application, having due regard to the context. This was explained in the decision in **Kanniyan**. When there is something repugnant in

the subject or context, the definition in Section 3(58) would have no application.

<u>“Insofar as any such matter is applicable to Union territories”</u>

127 In the State list and the Concurrent list of the Seventh Schedule, there are numerous entries which use the expression “State”. These entries are illustratively catalogued below:

> “**List II**
> 12. Libraries, museums and other similar institutions controlled or financed by the **State**.
> 26. Trade and commerce within the **State** subject to the provisions of entry 33 of List III.
> 37. Elections to the Legislature of the **State** subject to the provisions of any law made by Parliament.
> 38. Salaries and allowances of members of the Legislature of the **State**, of the Speaker and Deputy Speaker of the Legislative Assembly and, if there is a Legislative Council, of the Chairman and Deputy Chairman thereof.
> 39. Powers, privileges and immunities of the Legislative Assembly and of the members and the committees thereof, and, if there is a Legislative Council, of that Council and of the members and the committees thereof; enforcement of attendance of persons for giving evidence or producing documents before committees of the Legislature of the **State**.
> 40. Salaries and allowances of Ministers for the **State**.
> 41. **State** public services; **State** Public Service Commission.
> 42. **State** pensions, that is to say, pensions payable by the **State** or out of the Consolidated Fund of the **State**.
> 43. Public debt of the **State**.
>
> **LIST III**
> 3. Preventive detention for reasons connected with the security of a **State**
> 4. Removal from one **State** to another **State** of prisoners, accused persons and persons subjected to preventive detention for reasons specified in entry 3 of this List.
> 43. Recovery in a **State** of claims in respect of taxes and other public demands, including arrears of land-revenue and sums recoverable as such arrears, arising outside that **State**.” (Emphasis supplied)

128 Article 239AA(3)(a) permits the legislative assembly of the NCT to legislate on matters in the State list, except for Entries 1, 2 and 18 (and Entries 64, 65 and 66 insofar as they relate to the earlier entries) and on the Concurrent list, "**insofar as any such matter is applicable to Union territories**". In forming an understanding of these words of Article 239AA(3)(a), it has to be noticed that since the decision in **Kanniyan** right through to the nine-judge Bench decision in **NDMC**, it has been held that the expression "**State**" **in Article 246** does not include a Union territory. The expression "insofar as any such matter is applicable to Union territories" cannot be construed to mean that the legislative assembly of NCT would have no power to legislate on any subject in the State or Concurrent lists, merely by the use of the expression "State" in that particular entry. This is not a correct reading of the above words of Article 239AA(3)(a). As we see below, that is not how Parliament has construed them as well.

129 Section 7(5) of the GNCTD Act provides that salaries of the Speaker and Deputy Speaker of the legislative assembly may be fixed by the legislative assembly by law. Section 19 provides that the members of the legislative assembly shall receive salaries and allowances as determined by the legislative assembly by law. Section 43(3) similarly provides that the salaries and allowances of ministers shall be determined by the legislative assembly. However, Section 24 provides that a Bill for the purpose has to be reserved for

the consideration of the President. Parliament would not have enacted the above provisions unless legislative competence resided in the States on the above subject. The subjects pertaining to the salaries and allowances of members of the legislature of the state (including the Speaker and Deputy Speaker) and of the Ministers for the state are governed by Entry 38 and Entry 40 of the State list. The GNCTD Act recognises the legislative competence of the legislative assembly of NCT to enact legislation on these subjects. The use of the expression ‘State’ in these entries does not divest the jurisdiction of the

legislative assembly. Nor are the words of Article 239AA(3)(a) exclusionary or disabling in nature.

130 The purpose of the above narration is to indicate that the expression ‘State’ is by itself not conclusive of whether a particular provision of the Constitution would apply to Union territories. Similarly, it can also be stated that the definition of the expression state in Section 3(58) of the General Clauses Act (which includes a Union territory) will not necessarily govern all references

to ‘State’ in the Constitution. If there is something which is repugnant in the subject or context, the inclusive definition in Section 3(58) will not apply. This is made clear in the precedent emanating from this Court. In certain contexts, it has been held that the expression ‘State’ will not include Union territories while in other contexts the definition in Section 3(58) has been applied.

Hence, the expression “insofar as any such matter is applicable to Union territories” is not one of exclusion nor can it be considered to be so irrespective of subject or context.

L Construction of the proviso to Article 239AA(4)

131 The vexed issue of interpretation relates to the proviso to Article 239AA(4). Undoubtedly, the National Capital Territory continues to be a Union territory. The Union government has a special interest in the administration of its affairs. This is exemplified by the provisions of Article 239 and Section 49 of the GNCTD Act. The proviso to Article 239AA(4) must be given an interpretation

which is marked with a sense of fine constitutional balance. The balance which is drawn must preserve the vital interest of the Union government in the governance of the national capital while supporting the legitimacy, and constitutional status of the Council of Ministers which owes collective responsibility to the legislative assembly and which, in its capacity of the executive arm of government tenders aid and advice to the Lieutenant Governor under a cabinet form of governance.

132 Broadly speaking, three lines of reasoning emerge before the Court. The Court need not be constrained by having to choose one among them. It

would be possible to draw from each, in arriving at a conclusion. The first line of interpretation would have the Court interpret the expression “difference of opinion between the Lieutenant Governor and his Council of Ministers on any of the matter” without reservation or qualification. This line of interpretation follows a purely literal or textual construction. Any difference of opinion would fulfil the proviso to clause 4. ‘Any matter’ would mean any matter without restriction. The Lieutenant Governor would be free to refer to the President just about any difference of opinion of any matter, where it has arisen with the Council of Ministers. This approach cautions the court against confining the proviso to specified categories or confining the areas where differences can arise.

133 The second line of interpretation is that the expression should be read and confined to specified categories. To test the validity of this approach, four categories may be delineated. The Lieutenant Governor may invoke the power under the proviso where:

(i) Executive decisions or acts of the Government of NCT will impede or prejudice the exercise of the executive power of the Union government;

(ii) The requirement of complying with laws enacted by Parliament or of the provisions of the Constitution arises;

(iii) The executive authority of the government of NCT is sought to be exercised in an area where it has no legislative competence (the *ultra vires* doctrine); and

(iv) A matter is located within Rule 23 of the Transaction of Business Rules.

134 There is a third line of interpretation, which has two facets. The first facet postulates at what stage, a reference to the President may be made in terms of the proviso. According to it, a reference can be made to the President only after the Lieutenant Governor has made an effort to resolve a difference with a Minister or with the Council of Ministers by seeking a resolution through dialogue and discussion. The Lieutenant Governor has to follow the provisions contained in the Transaction of Business Rules, which mandate that an attempt should be made to resolve differences within the institutional level of the NCT government before escalating matters to the President. The second facet relates to the substantive meaning of the expression 'any matter'. 'Any matter' in this line of interpretation would not mean 'every matter' or every trifling matter but only those rare and exceptional matters where the difference is so fundamental to the governance of the Union territory that it deserves to be escalated to the President. The third approach to interpretation proposes that both a procedural and substantive nuance must be adopted while interpreting the proviso, failing which the salutary constitutional purpose underlying Article 239AA will be defeated.

135 A close analysis of the three lines of interpretation would indicate that there is a kernel of substance in each of them, but there are pitfalls which must be guarded against. The functioning of institutions must establish a constitutional balance which facilitates cooperative governance. Governance in cooperation is both a hallmark and a necessity of our constitutional structure. Our Constitution distributes legislative and executive powers between political entities. Distribution of power between institutions which are the creation of the Constitution is a significant effort to ensure that the values of participation and representation which constitute the foundation of democracy permeate to all levels of governance. The federal structure for governance which is a part of the basic structure recognizes the importance of fulfilling regional aspirations as a means of strengthening unity. The Constitution has adopted some but may be not all elements of a federal polity and the Union government has an important role in the affairs of the nation. For the purpose of the present discourse, it is necessary to emphasise the value which the Constitution places on cooperative governance, within the federal structure.} An illustration is to be found in Chapter II of Part XI which deals with the administrative relations between the Union and the States. Under Article 256, an obligation has been cast upon every state to ensure that its executive power is exercised to secure compliance with laws enacted by Parliament. The executive power of the Union extends to issuing directions to

} Granville Austin (Supra note 3), at page 232

a State as are necessary, for that purpose. Article 257 contains a mandate that in exercising its executive power, a State shall not impede or prejudice the exercise of the executive power of the Union. The constitutional vision of cooperative governance is enhanced by the provision made in Article 258 under which the President may, with the consent of a State, entrust to it or to its officers, functions in relation to any matter to which the power of the Union extends. Similarly, even on matters on which a State legislature has no power to make laws, Parliament may confer powers and impose duties on the officers of the State. Article 261 provides that full faith and credit must be given throughout the territory of India to public acts, records and judicial proceedings of the Union and of every State. Without determining (it being unnecessary for the present discussion) the extent to which these provisions apply to a Union territory, the purpose of emphasising the principles which emerge from the chapter on administrative relations is to highlight the necessity for cooperative governance between different levels of government, in a Constitution, such as ours, which contains an elaborate distribution of power between political entities and institutions. The construction which the Court places on the proviso to Article 239AA(4) must facilitate mutual cooperation so that the affairs of state are carried out without dislocations occasioned by differences of perception. Differences between political arms of the state are natural to a democratic way of life. The strength inherent in differences is that the Constitution provides a platform for the robust expression of views, accommodates differences of ideology and

acknowledges that the resilience, and not the weakness of the nation lies in the plurality of her cultures and the diversity of her opinions. The working of a democratic Constitution depends as much on the wisdom and statesmanship of those in charge of governing the affairs of the nation as much as it relies on the language of the Constitution defining their powers and duties.

136 The proviso to Article 239AA(4) must be operated and applied in a manner which facilitates and does not obstruct the governance of the NCT. If the expression 'any matter' were to be construed as 'every matter' or every trifling matter that would result in bringing to a standstill the administration of the affairs of the NCT. Every conceivable difference would be referred to the President. The elected representatives would be reduced to a cipher. The Union government would govern the day to day affairs. The forms of the Constitution would remain but the substance would be lost. Article 239AA has been introduced as a result of the exercise of the constituent power. The purpose of the exercise is to confer a special status on the National Capital Territory. The arrangements for administering the affairs of Delhi are constitutionally entrenched as a result of the Sixty-Ninth amendment. Whether there should be a Council of Ministers or a Legislature (or both) was not left to determination in an Act of Parliament. The Constitution mandates that both must exist in the NCT. The Constitution mandates direct elections to the Legislature. It obligates the existence of a Council of Ministers which owes collective responsibility to the Legislature. It demarcates the area of legislative

and executive power. The Lieutenant Governor, as the substantive part of Article 239AA(4) stipulates, is to act on the aid and advice of the Council of Ministers. In adopting these provisions, the Constitution incorporates the essentials of the cabinet form of government. Was this to have no meaning? A constitutional court must be averse to accepting an interpretation which will reduce these aspirations of governance to a mere form, without the accompanying substance. The Court must take into consideration constitutional morality, which is a guiding spirit for all stakeholders in a democracy.

137 In discharging his constitutional role, the Lieutenant Governor has to be conscious of the fact that the Council of Ministers which tenders aid and advice is elected to serve the people and represents both the aspirations and responsibilities of democracy. Neither the Constitution nor the enabling legislation, which we have noticed earlier, contemplate that every decision of the executive government must receive the prior concurrence of the Lieutenant Governor before it can be implemented.

138 The interpretation of the proviso must be cognizant of the constitutional position that though Delhi has a special status, it continues to be a Union territory governed by Part VIII. There are take-aways from the first line of interpretation which have significance. Within the rubric of Union territories, as the nine-judge Bench decision in **NDMC** noticed, different Union territories are

in varying stages of evolution. Some of the erstwhile Union territories such as Goa attained full statehood and ceased to be Union territories. Some may not have a legislature. Some may have a Legislature under an enactment of Parliament. Delhi has a special position in that both its Legislature as well as Council of Ministers have a constitutionally recognized status. The conferment of this status by a constitutional amendment enhances the position of its arms of governance within Union territories without conferring statehood. Delhi is administered by the President under Article 239 acting through an Administrator who is designated as a Lieutenant Governor under Article 239AA(1). The language of the opening words of Article 239(1) must be read in harmony with Article 239AA. In terms of the reach of its legislative powers, the legislative assembly for the NCT does not exercise exclusive jurisdiction over State List subjects. Parliament has legislative authority (in addition to the Union List), both in regard to the State and Concurrent Lists for NCT. Hence legislation by the legislative assembly, even on matters which fall within its legislative domain is subject to the overriding power of Parliament. The principle of repugnancy which Article 254 recognises between Union and State legislation on matters in the Concurrent List is extended by Article 239AA [3(b) and 3 (c)], both with reference to State and Concurrent List subjects for NCT. Moreover, certain subjects have been expressly carved out from the ambit of the legislative authority of the legislative assembly and vested exclusively in Parliament. Executive powers of the Government of NCT being co-extensive with legislative powers, the aid and advice which is

tendered to the Lieutenant Governor by the Council of Ministers is confined to those areas which do not lie outside the purview of legislative powers. These provisions demonstrate that while adopting the institutions of a cabinet form of government, the Constitution has, for NCT, curtailed the ambit of the legislative and executive power, consistent with its status as a Union territory.

139 The exercise of the constituent power to introduce Article 239AA was cognizant of the necessity to protect national interests inherent in the governance of a national capital. A sense of permanence and stability was sought to be attributed to the arrangements made for governing Delhi by bringing in a constitutional amendment. Both in terms of the reach of the legislative power, as well as in relation to the exercise of executive power, the special constitutional arrangements for Delhi recognise that the governance of Delhi implicates a sense of national interest. When matters of national interest arise, they would predicate a predominant role for institutions of national governance.

140 Consistent with the need to preserve national interest, it would not be appropriate to restrict the ambit of the proviso to Article 239AA(4) to situations where the action of the government is *ultra vires* the limits of its executive powers. This becomes evident on a construction of the provisions of Section 41(1)(i) and Section 44(1)(a) of the GNCTD Act. Sub-clause(i) of Section 41(1) enables the Lieutenant Governor to act in his discretion on a matter

which falls outside the purview of the powers conferred on the legislative assembly but in respect of which powers or functions are entrusted or delegated to him by the President. Under Section 44(1)(a), Rules of Business are made on matters on which the Lieutenant Governor is required to act on the aid and advice of the Council of Ministers. Section 44(1)(a) covers business which is not a part of Section 41(1)(i). This is because matters which fall within Section 44(1)(i) are not governed by the principle of aid and advice.

141 There is much to be said for not laying down an exhaustive catalogue of situations to which the proviso applies. Governance involves complexities. In the very nature of things, it would not be possible for a Court delivering judgment in the context of the problems of the day to anticipate situations which may arise in future. It would be unsafe to confine a constitutional provision to stated categories which may affect the resilience of the Constitution to deal with unforeseen situations. Some of the illustrations which may warrant the exercise of the power under the proviso may shed light on the purpose of the proviso and the object which it seeks to achieve.

142 There are two constitutional perspectives: first, the operation of the proviso should preserve the national concerns underlying the conferment of such a power, and second, the exercise of the power under the proviso must not destroy the essential democratic values recognised in Article 239AA. Thus, it is necessary to lay down the steps which need to be adopted before recourse is taken to the proviso. The Transaction of Business Rules indicate

in sufficiently elaborate terms that when there is a difference of opinion between the Lieutenant Governor and a Minister, primarily, an effort should be made to resolve it by mutual discussion. If this process does not yield a satisfactory result, the matter can be referred to the Council of Ministers with whom an attempt is made to seek a satisfactory solution. It is when these two stages are crossed and a difference still persists that the proviso can be taken recourse to by referring the matter to the President. These stages which are enunciated in the Transaction of Business Rules must be read in conjunction with the authority conferred by Section 44 of the GNCTD Act which was enacted in pursuance of Article 239AA(7). Hence the proviso must be read in conjunction with the law enacted by Parliament and the Transaction of Business Rules made by the President, to give clarity to the operating procedure for invoking the proviso. Moreover, once a reference is made to the President, the Lieutenant Governor is bound by the decision of the President. The Lieutenant Governor has the authority to take action which is warranted by emergent circumstances until the President has taken a decision. But before recourse is taken to the proviso, the Lieutenant Governor must make every effort with the Minister or, as the case may be, the Council of Ministers to resolve a matter of difference. The nature of the differences which may warrant a reference to the President cannot be exhaustively catalogued. But it would be appropriate to construe the proviso as a protector of national concerns in regard to governance of the NCT. The Lieutenant Governor is a watchdog to protect them. The Lieutenant Governor may, for instance, be

justified in seeking recourse to the proviso where the executive act of the government of the NCT is likely to impede or prejudice the exercise of the executive power of the Union government. The Lieutenant Governor may similarly consider it necessary to invoke the proviso to ensure compliance with the provisions of the Constitution or a law enacted by Parliament. There may well be significant issues of policy which have a bearing on the position of the National Capital Territory as a national capital. Financial concerns of the Union government may be implicated in such a manner that it becomes necessary for the Lieutenant Governor to invoke the proviso where a difference of opinion remains unresolved. A situation of the nature indicated in Rule 23 of the Transaction of Business Rules may well justify recourse to the proviso. The touchstone for recourse to the proviso is that the difference of opinion is not a contrived difference. The matter on which a difference has arisen must be substantial and not trifling. In deciding whether to make a reference, the Lieutenant Governor must always bear in mind the latitude which a representative government possesses to take decisions in areas falling within its executive authority. The Lieutenant Governor must bear in mind that it is not he, but the Council of Ministers which takes substantive decisions and even when he invokes the proviso, the Lieutenant Governor has to abide by the decision of the President. The Lieutenant Governor must also be conscious of the fact that unrestrained recourse to the proviso would virtually transfer the administration of the affairs of the NCT from its government to the Centre. If the expression ‘any matter’ were to be read so broadly as to

comprehend ‘every matter’, the operation of the proviso would transfer decision making away from the government of the NCT to the Centre. If the proviso were to be so read, it would result in a situation where the President would deal with a reference on every matter, leaving nothing but the husk to the administration of the Union territory. Article 239AB makes a provision where there is a failure of the constitutional machinery in the Union territory. The proviso to Article 239AA(4) does not deal with that situation. Hence, in the application of the proviso it would be necessary to bear in mind that the Council of Ministers for the NCT has a constitutionally recognised function, as does the legislative assembly to whom the Council is collectively responsible. The role of the Lieutenant Governor is not to supplant this constitutional structure but to make it workable in order to ensure that concerns of a national character which have an innate bearing on the status of Delhi as a national capital are not bypassed. If these fundamental precepts are borne in mind, the operation of the proviso should pose no difficulty and the intervention of the President could be invoked in appropriate cases where a matter fundamental to the governance to the Union territory is involved.

M Conclusions

143 After analysing the constitutional and statutory provisions and the precedents on this point, this Court reaches the following conclusions:

(1) The introduction of Article 239AA into the Constitution was the result of the exercise of the constituent power. The 69th amendment to the Constitution has important consequences for the special status of Delhi as the National Capital Territory, albeit under the rubric of a Union territory governed by Part VIII of the Constitution;

(2) The content of such a constitutional amendment cannot be confined or constrained by the content of legislations which governed Delhi in the past. The constitutional amendments sought to bring stability and permanence to the democratic governance of the NCT. An amendment which enhances the basic features of the Constitution must bear an interpretation which will fulfil its true character;

(3) The Administrator appointed by the President under Article 239(1) is designated, with reference to the NCT as its Lieutenant Governor. The substantive source of power to appoint the Lieutenant Governor arises from Article 239 of the Constitution;

(4) While Article 239(1) indicates that the administration of a Union territory is by the President, the opening words of the provision ("Save as otherwise provided by Parliament by law") indicate that the nature and extent of the administration by the President is as indicated in the law framed by Parliament. Moreover, the subsequent words of the provision ("to such extent as he thinks fit") support the same position;

(5) By adopting Article 239AA, Parliament as a constituent body, provided Delhi with a special status by creating constitutionally entrenched institutions of governance. Article 239AA mandates the existence of a legislative assembly and Council of Ministers to govern the affairs of the National Capital;

(6) The provisions of Article 239AA represent a clear mandate of the Constitution to provide institutional governance founded on participatory, representative and responsive government. These features emerge from the provisions of Article 239AA which:

(i) require direct election to the legislative assembly from territorial constituencies;

(ii) engage the constitutional functions of the Election Commission of India under Articles 324, 327 and 329;

(iii) confer law making authority on the legislative assembly in respect of matters governed by the State List (save for excepted matters) and the Concurrent List;

(iv) mandate the collective responsibility of the Council of Ministers to the legislative assembly; and

(v) provide (in the substantive part of Article 239AA(4)) that the Lieutenant Governor shall act on the aid and advise of the Council of Ministers headed by the Chief Minister.

In adopting these provisions through an amendment, the Constitution has recognized the importance of the cabinet form of government to govern the affairs of Delhi;

(7) The distribution of legislative power in Article 239AA is indicative of the predominant role assigned to Parliament as a legislative body. This emerges from:

(i) the position that Parliament is empowered to legislate on subjects falling in the State List as well as the Concurrent List; and

(ii) the carving out of the three subjects of public order, police and land (Entries 1, 2 and 18 of the State List) and of offences, jurisdiction of Courts and fees (Entries 64, 65 and 66 in so far as they relate to the previous entries), all of which are within the exclusive legislative domain of Parliament. Principles of repugnancy govern any inconsistency between laws enacted by the legislative assembly and those by Parliament and the laws of Parliament are to prevail unless a Presidential assent has been received.

(8) The executive power of the government of NCT is co-extensive with the legislative power. The principle of aid and advice under clause 4 of Article

239AA extends to areas where the Lieutenant Governor exercises functions in relation to matters where the legislative assembly has the power to make laws. In consequence, those matters on which the legislative assembly does not have the power to enact legislation are not governed by the principle of aid and advice. Similarly, the Lieutenant Governor is not subject to aid and advice on matters where he is required to exercise his own discretion by or under any law;

(9) The GNCTD Act, 1991 has been enacted by Parliament in pursuance of the legislative authority conferred upon it by clause 7(a) of Article 239AA. The President has made the Transaction of Business Rules for the NCT as contemplated in the GNCTD Act, 1991;

(10) Section 41 of the GNCTD Act indicates that:

(i) in matters which lie outside the legislative powers entrusted to the legislative assembly and where there has been an entrustment or delegation of functions by the President to the Lieutenant Governor under Article 239; and

(ii) on matters where the Lieutenant Governor exercises his own discretion by or under any law,

he is not subject to the aid and advice of the Council of Ministers;

(11) Section 44 of the GNCTD Act indicates that aid and advice governs areas other than those specified in Section 44(1)(i);

(12) Under the Transaction of Business Rules, the Lieutenant Governor must be kept duly apprised on all matters pertaining to the administration of the affairs of the NCT. The Rules indicate the duty of the Council of Ministers to inform the Lieutenant Governor right from the stage of a proposal before it. The duty to keep the Lieutenant Governor duly informed and apprised of the affairs of the NCT facilitates the discharge of the constitutional responsibilities entrusted to him and the fulfilment of his duties under the GNCTD Act, 1991 and the Transaction of Business Rules;

(13) While the provisions contained in the Transaction of Business Rules require a scrupulous observance of the duty imposed on the Council of Ministers to inform the Lieutenant Governor on all matters relating to the administration of the NCT, neither the provisions of Article 239AA nor the provisions of the Act and Rules require the concurrence of the Lieutenant Governor to a decision which has been taken by the Council of Ministers. Rule 14 of the Transaction of Business Rules in fact indicates that the duty is to inform and not seek the prior concurrence of the Lieutenant Governor. However, in specified areas which fall under Rule 23; it has

been mandated that the Lieutenant Governor has to be apprised even before a decision is implemented;

(14) As a result of the provisions of Article 367, the General Clauses Act, 1897 applies, subject to adaptations and modifications made under Article 372, to the interpretation of the Constitution. The definitions of the expressions ‘state’ (Section 3(58)) and ‘state government’ (Section 3(60)) and ‘union territory’ (Section 3(62A)) apply to the interpretation of the provisions of the Constitution unless there is something repugnant in the subject or context of a particular provision of the Constitution;

(15) Since the decision of this Court in **Kanniyan** (supra) and right through to the nine-judge Bench decision in **NDMC** (supra), it is a settled principle that the expression ‘state’ in Article 246(4) will not include a Union territory and that the definition contained in the General Clauses Act will not apply having regard to the subject and context of the provision. Decisions of this Court have applied the subject and context test to determine whether the expression ‘state’ in other provisions of the Constitution and in statutory provisions would include a Union territory;

(16) The use of the expression “State” in a particular provision is not dispositive of whether or not its application would stand excluded in

relation to a Union territory. The outcome is essentially based on the subject and context in which the word has been used;

(17) While giving meaning and content to the proviso to Article 239AA (4), it is necessary to harmonise two significant precepts:

(i) The Constitution has adopted a cabinet form of government for the Union territory of Delhi by creating institutions for the exercise of legislative power and an executive arm represented by the Council of Ministers; and

(ii) Vital national interests are implicated in the governance of the National Capital Territory.

The doctrines of aid and advice and of collective responsibility give effect to (i) above while the empowerment of the Lieutenant Governor to refer any matter on which there is a difference of opinion to the President is a reflection of (ii) above.

(18) While it may not be possible to make an exhaustive catalogue of those differences which may be referred to the President by the Lieutenant Governor, it must be emphasised that a difference within the meaning of the proviso cannot be a contrived difference. If the expression 'any matter' were to be read as 'every matter', it would lead to the President assuming administration of every aspect of the affairs of the Union

territory, thereby resulting in the negation of the constitutional structure adopted for the governance of Delhi;

(19) Before the Lieutenant Governor decides to make a reference to the President under the proviso to Article 239AA(4), the course of action mandated in the Transaction of Business Rules must be followed. The Lieutenant Governor 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. A reference to the President is contemplated by the Rules only when the above modalities fail to yield a solution, when the matter may be escalated to the President;

(20) In a cabinet form of government, the substantive power of decision making vests in the Council of Ministers with the Chief Minister as its head. The aid and advice provision contained in the substantive part of Article 239AA(4) recognises this principle. When the Lieutenant Governor acts on the basis of the aid and advise of the Council of Ministers, this recognises that real decision-making authority in a democratic form of government vests in the executive. Even when the Lieutenant Governor makes a reference to the President under the terms of the proviso, he has to abide by the decision which is arrived at by the President. The Lieutenant Governor has, however, been

authorised to take immediate action in the meantime where emergent circumstances so require. The provisions of Article 239AA(4) indicate that the Lieutenant Governor must either act on the basis of aid and advice or, where he has reason to refer the matter to the President, abide by the decision communicated by the President. There is no independent authority vested in Lieutenant Governor to take decisions (save and except on matters where he exercises his discretion as a judicial or quasi-judicial authority under any law or has been entrusted with powers by the President under Article 239 on matters which lie outside the competence of the Government of NCT); and

(21) The proviso to Article 239AA is in the nature of a protector to safeguard the interests of the Union on matters of national interest in relation to the affairs of the National Capital Territory. Every trivial difference does not fall under the proviso. The proviso will, among other things, encompass substantial issues of finance and policy which impact upon the status of the national capital or implicate vital interests of the Union. Given the complexities of administration, and the unforeseen situations which may occur in future, it would not be possible for the court in the exercise of judicial review to exhaustively indicate the circumstances warranting recourse to the proviso. In deciding as to whether the proviso should be invoked the Lieutenant Governor shall abide by the principles which have been indicated in the body of this judgment.

144 After the circulation of my judgment to my learned colleagues, I have had the benefit of receiving the judgments of the learned Chief Justice and brother Justice Ashok Bhushan. I believe that there is a broad coalescence of our views.

145 The reference shall stand answered in the above terms and the proceedings shall now be placed before the learned Chief Justice of India for appropriate directions in regard to the constitution of the Bench to decide the matters.

…….....J
[Dr D Y CHANDRACHUD]

New Delhi;
July 04, 2018.

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.2357 OF 2017

GOVERNMENT OF NCT OF DELHI … APPELLANT(S)

VERSUS

UNION OF INDIA … RESPONDENT(S)

WITH

Civil Appeal No.2358 of 2017, Civil Appeal No.2359 of 2017, Civil Appeal No.2360 of 2017, Civil Appeal No.2361 of 2017, Civil Appeal No.2362 of 2017, Civil Appeal No.2363 of 2017, Civil Appeal No.2364 of 2017, Criminal Appeal NO.277 of 2017 and Contempt Petition (C) No.175/2016 in W.P.(Crl.) No.539/1986.

J U D G M E N T

ASHOK BHUSHAN, J.

These appeals have been filed questioning the Division Bench judgment of Delhi High Court dated

04.08.2016 deciding nine writ petitions by a common judgment, out of nine writ petitions, two writ petitions were filed by the Government of National Capital Territory of Delhi (hereinafter referred to as "GNCTD") being Writ Petition (C) No.5888 of 2015 (GNCTD vs. UOI) impugning:

> *"Notifications dated 21.05.2015 and 23.07.2014 issued by the Govt. of India, Ministry of Home Affairs empowering the Lt. Governor to exercise the powers in respect of matters connected with "Services" and directing the ACB Police Station not to take cognizance of offences against officials of Central Government."*

and Writ Petition (Crl.) No.2099 of 2015 (GNCTD vs. Nitin Manawat) impugning:

> *"Order passed by the Lt. Governor, NCT of Delhi under Section 24 of Cr. P.C. appointing a Special Public Prosecutor to conduct the trial in FIR No.21/2012 in the Special Court under PC Act."*

One writ petition filed by Union of India being Writ Petition (C) No.8867 of 2015 (UOI vs. GNCTD & Anr.) impugning:

> *"Notification dated 11.08.2015 issued by the Directorate of Vigilance, GNCTD under the Commissions of Inquiry Act, 1952 without*

placing before the Lieutenant Governor for his views/concurrence."

2. Other six writ petitions were filed by individuals challenging various notifications issued by GNCTD. The petitioners in Writ Petition (C) No.7887 of 2015 and Writ Petition (C) No.8382 of 2015 had challenged the notification dated 11.08.2015 issued by the Directorate of Vigilance, GNCTD under the Commissions of Inquiry Act, 1952. In Writ Petition (C) No.7934 of 2015 (Naresh Kumar vs. GNCTD & Ors.) impugned action was:

"Notification dated 04.08.2015 issued by the Revenue Department, GNCTD revising minimum rates of agricultural land (circle rules) under the provisions of Indian Stamp Act, 1899 and Delhi Stamp (Prevention of Undervaluation of Instrument)Rules without placing before the Lieutenant Governor for his views/concurrence."

Writ Petition(C) No.8190 of 2015 (Sandeep Tiwari vs. GNCTD & Ors.) was filed questioning:

"Order passed by the Department of Power, GNCTD under Delhi Electricity Reforms Act, 2000 read with Delhi Electricity Reforms (Transfer Scheme) Rules, 2001 appointing the Nominee Directors on Board of Electricity Distribution Companies without placing before the Lieutenant Governor for his views/concurrence."

3. The petitioner in Writ Petition (C)No.348 of 2016 (Ramakant Kumar vs. GNCTD) had also challenged notification dated 22.12.2015 issued by the Directorate of Vigilance, GNCTD under the Commissions of Inquiry Act, 1952 constituting the Commission of Inquiry.

4. The Division Bench of the High Court after considering the arguments of the parties recorded its conclusion in paragraph 304 of the judgment and its outcome in paragraph 305. Paragraphs 304 and 305 are extracted below:

> *"304. The conclusions in this batch of petitions may be summarized as under:-*
>
> *(i) On a reading of Article 239 and Article 239AA of the Constitution together with the provisions of the Government of National Capital Territory of Delhi Act, 1991 and the Transaction of Business of the Government of NCT of Delhi Rules, 1993, it becomes manifest that Delhi continues to be a Union Territory even after the Constitution (69th Amendment) Act, 1991 inserting Article 239AA making special provisions with respect to Delhi.*
>
> *(ii) Article 239 of the Constitution continues to be applicable to NCT of Delhi and insertion of Article 239AA has not diluted the application of Article 239 in any manner.*

(iii) The contention of the Government of NCT of Delhi that the Lt. Governor of NCT of Delhi is bound to act only on the aid and advice of the Council of Ministers in relation to the matters in respect of which the power to make laws has been conferred on the Legislative Assembly of NCT of Delhi under clause (3)(a) of Article 239AA of the Constitution is without substance and cannot be accepted.

(iv) It is mandatory under the constitutional scheme to communicate the decision of the Council of Ministers to the Lt. Governor even in relation to the matters in respect of which power to make laws has been conferred on the Legislative Assembly of NCT of Delhi under clause (3)(a) of Article 239AA of the Constitution and an order thereon can be issued only where the Lt. Governor does not take a different view and no reference to the Central Government is required in terms of the proviso to clause (4) of Article 239AA of the Constitution read with Chapter V of the Transaction of Business of the Government of NCT of Delhi Rules, 1993.

(v) The matters connected with 'Services' fall outside the purview of the Legislative Assembly of NCT of Delhi. Therefore, the direction in the impugned Notification S.O.1368(E) dated 21.05.2015 that the Lt. Governor of the NCT of Delhi shall in respect of matters connected with 'Services' exercise the powers and discharge the functions of the Central Government to the extent delegated to him from time

to time by the President is neither illegal nor unconstitutional.

(vi) *The direction in the impugned Notification S.O.1896(E) dated 23.07.2014 as reiterated in the Notification S.O.1368(E) dated 21.05.2015 that the Anti-Corruption Branch Police Station shall not take any cognizance of offences against officers, employees and functionaries of the Central Government is in accordance with the constitutional scheme and warrants no interference since the power is traceable to Entry 2 (Police) of List II of the Seventh Schedule to the Constitution in respect of which the Legislative Assembly of NCTD has no power to make laws.*

(vii) *Notification No.F.5/DUV/Tpt./4/7/ 2015/ 9386-9393 dated 11.08.2015 issued by the Directorate of Vigilance, Government of NCT of Delhi under Section 3 of the Commission of Inquiry Act, 1952 appointing the Commission of Inquiry for inquiring into all aspects of the award of work related to grant of CNG Fitness Certificates in the Transport Department, Government of NCT of Delhi is illegal since the same was issued without seeking the views/concurrence of the Lt. Governor as provided under Rule 10 and Rule 23 read with Chapter V of Transaction of Business Rules, 1993.*

(viii) *For the same reasons, the Notification No. F.01/66/2015/DOV/15274-15281 dated 22.12.2015 issued by the Directorate of Vigilance, Government of NCT of Delhi under Section 3 of the*

Commission of Inquiry Act, 1952 appointing the Commission of Inquiry to inquire into the allegations regarding irregularities in the functioning of Delhi and District Cricket Association is also declared as illegal.

(ix) The appointment of Nominee Directors of Government of NCT of Delhi on Board of BSES Rajdhani Power Limited, BSES Yamuna Power Limited and Tata Power Delhi Distribution Limited by the Delhi Power Company Limited on the basis of the recommendations of the Chief Minister of Delhi without communicating the decision of the Chief Minister to the Lt. Governor of NCT of Delhi for his views is illegal.

(x) The proceedings of the Government of NCT of Delhi, Department of Power No.F.11(58) /2010/Power/1856 dated 12.06.2015 issuing policy directions to the Delhi Electricity Regulatory Commission regarding disruption in electricity supply to consumers and compensation payable in respect thereof are illegal and unconstitutional since such policy directions cannot be issued without communicating to the Lt. Governor of NCT of Delhi for his views.

(xi) The Notification No.F.1(1953)/Regn.Br./ Div.Com/HQ/2014/191 dated 04.08.2015 issued by the Government of NCT of Delhi, Revenue Department in exercise of the powers conferred by sub-section(3) of Section 27 the Indian Stamp Act, 1899 (2 of 1899) and Rule 4 of the Delhi Stamp (Prevention of Under - Valuation of Instruments) Rules, 2007 revising the

minimum rates for the purpose of chargeability of stamp duty on the instruments related to sale/transfer of agriculture land is illegal since the said notification was issued without seeking the views/concurrence of the Lt. Governor of NCT of Delhi as required under the constitutional scheme.

(xii) Though the Lt. Governor of NCT of Delhi is competent to appoint the Special Public Prosecutor under Section 24(8) of Cr.P.C., such power has to be exercised on the aid and advice of the Council of Ministers in terms of Clause (4) of Article 239AA of the Constitution.

305. In result, W.P.(C) No.5888/2015 is dismissed, W.P.(C) Nos.7887/2015, 7934/2015, 8190/2015, 8382/2015, 8867/2015, 9164/2015 and 348/2016 are allowed and W.P.(Crl.) No.2099/2015 is disposed of with directions."

5. The Government of NCTD aggrieved by the judgment has filed appeals. The GNCTD in its appeals has prayed for setting aside the judgment of the High Court.

6. Union of India has filed two appeals, namely, C.A.No.2364 of 2017 questioning the judgment of Division Bench in Writ Petition(C) No.7934 of 2015 and Criminal Appeal No.277 of 2017 questioning the judgment in Writ

Petition(Crl.) No.2099 of 2015.

7. These appeals raise important questions of law in respect of the powers exercisable by democratically elected Government of NCT in juxtaposition to the power of Lt. Governor of NCTD (hereinafter referred to as “LG”).

8. During the hearing of the appeals, a two Judge Bench of this Court opined that the appeals involve substantial questions of law as to the interpretation of Article 239AA of the Constitution of India. The Division Bench passed the following order for placing the matter before Chief Justice for constituting a Constitution Bench:

> "*During the hearing of these appeals our attention is drawn to the provisions of Article 145(3) of the Constitution of India. Having gone through the matters and the aforesaid provisions, we are of the opinion that these appeals need to be heard by a Constitution Bench as these matters involve substantial questions of law as to the interpretation of Article 239AA of the Constitution.*
>
> *The Registry shall accordingly place the*

papers before Hon'ble the Chief Justice of India for constituting an appropriate Constitution Bench."

9. These appeals, thus, have been placed before this Constitution Bench. At the outset, it was agreed between the learned counsel for the parties that this Constitution Bench may only answer the constitutional questions and the individual appeals thereafter will be decided by appropriate regular Benches.

10. We have been benefited by erudite submissions made by learned senior counsel, Shri P. Chidambaram, Shri Gopal Subramanium, Dr. Rajiv Dhawan, Smt. Indira Jaising and Shri Shekhar Naphade. On behalf of Union of India, submissions have been advanced by Shri Maninder Singh, learned Additional Solicitor General for India. We have also heard other learned counsel appearing for the parties as well as learned counsel appearing for intervenor for whom Dr. A.M. Singhvi and Shri Arvind Datar, learned senior counsel have appeared. Shri Siddharth Luthra, learned senior counsel has appeared for respondent in C.A. NO.2360 of 2017.

11. A common written submission has been filed on behalf of Government of National Capital Territory of Delhi. Shri Maninder Singh, learned Additional Solicitor General has also filed the written submission on behalf of Union of India and Lt. Governor of NCTD.

The submissions

12. Learned senior counsel appearing for GNCTD has emphasised and highlighted various aspects of the different constitutional issues which have arisen for consideration in these appeals. Their submissions are referred hereafter as common submissions on behalf of GNCTD. It is submitted that NCTD occupies a unique position in constitutional jurisprudence by virtue of insertion of Articles 239AA and 239AB vide the Constitution (Sixty Ninth Amendment) Act, 1991. Though still a Union Territory, the NCTD has come to acquire various characteristics that were, prior to the 69th Amendment and the Government of the National Capital Territory Act, 1991 (hereinafter referred to as "1991 Act"), considered under the Constitution to be

characteristics solely of States. As a consequence, the GNCTD also enjoys far more powers than the Government of any other Union Territory. The History of constitutional provisions and Parliamentary enactments with respect to the NCTD clearly establishes that 69th Amendment and 1991 Act were passed aiming for giving the residents of the NCTD proper participation an ever larger say in the governance of NCTD, truer and deeper form of democracy. Article 239AA intended to completely eradicate any hierarchical structure which functionally placed Lieutenant Governor of Delhi (hereinafter referred to as "LG") in a position superior to that of the Council of Ministers, especially with respect to the exercise of executive power. Pursuant to Article 239AA, a cabinet system of Government on the Westminster style was introduced in Delhi and the LG was made a titular head alone in respect of matters that were assigned to Legislative Assembly and the Council of Ministers. By way of the express and deliberate exclusion of language similar to that of the 1963 Act and 1966 Act from the words of Article 239AA, and the replacement of "assist

and advise" with the term of art "aid and advice", the 69th Constitutional Amendment consciously obviated a requirement for the LG's concurrence and allowed the Council of Ministers created thereunder to govern the NCTD. The provisions of Article 239AA must be interpreted as furthering the basic structure of the Constitution, a purposive interpretation has always been adopted by this Court. Learned counsel have also relied on "doctrine of constitutional silence and convention".

13. It is contended that federalism being the basic structure of the Constitution. The interpretation of the constitutional provisions has to be done in a manner which may strengthen the federal structure as contemplated by the Constitution. The arguments of respondent that provisions of Article 239AA should be read in a strictly textual manner is not correct. Our constitutional jurisprudence has moved away by several decisions of this Court from a textual to more purposive and organic method of constitutional interpretation.

14. The 69th Constitutional Amendment installed a Westminster style of Government for NCTD. The constitutional head would be bound by the "aid and advice" of their Council of Ministers, this is irrespective of who is the constitutional head, whether President, State Governor or by logical end the LG. In the case of NCTD, the principle of collective responsibility to a democratic legislative body requires that the "aid and advice" of the Council of Ministers be binding on the LG in order to give due respect to the stated intention of the 69th Constitutional Amendment, i.e., the introduction of constitutionally mandated democratic governance in Delhi.

15. It is the petitioner's case that the extent of the executive powers of the GNCTD can be understood by way of a combined reading of the provisions of Article 239AA(3) read with Article 239AA(4). The GNCTD possesses exclusive executive powers in relation to matters that fall within the purview of the Assembly's Legislative competence. Neither the President nor the Central Government has any

executive powers in Delhi with respect to these matters and the LG as the President's delegate has no role or power in this regard. Article 239AA(3) gives the Delhi Legislative Assembly legislative powers over all but Entries 1, 2, 18 and Entries 64, 65 and 66 in so far as they relate to Entry 1, 2 and 18 of the State List, and all the subjects in the Concurrent List. The Council of Ministers' executive domain under Article 239AA(4) is the same. Moreover, Article 239AA reserves primacy of the Union Parliament and the Central Government only in limited area. This is clear from the provisions of Article 239AA(3)(b). The primacy of the legislative powers of Parliament is reserved by this provision but there is no corresponding provision in the Constitution which preserves the executive power of the Central Government *vis-a-vis* the Delhi Government in respect of the NCT. Thus, Article 239AA(3)(b) consciously preserves Parliament's Legislative powers for Delhi, as they obtained for all Union Territories under Article 246. Also it consciously omits from giving the Centre coterminous executive powers, and Article 73 will only

operate to give the Centre executive power in relation to the three reserved subjects of State List.

16. Dwelling on the interpretation of proviso to Article 239AA(4), it is submitted that proviso is not meant for the LG to have a different view on the merits of the aid and advice that has been tendered by the Council of Ministers and is only meant to deal with situations where the aid and advice of the Council of Ministers is transgressing beyond the areas constitutionally prescribed to them. It is submitted that the said proviso operates in the following areas, where the decision of the Council of Ministers of the NCTD:-

a. is outside the bounds of executive power under Article 239AA(4);

b. impedes or prejudices the lawful exercise of the executive power of the Union;

c. is contrary to the laws of the Parliament.

d. falls within Rule 23 of the Transaction of Business of Government of National Capital Territory of Delhi Rules, 1993 matters such as-

i. matters which affect the peace and tranquillity of the Capital;

ii. Interests of any minority community;

iii. Relationship with the higher judiciary;

iv. any other matters of administrative importance which the Chief Minister may consider necessary.

17. A holistic reading of Article 239AA(4) and the proviso reveals that the proviso exists because the norm is for the LG to be bound by the aid and advice of the Council of Ministers of the NCTD. This norm can only be departed from in the circumstances laid out above for the applicability of the proviso.

18. It is submitted that 1991 Act as well as the Rules themselves cannot be used to interpret the constitutional provisions rather they are reflecting the scheme of governance. The “services” lies within the Legislative and Executive domains of the Delhi Assembly and the GNCTD respectively.

19. Shri Maninder Singh, learned Additional Solicitor General for India replying to the submissions of learned counsel for the appellant contends that while interpreting the Constitution the Courts should give effect to plain and literal meaning of the constitutional provisions. There is neither any ambiguity nor any absurdity arising from the plain/literal interpretation of the provisions of 239AA. The constitutional provisions concerning the GNCTD have been inserted keeping in view the carefully envisaged scheme of governance for NCTD under the Constitution of India. The Constitution makers have deliberately used the widest possible words “any matter” in order to retain the powers of the Union in both the legislative and executive spheres in relation to all matters, keeping in view the unique features as well as special responsibilities of the Union, in each subject in relation to the National Capital. Any contention seeking a restrictive interpretation of the said provisions are impermissible in view of the law laid down by this Court. Any such contention would not only be

contrary to the constitutional scheme envisaged for Delhi but would also be contrary to the intention of the Constitution makers in using the widest possible language for emphasising the responsibility and supremacy of the Union in the administration of the National Capital.

20. The contention on the basis of principles of constitutional silence or constitutional implication which run contrary to the constitutional scheme envisaged by express provisions has to be rejected. The Balakrishnan Committee Report which was foundation for 69th Constitutional Amendment throws light on the intention of the Constitution makers.

21. Article 239 is an integral/inseparable part of the constitutional scheme envisaged for all Union Territories as provided for under Part VIII of the Constitution, and is to be read with Article 239AA for NCT of Delhi. Article 239 applies to all Union Territories including NCT of Delhi when read with Article 239AA, the way it applies to Pondicherry when read with the provision of

Article 239A.

22. Shri Maninder Singh during his submission has referred to various paragraphs of Balakrishnan Committee Report to bring home his point of view.

23. It is submitted that even when Article 239AA(3)(a) stipulates that Legislative Assembly of Delhi shall have the power to legislate in respect of subject matters provided in List II and List III of the VIIth Schedule of Constitution of India, it specifically restricts the legislative powers of Legislative Assembly of Delhi to those subject matters which are “applicable to Union Territories”. The Constitution envisages that List II and List III of the VIIth Schedule of the Constitution of India contain certain subject matters which are not applicable to Union Territories. The intention of the Constitution makers is that even when the subject matters contained in List II and List III of the VIIth Schedule become available to the Legislative Assembly of NCT of Delhi, the subject matters in the said Lists which are

not applicable to Union Territories would not become available to the Legislative Assembly of NCT of Delhi and would be beyond its legislative powers.

24. Article 246(4) provides that in relation to all Union Territories including Delhi and any other territory which is not a State, Parliament has power to make laws on **any matter** i.e. all subject matters contained in all three Lists of the VIIth Schedule. This independent separate provision once again recognises the ultimate/eventual responsibility of the Union in relation to the Union Territories on all subject matters.

25. Since the executive power of the Union under Article 73(1)(a), and which is vested in the President of India under Article 53 extends to all subject matters on which Parliament has power to make laws – in a Union Territory, the executive power of the Union extends to **any matter** i.e. all subject matters contained in all three Lists of the VIIth Schedule and remains vested in the President under Article 239 of the Constitution for administering

Union Territories, including Union Territory of NCT Delhi.

26. It is submitted that the proviso to Article 239AA(4) re-enforces and recognises the ultimate/eventual responsibility and continuing control of the Union in relation to the administration of the Union Territory of Delhi. The Constitution makers have envisaged that owing to its responsibilities in relation to every subject, it may become necessary for the Union Government to take any decision with regard to any matter in relation to the administration of the National Capital Territory of Delhi. Such a need may also be arising in relation to day-to-day functioning of the National Capital.

27. It is further submitted that the Constitution makers have deliberately used the widest possible phrase of "**any matter**" in the proviso to Article 239AA(4). The Constitution Bench of this Court in the case of ***Tej Kiran Jain and Others Vs. N. Sanjiva Reddy and Others, (1970) 2 SCC 272*** has clearly held that the word "any" used in

relation to “anything” in the Constitution — would necessarily mean “everything”. The said principle would make it abundantly clear that the phrase “any matter” used in Article 239AA would necessarily and unexceptionally mean “every matter”. Further, only such an interpretation would ensure the intended objective and the necessity that if the need arises, the Union is not prevented from discharging its responsibilities in relation to the National Capital in relation to any matter.

28. It is further respectfully submitted that the proviso to Article 239AA(4) would not deserve to be interpreted as an “exception”. It is not an exception but the reiteration of a constitutional mandate. The constitutional mandate is that the Union would have overarching control in relation to all matters for the National Capital. There is no vestige of any exclusive Executive Power in the Council of Ministers of NCT of Delhi. The vestige of the Executive Power continues to remain in the President. The proviso is controlling the

provision of Article 239AA(4), reiterating the overarching control of the Union, and is not an exception. The proviso indicates the constitutional mandate of supremacy of the Union. In the humble submission of the respondents, no restrictive interpretation of the proviso ought to be permitted and the clear Constitutional mandate contained in the proviso to Article 239AA(4) would deserve to be followed, especially in the case of the National Capital.

29. It is most respectfully reiterated that the unitary scheme of governance for Union Territories, especially for National Capital of Delhi, has been envisaged keeping in view the fact that the administration of Union Territories specially National Capital of Delhi is the responsibility of the President/Union. The Union Government is the responsible Government, accountable to the Parliament for the administration of the Union Territories. The National Capital belongs to people of the entire nation. Learned Additional Solicitor General has also referred to and relied on various provisions of

1991 Act and Transaction of Business Rules, 1993 with regard to administration of GNCTD.

30. Learned Additional Solicitor General in its submission also contended that there are very few instances in which LG has made reference to President and in actual working LG neither withhold the files nor there is any other hindrance in decisions taken by GNCTD. He submits that on various occasions without even communicating the decisions taken by the Council of Ministers/Ministers to the LG, the GNCTD starts implementing the decision which is not in accordance with the scheme of governance as delineated by Article 239AA. 1991 Act and Transaction of Business Rules, 1993.

31. Learned counsel for the parties in support of their respective submissions have placed reliance on a large number of judgments of this Court and Foreign Courts. Relevant decisions of this Court and other Courts shall be referred to while considering the respective submissions.

Importance of a National Capital

32. The word "Capital" is derived from Latin word "**caput**" meaning head and denotes a certain primacy status associated with the very idea of a Capital. Delhi is the National Capital of the country. For the purposes of this case it is not necessary to notice the early history of Delhi. During the British period Calcutta was a seat of both the Provincial Government of Bengal as well as the Central Government. The conflicts of authorities and jurisdiction between the Governor of Bengal and Governor-General was brought into the notice of the Secretary of the State in London. Lord Hardinge in his dispatch of 25.08.1911 emphasised "that the Capital of a great Central Government should be separate and independent, and effect has been given to this principle in the United States of America, Canada and Australia". A decision was taken to transfer Capital from Calcutta to Delhi which was announced on 12.12.1911. A Government Notification No.911 dated 17.09.1912 was issued under which the Governor-General-in-Council took under his authority the

Territories comprising the Tehsil of Delhi and the Police Station of Mehrauli which were formerly included in the province of Punjab. The Notification provided for the administration of areas as a separate province under a Chief Commissioner. The Delhi Laws Act, 1911 and the Delhi Laws Act, 1915 made provisions for the continuance of the Laws in force in the Territories comprising the Chief Commissioner's province of Delhi and for the extension of other enactments in force in any part of British India to Delhi by Governor-General-in-Council. In 1915, trans-Yamuna areas comprising 65 villages were separated from United Provinces of Agra and Oudh and added to the Chief Commissioner's of Delhi.

Administration of Delhi after Enforcement of the Constitution of India.

33. The Government of India Act, 1935 did not affect any material changes in the administrative set-up for Delhi and it continued as before to be a Chief Commissioner's Province directly administered by the Governor-General "acting to such extent as he thinks fit through a Chief Commissioner". On 31.07.1947, a Committee under the

Chairmanship of Dr. B.Pattabhi Sitaramayya was established to study and report on the constitutional changes required in the administrative structure obtaining in the Chief Commissioner's Provinces, including Delhi. The Committee recommended that Delhi, Ajmer, Bhopal, Bilaspur, Coorg, Himachal Pradesh including Kutch, Manipur, Tripura and such other provinces may be so **designated as shall be the Lt. Governor's Province.** The report was debated in Constituent Assembly when draft Articles 212 and 213 (which was adopted as 239-240) was debated. When the Constitution was enforced from 26th January, 1950 the scheme of the Constitution of India including Articles 1 to 4, Territory of India was divided into four categories Part 'A', Part 'B', Part 'C' and Part 'D' States. With regard to Part 'A' and Part 'B' States, the Constitution envisaged a vertical division of power between the Union and States wherein Part 'C' and 'D' States, Constitution had provided structure under which Union Government retained the power in both the executive and legislative sphere. Part 'C' States had also been termed as centrally

administered areas which included Delhi. Parliament enacted the Government of Part C States Act, 1951, under which provision was made to aid and advice to Chief Commissioner. The States Re-organisation Commission was set up on 29.12.1953 which also took up subject of functioning of Part 'C' States. The State Re-organisation Commission made the following Report with regard to Delhi:

> *"584. It is hardly necessary to discuss in any detail the reasons why Delhi, if it is to continue as the Union Capital, cannot be made part of a full-fledged constituent unit of the Indian Union. Even under a unitary system of government, the normal practice is to place national capitals under a special dispensation. In France, for example, there is a greater degree of central control over Paris than over other municipalities. In England, the police administration of the metropolitan area is directly under the control of the Home Secretary, who does not exercise similar powers in respect of other municipal areas. Apart from reasons which are peculiar to each country or city, there are some general considerations necessitating special arrangements in respect of national capitals. Capital cities possess, or come to possess, some degree of political and social predominance. They are seats of national governments, with considerable property belonging to these governments. Foreign diplomatic missions and international agencies are located in these capitals. They also become centres of national culture and*

art. So far as federal capitals are concerned, there is also an additional consideration. Any constitutional division of powers, if it is applicable to units functioning in the seats of national governments, is bound to give rise to embarrassing situations. Practice in other countries, administrative necessity and the desirability of avoiding conflicting jurisdictions, all point to the need for effective control by national governments over federal capitals."

34. On the basis of the recommendation of the State Re-organisation Commission, 7th Amendment Act, 1956 was passed, under the Amendment Part 'C' States were renamed as Union Territory. Delhi a Part 'C' State became Union Territory and the Legislative Assembly and Council of Ministers ceased to act w.e.f. 01.11.1956. Subsequent to 7th Amendment, different schemes were enforced for administration of Delhi, Delhi Municipal Corporation Act, 1957 was passed by the Parliament providing for direct election of Councillors from all the constituencies to be elected by residents of Delhi. By Constitution 14th Amendment Act, 1962, Article 239A was inserted which was enabling provision for the Parliament to make law to create a Legislature or Council of Ministers or both for

the Union Territories specified therein. The Union Territory of Delhi was not included in the list of Union Territories in Article 239A. The Parliament enacted the Government of Union Territories Act, 1963. The Delhi Administration Act, 1966 was passed by the Parliament to provide for an elected body of Delhi Metropolitan Council. A Committee was appointed by the Government of India to go into the various issues connected with the administration of Union Territory of Delhi. The Committee, after, studying for two years about all aspects of the matters had submitted its Report on 14.12.1989 to the Home Minister. The Report of the Committee is commonly known as Balakrishnan Committee Report. While submitting the Report S.Balakrishnan, in nutshell, in his letter dated 14.12.1989 addressed to Home Minister has outlined task given to the Committee in following words:

> *"The task of designing a proper structure of Government for the national capital particularly for a country with a federal set up like ours, has always proved difficult because of two conflicting requirements. On the one hand, effective administration of the national capital is of vital importance to the national Government*

not only for ensuring a high degree of security and a high level of administrative efficiency but also for enabling the Central Government to discharge its national and international responsibilities; to ensure this, it must necessarily have a complete and comprehensive control over the affairs of the capital. On the other hand, the legitimate demand of the large population of the capital city for the democratic right of participation in the government at the city level is too important to be ignored. We have endeavoured to design a governmental structure for Delhi which we hope, would reconcile these two requirements."

35. Balakrishnan Committee Report studied different aspects connected with the administration of Delhi, the Capital of this country. While studying "National Capital Administration in some countries", in Chapter V, the Committee examined various models including United States of America, Canada, Japan and United Kingdom. After noticing the different aspects in paragraph 5.7.3 following has been observed:

"5.7.3 It will be clear from the above that it has been recognised in many countries of the world that the national government should have the ultimate control and authority over the affairs of the national capital. At the same time, there is a noticeable trend in those countries to accept the principle of associating the people in the capital with sectors of administration affecting them, by

means of a representative body. Because of the difficulty in securing a balance between these two considerations, the problem of evolving an appropriate governmental structure for the national capital has proved difficult in many countries particularly those with a federal type of government."

36. Before the Committee, the arguments for giving Statehood to Delhi as well as arguments against the Statehood was noticed. The Committee after considering the rival arguments concluded following in paragraph 6.5.9 and 6.5.10:

"6.5.9 We are also impressed with the argument that Delhi as the national capital belongs to the nation as a whole and any constituent 'State of the Union of which Delhi will become a part would sooner or later acquire a predominant position in relation to other States. Sufficient constitutional authority for Union intervention in day-to-day matters, however, vital some of them may be, will not be available to the Union, thereby prejudicing the discharge of its national duties and responsibilities.

6.5.10 In the light of the foregoing discussion our conclusion is that it will not be in the national interests and in the interests of Delhi itself, to restructure the set-up in Delhi as a full-fledged constituent State of the Union, this will have to be ruled out. We recommend accordingly."

37. While discussing "salient features of proposed structure" following was stated in paragraphs 6.7.1 and 6.7.2:

> *"6.7.1 As a consequence of our recommendation in the preceding paragraph that Delhi should be provided with a Legislative Assembly and a Council of Ministers the further issues to be considered are:*
>
> *(i) the extent of the powers and responsibilities to be conferred on or entrusted to these bodies, the special safeguards to ensure that the Union is not hampered in discharging its duties and responsibilities and the other salient features of the structure; and*
>
> *(ii) the manner in which the proposed changes in the structure should be brought about, that is, whether they should be by amendments to the Constitution, or by a Parliamentary law or by a combination of both.*
>
> *We will now take up the issue in item (i) above in the succeeding paragraphs. Item (ii) will be discussed in Chapter VII.*
>
> *6.7.2 As we have already stated, any governmental set-up for Delhi should ensure that the Union is not fettered or hampered in any way in the discharge of its own special responsibilities in relation to the administration of the national capital, by a constitutional division of powers, functions and responsibilities between the Union and the Delhi Administration. The only way of ensuring this arrangement is to keep Delhi as*

a Union Territory for the purposes of the Constitution. Thereby, the provision in Article 246(4) of the Constitution will automatically ensure that Parliament has concurrent and overriding powers to make laws for Delhi on all matters, including those relateable to the State List. Correspondingly, the Union, Executive can exercise executive powers in respect of all such matters subject to the provisions of any Central law governing the matter. We, therefore, recommend that even after the creation of a Legislative Assembly and Council of Ministers for Delhi it should continue to be a Union Territory for the purposes of the Constitution."

38. Various other recommendations were made by Balakrishnan Committee which led to Constitution 69th Amendment. Statement and Objects of Constitution 69th Amendment notices the object and purpose of constitutional amendment which are to the following effect:

"STATEMENT OF OBJECTS AND REASONS

The question of re-organisation of the Administrative set-up in the Union territory of Delhi has been under the consideration of the Government for some time. The Government of India appointed on 24-12-1987 a Committee to go into the various issues connected with the administration of Delhi and to recommend measures inter alia for the streamlining of

the administrative set-up. The Committee went into the matter in great detail and considered the issues after holding discussions with various individuals, associations, political parties and other experts and taking into account the arrangements in the national Capitals of other countries with a federal set-up and also the debates in the Constituent Assembly as also the reports by earlier Committees and Commissions. After such detailed inquiry and examination, it recommended that Delhi should continue to be a Union territory and provided with a Legislative Assembly and a Council of Ministers responsible to such Assembly with appropriate powers to deal with matters of concern to the common man. The Committee also recommended that with a view to ensure stability and permanence the arrangements should be incorporated in the Constitution to give the National Capital a special status among the Union territories.

2. The Bill seeks to give effect to the above proposals."

39. By 69th Amendment Act, Article 239AA and Article 239AB were added in Part VIII of the Constitution. Article 239AA and 239AB which Articles are taken up for consideration in these appeals are as follows:

"Article 239AA **{Special provisions with respect to Delhi}**

1. As from the date of commencement of the Constitution (Sixty ninth Amendment) Act, 1991, the Union territory of Delhi shall be called the National Capital Territory of Delhi (hereafter in this Part referred to as the National Capital Territory) and the administrator thereof appointed under article 239 shall be designated as the Lieutenant Governor.

2(a) There shall be a Legislative Assembly for the National Capital Territory and the seats in such Assembly shall be filled by members chosen by direct election from territorial constituencies in the National Capital Territory.

(b) The total number of seats in the Legislative Assembly, the number of seats reserved for Scheduled Castes, the division of the National Capital Territory into territorial constituencies (including the basis for such division) and all other matters relating to the functioning of the Legislative Assembly shall be regulated by law made by Parliament.

(c) The provisions of articles 324 to 327 and 329 shall apply in relation to the National Capital Territory, the Legislative Assembly of the National Capital Territory and the members thereof as they apply, in relation to a State, the Legislative Assembly of a State and the members thereof respectively; and any reference in articles 326 and 329 to "appropriate Legislature" shall be deemed to be a reference to Parliament.

3(a) Subject to the provisions of this Constitution, the Legislative Assembly shall have power to make laws for the whole or any part of the National Capital Territory with

respect to any of the matters enumerated in the State List or in the Concurrent List in so far as any such matter is applicable to Union territories except matters with respect to Entries 1, 2 and 18 of the State List and Entries 64, 65 and 66 of that List in so far as they relate to the said Entries 1, 2 and 18.

(b) Nothing in sub-clause (a) shall derogate from the powers of Parliament under this Constitution to make laws with respect to any matter for a Union territory or any part thereof.

(c) If any provision of a law made by the Legislative Assembly with respect to any matter is repugnant to any provision of a law made by Parliament with respect to that matter, whether passed before or after the law made by the Legislative Assembly, or of an earlier law, other than a law made by the Legislative Assembly, then, in either case, the law made by Parliament, or, as the case may be, such earlier law, shall prevail and the law made by the Legislative Assembly shall, to the extent of the repugnancy, be void: Provided that if any such law made by the Legislative Assembly has been reserved for the consideration of the President and has received his assent, such law shall prevail in the National Capital Territory: Provided further that nothing in this sub-clause shall prevent Parliament form enacting at any time any law with respect to the same matter including a law adding to, amending, varying or repealing the law so made by the Legislative Assembly.

4. There shall be a Council of Ministers consisting of not more than ten per cent of the total number of members in the Legislative

Assembly, with the Chief Minister at the head to aid and advise the Lieutenant Governor 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: Provided that in the case of difference of opinion between the Lieutenant Governor and his Ministers on any matter, the Lieutenant Governor shall refer it to the President and pending such decision it shall be competent for the Lieutenant Governor in any case where the matter, in his opinion, is so urgent that it is necessary for him to take immediate action, to take such action or to give such direction in the matter as he deems necessary.

5. *The Chief Minister shall be appointed by the President and the other Ministers shall be appointed by the President on the advice of the Chief Minister and the Ministers shall hold office during the pleasure of the President.*

6. *The Council of Ministers shall be collectively responsible to the Legislative Assembly.*

7(a) *Parliament may, by law, make provisions for giving effect to, or supplement the provisions contained in the foregoing clauses and for all matters incidental or consequential thereto.*

(b) *Any such law as is referred to in sub-clause (a) shall not be deemed to be an amendment of this constitution for the purposes of article 368 notwithstanding that it contains any provision which amends or has the effect of amending this constitution.*

8. *The provisions of article 239B shall, so far as may be, apply in relation to the National*

Capital Territory, the Lieutenant Governor and the Legislative Assembly, as they apply in relation to the Union territory of Pondicherry, the administrator and its Legislature, respectively; and any reference in that article to "clause (1) or article 239A" shall be deemed to be a reference to this article or article 239AB, as the case may be.

Article 239AB {Provision in case of failure of constitutional monarchy}

If the President, on receipt of a report from the Lieutenant Governor or otherwise, is satisfied -

(a) that a situation has arisen in which the administration of the National Capital Territory cannot be carried on in accordance with the provisions of article 239AA or of any law made in pursuance of that article; or

(b) that for the proper administration of the National Capital Territory it is necessary or expedient so to do, the President may by order suspend the operation of any provision of article 239AA or of all or any of the provisions of any law made in pursuance of that article for such period and subject to such conditions as may be specified in such law and make such incidental and consequential provisions as may appear to him to be necessary or expedient for administering the National Capital Territory in accordance with the provisions of article 239 and article 239AA."

The Principles of Constitutional Interpretation

40. Before we proceed to examine the scheme delineated by Article 239AA, it is necessary to have an overview on the principles which have been accepted for interpretation of a Constitution. Before we notice the accepted principles for constitutional interpretation, we want to notice prophetic words of Dr. B.R. Ambedkar where Dr. Ambedkar in closing debate on 25.11.1949 in the Constituent Assembly on the draft Constitution made following statement:

> *"...Because I feel, however good a Constitution may be, it is sure to turn out bad because those who are called to work it, happen to be a bad lot. However, bad a Constitution may be, it may turn out to be good if those who are called to work it, happen to be a good lot. The working of a Constitution does not depend wholly upon the nature of the Constitution. The Constitution can provide only the organs of State such as the Legislature, the executive and the Judiciary. The factors on which the working of those organs of the State depend are the people and the political parties they will set up as their instruments to carry out their wishes and their politics."*

41. After noticing the universal truth stated by Dr. B.R. Ambedkar as above, we now proceed to notice the principles of Constitutional interpretation. The general

rule for interpreting a Constitution are the same as those for interpreting a general Statute. Article 367 of the Constitution provides that Unless the context otherwise requires, the General Clauses Act, 1897, shall, subject to any adaptations and modifications that may be made therein under Article 372, apply for the interpretation of this Constitution as it applies for the interpretation of an Act of the Legislature of the Dominion of India. This Court in ***Keshavan Madhava Menon Vs. State of Bombay, AIR 1951 SC 128 : (1951) SCR 228*** held that court of law has to gather the spirit of the Constitution from the language of the Constitution. True meaning of the Constitution has to be arrived at uninfluenced by any assumed interpretation of the Constitution. In Para 13 of the judgment, following was held :-

> *"**13**. An argument founded on what is claimed to be the spirit of the Constitution is always attractive, for it has a powerful appeal to sentiment and emotion; but a court of law has to gather the spirit of the Constitution from the language of the Constitution. What one may believe or think to be the spirit of the Constitution cannot prevail if the language of the Constitution does not support that view. Article 372(2) gives power to the President to*

adapt and modify existing laws by way of repeal or amendment. There is nothing to prevent the President, in exercise of the powers conferred on him by that article, from repealing, say the whole or any part of the Indian Press (Emergency Powers) Act, 1931. If the President does so, then such repeal will at once attract Section 6 of the General Clauses Act. In such a situation all prosecutions under the Indian Press (Emergency Powers) Act, 1931, which were pending at the date of its repeal by the President would be saved and must be proceeded with notwithstanding the repeal of that Act unless an express provision was otherwise made in the repealing Act. It is therefore clear that the idea of the preservation of past inchoate rights or liabilities and pending proceedings to enforce the same is not foreign or abhorrent to the Constitution of India. We are, therefore, unable to accept the contention about the spirit of the Constitution as invoked by the learned counsel in aid of his plea that pending proceedings under a law which has become void cannot be proceeded with. Further, if it is against the spirit of the Constitution to continue the pending prosecutions under such a void law, surely it should be equally repugnant to that spirit that men who have already been convicted under such repressive law before the Constitution of India came into force should continue to rot in jail. It is, therefore, quite clear that the court should construe the language of Article 13(1) according to the established rules of interpretation and arrive at its true meaning uninfluenced by any assumed spirit of the Constitution."

42. This Court in subsequent judgments have also propounded the doctrine of literal interpretation and doc-

trine of purposive interpretation. There cannot be denial to the fact that the Court has to respect the language used in the Constitution wherever possible, the language be such interpreted as may best serve the purpose of the Constitution. A Constitutional document should be construed with less rigidity and more generosity than other acts. This Court in ***S.R. Chaudhuri Vs. State of Punjab & Ors., (2001) 7 SCC 126*** held that we must remember that a Constitution is not just a document in solemn form, but a living framework for the Government of the people exhibiting a sufficient degree of cohesion and its successful working depends upon the Democratic spirit underlying it being respected in letter and in spirit.

43. Before a Constitution Bench of this Court in ***G. Narayanaswami Vs. G. Paneerselvam and Others, (1972) 3 SCC 717***, provisions of Article 171 came up for interpretation, in the above case, in Paragraph 4 of the judgment, following principle was reiterated:-

> *"4. Authorities are certainly not wanting which indicate that courts should interpret in a broad and generous spirit the document which*

contains the fundamental law of the land or the basic principles of its Government. Nevertheless, the rule of "plain meaning" or "literal" interpretation, described in Maxwell's Interpretation of Statutes as "the primary rule", could not be altogether abandoned today in interpreting any document. Indeed, we find Lord Evershed, M.R., saying: "The length and detail of modern legislation, has undoubtedly reinforced the claim of literal construction as the only safe rule". (See: Maxwell on Interpretation of Statutes, 12th Edn., p. 28.) It may be that the great mass of modern legislation, a large part of which consists of statutory rules, makes some departure from the literal rule of interpretation more easily justifiable today than it was in the past. But, the object of interpretation and of "construction" (which may be broader than "interpretation") is to discover the intention of the law-makers in every case (See: Crawford on Statutory Construction, 1940 Edn., para 157, pp. 240-42). This object can, obviously, be best achieved by first looking at the language used in the relevant provisions. Other methods of extracting the meaning can be resorted to only if the language used is contradictory, ambiguous, or leads really to absurd results. This is an elementary and basic rule of interpretation as well as of construction processes which, from the point of view of principles applied, coalesce and converge towards the common purpose of both which is to get at the real sense and meaning, so far as it may be reasonably possible to do this, of what is found laid down. The provisions whose meaning is under consideration have, therefore to be examined before applying any method of construction at all……."

44. In ***B.R. Kapur Vs. State of T.N. and Another, (2001) 7 SCC 231*** Justice Pattanaik, delivering a concurring judgment, laid down following in Paragraph 72:-

> *"72. ……A documentary constitution reflects the beliefs and political aspirations of those who had framed it. One of the principles of constitutionalism is what it had developed in the democratic traditions. A primary function that is assigned to the written constitution is that of controlling the organs of the Government. Constitutional law presupposes the existence of a State and includes those laws which regulate the structure and function of the principal organs of the government and their relationship to each other and to the citizens. Where there is a written constitution, emphasis is placed on the rules which it contains and on the way in which they have been interpreted by the highest court with constitutional jurisdiction. Where there is a written constitution the legal structure of the Government may assume a wide variety of forms. Within a federal constitution, the tasks of the Government are divided into two classes, those entrusted to the federal organs of the Government, and those entrusted to the various States, regions or provinces which make up the federation. But the constitutional limits bind both the federal and State organs of the Government, which limits are enforceable as a matter of law……."*

45. Another Constitution Bench in ***Kuldip Nayar and Others Vs. Union of India and Others, (2006) 7 SCC 1*** after

the above quoted passage of ***G. Narayanaswami (supra)*** stated following in Para 201:-

> *"201. Xxxxxxxxxxxxxxxx*
>
> *We endorse and reiterate the view taken in the abovequoted paragraph of the judgment. It may be desirable to give a broad and generous construction to the constitutional provisions, but while doing so the rule of "plain meaning" or "literal" interpretation, which remains "the primary rule", has also to be kept in mind. In fact the rule of "literal construction" is the safe rule unless the language used is contradictory, ambiguous, or leads really to absurd results."*

46. We may also notice the Constitution Bench Judgment in ***I.R. Coelho Vs. State of T.N., (2007) 2 SCC 1,*** it laid down the principles of construction in Paragraph 42, which is to the following effect:-

> *"**42.** The controversy with regard to the distinction between ordinary law and constitutional amendments is really irrelevant. The distinction is valid and the decisions from Indira Gandhi case (1975 Supp. SCC 1) up to Kuldip Nayar v. Union of India [(2006) 7 SCC 1] case represents the correct law. It has no application in testing the constitutional amendment placing the Acts in the Ninth Schedule. There is no manner of doubt that:*
>
> *A) In Kesavananda Bharati [(1973) 4 SCC 225] case Sikri, C.J. [para 475(h)], Shelat & Grover, JJ. [paras 607, 608(7)], Hegde & Mukherjea, JJ.*

> *[paras 742, 744(8)] and Jaganmohan Reddy, J. [paras 1211, 1212(4)] all clearly held that the Acts placed in the Ninth Schedule and the provisions thereof have to be subjected to the basic structure test.*
>
> *(B) Chandrachud, C.J. in Waman Rao case [(1980) 3 SCC 587], followed the path laid down by 6 Judges in Kesavananda Bharati without quoting from their conclusions and without attempting to reconcile their views with the subsequent development in the law regarding the distinction between ordinary legislations and constitutional amendments."*

47. Learned counsel for the appellant submits that Federalism being one of the basic structure of the Constitution, this Court may put such interpretation on Article 239AA, which strengthens the federal structure. It is further contended that Parliamentary democracy having been adopted by our Constitution, this Court may interpret Article 239AA so that Constitutional design and Constitutional objectives be fulfilled. It is submitted that judgments of this Court in ***Rustom Cavasjee Cooper Vs. Union of India, (1970)1 SCC 248: AIR 1970 SC 564*** and judgment of this Court in ***Maneka Gandhi Vs. Union of India and Another, (1978)1 SCC 248: AIR 1978 SC 597*** reflect

that principles of less textual and more purposive method of Constitutional interpretation which has been adopted in these cases. Judgment of this Court in ***K.C. Vasanth Kumar and Another Vs. State of Karnataka, 1985 Supp. SCC 714*** has been relied, wherein this Court laid down following:-

> *"…….It is not enough to exhibit a Marshallian awareness that we are expounding a Constitution; we must also remember that we are expounding a Constitution born in the mid-twentieth century, but of an anti-imperialist struggle, influenced by constitutional instruments, events and revolutions elsewhere, in search of a better world, and wedded to the idea of justice, economic, social and political to all. Such a Constitution must be given a generous interpretation so as to give all its citizens the full measure of justice promised by it. The expositors of the Constitution are to concern themselves less with mere words and arrangement of words than with the philosophy and the pervading "spirit and sense" of the Constitution, so elaborately exposed for our guidance in the Directive Principles of State Policy and other provisions of the Constitution……."*

48. Shri H.M. Seervai, in his "A Critical Commentary" on Constitutional Law of India, on interpretation of the Constitution, states following in Paragraph 2.1 and 2.2:-

"2.1 A Court of Law must gather the spirit of the Constitution from the language used, and what one may believe to be the spirit of the Constitution cannot prevail if not supported by the language, which therefore must be construed according to well-established rules of interpretation uninfluenced by an assumed spirit of the Constitution. Where the Constitution has not limited, either in terms or by necessary implication, the general powers conferred upon the Legislature, the Court cannot limit them upon any notion of the spirit of the Constitution.

2.2 Well established rules of interpretation require that the meaning and intention of the framers of a Constitution — be it a Parliament or a Constituent Assembly — must be ascertained from the language of that Constitution itself; with the motives of those who framed it, the Court has no concern. But, as Higgins J. observed — "in words that have not withered or grown sterile with years"-:

> *"although we are to interpret the words of the constitution on the same principles of interpretation as we apply to any ordinary law, these very principles of interpretation compel us to take into account the nature and scope of the Act we are interpreting, to remember that it is a Constitution, a mechanism under which laws are to be made, and not a mere Act which declares what the law is to be."*

49. Justice G.P. Singh in "Principles of Statutory Interpretation", 14th Edition, while discussing interpretation of Constitution stated following:-

> *"The Constitution is a living organic thing and must be applied to meet the current needs and requirements, and is not bound to be interpreted by reference to the original understanding of the constitutional economics as debated in Parliament. Accordingly, the Supreme Court held that the content and meaning of Article 149, which provides the duties and powers of the CAG, will vary from age to age and, given that spectrum is an important natural resource, CAG has the power to examine the accounts of telecom service providers under Article 149.*
>
> *It cannot, however, be said that the rule of literal construction or the golden rule of construction has no application to interpretation of the Constitution. So when the language is plain and specific and the literal construction produces no difficulty to the constitutional scheme, the same has to be resorted to. Similarly, where the Constitution has prescribed a method for doing a thing and has left no 'abeyance' or gap, if the court by a strained construction prescribes another method for doing that thing, the decision will become open to serious objection and criticism."*

50. Aharon Barak (Former President, Supreme Court of Israel) while dealing with Purposive Constitutional Interpretation expounded the modern concept in following words:-

> *"The purpose of the constitutional text is to provide a solid foundation for national existence. It is to embody the basic aspirations of the people. It is to guide future*

> *generations by its basic choices. It is to control majorities and protect individual dignity and liberty. All these purposes cannot be fulfilled if the only guide to interpretation is the subjective purposes of the framers of the constitutional text. The constitution will not achieve its purposes if its vision is restricted to the horizons of its founding fathers. Even if we assume the broadest generalizations of subjective purpose, this may not suffice. It may not provide a solid foundation for modern national existence. It may be foreign to the basic aspirations of modern people. It may not be consistent with the dignity and liberty of the modern human being. A constitution must be wiser than its creators".*

51. Almost same views have been expressed by Aharon Barak in "Foreword: A Judge on Judging The Role of a Supreme Court in a Democracy", which are as under:-

> *"The original intent of the framers at the time of drafting is important. One cannot understand the present without understanding the past. The framers' intent lends historical depth to understanding the text in a way that honors the past. The intent of the constitutional authors, however, exists alongside the fundamental views and values of modern society at the time of interpretation. The constitution is intended to solve the problems of the contemporary person, to protect his or her freedom. It must contend with his or her needs. Therefore, in determining the constitution's purpose through interpretation, one must also take into account the values and principles that prevail at the time of interpretation, seeking syn-*

> *thesis and harmony between past intention and present principle."*

52. In this context, we may also profitably notice views of David Feldman expressed in "The Nature and Significance of Constitutional Legislation" published in 2013(129) L.Q.R. 343-358. Few principles to guide the interpretation of Constitution instruments were noted, which are as follows:-

> *"Despite differences between constitutions, and between types of provision within each constitution, diverse jurisdictions have shown considerable consistency in their selection of principles to guide the interpretation of constitutional instruments. First, constitutions are to be interpreted with the aid of their preambles, which are usually treated as forming an integral part of them.63 Secondly, a democratic constitution must be interpreted to "foster, develop and enrich", rather than undermine, democratic institutions.64 In particular, interpreters should give scope for a self-governing entity to make its own decisions, including decisions about the terms on which democratic institutions operate, subject to limits imposed by the constitution.65 Thirdly, constitutions are not to be interpreted with mechanical literalness. Interpreters must take account of the context, ultimate object, and textual setting of a provision, 66 bearing in mind that "the question is not what may be supposed to have been intended [by the framers], but what has been said". 67 Fourthly, according to at least some*

> *judges, constitutions are not to be interpreted as permitting institutions, including legislatures, to act in a way which "offends what I may call the social conscience of a sovereign democratic republic", because law must be regarded by ordinary people as "reasonable, just and fair"*
>
> *Nevertheless, these principles must be qualified by the recognition of differences between constitutions."*

53. Learned counsel for the appellant has also relied on the principles of Constitutional silence and Constitutional implications. It is submitted that Constitutional silence and Constitutional implications have also to be given due effect while interpreting Constitutional provisions. Reliance has been placed on Constitutional Bench Judgment of this Court in ***Manoj Narula Vs. Union of India, (2014) 9 SCC 1***. Constitution Bench in the above case while considering principles of Constitutional silence or abeyance laid down following in Paras 65-66:-

> *"**65**. The next principle that can be thought of is constitutional silence or silence of the Constitution or constitutional abeyance. The said principle is a progressive one and is applied as a recognised advanced constitutional practice. It has been recognised by the Court to fill up the gaps in respect of certain areas in the interest of justice and larger public interest. Liberalisation of*

the concept of locus standi for the purpose of development of public interest litigation to establish the rights of the have-nots or to prevent damages and protect environment is one such feature. Similarly, laying down guidelines as procedural safeguards in the matter of adoption of Indian children by foreigners in Laxmi Kant Pandey v. Union of India [(1987) 1 SCC 66] or issuance of guidelines pertaining to arrest in D.K. Basu v. State of W.B. [(1997) 1 SCC 416] or directions issued in Vishaka v. State of Rajasthan [(1997) 6 SCC 241] are some of the instances.

66. *In this context, it is profitable to refer to the authority in Bhanumati v. State of U.P. [(2010) 12 SCC 1] wherein this Court was dealing with the constitutional validity of the U.P. Panchayat Laws (Amendment) Act, 2007. One of the grounds for challenge was that there is no concept of no-confidence motion in the detailed constitutional provision under Part IX of the Constitution and, therefore, the incorporation of the said provision in the statute militates against the principles of Panchayati Raj institutions. That apart, reduction of one year in place of two years in Sections 15 and 28 of the Amendment Act was sought to be struck down as the said provision diluted the principle of stability and continuity which is the main purpose behind the object and reason of the constitutional amendment in Part IX of the Constitution. The Court, after referring to Articles 243-A, 243-C(1), (5), 243-D(4), 243-D(6), 243-F(1), 243-G, 243-H, 243-I(2), 243-J, 243-K(2) and (4) of the Constitution and further taking note of the amendment, came to hold that the statutory provision of no-confidence is contrary to Part IX of the Constitution. In that con-*

text, it has been held as follows: (Bhanumati case, SCC p. 17, paras 49-50)

> *"49. Apart from the aforesaid reasons, the arguments by the appellants cannot be accepted in view of a very well-known constitutional doctrine, namely, the constitutional doctrine of silence. Michael Foley in his treatise on The Silence of Constitutions (Routledge, London and New York) has argued that in a Constitution 'abeyances are valuable, therefore, not in spite of their obscurity but because of it. They are significant for the attitudes and approaches to the Constitution that they evoke, rather than the content or substance of their strictures'. (p. 10)*
>
> *50. The learned author elaborated this concept further by saying, "Despite the absence of any documentary or material form, these abeyances are real and are an integral part of any Constitution. What remains unwritten and indeterminate can be just as much responsible for the operational character and restraining quality of a Constitution as its more tangible and codified components.' (p. 82)"*

54. It is further relevant to notice that although above well known Constitutional doctrine was noticed but the Court held that express Constitutional provisions cannot be ignored while considering such doctrine and princi-

ples. After what has been stated above about above principles in Paras 65 and 66, following was held in Para 67:-

> *"**67**. The question that is to be posed here is whether taking recourse to this doctrine for the purpose of advancing constitutional culture, can a court read a disqualification to the already expressed disqualifications provided under the Constitution and the 1951 Act. The answer has to be in the inevitable negative, for there are express provisions stating the disqualifications and second, it would tantamount to crossing the boundaries of judicial review."*

55. Doctrine of Constitutional implications was also noticed by Constitution Bench in Para 68 to the following effect:-

> *"**68**. The next principle that we intend to discuss is the principle of constitutional implication. We are obliged to discuss this principle as Mr Dwivedi, learned Amicus Curiae, has put immense emphasis on the words "on the advice of the Prime Minister" occurring in Article 75(1) of the Constitution. It is his submission that these words are of immense significance and apposite meaning from the said words is required to be deduced to the effect that the Prime Minister is not constitutionally allowed to advise the President to make a person against whom charge has been framed for heinous or serious offences or offences pertaining to corruption as Minister in the Council of Ministers, regard being had to the sacrosanctity*

> *of the office and the oath prescribed under the Constitution. The learned Senior Counsel would submit that on many an occasion, this Court has expanded the horizon inherent in various articles by applying the doctrine of implication based on the constitutional scheme and the language employed in other provisions of the Constitution."*

56. There cannot be any dispute with regard to doctrine of silence and doctrine of implications as noticed above. But while applying above said doctrines in interpreting a Constitutional provision, express provision cannot be given a go-bye. The purpose and intent of Constitutional provisions especially the express language used which reflect a particular scheme has to give full effect to and express Constitutional scheme cannot be disregarded on any such principles.

57. From the above discussions, it is apparent that Constitutional interpretation has to be purposive taking into consideration the need of time and Constitutional principles. The intent of Constitution framers and object and purpose of Constitutional amendment always throw light on the Constitutional provisions but for interpreting a particular Constitutional provision, the Constitu-

tional Scheme and the express language employed cannot be given a go-bye. The purpose and intent of the Constitutional provisions have to be found from the very Constitutional provisions which are up for interpretation. We, thus, while interpreting Article 239AA have to keep in mind the purpose and object for which Sixty Ninth Constitution (Amendment) Act, 1991 was brought into force. After noticing the above principles, we now proceed further to examine the nature and content of the Constitutional provisions.

CONSTITUTIONAL SCHEME OF ARTICLE 239AA

58. To find out the Constitutional Scheme as delineated by Article 239AA, apart from looking into the express language of Article 239AA, we have also to look into the object and purpose of Constitutional provision, on which sufficient light is thrown by the object and reasons as contained in Sixty Ninth Constitutional Amendment as well as Balakrishnan's Report which was the basis of Sixty Ninth Constitutional Amendment. We have already referred to some relevant parts of Balakrishnan's report in

preceding paragraph of this judgment.

59. The task before Balakrishnan Report in words of Balakrishnan himself was to synchronise the two competing claims i.e. “On the one hand, effective administration of the National Capital is of vital importance to the National Government not only for ensuring a high degree of security and a high level of administrative efficiency but also for enabling the Central Government to discharge its national and international responsibilities”. To ensure this, it must necessarily have a complete and comprehensive control over the affairs of the capital. On the other hand, legitimate demand of the large population of the capital city for the democratic right of participation in the Government at the city level is too important to be ignored. We have endeavoured to design a Governmental structure for Delhi which we hope, would reconcile these two requirements”.

60. For administration of Delhi, there has been earlier a Parliamentary Legislation. Legislative Assembly functioned in Delhi after the enforcement of the

Constitution till 01.11.1956. Article 239A which was inserted by Constitutional Fourteenth Amendment Act, 1962 had already contemplated that Parliament may by law provide for Legislative Assembly for a Union territory. While considering the salient features of the proposed structure, following was stated in Para 6.7.2 of the Report:

> *"6.7.2 As we have already stated, any governmental set-up for Delhi should ensure that the Union is not fettered or hampered in any way in the discharge of its own special responsibilities in relation to the administration of the national capital by a constitutional division of powers, functions and responsibilities between the union and the Delhi Administration. The only way of ensuring this arrangement is to keep Delhi as a Union territory for the purposes of the Constitution. Thereby, the provision in article 246(4) of the Constitution will automatically ensure that Parliament has concurrent and overriding powers to make laws for Delhi on all matters, including those relateable to the State List. Correspondingly, the Union Executive can exercise executive powers in respect of all such matters subject to the provisions of any Central law governing the matter. We, therefore, recommend that even after the creation of a Legislative Assembly and Council of Ministers for Delhi it should continue to be a Union territory for the purposes of the Constitution."*

61. The Report also highlighted the necessity of certain subjects being kept out of jurisdiction of Legislative Assembly of Delhi which were to be dealt with by the Union.

62. At this juncture, it is also relevant to note the issue pertaining to admissibility of the Balakrishnan Report. The issue regarding admissibility of Parliamentary Committee's Report in proceeding under Article 32/Article 136 of the Constitution of India was engaging attention of the Constitution Bench when hearing in these matters were going on. The Constitution Bench has delivered its judgment in Writ Petition (C) No.558 of 2012 ***Kalpana Mehta and others Vs. Union of India and others*** on 09.05.2018. The Constitution Bench had held that Parliamentary Committee Reports can be looked into and referred to by this Court in exercise of its jurisdiction under Article 32/136. The Chief Justice delivering his opinion (for himself and on behalf of Justice A.M. Khanwilkar) in the conclusions recorded in Paragraph 149 in sub paragraph (iv) and (vii), has laid

down:

> "**(iv)** In a litigation before this Court either under Article 32 or Article 136 of the Constitution of India can take on record the report of the Parliamentary Standing Committee. However, the Court while taking the report on record as a material can take aid of as long as there is no contest or the dispute on the content because such a contest would invite the court to render a verdict either accepting the report in toto or in part or rejecting it in entirety.
>
> **(vii)** In a public interest litigation where the adversarial position is absent, the Court can take aid of the said report in larger interest of the society to subserve the cause of welfare State and in any furtherance to rights provided under the Constitution or any statutory provision."

63. **Justice D.Y. Chandrachud** (one of us) answering the reference has held at Page 86:

> "***(i)*** *As a matter of principle, there is no reason why reliance upon the report of a Parliamentary Standing Committee cannot be placed in proceedings under Article 32 or Article 136 of the Constitution;*
>
> ***(ii)*** *Once the report of a Parliamentary Committee has been published, reference to it in the course of judicial proceedings will not constitute a breach of parliamentary privilege. The validity of the report is not called into question in*

> *the court. No Member of Parliament or person can be made liable for what is stated in the course of the proceedings before a Parliamentary Committee or for a vote tendered or given; and*
>
> ***(iii)*** *However, when a matter before the court assumes a contentious character, a finding of fact by the court must be premised on the evidence adduced in the judicial proceeding.”*

64. Myself **(Justice Ashok Bhushan)** delivering my concurring opinion has also laid down following in Paragraph 151(ii,vii):

> *“**(ii)** The publication of the reports not being only permitted, but also are being encouraged by the Parliament. The general public are keenly interested in knowing about the parliamentary proceedings including parliamentary reports which are steps towards the governance of the country. The right to know about the reports only arises when they have been published for use of the public in general.*
>
> ***(vii)*** *Both the parties have not disputed that Parliamentary Reports can be used for the purposes of legislative history of a Statute as well as for considering the statement made by a minister. When there is no breach of privilege in considering the Parliamentary materials and reports of the committee by the Court for the above two purposes, we fail to see any valid reason for not accepting the submission of*

> *the petitioner that Courts are not debarred from accepting the Parliamentary materials and reports, on record, before it, provided the Court does not proceed to permit the parties to question and impeach the reports."*

65. Thus, it is now well settled that Parliamentary Committee Report can be looked into to find out the intent and purpose of legislation, in the present case, Sixty Ninth Constitutional Amendment.

66. The statement of object & reasons of Sixty Ninth Amendment Act has also referred to the Balakrishnan's Report. While referring to the Balakrishnan's Report, following has been noted:

> *"The Committee went into the matter in great detail and considered the issues after holding discussions with various individuals, associations, political parties and other experts and taking into account the arrangements in the National Capitals of other countries with a federal set-up and also the debates in the Constituent Assembly as also the reports by earlier Committees and Commissions. After such detailed inquiry and examination, it recommended that Delhi should continue to be a Union territory and provided with a Legislative Assembly and a Council of Ministers responsible to such Assembly with appropriate powers to deal with matters of concern to the common man. The Committee also recommended that with a view to ensure*

stability and permanence the arrangements should be incorporated in the Constitution to give the National Capital a special status among the Union territories.”

67. The recommendation of the Committee that Delhi should continue to be Union territory providing with a Legislative Assembly and Council of Ministers responsible to such Assembly was thus accepted and to give effect the same Article 239AA was inserted in the Constitution. There is no denying that one of the purposes for insertion of Article 239AA is to permit a democratic and republican form of Government. The principle of cabinet responsibility was the Constitutional intent which has to be kept in mind while interpreting the Constitutional provisions.

68. There are many facets of Article 239AA which need elaborate consideration. Different facets shall be separately dealt under following heads:

A LEGISLATIVE POWER OF PARLIAMENT AND THAT OF GNCTD

B EXECUTIVE POWER OF UNINON (PRESIDENT/ LG) AND THAT OF GNCTD

C PROVISO TO ARTICLE 239AA
(i) AID AND ADVICE
(ii) IN MATTER

D WHETHER CONCURRENCE OF LG REQUIRED FOR EXCLUSIVE DECISION OF GNCTD

E COMMUNICATION OF DECISION OF COUNCIL OF MINISTERS / MINISTER AND LG, ITS PURPOSE AND OBJECT

F ADMINISTARTIVE FUNCTION OF THE GNCTD AND LG AS DELINEATED BY 1991 ACT AND THE TRANSACTIONS OF BUSINESS RULEs, 1993.

A. LEGISLATIVE POWER OF PARLIAMENT AND THAT OF GNCTD

69. Clause (3) of the 239AA deals with power to make laws for the whole or any part of the National Territory of Delhi by the Legislative Assembly as well as by Parliament. Clause (3) of Article 239 is extracted for ready reference:

> *"(3) (a) Subject to the provisions of this Constitution, the Legislative Assembly shall have power to make laws for the whole or any part of the National Capital Territory with respect to any of the matters enumerated in the State of List or in the Concurrent List in so far as any such matter is applicable to Union territories except matters with respect to Entries 1, 2, and 18 of the State List and Entries 64, 65 and 66 of that List in so far as they relate to the said Entries 1, 2,and 18.*

(b) Nothing in sub-clause (a) shall derogate from the powers of Parliament under this Constitution to make laws with respect to any matter for a Union territory or any part thereof.

(c) If any provision of a law made by the Legislative Assembly with respect to any matter is repugnant to any provision of a law made by Parliament with respect to that matter, whether passed before or after the law made by the Legislative Assembly, or of an earlier law, other than a law made by the Legislative Assembly, then, in either case, the law made by Parliament, or, as the case may be, such earlier law, shall prevail and the law made by the Legislative Assembly shall, to the extent of the repugnancy, be void;

Provided that if any such law made by the Legislative Assembly has been reserved for the consideration of the President and has received his assent such law shall prevail in National Capital Territory :

Provided further that nothing in this sub-clause shall prevent Parliament from enacting at any time any law with respect to the same matter including a law adding to, amending, varying or repealing the law so made by the Legislative Assembly.”

70. The above provision makes it clear that Legislative Assembly shall have power to make laws in respect of any of the matters enumerated in the State List or in the

Concurrent List in so far as any such matter is applicable to Union territories except matters with respect to Entries 1, 2 and 18 of the State List and Entries 64, 65 and 66 of the List.

71. The provision is very clear which empowers the Legislative Assembly to make laws with respect to any of the matters enumerated in the State List or in the Concurrent List except the excluded entries. One of the issue is that power to make laws in State List or in Concurrent List is hedged by phrase “in so far as any such matter is applicable to Union territories”.

72. A look of the Entries in List II and List III indicates that there is no mention of Union Territory. A perusal of the List II and III indicates that although in various entries there is specific mention of word “State” but there is no express reference of “Union Territory” in any of the entries. For example, in List II Entry 12, 26, 37, 38, 39, 40, 41, 42 and 43, there is specific mention of word “State”. Similarly, in List III Entry 3, 4 and 43 there is mention of word “State”. The above phrase “in

so far as any such matter is applicable to Union Territory" is inconsequential. The reasons are two fold. On the commencement of the Constitution, there was no concept of Union Territories and there were only Part A, B, C and D States. After Seventh Constitutional Amendment, where First Schedule as well as Article 2 of the Constitution were amended which included mention of Union Territory both in Article 1 as well as in First Schedule. Thus, the above phrase was used to facilitate the automatic conferment of powers to make laws for Delhi on all matters including those relatable to the State List and Concurrent List except where an entry indicates that its applicability to the Union Territory is excluded by implication or any express Constitutional provision.

73. Thus, there is no difficulty in comprehending the Legislative power of the NCTD as expressly spelled out in Article 239AA. Now, we turn to find out Legislative power of the Parliament. Sub-clause (b) of Clause (3) of the Article 239AA mentions "nothing in sub clause (a) shall derogate from the powers of Parliament under this Constitution to make laws with respect to any matter for

a Union Territory or any part thereof.

74. It is relevant to note that sub clause (3) begins with the word "subject to the provisions of this Constitution". Article 246 thus, by Chapter 1st of the Part X1 of the Constitution dealing with the Legislative relations has to be looked into and to be read alongwith Article 239AA clause (3). Article 246 provides as follows:

> *"246. Subject-matter of laws made by Parliament and by the Legislatures of States.-*
>
> *(1) Notwithstanding anything in clauses (2) and (3), Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule (in this Constitution referred to as the "Union List").*
>
> *(2) Notwithstanding anything in clause (3), Parliament and, subject to clause (1), the Legislature of any State also, have power to make laws with respect to any of the matters enumerated in List III in the Seventh Schedule (in this Constitution referred to as the "Concurrent List").*

> *(3) Subject to clauses (1) and (2), the Legislature of any State has exclusive power to make laws for such State or any part thereof with respect to any of the matters enumerated in List II in the Seventh Schedule (in this Constitution referred to as the "State List").*
>
> *(4) Parliament has power to make laws with respect to any matter for any part of the territory of India not included (in a State) notwithstanding that such matter is a matter enumerated in the State List."*

75. Article 246 clause (4) expressly provides that Parliament has power to make laws with respect to any matter for any part of the territory of India not included in a State; notwithstanding that such matter is a matter enumerated in the State List.

76. The Union Territories are part of the India which are not included in any State. Thus, Parliament will have power to make laws for any matter with regard to Union territories. In clause (4) of Article 246 by Seventh Constitutional Amendment, in place of words "in

Part A or Part B of the First Schedule" the words "in State" have been substituted. Thus, overriding power of the Parliament was provided with regard to Part C and D States on enforcement of the Constitution which Constitutional Scheme is continued after amendment made by Seventh Constitutional Amendment.

77. The issue regarding constitutional scheme envisaged for Delhi consequent to insertion of Article 239AA of Sixty Ninth Constitution Amendment came for consideration before a Nine Judge Bench of this Court in ***NDMC Vs. State of Punjab (1997) 7 SCC 339***. The issue in the NDMC case was whether the property tax levied by NDMC On the immovable properties of States situated within the Union Territory of Delhi would be covered by the exemption provided in Article 289 of the Constitution of India. Delhi High Court had been pleased to hold that the exemption under Article 289 would apply and the assessment and demand notices of NDMC were quashed. The appeal came to be decided by a Nine Judge Bench of this Court.

78. The majority opinion was delivery by Justice B.P. Jeevan Reddy. The majority held that States and Union territories are different entities, which is clear from the scheme of Articles 245 and 246. Following was laid down in Paragraphs 152, 155 and 160:-

> ……*152. On a consideration of rival contentions, we are inclined to agree with the respondents-States. The States put together do not exhaust the territory of India. There are certain territories which do not form part of any State and yet are the territories of the Union.* ***That the States and the Union Territories are different entities, is evident from clause (2) of Article 1 – indeed from the entire scheme of the Constitution.*** *Article 245(1) says that while Parliament may make laws for the whole or any part of the territory of India, the legislature of a State may make laws for the whole or any part of the State. Article 1(2) read with Article 245(1) shows that so far as the Union Territories are concerned, the only law-making body is Parliament. The legislature of a State cannot make any law for a Union Territory; it can make laws only for that State. Clauses (1), (2) and (3) of Article 246 speak of division of legislative powers between Parliament and State legislatures.* ***This division is only between Parliament and the State legislatures, i.e., between the Union and the States. There is no division of legislative powers between the Union and Union Territories.***

Similarly, there is no division of powers between States and Union Territories. So far as the Union Territories are concerned, it is clause (4) of Article 246 that is relevant. It says that Parliament has the power to make laws with respect to any matter for any part of the territory of India not included in a State notwithstanding that such matter is a matter enumerated in the State List. Now, the Union Territory is not included in the territory of any State. If so, Parliament is the only law-making body available for such Union Territories. *It is equally relevant to mention that the Constitution, as originally enacted, did not provide for a legislature for any of the Part 'C' States (or, for that matter, Part 'D' States). It is only by virtue of the Government of Part 'C' States Act, 1951 that some Part 'C' States including Delhi got a legislature. This was put an end to by the States Reorganisation Act, 1956. In 1962, the Constitution Fourteenth (Amendment) Act did provide for creation/constitution of legislatures for Union Territories (excluding, of course, Delhi) but even here the Constitution did not itself provide for legislatures for those Part 'C' States; it merely empowered Parliament to provide for the same by making a law.* ***In the year 1991, the Constitution did provide for a legislature for the Union Territory of Delhi [National Capital Territory of Delhi] by the Sixty-Ninth (Amendment) Act (Article 239-AA) but even here the legislature so created was not a full-fledged legislature nor did it have the effect of — assuming that it could — lift the National Capital Territory of Delhi from Union Territory category to the***

category of States within the meaning of Chapter I of Part XI of the Constitution. All this necessarily means that so far as the Union Territories are concerned, there is no such thing as List I, List II or List III. The only legislative body is Parliament — or a legislative body created by it. Parliament can make any law in respect of the said territories — subject, of course, to constitutional limitations other than those specified in Chapter I of Part XI of the Constitution. Above all, the Union Territories are not "States" as contemplated by Chapter I of Part XI; they are the territories of the Union falling outside the territories of the States. Once the Union Territory is a part of the Union and not part of any State, it follows that any tax levied by its legislative body is Union taxation. Admittedly, it cannot be called "State taxation" — and under the constitutional scheme, there is no third kind of taxation. Either it is Union taxation or State taxation**……**

…… *155. In this connection, it is necessary to remember that all the Union Territories are not situated alike. There are certain Union Territories (i.e., Andaman and Nicobar Islands and Chandigarh) for which there can be no legislature at all — as on today. There is a second category of Union Territories covered by Article 239-A (which applied to Himachal Pradesh, Manipur, Tripura, Goa, Daman and Diu and Pondicherry — now, of course, only Pondicherry survives in this category, the rest having acquired Statehood) which have legislatures by courtesy of Parliament. Parliament can, by law, provide for constitution of*

legislatures for these States and confer upon these legislatures such powers, as it may think appropriate. Parliament had created legislatures for these Union Territories under the "the Government of Union Territories Act, 1963", empowering them to make laws with respect to matters in List II and List III, but subject to its overriding power. The third category is Delhi. It had no legislature with effect from 1-11-1956 until one has been created under and by virtue of the Constitution Sixty-Ninth (Amendment) Act, 1991 which introduced Article 239-AA. We have already dealt with the special features of Article 239-AA and need not repeat it. Indeed, a reference to Article 239-B read with clause (8) of Article 239-AA shows how the Union Territory of Delhi is in a class by itself but is certainly not a State within the meaning of Article 246 or Part VI of the Constitution. In sum, it is also a territory governed by clause (4) of Article 246. ***As pointed out by the learned Attorney General, various Union Territories are in different stages of evolution. Some have already acquired Statehood and some may be on the way to it. The fact, however, remains that those surviving as Union Territories are governed by Article 246(4) notwithstanding the differences in their respective set-ups — and Delhi, now called the "National Capital Territory of Delhi", is yet a Union Territory*****……"**

……160. It is then argued for the appellants that if the above view is taken, it would lead to an inconsistency. The reasoning in this behalf runs thus: a law made by the legislature of a Union

> *Territory levying taxes on lands and buildings would be "State taxation", but if the same tax is levied by a law made by Parliament, it is being characterised as "Union taxation"; this is indeed a curious and inconsistent position, say the learned counsel for the appellants. In our opinion, however, the very premise upon which this argument is urged is incorrect.* ***A tax levied under a law made by a legislature of a Union Territory cannot be called "State taxation" for the simple reason that Union Territory is not a "State" within the meaning of Article 246 (or for that matter, Chapter I of Part XI) or Part VI or Articles 285 to 289****……"*

79. After examining the Constitutional Scheme delineated by Article 239AA, another constitutional principle had been laid down by the Constitution Bench that Union territories are governed by Article 246(4) notwithstanding their differences in respective set-ups and Delhi, now called the "National Capital Territory of Delhi" is yet a Union Territory. The Constitution Bench had also recognised that the Union territory of Delhi is in a class by itself, certainly not a State. Legislative power of the Parliament was held to cover Union Territories including Delhi.

80. The above clearly indicates that Parliament has power to make laws for NCTD with respect to any of the matter enumerated in State List or Concurrent List. The Legislative Assembly of NCT has legislative power with respect to any of the matters enumerated in the State List or in the Concurrent List excluding the excepted entries of State List.

B. EXECUTIVE POWERS OF THE UNION(PRESIDENT /LG) AND THAT OF THE GNCTD

81. Although there is no express provision in the Constitutional Scheme conferring executive power to LG of the Union territory of Delhi, as has been conferred on the Union under Article 73 and conferred on the State under Article 154. Under the Constitutional Scheme executive power is co-extensive with the Legislative power. The Executive power is given to give effect to Legislative enactments. Policy of legislation can be given effect to only by executive machinery. The executive power has to be conceded to fulfill the constitutionally conferred democratic mandate. Clause (4)

of Article 239AA deals with the exercise of executive power by the Council of Ministers with the Chief Minister as the head to aid and advice the LG in exercise of the above functions. The submission of the respondent is that executive power in relation to all matters contained in List II and List III is vested in the President.

82. The Union and States can exercise Executive power on the subjects on which they have power to legislate. This Court in ***Rai Sahib Ram Jawaya Kapur and Others Vs. State of Punjab, AIR 1955 SC 549*** while considering the extent of the Executive power in Paragraph 7 held following:-

> *"**7.** Article 73 of the Constitution relates to the executive powers of the Union, while the corresponding provision in regard to the executive powers of a State is contained in Article 162. The provisions of these articles are analogous to those of Sections 8 and 49(2) respectively of the Government of India Act, 1935 and lay down the rule of distribution of executive powers between the Union and the States, following, the same analogy as is provided in regard to the distribution of legislative powers between them. Article 162, with which we are directly concerned in this case, lays down:*
>
> > *"Subject to the provisions of this Constitution, the executive power of a State shall extend to the matters with respect*

to which the legislature of the State has power to make laws:

Provided that in any matter with respect to which the legislature of a State and Parliament have power to make laws, the executive power of the State shall be subject to, and limited by, the executive power expressly conferred by this Constitution or by any law made by Parliament upon the Union or authorities thereof."

Thus under this article the executive authority of the State is exclusive in respect to matters enumerated in List II of Seventh Schedule. The authority also extends to the Concurrent List except as provided in the Constitution itself or in any law passed by Parliament. Similarly, Article 73 provides that the executive powers of the Union shall extend to matters with respect to which Parliament has power to make laws and to the exercise of such rights, authority and jurisdiction as are exercisable by the Government of India by virtue of any treaty or any agreement. The proviso engrafted on clause (1) further lays down that although with regard to the matters in the Concurrent List the executive authority shall be ordinarily left to the State it would be open to Parliament to provide that in exceptional cases the executive power of the Union shall extend to these matters also. Neither of these articles contain any definition as to what the executive function is and what activities would legitimately come within its scope. They are concerned primarily with the distribution of the executive power between the Union on the one hand and the States on the other. They do not mean, as Mr Pathak seems to suggest, that it is only when Parliament or the State Legislature has legis-

> *lated on certain items appertaining to their respective lists, that the Union or the State executive, as the case may be, can proceed to function in respect to them. On the other hand, the language of Article 172 clearly indicates that the powers of the State executive do extend to matters upon which the State Legislature is competent to legislate and are not confined to matters over which legislation has been passed already. The same principle underlies Article 73 of the Constitution. These provisions of the Constitution therefore do not lend any support to Mr Pathak's contention."*

83. The Constitution Bench has also in above case laid down that in our Constitution; we have adopted the same system of Parliamentary democracy as in England. In this regard, following was held in Para Nos. 13 and 14:-

> *"**13**. The limits within which the executive Government can function under the Indian Constitution can be ascertained without much difficulty by reference to the form of the executive which our Constitution has set up. Our Constitution, though federal in its structure, is modelled on the British parliamentary system where the executive is deemed to have the primary responsibility for the formulation of governmental policy and its transmission into law though the condition precedent to the exercise of this responsibility is its retaining the confidence of the legislative branch of the State. The executive function comprises both the determination of the policy as well as carrying it into execution. This evidently includes the initiation of legislation, the maintenance of order, the promotion of so-*

cial and economic welfare, the direction of foreign policy, in fact the carrying on or supervision of the general administration of the State.

14. *In India, as in England, the executive has to act subject to the control of the legislature; but in what way is this control exercised by the legislature? Under Article 53(1) of our Constitution, the executive power of the Union is vested in the President but under Article 75 there is to be a Council of Ministers with the Prime Minister at the head to aid and advise the President in the exercise of his functions. The President has thus been made a formal or constitutional head of the executive and the real executive powers are vested in the Ministers or the Cabinet. The same provisions obtain in regard to the Government of States; the Governor or the Rajpramukh, as the case may be, occupies the position of the head of the executive in the State but it is virtually the Council of Ministers in each State that carries on the executive Government. In the Indian Constitution, therefore, we have the same system of parliamentary executive as in England and the Council of Ministers consisting, as it does, of the members of the legislature is, like the British Cabinet, "a hyphen which joins, a buckle which fastens the legislative part of the State to the executive part". The Cabinet enjoying, as it does, a majority in the legislature concentrates in itself the virtual control of both legislative and executive functions; and as the Ministers constituting the Cabinet are presumably agreed on fundamentals and act on the principle of collective responsibility, the most important questions of policy are all formulated by them."*

84. The appellant relying on Article 73 of the Constitution had submitted that Article 73 lays down the principle that while there may exist under the Constitution concurrent legislative powers on two different federal units, there can never be any concurrent executive powers. It was further submitted that the above principle equally applies to matters listed in List II and List III of the Constitution of India for NCTD. Referring to the Article 239AA(3)(b), it is contended that the said provision confers power on Parliament to enact legislations in matters in both state list and concurrent lists. Such power is also available under Article 246. However, it does not follow from the above that the said provision also confers executive powers in relation to matters in the state list and concurrent list. It is further submitted that Parliament may by law confer executive powers in relation to matters in the concurrent list on the Union Government for States, it may also do so in relation to the NCTD. But, if such thing is not done, Union Government will, as a general rule, have no executive powers in respect of matters under List II (except the

excluded Entries) and it is the GNCTD, which shall enjoy exclusive executive powers. We are of the view that the above interpretation as put up by the appellant on Constitutional provisions cannot be accepted. The principle is well established that Executive powers co-exist with the Legislative powers. Reference to Article 73 has been made in this context, which need to be noted. Article 73 provides as follows:-

> *"**73.** (1) Subject to the provisions of this Constitution, the executive power of the Union shall extend—*
>
> *(a) to the matters with respect to which Parliament has power to make laws; and*
>
> *(b) to the exercise of such rights, authority and jurisdiction as are exercisable by the Government of India by virtue of any treaty or agreement:*
>
> *Provided that the executive power referred to in subclause (a) shall not, save as expressly provided in this Constitution or in any law made by Parliament, extend in any State to matters with respect to which the Legislature of the State has also power to make laws.*
>
> *(2) Until otherwise provided by Parliament, a State and any officer or authority of a State may, notwithstanding anything in this article, continue to exercise in matters with respect to which Parliament has power*

> *to make laws for that State such executive power or functions as the State or officer or authority thereof could exercise immediately before the commencement of this Constitution.”*

85. The proviso to Article 73(1) provides that the executive power referred to in subclause (a) shall not, save as expressly provided in this Constitution or in any law made by Parliament, extend in any State to matters with respect to which the Legislature of the State has also power to make laws. Obviously, the proviso refers to the Concurrent List where both Parliament and State has power to make laws. Executive power in reference to Concurrent List has been deliberately excluded to avoid any duplicacy in exercise of power by two authorities. The Article 73 as it stood prior to Constitution Seventh Amendment Act, 1956 contained the expression after the word State “specified in Part A or Part B of the First Schedule”. Thus, the executive power was excluded of the Union only with regard to Part A and Part B States alone. Thus, when the Constitution was enforced, executive power of Union in reference to Part C States was not excluded with regard to Concurrent List also. Part C States hav-

ing been substituted as now by Union Territories by Constitution Seventh Amendment Act. the word “State” in Proviso to Article 73 cannot be read to include Union Territory. Reading the word Union Territory within the word “State” in proviso to Article 73(1) shall not be in accordance with Scheme of Part VIII (Union Territories) of the Constitution. Union Territories are administered by the President. Exercise of executive power of the Union through President is an accepted principle with regard to Union Territories. The above interpretation is also reinforced due to another reason. Under Article 239AA(4) proviso, the Lieutenant Governor, in case of difference of opinion, can make a reference to the President for decision and has to act according to the decision given thereon. The President, thus, with regard to a particular executive action, which has been referred, has exclusive jurisdiction to take a decision, which both Council of Ministers as well as Lieutenant Governor has to follow. The provision does not indicate that power of the President is confined only to executive actions which are mentioned in List II. When the President as provided by the

Constitutional Scheme, is entitled to take executive decision on any matter irrespective of the fact whether such executive decision taken by the Council of Ministers or Ministers related to matters covered by List II and List III, the executive power to Union through President cannot be confined to List II. Overriding power to the Union even on the executive matters has to be conceded to be there as per Constitutional scheme. It is another matter that for exercise of executive powers by the Union through President and by Council of Ministers, headed by Chief Minister of NCTD, the Constitution itself indicates a scheme which advances the constitutional objectives and provide a mechanism for exercise of executive powers, which aspect shall be, however, further elaborated while considering sub-clause(4) of Article 239AA. Legislative power of the Union is co-extensive with its executive power in relation to NCT is further indicated by the provisions of the Government of National Capital Territory of Delhi Act, 1991. The insertion of Article 239AA by the Constitution 69th Amendment has been followed by enactment of the Government of National Capital Territory of Delhi

Act, 1991 which Act was enacted by the Parliament in exercise of power under Article 239AA(7)(a) of the Constitution. Section 49 of the Act, 1991 provides as follows:

> "***49. Relation of Lieutenant Governor and his Ministers to President.-*** *Notwithstanding anything in this Act, the Lieutenant Governor and his Council of Ministers shall be under the general control of, and comply with such particular directions, if any, as may from time to time be given by the President."*

86. Legislative power of the Union is exercised by the President as per the constitutional scheme and Section 49 itself indicates that Parliament clearly envisaged Council of Ministers and the Lieutenant Governor shall be under the general control of, and comply with such particular directions issued by the President from time to time. The power of the President to issue direction is not limited in any manner so as to put any restriction on the executive power of the Union.

87. The President further is empowered under Section 44 of Act, 1991 to make rules for the allocation of business to the Ministers in so far as it is business with respect

to which the Lieutenant Governor is required to act on the aid and advice of his Council of Ministers. As per Article 239AA sub-clause (4) read with business rules, the manner and procedure of conduct of business including executive functions of GNCTD has to be administered. Although the Union ordinarily does not interfere with or meddle with the day to day functions of the GNCTD which is in tune with the constitutional scheme as delineated by Article 239AA and to give meaning and purpose to the Cabinet form of Government brought in place in the National Capital of Territory. But as the overriding legislative power of the Parliament is conceded in the constitutional scheme, overriding executive power has also to be conceded even though such power is not exercised by the Union in the day to day functioning of the GNCTD. We thus conclude that executive power of the Union is co-extensive on all subjects referable to List I and List II on which Council of Ministers and the NCTD has also executive powers.

88. Learned counsel for the appellants have also referred to Article 239AB. One of the submissions raised by the

appellants is that the executive power can be exercised by Union or the Lieutenant Governor only in the circumstances as mentioned in Article 239AB i.e. only when constitutional machinery in National Capital Territory has failed and National Capital Territory is unable to carry out the administration in accordance with the provisions of Article 239AB. Article 239AB was also added by Constitution Sixty Ninth Amendment Act, which is as follows:-

> "***239AB. Provision in case of failure of constitutional machinery.-*** *If the President, on receipt of a report from the Lieutenant Governor or otherwise, is satisfied—*
>
> *(a) that a situation has arisen in which the administration of the National Capital Territory* ***cannot be carried on in accordance with the provisions of Article 239AA*** *or of any law made in pursuance of that article; or*
>
> *(b) that for the proper administration of the National Capital Territory it is necessary or expedient so to do, the President may by order suspend the operation of any provision of Article 239AA or of all or any of the provisions of any law made in pursuance of that article for such period and subject to such conditions as may be specified in such law and make such incidental and consequential provisions as may appear to him to be necessary or expedient for administering the National Capital Territory in accordance with the provisions of Article 239 and Article 239AA."*

89. The provision of the Article 239AB is a special provision where President may suspend the provision of Article 239AA or any of the provision of any law made in pursuance of that article. The above provision is akin to Article 356, the subject of both the provisions, i.e., Article 239AB and Article 356 is same, i.e., "provision in case of failure of constitutional machinery". The power under Article 356/239AA is conferred on Union in larger interest of State. The submission that executive power can be exercised by the Union through President only when power under Article 239AB is exercised, cannot be accepted. The provision of Article 239AB is for entirely different purpose, and is not a provision regarding exercise of general executive power by the Union.

Article 239AA(4) Proviso

90. The interpretation of the proviso to sub-clause(4) is the main **bane** of contention between the parties. There are two broad aspects which need detailed consideration. The first issue is the concept of the words "aid and ad-

vice" as contained in sub-clause (4) of Article 239AA. The appellants case is that the content and meaning of aid and advice is same as has been used in Article 74 and Article 163 of the Constitution. Article 163 Sub-clause(1) is extracted for ready reference:-

> **163.Council of Ministers to aid and advise Governor:-** (1) There shall be a council of Ministers with the Chief Minister as the head to aid and advise the Governor in the exercise of his functions, except in so far as he is by or under this constitution required to exercise his functions or any of them in his discretion.

91. The appellant's have placed reliance on Constitution Bench judgment of this Court in ***Shamsher Singh Vs. State of Punjab and Another, (1974) 2 SCC 831.*** The Constitution Bench of this Court in the above case had occasion to examine the phrase "aid and advice" as used in Article 163 of the Constitution. This Court found that our Constitution embodies generally the Parliamentary system of the Government of British model both for Union and the States. Both President and Governor have to act on the basis of aid and advice received from the Council of the Ministers except when they have to exercise their func-

tion in their discretion. Paras 27, 28, 30, 32 and 33, which are relevant are quoted as follows:-

> *"**27**. Our Constitution embodies generally the Parliamentary or Cabinet system of Government of the British model both for the Union and the States. Under this system the President is the constitutional or formal head of the Union and he exercises his powers and functions conferred on him by or under the Constitution on the aid and advice of his Council of Ministers. Article 103 is an exception to the aid and advice of the Council of Ministers because it specifically provides that the President acts only according to the opinion of the Election Commission. This is when any question arises as to whether a Member of either House of Parliament has become subject to any of the disqualifications mentioned in clause (1) of Article 102.*
>
> ***28**. Under the Cabinet system of Government as embodied in our Constitution the Governor is the constitutional or formal head of the State and he exercises all his powers and functions conferred on him by or under the Constitution on the aid and advice of his Council of Ministers save in spheres where the Governor is required by or under the Constitution to exercise his functions in his discretion.*
>
> ***30**. In all cases in which the President or the Governor exercises his functions conferred on him by or under the Constitution with the aid and advice of his Council of Ministers he does so by making rules for convenient transaction of the business of the Government of India or the Government of*

the State respectively or by allocation among his Ministers of the said business, in accordance with Articles 77(3) and 166(3) respectively. Wherever the Constitution requires the satisfaction of the President or the Governor for the exercise of any power or function by the President or the Governor, as the case may be, as for example in Articles 123, 213, 311(2) proviso (c), 317, 352(1), 356 and 360 the satisfaction required by the Constitution is not the personal satisfaction of the President or of the Governor but is the satisfaction of the President or of the Governor in the constitutional sense under the Cabinet system of Government. The reasons are these. It is the satisfaction of the Council of Ministers on whose aid and advice the President or the Governor generally exercises all his powers and functions. Neither Article 77(3) nor Article 166(3) provides for any delegation of power. Both Articles 77(3) and 166(3) provide that the President under Article 77(3) and the Governor under Article 166(3) shall make rules for the more convenient transaction of the business of the Government and the allocation of business among the Ministers of the said business. The Rules of Business and the allocation among the Ministers of the said business all indicate that the decision of any Minister or officer under the Rules of Business made under these two articles viz. Article 77(3) in the case of the President and Article 166(3) in the case of the Governor of the State is the decision of the President or the Governor respectively.

32. *It is a fundamental principle of English Constitutional law that Ministers must accept responsibility for every executive act. In England the Sovereign never acts on his*

own responsibility. The power of the Sovereign is conditioned by the practical rule that the Crown must find advisers to bear responsibility for his action. Those advisers must have the confidence of the House of Commons. This rule of English Constitutional law is incorporated in our Constitution. The Indian Constitution envisages a Parliamentary and responsible form of Government at the Centre and in the States and not a Presidential form of Government. The powers of the Governor as the constitutional head are not different.

***33**. This Court has consistently taken the view that the powers of the President and the powers of the Governor are similar to the powers of the Crown under the British Parliamentary system. (See Ram Jawaya Kapur v. State of Punjab, A. Sanjeevi Naidu v. State of Madras4, U.N.R. Rao v. Indira Gandhi5). In Ram Jawaya Kapur case Mukherjea, C.J. speaking for the Court stated the legal position as follows. The Executive has the primary responsibility for the formulation of governmental policy and its transmission into law. The condition precedent to the exercise of this responsibility is that the Executive retains the confidence of the legislative branch of the State. The initiation of legislation, the maintenance of order, the promotion of social and economic welfare, the direction of foreign policy, the carrying on of the general administration of the State are all executive functions. The Executive is to act subject to the control of the Legislature. The executive power of the Union is vested in the President. The President is the formal or constitutional head of the Executive. The real executive powers are vested in the Ministers of the Cabinet. There is a Council of*

> *Ministers with the Prime Minister as the head to aid and advise the President in the exercise of his functions."*

92. It is well settled that the Governor is to act on aid and advice of the Council of Ministers and as contemplated under Article 163, according to the Constitutional scheme, Governor is not free to disregard the aid and advice of the Council of Ministers except when he is required to exercise his function in his discretion. There cannot be any dispute to the proposition as laid down by this Court in ***Shamsher Singh (supra)*** and followed thereafter in number of cases. Whether the "aid and advice" as used in Article 239AA(4) has to be given the same meaning as is contained in Article 163 and Article 74 is the question to be answered. The appellant's case is that Constitution scheme as delineated in Article 239AA itself having accepted Westminster model of Governing system, "aid and advice" of the Council of Ministers is binding on the LG and he cannot act contrary to the aid and advice and is bound to follow the aid and advice. It is submitted that any other interpretation shall run contrary to the very concept of Parliamentary democracy,

which is basic feature of the Constitution. There could have been no second opinion had the proviso to sub-clause(4) of Article 239AA was not there. The aid and advice as given by Council of Ministers as referred to in sub-clause(4) has to be followed by the Lieutenant Governor unless he decides to exercise his power given in proviso of sub-clause(4) of Article 239AA. The proviso is an exception to the power as given in sub-clause(4). A case when falls within the proviso, the "aid and advice" of the Council of Ministers as contemplated under sub-clause (4) is not to be adhered to and a reference can be made by Lieutenant Governor. This is an express Constitution scheme, which is delineated by sub-clause(4) of Article 239AA proviso. It is relevant to note that the scheme which is reflected by sub-clause(4) of Article 239AA proviso is the same scheme which is contained under Section 44 of the Government of Union Territories Act, 1963. Section 44 of the Act is quoted below:-

> *"There shall be a Council of Ministers in each Union Territory with the Chief Minister at the head to aid and advise the Administrator in the exercise of his functions in relation to matters with respect to which the Legislative Assembly of*

the Union Territory has power to make laws except in so far as he is required by or under this Act to act in his discretion or by or under any law to exercise any judicial or quasi-judicial functions.

Provided that in case of difference of opinion between the Administrator and his Ministers on any matter, the Administrator shall refer it to the President for decision and act according to the decision given thereon by the President, and pending such decision, it shall be competent for the Administrator in any case where the matter in his opinion is so urgent that it is necessary for him to take immediate action, to take such action or to give such direction in the matter as it deems necessary".

93. Thus, with regard to Union Territories, the exception as carved out in proviso was very much there since before. Thus, the scheme as contained in proviso was well known scheme applicable in the Union Territories. When there is an express exception when the aid and advice given by the Council of Ministers is not binding on the Lieutenant Governor and he can refer it to the President and pending such decision in case of urgency take his own decision, we are not persuaded to accept that aid and advice is binding on the Governor under Article 163. The Legislative Assembly of the NCTD being representing the

views of elected members their opinion and decision has to be respected and in all cases, except where Lieutenant Governor decides to make a reference.

94. Another issue which needs consideration is the meaning of the word “any matter” as occurring in first sentence of the proviso to sub-clause(4). Another issue which needs to be considered in this context is as to whether the operation of the proviso to sub-clause(4) is confined to only few categories of cases as contended by appellant or the proviso can be relied by Lieutenant Governor in all executive decisions taken by Council of Ministers. According to appellants, the proviso operates in the following areas, when the decision of the Council of Ministers of the NCTD:-

a. is outside the bounds of executive power under Article 239AA(4);

b. impedes or prejudices the lawful exercise of the executive power of the Union;

c. is contrary to the laws of the Parliament;

d. falls within Rule 23 matters such as -

i. matters which affect the peace and tranquillity of the Capital;

ii. interests of any minority community;

iii. relationship with the higher judiciary;

iv. any other matters of administrative importance which the Chief Minister may consider necessary.

95. Thus, appellants contended that apart from above categories mentioned above, proviso has no application in any other matter. We are not able to read any such restriction in the proviso as contended by the appellants. The proviso uses the phrase "any matter" in the first sentence, i.e., "provided that in the case of difference of opinion between the Lieutenant Governor and his Ministers on any matter……." The word "any matter" are words of wide import and the language of Article 239AA(4) does not admit any kind of restriction in operation of proviso. There is nothing in the provision of sub-clause (4) to read any restriction or limitation on the phrase "any matter" occurring in proviso. The word "any matter"

has also been used in Article 239AA(3) while providing for power to make laws. Sub-clause(3)(a) reads "subject to the provisions of this Constitution, the Legislative Assembly shall have power to make laws for the whole or any part of the National Capital Territory with respect to any of the matters stated in the State List or in the Concurrent List in so far as any such matter is applicable to Union Territories……". Further, sub-clause(b) provides "Nothing in sub-clause(a) shall derogate from the powers of Parliament under the Constitution to make laws with respect to any matter for a Union Territory or any part thereof". The use of word "any matter" in above two clauses clearly indicate that it is not used in any limited or restricted manner rather use of word "any matter" is used referring to the entire extent of legislation. When the same phrase has been used in proviso to sub-clause(4), we are of the view that similar interpretation has to be given to the same word used in earlier part of the same Article.

96. In this context, we refer to ***Tej Kiran Jain and Others Vs. N. Sanjiva Reddy and Others, (1970) 2 SCC 272.*** In the above case, this Court had occasion to consider the word "any thing" as used in Article 105(2) of the Constitution of India. This Court stated following in Paragraph 8:-

> *"**8.** In our judgment it is not possible to read the provisions of the article in the way suggested. The article means what it says in language which could not be plainer. The article confers immunity inter alia in respect of "anything said ... in Parliament". The word "anything" is of the widest import and is equivalent to "everything". The only limitation arises from the words "in Parliament" which means during the sitting of Parliament and in the course of the business of Parliament. We are concerned only with speeches in Lok Sabha. Once it was proved that Parliament was sitting and its business was being transacted, anything said during the course of that business was immune from proceedings in any Court this immunity is not only complete but is as it should be……."*

97. From the above discussions, it is thus clear that aid and advice of the Council of Ministers is binding on the Lieutenant Governor except when he decides to exercise his power given in proviso of sub-clause(4) of Article 239AA. In the matters, where power under Proviso has not

been exercised, aid and advice of the Council of Ministers is binding on the Lieutenant Governor. We are of the view that proviso to sub-clause(4) of Article 239AA cannot be given any other interpretation relying on any principle of Parliamentary democracy or any system of Government or any principle of Constitutional silence or implications.

98. The submission of the appellants that proviso to sub-clause(4) of Article 239AA envisages an extreme and unusual situation and is not meant to be a norm, is substantially correct. The exercise of power under Proviso cannot be a routine affair and it is only in cases where Lieutenant Governor on due consideration of a particular decision of the Council of Ministers/Ministers, decides to make a reference so that the decision be not implemented. The overall exercise of administration of Union Territory is conferred on President, which is clear from the provisions contained in Part VIII of the Constitution. Although, it was contended by the appellant that Article 239 is not applicable with regard to NCTD after Article 239AA has been inserted in the Constitution.

The above submission cannot be accepted on account of the express provisions which are mentioned under Article 239AA and Article 239AB itself. Article 239AA sub-clause(1) itself contemplates that administrator appointed under Article 239 shall be designated as the Lieutenant Governor. Thus the administrator appointed under Article 239 is designated as LG. Article 239AB is also applicable to NCTD. Article 239AB in turn refers to Article 239. The provisions contained in Part VIII of the Constitution have to be looked into in its entirety. Thus, all the provisions of Part VIII has to be cumulatively read while finding out the intention of the Constitution makers, which makes it clear that Article 239 is also applicable to the NCTD.

Whether concurrence of Lieutenant Governor is required on executive decision of GNCTD.

99. The constitutional provision of Article 239AA does not indicate that the executive decisions of GNCTD have to be taken with the concurrence of LG. The constitutional provisions inserted by 69th Constitution Amendment are with the object to ensure stability and permanence by providing

Legislative Assembly and Council of Ministers by the constitutional provisions itself. With regard to executive decision taken by the Council of Ministers/Ministers of GNCTD proviso gives adequate safeguard empowering the LG to make a reference to the President in the event there is difference of opinion between executive decisions of the GNCTD and the LG, but the scheme does not suggest that the decisions by Council of Ministers/Ministers have to be taken with the concurrence of the LG. The above conclusion is re-enforced by looking into the 1991 Act as well as Rules framed by the President under Section 44 of 1991 Act, namely, the Transaction of Business of the Government of National Capital Territory of Delhi Rules, 1993. The provisions of 1991 Act although provide for communication of proposal, agenda and decisions of the Council of Ministers/Ministers to LG but there is no indication in any of the provisions that the concurrence of LG is required with regard to the aforesaid decisions.

100. Earlier enactments governing the Delhi administration did provide the word concurrence of LG for

implementing decisions taken by GNCTD but the said scheme having been given a go-bye in the 1991 Act, there is no requirement of any concurrence of LG to the executive decisions taken by the GNCTD.

Communication to the LG, its purpose and object

101. The scheme of 1991 Act clearly delineates that LG has to be informed of all proposals, agendas and decisions taken by the Council of Minister/Ministers. Section 44 deals with the conduct of business which is to the following effect:

> *"**44.Conduct of business :***
>
> *(1) The President shall make rules :*
>
> *(a) for the allocation of business to the Ministers in so far as it is business with respect to which the Lieutenant Governor is required to act on the aid and advice of his Council of Ministers; and*
>
> *(b) for the more convenient transaction of business with the ministers, including the procedure to be adopted in the case of a difference of opinion between the Lieutenant Governor and the Council of Ministers or a Minister.*

> *(2) Save as otherwise provided in this Act, all executive action of Lieutenant Governor whether taken on the advise of his Ministers or otherwise shall be expressed to be taken in the name of the Lieutenant Governor.*
>
> *(3) Orders and other instruments made and executed in the name of the Lieutenant Governor shall be authenticated in such manner as may be specified in rules to be made by the Lieutenant Governor and the validity of an order or instrument which is so authenticated shall not be called in question on the ground that it is not an order or instrument made or executed by the Lieutenant Governor."*

102. Under Section 45, Chief Minister is to furnish information to the LG about all decisions of the Council of Ministers relating to the administration of the affairs of the Capital and the proposals for legislation and to furnish such information as may be called for by the LG. Section 45 is as follows:

> *"45. Duties of Chief Minister as respects the furnishing of information to the Lieutenant Governor, etc. :*
>
> *It shall be the duty of the Chief Minister —*
>
> *(a)to communicate to the Lieutenant Governor all decisions of the Council of Ministers relating to the administration*

of the affairs of the Capital and proposals for legislation;

(b)to furnish such information relating to the administration of the affairs of the Capital and proposals for legislation as Lieutenant Governor may call for, and

(c)if the Lieutenant Governor so requires, to submit for the consideration of the Council of Ministers any matter on which a decision has been taken by a Minister but which has not been considered by the Council."

103. Rules have been framed under Section 44 of 1991 Act, namely, 1993 Rules, which throw considerable light over the actual functioning of GNCTD and LG. Rule 9 sub-rule (2) provides that if it is decided to circulate any proposal, the Department to which it belongs, shall prepare a memorandum setting out in brief the facts of the proposal, the points for decision and the recommendations of the Minister in charge and when the same is circulated to the Ministers, simultaneously a copy thereof is to be sent to the LG. Rule 10 is as follows:

"10. (1) While directing that a proposal shall be circulated, the Chief Minister may also direct, if the matter be of urgent

nature, that the Ministers shall communicate their opinion to the Secretary to the Council by a particular date, which shall be specified in the memorandum referred to in rule 9.

(2) If any Minister fails to communicate his opinion to the Secretary to the Council by the date so specified in the memorandum, it shall be assumed that he has accepted the recommendations contained therein.

(3) If the Minister has accepted the recommendations contained in the memorandum or the date by which he was required to communicate his opinion has expired, the Secretary to the Council shall submit the proposal to the Chief Minister.

(4) If the Chief Minister accepts the recommendations and if he has no observation to make, he shall return the proposal with his orders thereon to the Secretary to the Council.

(5) On receipt of the proposal, the Secretary to the Council shall communicate the decision to the Lieutenant Governor and pass on the proposal to the Secretary concerned who shall thereafter take necessary steps to issue the orders unless a reference to the Central Government is required in pursuance of the provisions of Chapter V."

104. The above provision also indicates that after proposal is accepted by the Chief Minister, the same shall be communicated to the LG and only thereafter

necessary step to issue the orders is to be taken provided no reference is made to the Central Government by the LG under Chapter V of the Rules.

105. Rule 13 sub-rule (3) provides that an agenda showing the proposals to be discussed in a meeting of the Council has been approved by the Chief Minister shall be sent to the LG. The agenda approved by the Chief Minister shall be sent by the Secretary to the Council, to the LG. Rule 13 sub-rule (3) is as follows:

> *"Rule 13(3) After an agenda showing the proposals to be discussed in a meeting of the Council has been approved by the Chief Minister, copies thereof, together with copies of such memoranda as have not been circulated under rule 11, shall be sent by the Secretary to the Council, to the Lieutenant Governor, the Chief Minister and other Ministers, so as to reach them at least two days before the date of 7 such meeting. The Chief Minister may, in case of urgency, curtail the said period of two days."*

106. Rule 14 again provides that decisions taken by the Council on each proposal shall be communicated to the LG. Standing orders issued by the Minister-in-charge for the disposal of proposals or matters in his Department are

also required to be communicated to LG, as required by Rules 15 and 16.

107. Rule 19 sub-rule (5) empowers the LG to call for papers relating to any proposal or matter in any Department and such requisition shall be complied with by the Secretary to the Department concerned.

108. Rule 23 enumerates certain matters which are to be submitted to LG before issuing any orders thereon. Rule 23 is as follows:

> *"23. The following classes of proposals or matters shall essentially be submitted to the Lieutenant Governor through the Chief Secretary and the Chief Minister before issuing any orders thereon, namely:*
>
> *(i) matters which affect or are likely to affect the peace and tranquility of the capital;*
>
> *(ii) matters which affect or are likely to affect the interest of any minority community, Scheduled Castes and backward classes;*
>
> *(iii) matters which affect the relations of the Government with any State Government, the Supreme Court of India or the High Court of Delhi;*

(iv) proposals or matters required to be referred to the Central Government under the Act or under Chapter V;

(v) matters pertaining to the Lieutenant Governor's Secretariat and personnel establishment and other matters relating to his office;

(va) matters on which Lieutenant Governor is required to make order under any law or instrument in force;

(vi) petitions for mercy from persons under sentence for death and other important cases in which it is proposed to recommend any revision of a judicial sentence;

(vii) matters relating to summoning, prorogation and dissolution of the Legislative Assembly, removal of disqualification of voters at elections to the Legislative Assembly, Local Self Government Institutions and other matters connected with those; and

(viii) any other proposals or matters of administrative importance which the Chief Minister may consider necessary.

109. Under Rule 24, the LG is empowered to require any order passed by the Minister-in-charge to be placed before the Council for consideration.

110. Rule 25 obliges the Chief Minister to furnish to the LG such information relating to the administration of

the Capital and proposals for legislation as the LG may call for.

111. Rule 49 deals with the difference of opinion between the LG and Minister in regard to any matter, whereas Rule 50 deals with difference of opinion between the LG and the Council with regard to any matter. Rules 49 and 50 are as follows:

> *"49. In case of difference of opinion between the Lieutenant Governor and a Minister in regard to any matter, the Lieutenant Governor shall endeavour by discussion on the matter to settle any point on which such difference of opinion has arisen. Should the difference of opinion persist, the Lieutenant Governor may direct that the matter be referred to the Council*
>
> *50. In case of difference of opinion between the Lieutenant Governor and the Council with regard to any matter, the Lieutenant Governor shall refer it to the Central Government for the decision of the President and shall act according to the decision of the President."*

112. Rule 49 enable and oblige the LG to discuss the matter when there is some difference with decision of a Minister. The discussion to sort out difference and to arrive at an acceptable course of action is always welcome and is a measure employed in all organisational

functioning.

113. The scheme as delineated by 1991 Act and Rules 1993 clearly indicates that LG has to be kept informed of all proposals, agendas of meeting and decisions taken. The purpose of communication of all decisions is to keep him posted with the administration of Delhi. The communication of all decisions is necessary to enable him to go through the proposals and decisions so as to enable him to exercise powers as conceded to him under 1991 Act and Rules 1993. Further, the power given under proviso to 239AA(4) can be exercised only when LG is informed and communicated of all decisions taken by GNCTD. The communication of all decisions is necessary to enable the LG to perform duties and obligations to oversee the administration of GNCTD and where he is of different opinion he can make a reference to the President. As observed above the purpose of communication is not to obtain his concurrence of the decision but purpose is to post him with the administration so as to enable him to exercise his powers conceded to him under proviso to

Article 239AA sub-clause (4). We have already observed that the powers given in proviso to sub-clause (4) is not to be exercised in a routine manner rather it is to be exercised by the LG on appropriate reasons to safeguard the interest of the Union Territory.

114. Learned Additional Solicitor General has submitted before us that in the last few years there have been very few references by the LG in exercise of powers under proviso to sub-clause (4) of Article 239AA. Rule 14 sub-rule (2) of 1993 Rules empowers the Minister concerned to take necessary action to give effect to the decision of the Council after decision has been communicated to the LG. The purpose of communication is to enable the LG to discharge obligation to oversee and scrutinise the decision. Although, there is no indication in the 1993 Rules as to after communication of the decisions of the Council as to what stage the decisions are to be implemented. As observed no concurrence is required on the decisions and communication is only for the purpose of enabling the LG to formulate opinion as to whether

there is any such difference which may require reference. Only a reasonable time gap is to elapse, which is sufficient to the LG to scrutinise the decision. It is for the LG and the Council of Ministers to formulate an appropriate procedure for smooth running of the administration decisions which can very well be implemented by the GNCTD immediately after the decisions are communicated to LG and are “seen” by the LG. When LG has seen a decision and does not decide to make a reference, the decision has to be implemented by all means. We are, thus, of the view that the 1991 Act and 1993 Rules cover the entire gamut, manner and procedure of executive decisions taken by the Council of Ministers/Minister their communication, and implementation and the entire administration is to be run accordingly.

115. The 1993 Rules provide that Chief Secretary and the Secretary of the Department concerned are severally responsible for the careful observance of these Rules and when either of them considers that there has been any

material departure, he shall bring it to the notice of the Minister-in-charge, Chief Minister and the LG. Rule 57 is as follows:

> *"57. The Chief Secretary and the Secretary of the Department concerned are severally responsible for the careful observance of these rules and when either of them considers that there has been any material departure from these rules, he shall personally bring it to the notice of the Minister-in-charge, Chief Minister and the Lieutenant Governor."*

116. The duty of observance of 1993 Rules and other statutory provisions lay both on Council of Ministers, Chief Minister and LG. All have to act in a manner so that the administration may run smoothly without there being any bottleneck. The object and purpose of all constitutional provisions, Parliamentary enactments and the Rules framed by the President is to carry the administration in accordance with the provisions in the interest of public in general so that rights guaranteed by the Constitution to each and every person are realised. When the duty is entrusted on persons holding high office, it is expected that they shall conduct themselves, in faithful, discharge of their duties to

ensure smooth running of administration and protection of rights of all concerned.

117. I have perused the elaborate opinion of My Lord, the Chief Justice with which I substantially agree, but looking to the importance of the issues, I have penned my own views giving reasons for my conclusions.

118. I have also gone through the well researched and well considered opinion of Brother Justice D.Y. Chandrachud. The view expressed by Justice Chandrachud are substantially the same as have been expressed by me in this judgment.

119. In view of the foregoing discussions we arrive on the following conclusions on the issues which have arisen before us:

CONCLUSIONS

I. The interpretation of the Constitution has to be purposive taking into consideration the need of time and Constitutional principles. The intent of the Constitution

framers, the object and reasons of a Constitutional Amendment always throw light on the Constitutional provisions. For adopting the purposive interpretation of a particular provision the express language employed cannot be given a complete go-bye.

II. The Parliament has power to make laws for NCTD in respect of any of the matters enumerated in State List and Concurrent List. The Legislative Assembly of NCTD has also legislative power with respect to matters enumerated in the State List (except excepted entries) and in the Concurrent List.

III. Executive power is co-extensive with the legislative power. Legislative power is given to give effect to legislative enactments. The Policy of legislation can be given effect to only by executive machinery.

IV. When the Constitution was enforced, executive power of Union in reference to Part C States with regard to Concurrent List was not excluded. Part C States having been substituted by 7th Constitution Amendment as Union

Territories. The word 'State' as occurring in proviso to Article 73 after 7th Constitution Amendment cannot be read as including Union Territory. Reading the word 'Union Territory' within the word 'State' in proviso to Article 73 shall not be in consonance with scheme of Part VIII (Union Territories) of the Constitution.

V. Executive power of the Union is co-extensive on all subjects referable to List II and III on which Legislative Assembly of NCTD has also legislative powers.

VI. The “aid and advice” given by Council of Ministers as referred to in sub-clause (4) of Article 239AA is binding on the LG unless he decides to exercise his power given in proviso to sub-clause (4) of Article 239AA.

VII. The Legislative Assembly of NCTD being representing the views of elected representatives, their opinion and decisions have to be respected in all cases except where LG decides to make a reference to the President.

VIII. The power given in proviso to sub-clause (4) to LG is not to be exercised in a routine manner rather it is to be exercised by the LG on valid reasons after due consideration, when it becomes necessary to safeguard the interest of the Union Territory.

IX. For the Executive decisions taken by the Council of Ministers/Ministers of GNCTD, proviso to sub-clause (4) gives adequate safeguard empowering the LG to make a reference to the President in the event there is difference of opinion between decisions of the Ministers and the LG, but the Constitutional Scheme does not suggest that the decisions by the Council of Ministers/Ministers require any concurrence of the LG.

X. The scheme as delineated by 1991 Act and 1993 Rules clearly indicates that 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. The communication of all decisions is necessary to enable him to go through so as

to enable him to exercise the powers as conceded to him under proviso to sub-clause (4) as well as under 1991 Act and 1993 Rules. The purpose of communication is not to obtain concurrence of LG.

XI. 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.

120. We having answered the constitutional issues raised before us in the above manner let these matters be now placed before the appropriate Bench for hearing after obtaining orders from Hon'ble the Chief Justice.

.....J.
(ASHOK BHUSHAN)

NEW DELHI,
JULY 04, 2018.