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Email: pu@harbinger.co.in

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FOREWORD

With the year 2020 behind us, we may hope that 2021 will see the last of the pandemic. With the efficient global rollout of several vaccines, one may hope that things will soon go back to normal and the world will not have to face a million more deaths due to the relentless coronavirus. The preparation of this issue has also been a personal challenge, which we hope we have overcome, as we took over the reins of the Journal from the outgoing Editor-in-Chief and his deputies.

Amidst such existential challenges, there have been evolutionary changes in the Indian Justice System. Court proceedings and even quasi-judicial have moved completely online, starting from filing submissions to making oral pleadings. It is often said that the evolution of constitutional law is deeply linked to the evolution of a country's political affairs. In this regard, India has seen a tumultuous political climate with regional elections across the country and the alleged use of federal agencies to suppress dissent. To this end, Edition XIII offers a critique on a bouquet of contemporary narratives ranging from a discussion on nominated MLAs in Puducherry to the controversial Government of NCT of Delhi Amendment Act.

In the paper titled *Nominated MLAs in the Union Territory of Puducherry Assembly: A Façade of Democracy,* Dr. S. Srinivasan and T.N. Thanaraman aim to discuss the democratic set up in Indian Union Territories. In this regard, they discuss whether an opposition party with nominated MLAs would be in a position to overthrow the ruling government. They go on to suggest that the present set-up lacks sufficient autonomy from the Union Government and a partly elected partly nominated legislature is bound to fail.

K J Chendhil Kumar, in the paper titled *Doctrine of Proportionality as a standard of review under Article 14*, attempts to discuss the judicial interpretation of the doctrine of proportionality. In doing so, the author argues that the inclusion of such doctrine under Article 14 jurisprudence has been a fallacy. To buttress such an argument, the author highlights the historical jurisprudence that has led to the present Article 14 jurisprudence.

Rishabh Joshi and Rishab Aggarwal, in the paper titled *The Constitutional Validity of a State Tax on consumption of electricity sourced from the outside the State*, aim to discuss the constitutionality of the Karnataka Electricity Amendment Act 2013, in light of the Supreme Court of India's decision in *State of AP v. NTPCL*. The authors contend that provisions concerning taxation on inter-state sale and consumption of electricity are unconstitutional and further argue that States lack legislative competence to enact such provisions. The authors also aim to establish that such provisions violate constitutional rights.

Through *Proviso to Section 44(2) of the Government of National Capital Territory of Delhi Act, 1991: A Constitutional Perspective*, Devansh Garg discusses the controversial 2021 Amendment, which enhances the powers of the Lieutenant Governor. The author, while conducting a detailed discussion on this issue, specifically delves into Article 239AA and the legal position before the 2021 Amendment. The author aims to establish that the 2021 Amendment is unconstitutional.

Finally, in *Government of NCT of Delhi v Union of India*, Aditya Anand examines the Supreme Court of India's constitutional bench and division bench decisions in *Government of NCT of Delhi v Union of India*. The author aims to contend that the division bench's decision affects the federal structure of the NCT, as it is tilted in favour of the Union Government.

Edition XIII thus engages in a wide array of themes, scrutinising recent contemporary developments through the lens of constitutionalism. As always, we are grateful to the Advisory Board, Publishing Team, Editors, Peer Reviewers and most importantly, our readers. We hope you enjoy reading this issue. We hope you find it insightful and engaging. We hope to hear your constructive criticism too! From us to you – Happy Reading!

Sincerely,

Syamantak Sen, ***Editor – in – Chief***
Tanya Agarwal, ***Editor – in – Chief (Designate)***
Eeshan Sonak, ***Deputy Editor – in – Chief***

NOMINATED MLA'S IN THE UNION TERRITORY OF PUDUCHERRY ASSEMBLY: A FAÇADE OF DEMOCRACY

Dr. S. Srinivasan & T.N. Thanaraman[Y]

Abstract

The Union Territory of Puducherry Assembly was suspended, and placed under President rule from 22nd February 2021 by the notification issued by the Ministry of Home Affairs (MHA), after receiving a report from the Lieutenant Governor of the Union Territory. The situation occurred due to a confidence motion moved by the ruling party which ultimately could not succeed.

Because of the Supreme Court's Judgment in 2018 of Lakshminaraya Thenan vs. Lieutenant Governor, Puducherry, (popularly known as the nominated MLAs case), the opposition parties with nominated members could overthrow the ruling government in power. Keeping in mind the instability prevailing in Puducherry, the article revolves upon the basic question, whether the nominated MLAs can exercise their voting rights and whether the Union Territories are given a democratic set up with adequate autonomy.. The concept of "Union Territory" is one of the many ways in which India regulates the relations between the Centre and its units. It should not be used to subvert the basis of an electoral democracy. In short, parliamentary democracy should either have a unicameral legislature or a bicameral legislature, and not a mix of both, as partly elected and partly nominated. Experience shows that the Union Territories having legislatures with ultimate control vested in the Union Government do not work.

Keywords: Parliamentary Democracy, National Capital Territory, Union Territories Act, Jammu and Kashmir reorganization Act, Pondicherry Code, Legislative power of the Assembly, Constitution of French Republic, Voting Right, Union Government.

[Y] Dr. S. Srinivasan is the principal of the Dr. Ambedkar Government Law College, Puducherry. T.N. Thanaraman is a Commercial Tax Officer (Rtd.) Department of Commercial Taxes, Government of Puducherry.

Introduction

The Assembly in the Union Territory of Puducherry was suspended and the Union Territory placed under President rule from 22nd February 2021 by a notification[1] issued by the Ministry of Home Affairs ("**MHA**"). This situation occurred due to a confidence motion moved by the ruling party, which ultimately could not succeed. There was a tie between the ruling party alliance members and the opposition members as there were 13 votes on both sides. The 13 numbers of opposition includes three members nominated by the Union Government. Two members of the ruling alliance resigned from their positions as MLAs on the eve of the confidence motion and brought the strength down to 11. There were only 10 elected members belonging to the opposition alliance. There were 11 elected members present on the ruling side, as against the opposition which had only 10 elected members and 3 nominated members.

The overthrowing of the ruling government in power, by the nominated members of the opposition parties, was made possible by the 2018 Supreme Court judgment in the nominated MLAs case (*Lakshminarayanan vs. Lieutenant Governor, Puducherry*).[2] This altered the balance of powers in the representative character of the legislature. The Supreme Court judgment held that the nominated MLA's of Puducherry had a right to vote in all matters including the right to participate in the budget and to vote in a no-confidence motion. This judgment nullified the democratic spirit of the representative character of the Legislative Assembly. The end result of the judgment reveals the façade or deficit of democracy in the Union Territory with Assembly. This article dwells on the comparative deficit of democracy in the Union Territories ("UT") with Legislatures in India.

Thiru P.D.T Achary, former Secretary General of the Lok Sabha, in his article rightly pointed out that Union Territories were never given a fully democratic set up with necessary autonomy. Experience shows that the UTs having Legislatures with ultimate control vested in the Union Government do not work. The redemption for the harried Governments of these territories lies

[1] Notification No. 11012/3/2021-UTL, Ministry of Home Affairs (Feb. 25, 2021), https://egazette.nic.in/WriteReadData/2021/225455.pdf
(The notification issued by Union Home Secretary Ajay Kumar Bhalla said the "Legislative Assembly of the said Union Territory is hereby placed under suspended animation").
[2] K. Lakshminarayanan v. The Union of India, (2020) 14 SCC 664.

in the removal of the legal and constitutional provisions, which enable the Union Government to break down the neck of an elected Government, via nominated MLAs.

Backdrop

Nomination as such is not new to the Indian Legislature. It started with the Government of India Act, 1919, i.e, the Montagu-Chelmsford Reforms.[3] It provided special provisions for the nomination of Anglo-Indians to the elected Parliament from the year 1920. This provision lasted up to January 24th 2020 through the subsequent Government of India Acts 1935 and Constitution of India, 1950. As of October 31st, 2019 there were eight UTs with two categories. i.e five UTs without Legislature[4] and three UTs with Legislature[5] - Puducherry, Jammu & Kashmir and Delhi. These UTs, also have representation in the Rajya Sabha.

Legislative Framework

Article 239 stipulates that every Union Territory is to 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. The opening words of Article 239, however, are 'save as otherwise provided by Parliament by law', which means that Parliament by law can provide different schemes of administration for such Union Territories, i.e., different from what is stated in Article 239.[6] Article 239A[7] is applicable for Puducherry and Jammu and Kashmir whereas Article 239AA is applicable for Delhi as it is the National Capital Territory.

Articles 239A and 239AA provide for an elected Legislature through the following Parliamentary Acts:

[3] The Montagu–Chelmsford Reforms or more briefly known as Mont-Ford Reforms (MCR) were reforms introduced by the colonial government in British India to introduce self-governing institutions gradually in India. MCR along with brought various new dimensions in Indian polity which were unknown hitherto like parliamentary system in India, involvement in budget making and policy formulation, participation in central legislative assembly, diarchy i.e. decentralized form of govt etc.

[4] The Union Territories without Legislature are Andaman & Nicobar Islands, Lakshadweep, Dadra Nagar Haveli& Daman& Diu, Chandigarh and Ladakh.

[5] These three union territories have representation in the upper house of the Indian Parliament, the Rajya Sabha.

[6] Government of NCT of Delhi v. Union of India, (2020) 12 SCC 259.

[7] INDIA CONST. art. 239A; In the year 1962, Article 239A was inserted, providing a little departure from the Scheme of administration contained in Article 239, insofar as Union Territory of Puducherry is concerned.

1. Government of Union Territories Act, 1963.
2. Jammu & Kashmir Reorganization Act, 2019
3. Government of National Capital Territory of Delhi, Act 1991

The first two Acts provide for the creation of a Legislature which is partly nominated and partly elected. Under the Government of Union Territories Act, 1963, Puducherry is the only U.T. with Legislature till 30.10.2019. With effect from 31.10.2019, the provisions contained in Article 239A which are applicable to U.T of Puducherry, also apply to U.T of Jammu & Kashmir (J&K) by the Section 13 of the Jammu and Kashmir Reorganization Act, 2019.

Government of U.T. Act, 1963 Section 3(3) states that the Central Government may nominate not more than three persons, other than persons in the service of Government, as Members of the Legislative Assembly of the UT.[8] Section 13 of the Jammu & Kashmir Reorganization Act, 2019[9] provides for the applicability of Article 239A, which is applicable to the UT of Puducherry. Section 14(3) and Section 15 of the J&K Reorganization Act, provide for elected and nominated Members of Legislature.

Section 14(3) states that the total number of seats in the Assembly of Jammu and Kashmir to be filled by persons through direct election shall be 107. After excluding 24 members assigned for Pakistan occupied Kashmir, the net elected members will be 83.[10] Further, Section15 highlights that the Legislative Government may nominate two Members to the Legislative Assembly to give representation to women, if, in the L.Gs opinion, women are not adequately represented in the Legislative Assembly.[11]

[8] §3(3), The Government Of Union Territories Act, No. 20 of 1963 ("The Central Government may nominate not more than three persons, not being persons in the service of Government, to be members of the Legislative Assembly of the Union territory").
[9] §13, The Jammu and Kashmir Reorganisation Act, No. 34 of 2019 ("On and from the appointed day, the provisions contained in article 239A, which are applicable to 'Union territory of Puducherry', shall also apply to the 'Union territory of Jammu and Kashmir'").
[10] §14(3), The Jammu and Kashmir Reorganisation Act, No. 34 of 2019 ("The total number of seats in the Legislative Assembly of the Union territory of Jammu and Kashmir to be filled by persons chosen by direct election shall be 107").
[11] §15, The Jammu and Kashmir Reorganisation Act, No. 34 of 2019 ("Notwithstanding anything in sub-section (3) of section 14 the Lieutenant Governor of the successor Union territory of Jammu and Kashmir may nominate two members to the Legislative Assembly to give representation to women, if in his opinion, women are not adequately represented in the Legislative Assembly").

In effect, Jammu and Kashmir will have 83 elected MLAs with 2 women nominated MLAs and 3 other nominated under the Government of Union Territory Act, 1963. Thus, the total number of MLAs will be 88 or 86 depending upon availability of elected women MLAs. In the case of nominated MLAs, Puducherry and Jammu & Kashmir are in the same boat. Both are peculiarly covered by Treaties with the Union of India. Jammu and Kashmir was annexed by the Union by the Instrument of Accession, 1948 which was executed under the India Independence Act, 1947. Puducherry is annexed with the Union of India under the French-India Treaty of Cession 1956, which was executed under the 5th Constitution of French Republic and Constitution of India (Article 253).

The Union Territory of Delhi escaped from the provisioning of nominated MLAs. The Government of National Capital Territory of Delhi, Act, 1991 enacted under Art 239AA does not provide for nominated MLAs. However, being a national capital it suffers from the attitude of the Union, which is explicitly subjugated recently by the Government of National Capital Territory of Delhi (Amendment) Act 2021. The Act stated that the Legislative Assembly shall not make any rule to enable itself or its committees to consider the matters of the day-to-day administration of the National Capital or conduct inquiries in relation to the administrative decisions vide section 21, 24, 33 and 44 of the GNCT Act, 1991.

The difference between the nominated and elected MLAs can also be seen from the forms of oaths or affirmations made by the MLAs of Puducherry, Jammu & Kashmir and Delhi. The form of oath is provided for only elected members, in the case of the Legislative Assembly of the Union Territory Delhi. The form of oath does not provide for nominated members in the Delhi UT. On the other hand, the Government of Union Territory Act, 1963 for Puducherry and Reorganization of Jammu and Kashmir Act, 2019 provides for a form of oath or affirmation to be made by elected or nominated Members of the Legislative Assembly.

Rationale behind Nomination

Section 3(3) of the Government of Union Territory Act, 1963 and Sec. 13 and Sec. 15 of the Jammu and Kashmir Reorganization Act, 2019 are not regulated clearly in respect of nominated MLAs. But the provisions for nomination to the Rajya Sabha, Lok Sabha,

Legislative Council and Legislative Assembly have some rationale and reasons to have the provisions. They provide inter-alia, the rationale for the nominated members and the criteria for the persons:

1. Should be an Indian Citizen and resident of a State
2. Should have the age not less than thirty years
3. Special knowledge or practical experience in respect of matters of Literature, Science, Art and Social Service and Co-Operative movement
4. Women, wherever applicable.
5. Anglo –Indian, wherever applicable.
6. Limitation of 70 years of time period as in case of Anglo-Indian nomination. It is expired on 24th January, 2020.

So, there is a nexus between the object of nomination and regulation of nominated MP and MLA and MLC.

Such regulation or rationale or object is not found in providing power to the Central Government in Sec. 3(3) of the Government of Union Territory Act, 1963 and in Sec. 13 of Jammu Kashmir Recognition Act, 2019. It is an unbridled, unregulated and unguided power to the Union Executive, which amounts to excessive delegation of power by the Parliament. This is against the recommendation of Lok Sabha Committee on Delegated Legislation. Delegation to the Executive by the Parliament should be on details and not on substantive matters. When it was pointed out to the Supreme Court, in order to fill the gap, it refused to do so, in *K. Lakshminarayanan v Union of India & AIR*.[12] It held that "the power is to be exercised by the Central Government is presumed. The Central Government, in exercise of its power, shall be guided by objective and rational considerations. We, however, hasten to add there is no inhibition in the Central Government or the Legislature to make Rules or a Statute for more convenient transaction of business regarding nominations". In our opinion, the Supreme Court should have filled the gap in law by invoking its power under Article 142 to render complete justice to the elected MLAs. Instead it set aside all the recommendations made by the High Court of Madras to the Central Government in respect of nominated MLAs of Puducherry.

[12] K Lakshminarayanan, *Supra* note 2, ¶91.

The Supreme Court Judgement and its implications

The Supreme Court in Lakshminarayan's Nominated MLA case held that all members including the nominated members are entitled to vote in the sitting of the Legislative Assembly.[13] It was added that when nomination of MLAs has to be done by the Centre, then there is no occasion for consultation with the council of ministers or the Chief Minister by the administrator. The Court held that the nomination in the Legislative Assembly in the Puducherry is to be made by the Central Government by virtue of Article 239A read with Section 3(3) of the Act. In view of the foregoing discussion, we are of the clear opinion that nomination in the Legislative Assembly of Puducherry is not the Business of the Government of Puducherry. It is a business of the Central Government as per Sec. 3(3) of Act, 1963.[14]

Further, the Court held that there is no basis for the submission that the nominated members cannot exercise their vote in the budget, and in the no confidence motion against the Government because the statutory provision does not give any such indication. This enabled the nominated MLAs to topple the elected Government of Puducherry in February 2021. This is the first time that an elected Government, while having a majority of elected members, was defeated in Puducherry, with the help of 3 nominated MLAs.

Revisit Rationale for Nomination

1. No Voting Power to Nominated Members

The constitutional provisions do not provide for voting powers to the nominated Members of Parliament and Legislatures. Article 54 states that the President shall be elected by the elected Members of an electoral college consisting of

[13] The Supreme Court ruled that the Central Government was empowered to nominate three members to the Legislative Assembly of Puducherry. A bench of Justices A K Sikri, Ashok Bhushan and S Abdul Nazeer rejected two separate petitions filed by K Lakshminarayanan and S Dhanalakshmi against the Madras High Court's judgement of March 22 that dismissed their plea questioning the power of the Union government to nominate. The top court said the nomination to the State Assembly is to be made by the Central Government by virtue of Article 239A of the Constitution read with Sec. 3(3) of the Government of Union Territories Act, 1963.

[14] Press Trust of India, *SC upholds Centre's decision to nominate three BJP members to Puducherry Assembly*, BUSINESS STANDARD (Dec. 6, 2018), https://www.business-standard.com/article/pti-stories/sc-upholds-centre-s-decision-to-nominate-three-bjp-members-to-puducherry-assembly-118120601123_1.html.

(a) the elected Members of both houses of Parliament (Nominated 12 Rajya Sabha Members and 2 Lok Sabha Members are excluded implicitly);

(b) the elected Members of the Legislative Assemblies of the States (nominated MLAs of Puducherry and Jammu Kashmir Legislatures are excluded by Explanation to Art. 54).

Under Art. 54 and Art. 55, the "State" includes the National Capital Territory of Delhi and the Union Territory of Pondicherry. The Union Territory of Jammu and Kashmir is not included in this explanation to Art. 54. Thus, the elected MLAs of Jammu and Kashmir U.T. Legislature, of Election to the President of India took place would have no right to vote, unless an amendment to Explanation to Article 54 of the Constitution is carried out.

Section 53(1)(b) of the Government of Union Territory Act, 1963, provides to fill the seat in the House of the People and the seat in the Council of States allotted to the Union territory of Puducherry. It does not mention the voting right of a nominated MLA to fill the seat in the Council of States. Article 54(b) provides right to vote to elected MLAs of the Legislature. Article 54(a) also does not give the right to vote to nominate Anglo–Indian Member of Parliament in Lok Sabha and State Assemblies.

Accordingly to Article 55 of the constitution, there shall be uniformity in the scale of representation of the different states at the election of the president. Every elected member of the Legislature Assembly shall have different vote value based on the population of the state divided by the total number of the only elected members of the Assembly.

In addition, the Constitution bars the Rajya Sabha and Legislative Councils that a Money Bill shall not be introduced in the Council of States and Legislative Council vide Article 109 (1), (5) and Article 198 (1), (4), (5). The Money Bill transmitted to the Rajya Sabha and the Legislative Council shall be deemed to have been passed at the expiration of 14 days if the Money Bill is not returned to the House of the People or State Legislature with or without recommendation. These facts show that the nominated MP, MLA and MLCs have no vote with respect to the:

a) Election of President

b) Election of Rajya Sabha Member
c) Vote on Money Bill
d) Vote on confidence or No confidence motion against the Government.
Elected members only could move no confidence motion in the parliament and in the Legislative Assembly have to be noted.

At most, the nominated MLAs in Legislatures can be considered as Council Members in the House as they do not represent any territorial constituencies and have no population based vote value. Thus, they must be treated as Legislative Council members and not as Legislative Assembly members. Therefore, the decision of the Supreme Court deserves review and guidance for fair procedure. According to P.D.T. Achary, the Supreme Court took too technical a view on the matter of nomination and did not go into the need to specify the fields from which those persons could be nominated, and also lay down a fair procedure to be followed for nomination of members. As things stand, the law invites arbitrariness in dealing with the nomination of members to the Union territory Legislatures.[15]

The Supreme Court judgment Dated December 06, 2018 in Para 54 says: "At the same time, this Constitutional provision, i.e. Art. 239A, with regards to the Union territory of Puducherry itself envisages the Constitution of Legislative Council partly by nomination and partly by election." Further, specific authority to nominate in the Legislative Council has been conferred by law i.e. under Sec. 3[16] to the Central Government. Factually, Government of Union Territory Act, 1963, speak about two kinds of MLAs under Part II Legislative Assemblies for Union territories and their composition in section 3(2) for elected MLA and in section 3 (3) for nominated MLA.

[15] P.D.T Achary, *The Structural Fragility of Union Territories*, THE HINDU (Feb. 25, 2021), https://www.thehindu.com/opinion/lead/the-structural-fragility-of-union-territories/article33927116.ece
(The Vice-President is elected by all the members including nominated Lok Sabha and Rajya Sabha members of both House of Parliament. There is a difference in wording of "members" between election of President and Vice-President in Art 55 and 66 of the constitution).

[16] §3, The Government Of Union Territories Act, No. 20 of 1963 ("(1) There shall be a Legislative Assembly for each Union territory. (2) The total number of seats in the Legislative Assembly of the Union territory to be filled by persons chosen by direct election shall be thirty. (3) The Central Government may nominate not more than three persons, not being persons in the service of Government, to be members of the Legislative Assembly of the Union territory").

The people chosen by direct election under Sec. 3(2) of the Act, 1963 to the Assembly are to be members of Legislative Assembly and nominated members by the Central Government under Section 3(3) to the Assembly are to be Members of Legislative Council as correctly said by the Supreme Court in Para 54. These Council members should have the limited powers as available in the matters of election of President, election of Rajya Sabha Member, Money Bills and Confidence /No confidence motions.

This must be reflected in the Government of Union Territory Act, 1963 by way of explicit explanation. This arbitrariness of the Union Executive needs to be corrected to uphold the supremacy of the people, or otherwise it would shed the relevance of election in respect of Union Territories with Legislatures, as they will have no meaning. It will become a farce or a façade.

Puducherry U.T Distinguishable

Union Territories of Puducherry (1962), NCT of Delhi (1991) and Jammu and Kashmir (2019) are each distinct union territories with separate Acts. Out of the three Union Territories, Puducherry is more distinguishable by virtue of French-India Treaty, 1956. In pursuance of the Facto Agreement dated 21st October, 1954, Article 2 and 3 the Representative Assembly of Pondicherry[17] shall be maintained. The Government of India shall succeed to the rights and obligations resulting from such acts of the French Administration as are binding on these Establishments. The fact is not so in respect of the Pondicherry State in 1962.[18] The existence of French Fifth Constitution and Pondicherry State under the Ministry of Overseas Territories as one of the States of France vindicate that Puducherry had a pre-existing State with a constitution of its own.

[17] The Representative Assembly of the State of Pondicherry was established under the French Decree No.46 – 2381 dated 25th October, 1946 i.e. under the Fourth Constitution of French Republic 1946 dated 13th October 1946 which lasted up to 3rd October 1958. The French-India treaty dated 28th of May, 1956 was ratified by the French Parliament in May, 1962 under the Fifth Republic of French Constitution, 1958. The Fifth Constitution of French Republic was in force in the State of Puducherry on the eve of De jure independence of Puducherry in August 1962. This applicability of French Fifth Republic Constitution in Pondicherry since August 1962 is distinguishable. H.R. Seervai, in his book Constitutional law of India under the "Chapter Federalism in India" says "Our Constitution also constituted new States into the provinces of India and there were no pre-existing States with Constitutions of their own."

[18] H.M. SEERVAI, CONSTITUTIONAL LAW OF INDIA 288 (4th ed., 2015).

This State of Puducherry became a Union Territory of India by the Constitution (14th amendment) Act, 1962. The Jammu and Kashmir Act, 2019 converted the Jammu and Kashmir State into two Union Territories as UTs of Jammu and Kashmir with Legislature and Ladakh without a Legislature. At the time of accession to India in 1948, J&K had no vestige of sovereignty outside the Constitution of India. The constitution of Jammu and Kashmir was subordinate to the Constitution of India. It is therefore wholly incorrect to describe Jammu and Kashmir as being sovereign in the sense of its residents constituting separate and distinct classes in themselves. Permanent residents of Jammu and Kashmir are first and foremost citizens of India so ruled by the Supreme Court of India in *State Bank of India v Santosh Gupta AIR 2017* Civil Appeal No.12237, 12238 of 2016 dated 16th December, 2016. But, Puducherry being sovereign in the sense of its residents constitute a separate and distinct class in themselves till August 15, 1962.[19]

Unlike Jammu and Kashmir, Puducherry is distinguishable in respect of having vestige of sovereignty being outside the Constitution of India which was ceded to India under French-India Treaty, 1956. The treaty of 1956 is not subordinate to the Constitution of India, vide Art. II,[20] Art. III,[21] and Art. XXX[22] of the Treaty 1956. This treaty of 1956 and the Constitution of India, 1950 came into force in the State of Puducherry on 16th August, 1962. Article 53[23] of French Constitution is in force from 16th August, 1962 to till date in vide Article 2, Article 3 and Article 30 of the Treaty 1956. This is another distinguishable feature. Parliament of India before making any law under Article 3 (a) of the Constitution by uniting any territory of Puducherry to part of any State has to abide by the Article 2, 3 and 30 of the Treaty, 1956 read

[19] *See* The Pondicherry (Administration) Act, No. 49 of 1962.
[20] Treaty Establishing De Jure Cession of French Establishments in India, France-India, art. II, May 28, 1956, https://mea.gov.in/bilateraldocuments.htm?dtl/5302/Treaty+establishing+De+Jure+Cession+of+French+Establishments+in+India ("The Establishments will keep the benefit of the special administrative status which was in force prior to 1st November, 1954. Any constitutional changes in this status which may be made subsequently shall be made after ascertaining the wishes of the people").
[21] *Id.*, art. III ("The Government of India shall succeed to the rights and obligations resulting from such acts of the French administrations as are binding on these Establishments").
[22] *Id.*, art. XXX ("Any disagreement in respect of the application or interpretation of the present treaty which cannot be resolved through diplomatic negotiation or arbitration shall be placed before the International Court of Justice at the request of one or other of the High Contracting Parties").
[23] 1958 CONST. 53 (France) ("Peace Treaties, Trade Agreements, treaties or agreements relating to international organization, those committing the finances of the State, those modifying provisions which are the preserve of Statute law, those relating to the status of persons, and those involving the ceding, exchanging or acquiring of territory, may be ratified or approved only by an Act of Parliament. They shall not take effect until such ratification or approval has been secured").

with Article 53 of the 5th Constitution of French Republic and Article 51(C) of the Constitution of India.[24]

The Representative Assembly of the State of Pondicherry by the Decree No.46-2381, Dated 25th October, 1946 and the Council of Government in the State of Pondicherry by the Decree No.47-1490 Dated 12th August, 1947 did not have provisions for nominated MLAs in the Representative Assembly. Not having nominated MLAs in the Representative Assembly by French Decrees are rights inherited by the people of Puducherry. This has to be honored in letter and spirit in view of the Treaty, 1956. Thus, from the above, it is clear that nominated MLA under Art. 3(3) of the Government of Union Territory Act 1963 are violative of the International Treaty and principles of representative democracy of the Constitution of India. It also weakens co-operative federalism.

Judicial Remedy vis-à-vis Legislative remedy

These facts of French-India Treaty of cession Treaty 1956, obligations of the Central Government for maintaining elected MLAs only in Puducherry Assembly should be placed before the Supreme Court by way of review of its judgment dated December 06, 2018 to invoke its power under Art. 142 for doing complete justice and for fulfilling democracy in the matter of elected MLAs. The following points need to be considered for the said purpose.

a. The Legislature of Puducherry, as rightly said by the Supreme Court in para 91 of the judgment, dated 06.12.2018, could make Rule or a Statute for more convenient transaction of business regarding nominations.

b. The President shall, under Art. 239 A(1) make rules for the more convenient transaction of business with regard to the powers and functions in respect of partly nominated MLAs. The rule shall make explicit that the nominated MLAs will be treated with powers as of nominated members of Legislative council i.e. they cannot move cut motion in Money Bills and motion of confidence/no confidence.

[24] INDIA CONST. art 51(c) ("The State shall endeavor to foster respect for international law and treaty obligations in the dealings or organized people with one another").

c. Alternatively, Section 3(3) of the Government of Union Territory Act 1963 should be struck down by filing a review for excessive and unregulated delegation of power by Parliament to the Union Executive.

d. Parliament by itself should delete the Section 3(3) of the Government of Union Territory Act, 1963 as it is an anachronism to the spirit of democracy and the Rule of Law.

e. The words in Art. 239A(1)(a) "or partly nominated and partly elected" should bedeleted altogether so as to bring the Article in harmony with Democratic Republican spirit.

Excessive delegation of Power to Union Executive by the Parliament

It is already mentioned that there is an excessive delegation of power by the Parliament to the Executive under Section 3(3) of the Government of Union Territory Act 1963, and in Sec. 13 of the Jammu and Kashmir Reorganization Act, 2019. By enacting further amendments to the Government of National Capital Territory of Delhi (Amendment) Act, 2021 under Sections 21, 24, 33 and 44 of the Government of National Capital Territory of Delhi Act, the Parliament empowered the Union Executive and the Lieutenant Governor of Delhi as the Viceroy of India and Resident Commissioner respectively. The amendment of NCT of Delhi Act, 2021, provides that "*before taking any executive action in pursuance of the decision of the Council of Ministers or a Minster to exercise power of Government, under any law in force in the Capital, the opinion of Lieutenant Governor shall be obtained on all such matters as may be specified by general or special order, by Lieutenant Governor*." This proves to be another incidence of excessive delegation of power.

There were provisions for five nominated MLAs in the Delhi Administration Act, 1966. Instead of nominated MLAs, the Union Executive by this Amendment Act, 2021 straight away bestowed unlimited and unregulated power to its subordinate executive i.e. the Lieutenant Governor. Thus, Delhi will have an unrepresentative administration.

Article 239AA(7)(a) does not intend for such matters incidental or consequential power to the Parliament to amend the basic structure of the constitution which[25] consists of

1) Supremacy of the Constitution

[25] Lakshminarayavnan, *Supra* note 2, ¶46.

2) Republican and Democratic form of Government

3) Federal character of Constitution and

4) Separation of powers between the Legislature, the Executive and the Judiciary

The present GNLT Amendment Act, 2021 violates the aforementioned four basic structures of the Constitution. This affects the dignity and freedom of the people of Delhi, which is of supreme importance. Sanjay Hegde in an article[26] said, the Supreme Court has already cautioned "Interpretation [viz (Art. 239AA(7) (b) deemed not to be an amendment of the Constitution - Authors] cannot ignore the conscience of the Constitution". That apart, when we take a broader view, we must also address 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, then the expectations 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. This Amendment of 2021, brings forth the urgency of statehood to the Delhi Union Territory. The delegation of excessive power to the Union Executive leads to autocracy and weakening of the federal democracy.[27]

Conclusion

Our Indian democracy is structured as per the Westminster form of Parliamentary system. There can be no liberty where the legislative and executive powers are united in the same person, or body of authority. It may justly be pronounced as the very definition of tyranny. Basic structure of the Constitution is built on the basic foundation i.e. the dignity and freedom of the individual which is of supreme importance. This cannot by any form be destroyed. The law declared by the Supreme Court clearly indicates that the Indian Constitution is basically federal in form. The "Union Territory" concept is one of many ways in which India regulates relations between the Centre and its units. It should not be used to subvert the basis of electoral democracy.

[26] Sanjay Hedge, *Delhi's administration as the tail wagging the dog*, THE HINDU (Mar. 23, 2021), https://www.thehindu.com/opinion/lead/delhis-administration-as-the-tail-wagging-the-dog/article34135140.ece.
[27] *See* The Government of National Capital Territory of Delhi (Amendment) Act, No. 15 of 2021.

The mindset of the Union Government is that Union Territory is "their property and under the absolute control of the Union Government". It means people in Union Territory with legislatures are merely the subjects and not citizens, notwithstanding that though they are empowered to elect their Government under the People Representation Act. This mindset is against the basic structure of the Republican and Democratic form of Government and Federal character of the Constitution.

The working of Union Territories with legislatures with ultimate control vested in the Central Administrator causes alienation from participatory democracy among the electorates of those peoples. In fact the working of the Constitution under Art. 239A(1) and the Government of Union Territory Act, 1963 with provision for nominated MLAs shows that India is one country but has two systems of governance. The provision for nominated MLAs in the Act, 1963 and Art. 239A(1) of the Constitution itself should be deleted. There should be only either Union Territory without Legislatures or Union Territory with Legislature but without nominated MLAs. A Legislature without a Council of Ministers or a Council of Ministers without a legislature is a conceptual absurdity. Similarly, a legislature that is partly elected and partly nominated is another anomaly. This is why Puducherry, Jammu and Kashmir and NCT of Delhi people longing for full statehood so as to feel not as subject to the Union Government but to feel as free citizens of India having full and equal sovereignty power. Otherwise people of Union Territory with Legislature will feel the Union Government "grabbed" their right to vote for those they deem fit to administer.

In short, parliamentary democracy either should have a unicameral legislature or bicameral legislature and not a mix of both as partly elected and partly nominated. Experience shows that the Union Territories having legislatures with ultimate control vested in the Union Government are not workable. As things stand, either the same party or different party runs the Government in the Union Territories this nomination provision of Acts and Art. 239A (1) will be used by the Union Government as if they are its own territorial possession, which is what happened in Puducherry. To supplant this democracy deficit in Union Territories with Legislatures, remedy lies in having one country one system of elected representative states, abolishing thereby Union Territory with Legislatures and by upgrading them to full Statehood.

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DOCTRINE OF PROPORTIONALITY AS A STANDARD OF REVIEW UNDER ARTICLE 14

K J Chendhil Kumar[Y]

Abstract

Proportionality as a judicial standard has always been read into various provisions of the Constitution of India and other legislations as well regardless of a textual backing of the standard in the Indian Constitution. It has been regarded as an equitable principle for a just construction of many provisions of laws. However, its extension into Article 14 has not only been invalid and illegitimate in the beginning but has also been devastating in terms of its consequences and understanding. Perhaps a better reading of proportionality into Article 19 of the Constitution or Article 19 read with Article 21, would be reasonable. Reading proportionality as a standard under Article 14, as Prof. Tarunabh Khaitan suggests invites a lot of confusions and problems along with it. This is owing to the reason that the equality code of the Indian Constitution was not drafted in the way it was drafted in the Constitutions of other jurisdictions. In this regard, it is important to go back in time and trace the historical jurisprudence that has led to its current understanding and check whether there was a proper incorporation of the standard into Article 14 of the Constitution. That will clarify its context and help understanding its current application.

Keywords- Article 14, proportionality, reasonableness, service law matters, Supreme Court of India.

[Y] K J Chendhil Kumar is a final year student studying law at the National Academy of Legal Studies and Research (NALSAR), Hyderabad. Please feel free to contact the author at chendhil@nalsar.ac.in for any constructive feedback.

Introduction

One of the foremost functions of the Constitutions is not only to state who is to govern and how but also to limit the powers of the sovereign.[1] The limitations imposed on the government is where the right of its subjects flows from. Similarly, every right comes with its own limitations notwithstanding the absolute rights that some of the (rare) modern constitutional law accounts for.[2] Proportionality, as a principle, emerged at the backdrop of this limitations in the field of law. One of the oldest documents incorporating this standard could be the Magna Carta. Magna Carta has a written principle of proportionality, which calls for proportional imposition of fine on offenders.[3]

This paper enquires into the aspect of proportionality in the context of judicial review of service law matters, where the Courts asks the question of whether the regulating exercise of fundamental rights done by the government is the lease restrictive choice of measures that the legislator could do.[4] This test has now been used in Indian jurisprudence for both legislative action and administrative action, even though there is still a substantial amount of scholarly debate,[5] at the International level with regards to its applicability to administrative actions. This paper exclusively deals with the critical analysis of incorporation of Doctrine of proportionality in the context of Article 14 of the Constitution of India. For this purpose, a set of seven cases have been selected from the Supreme Court of India, that uses proportionality doctrine to adjudicate upon disputes around Article 14. Article 14 of the Constitution of India, often called the right to equality guarantees '*equality before law and equal protection of law*'.[6] The paper also makes passing references on comparative jurisprudence attached to the principle of proportionality for better insights into its application and to better appreciate the author's argument of judiciary's flawed incorporation of proportionality in the context of Article 14.

[1] Rajeev Bharghava, "Why we need a Constitution?", Article on The Hindu dated July 08, 2018. Available on : https://www.thehindu.com/opinion/columns/why-we-need-a-constitution/article24361253.ece.
[2] A. Kavanagh, Constitutional Review under the UK Human Rights Act (Cambridge University Press, 2009), 257. He groups rights into qualified and uqualified rights. Qualified are relative rights that have a limited scope whereas unqualified rights cannot be limited.
[3] G. R. C. Davis, Magna Carta (London: Trustees of the British Museum, 1963), 19.
[4] Teri Oats Estates v U.T., Chandigarh, (2004) 2 SCC 130 paras 43 to 46. See also Sudhakar v Post Master General, Hyderabad. 2006 (3) SCALE 524. See also: Tarunabh Khaitan, 'Beyond Reasonableness'- A Rigorous Standard of Review for Article 15 Infringement, 50(2) *Journal of Indian Law Institute* 177-208 (2008) at 180.
[5] *Id.*
[6] For further discussion on Article 14 and Test of Proportionality read: *Tarunabh Khaitan* (*Supra* Note 4).

Tracing the Roots of the Doctrine

The doctrine initially was used in the German jurisprudence in the context of disproportionate and illegal police actions. For instance, order for closure of a liquor shop for minor license violations.[7] Post second world war, the principle, for the first time in World history was introduced into Constitutional law by German Courts which was used when legislature imposed restrictions on pharmaceutical sale and the court invalidated it[8] and then in the context of freedom to association[9] and free use of property.[10] From the German Jurisprudence, the principle moved into the European law domain where it was incorporated into the Convention for the Protection of Human Rights and Fundamental Freedoms.[11] It was used in the first of its kind decision in the *Handyside*[12] case in 1976 that included the curbing of the freedom of expression, where the court held that every "condition", "restrictions" imposed in this sphere must be proportionate to legitimate aim pursued.[13] In this case, the European Court of Human Rights held that the act of confiscation of a book that is deemed by the government as obscene did not violate the right to freedom of expression of its citizens.

From German Jurisprudence, the doctrine was reportedly applied in a Canadian Court. Justice Hogg in the Sunday Times case of 1979[14] observed that the word "reasonable limits" in their general limitation clause[15] meant the proportionality doctrine. In the Australian Courts, the proportionality doctrine was adopted in a case regarding the political freedom of expression. In doing so the court referred to the Canadian case of Oakes.[16] However, scholars like Barak

[7] 13 PrOVGE 424, 425, as cited by G. Frumkin, "A Survey of the Sources of the Principle of Proportionality in German Law" (unpublished thesis), University of Chicago, 1991.
[8] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] June 11, 1958, 7 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 377.
[9] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] May 14, 1985, 69 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 315.
[10] Bundesverfassungsgericht [BVerfG][Federal Constitutional Court] Mar. 2, 1999, 100 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 226. See also: Bernard Schlink, Proportionality In Constitutional Law: Why Everywhere But Here? 22 Duke Journal of Comparative & International Law 291-302 (2012). Available at: https://scholarship.law.duke.edu/djcil/vol22/iss2/5.
[11] The European Convention for the Protection of Human Rights and Fundamental Freedoms (1950).
[12] Handyside v. United Kingdom, App. No. 5493/72, 1 EHRR 737 (1979).
[13] *Id*., para. 47. Please note that the legitimate aim is the restriction on the basis of which the measures are taken to infringe into our rights.
[14] Sunday Times v United Kingdom, App. No. 6538/74, 2 EHHR 245 (1980). Upheld in R v. Oakes [1986] 1 SCR 103.
[15] Article 1, Canadian Charter of Rights and Freedoms.
[16] See Nationwide News Pty Ltd. v. Wills (1992) 177 CLR 1; Australian Capital Television Pty Ltd. v. Commonwealth (1992) 177 CLR 106.

argues that the position regarding application of the doctrine is still not settled in Australia.[17] Similar to the position in Canada, the term 'reasonable limits' in their general limitation clause was accepted as a doorway for the test of proportionality in New Zealand.[18] The doctrine then spread across many European countries like Spain,[19] Portugal,[20] France[21] etc. When the question came for its incorporation into English law, while Lord Diplock left the question unanswered,[22] Lord Millet considered the test as a dangerous option[23] and there are also instances of cases where the court expressly refused to adopt.[24] It was only after the adoption of Human Rights Act in the United Kingdom, did the Courts start accepting proportionality as a standard of judicial review. It is notable that even in American Jurisprudence, the doctrine of proportionality was brought in as a doctrine to check the power of governmental agency.[25]

The Indian Scenario

In India, proportionality has been accepted as a standard of review under Article 14 of the Constitution of India.[26] Other than this, the Supreme Court has recognised the traditional doctrine of Rational Basis and the (relatively) recent doctrine of Arbitrariness as the two grounds of judicial review to test a claim under Article 14.[27] Under the rational basis doctrine, Prof. Tarunabh Khaitan argues that there are three different standards of judicial review under Article 14 in the Indian context: (a) Rational Basis (intelligible differentia); (b) Doctrine of

[17] Barak A, Proportionality: Constitutional Rights and their Limitations, Cambridge University Press (2012), pp 197.
[18] Ministry of Transport v. Noort [1992] 3 NZLR 260; Moonen v. Film and Literature Board of Review [2000] 2 NZLR 9.
[19] Recurso de Amparo (Habeas Corpus) 66/1995 decided by the Constitutional Court of Spain on May 8, 1995; J. Barnes, "El Principio de Proporcionalidad: Estudio Preliminar," 5 CDP 15 (1998).
[20] 1976 Constitution S18 (2) 7th revision (2005); V. Canas, "Proporcionalidade," in Dicion á rio Jurídico da Administração Pública, vol. VI (1994).
[21] See X. Philippe, Le Contrôle de Proportionnalité dans les Jurisprudences Constitutionnelle et Administrative Françaises (Aix-en-Provence: Presses Universitaires d'Aix-Marseille, 1990); V. Goesel-Le Bihan, "Le Contrôle de Proportionnalité Exercé par le. Conseil Constitutionnel," 22 Les Cahiers du Conseil Constitutionnel 208 (2007).
[22] Council of Civil Service Unions v. Minister for the Civil Service [1985] AC 374.
[23] Judge Millet's opinion in Allied Dunbar (Frank Weisinger) Ltd. v. Frank Weisinger [1988] 17 IRLR 60, 65.
[24] R v. Secretary of State for the Home Department, ex p. Brind [1991] 1 AC 696.
[25] Stephen Breyer, Active Liberty: Interpreting Our Democratic Constitution, pp 49 (2006).
[26] Tarunabh Khaitan, 'Beyond Reasonableness'- A Rigorous Standard of Review for Article 15 Infringement, 50(2) *Journal of Indian Law Institute* 177-208 (2008) at 180.
[27] E.P. Royappa v State of Tamil Nadu, 1974 SCR (2) 348; Air India v Nergesh Meerza, AIR 1981 SC 1829. For detailed analysis, See: V.K. Sircar, The Old and New Doctrines of Equality: A Critical Study of Nexus Tests and Doctrine of Non-Arbitrariness, (1991) 3 SCC (Journal) 1. Available at: https://www.ebc-india.com/lawyer/articles/91v3a1.htm.

Proportionality; (c) Doctrine of Strict Scrutiny. This section would deal with the analysis of the second standard of review, i.e., Proportionality w.r.t Article 14 of the Constitution of India.

1. Bhagat Ram v State of Himachal Pradesh[28]

One of the first cases is *Bhagat Ram v State of Himachal Pradesh*.[29] Bhagat Ram was a forest guard who was accused of allowing Kali Das to cut down trees (in a bona fide faith that he is cutting the trees from the adjoining land that belonged to Kali Das) and charged with causing loss to government, negligence and dishonesty. He was thereby terminated of his services. When this was challenged in the Court, it was held that *the penalty imposed must be commensurate with the gravity of the misconduct, and that any penalty disproportionate to the gravity of the misconduct would be violative of Article 14 of the Constitution.*[30]

From a plain reading of the judgment, it becomes evident that the Court has just used the term "disproportionate" in its usual term, without referring to any test/doctrine/ standard of judicial review as such. It is merely a generic statement as to the action being "disproportionate" without actually citing any authority or reasons as to how disproportionate administrative action is read into Article 14 of the Constitution of India. This paves the way for further ambiguities and confusions in the future, which will be discussed in the cases mentioned below.

2. Ranjit Thakur v Union of India[31]

The previous judgment was further upheld by Justice M.N. Venkatachaliah in *Ranjit Thakur v Union of India*[32] while dealing with a similar service matter. An army soldier who was already serving a 28-day punishment refused to eat food after receiving direct orders from the senior officials. He was summarily court martialled for insubordination and removed from the service subsequently. The Court referred to the UK case of *Council of Civil Service Unions v. Minister for the Civil Services*[33] that dealt with judicial review of administrative action and

[28] (1983) 2 SCC 442.
[29] *Id.* at 447 (hereinafter referred to as "Bhagat Ram").
[30] *Id.*
[31] (1987) 4 SCC 611.
[32] *Id.* at 620.
[33] (1984) 3 WLR 1174 (hereinafter referred to as "CCSU case").

which had invoked the principle of proportionality as was understood in the sense of European Courts at that point of time.[34] The learned judge then relied on the rationale of *Bhagat Ram* case that which merely referred to the term "disproportionate" mentioned in it, and arrived at a conclusion that Indian Courts also follow proportionality as followed around in Europe.

The findings are not correct at least for two reasons. First, the mere mention of the term 'disproportionate' in *Bhagat Ram* was not in the context of the doctrine of proportionality that was invoked in the UK's *CCSU case.* Second, even in UK's CCSU case, Lord Diplock only discussed the possibility of such a test along with similar tests been applied in the future and refused to apply the same in the instant case. This position was also clarified by Justice Jagannadha Rao in the subsequent case of *Union of India v Ganayutham*.[35]

The case was disposed on the touchstone of the test of '*Wednesbury Reasonableness*' and on the basis of the other three grounds of judicial review i.e., illegality, irrationality and procedural impropriety. Therefore, it appears that the Court erred in invoking a case for proportionality, when it did not even apply the same.

3. State of Andhra Pradesh v McDowell and Co. and Ors.[36]

This landmark is case well known for the rejection of the test of arbitrariness for legislative actions and the doctrine of proportionality was also rejected as a standard to scrutinize a legislation. The validity of Andhra Pradesh Prohibition Act, 1995 was challenged in this case, where Justice B.P. Jeevan Reddy was reviewing the said legislation. He observed that since the application of the doctrine of proportionality is not well settled in administrative law itself,[37] it would be odd to apply the same to strike down any enactment applying that principle.[38] However, provided that the position regarding the application of the said doctrine to strike down a legislation is still debateable,[39] thus, should not be applied as a sole ground to

[34] *Id*. Per Lord Diplock.
[35] (1997) 7 SCC 463, at 471.
[36] (1996) 3 SCC 709 (hereinafter referred to as "McDowell's case").
[37] After referring to Lord Ackner's observations in R v. Secretary of State for Home Department Ex-parte Brind and Ors. (1991) A.C. 696.
[38] *Supra* Note 31 at 754.
[39] Boyron, S. (1992). Proportionality in English Administrative Law: A Faulty Translation? Oxford Journal of Legal Studies, 12(2), 237-264. Retrieved from http://www.jstor.org/stable/764704.

strike down any legislation. The debate is primarily around whether proportionality as a standard of review must only apply to administrative actions of the executive branch or even extend to legislations that enjoys the presumption of constitutionality.

4. Union of India v. Ganayutham[40]

This is one of the initial cases that debated upon the applicability of the doctrine of proportionality in administrative action and legislative review. In the said case, a Central Excise Officer was charged of misconduct resulting in a substantial loss to the government of India, which withheld half of his payments in pensions and gratuity. The court, however, held that the punishment was excessive and over-ruled it.

First, the Court also held that the doctrine of proportionality could be applied to administrative action in India after referring to *Ranjit Thakur*. However, it does not appear that Ranjit Thakur itself had properly incorporated the doctrine of proportionality into Indian Jurisprudence.

Second, after referring to McDowell's case, the Court also held that the doctrine also applies for legislative review.[41] However, it must be noted that the Court had only taken a portion of the judgment, and therefore misrepresented the holding in the case. Whereas, the court in *McDowell* expressed strong doubts and concerns regarding the possibility of applying the doctrine of proportionality in legislative review, the court in this case failed to appreciate the doubts of the court in McDowell and relied on the holding to extend the application of the doctrine of proportionality to legislative review.

Third, the court cites cases that have mentioned the word "proportionality" (or disproportionate") in its literal sense (not as a doctrine has been applied) in the context of Article 19 and 21 and not Article 14.[42] Fourth, the court also states that the doctrine applies for

[40] (1997) 7 SCC 463 (hereinafter referred to as Ganayutham Case)
[41] *Id* at 482.
[42] *Id*. The Court refers to cases like State of Madras v V.G. Row 1952 Cri LJ 966 and Indian Express Newspapers v. Union of India.

legislative review in Australia and Canada.[43] However, as stated previously, both the countries have a general limitation clause that reads that "reasonable limits" can be imposed on fundamental rights and freedoms. In our country we only have such a terminology applicable to Article 19 in the form of restrictions mentioned in Article 19(2), but a similar provision does not exist for Article 14. Therefore, it is contended that these countries cannot be cited as authorities to argue that proportionality should be a ground for legislative review.

However, I would like to draw attention to the concluding remarks of Justice Jagannadha Rao in the same case. After much analysis, he arrives at a conclusion that the doctrine of proportionality must not be applied in the context of Article 14. It must be applied only when the Courts will have to decide upon issues relating to Article 19 or 21 violations.[44] Notwithstanding the analysis that the court had extensively done in the case, the concluding observations made by the Court is the correct and more sensible position of law since it is also congruent with the textual understanding of the Constitution of India.

5. Om kumar & Ors. v. Union of India[45]

Om kumar was one of the Officers in Delhi Development Authority against whom Departmental inquiries were conducted regarding land allotment scam with Skipper Construction. The ultimate penalty that was imposed on them was challenged for disproportionate quantum of punishment. The Court had applied the doctrine of proportionality and also held that the same is applicable under Article 14 too.

However, there is one strange aspect of the judgment that requires immediate attention. Justice Jagannadha Rao who in Ganayutham held that the doctrine of proportionality should not be applied in the context of Article 14 for primary review but only in the context of Article 19 and 21, but his stance seemed to have changed in Omkumar case as he held that the doctrine of proportionality is also applicable to Article 14[46] with no authority or precedents to support his

[43] *Id*. The Court also cites cases like Cunliffe v. Commonwealth (1994) 68 Aust LJ 791; Australian Capital Tel. Co. v. Commonwealth 1992 CL 106: Queen v. Oake (1987) Law Reports of Commonwealth 477 (at 500) (Can); R. v. Big M. Drug Mart Ltd. 1985 (1) SCR 295.
[44] *Supra* Note 31, at 491 (4(b)).
[45] (2001) 2 SCC 386 (hereinafter referred to as "Omkumar").
[46] *Id.*, at 418.

conclusion. One of his arguments to include it was that when Article 14 is broad enough to include reasonable classification and arbitrariness as two distinct tests, there is nothing wrong in also including the doctrine of proportionality into it. He relied upon the Canadian and the Australian position to incorporate the same into Indian position,[47] which, as previously argued lacks context.

It is important to note that the court also discussed in brief, and acknowledgd the fact that the doctrine was first incorporated into Indian jurisprudence in the context of Article 19[48] through the case of *State of Madras v V S Row*.[49] Similarly, scholar Barak also argues that the doctrine of proportionality was introduced in India in the context of the "reasonable restrictions" in Article 19(2) of the Constitution of India.[50] In his paper, Barak also goes on to say that Ganayutham and Omkumar marked a significant change in the Indian history of proportionality since they have provided a new way of looking and applying the tests itself.

Omkumar's case also moves forward to hold that both the test of proportionality and strict scrutiny as a ground of judicial review are one and the same and could be read together. It is submitted that the test of strict scrutiny was initially proposed in the case of *R v. Ministry of Defense*[51] as a higher order/standard of scrutiny of a legislation that even falls above the test of proportionality. In that case, this conflation cannot be the right way of looking into the two tests. Even writers like Prof. Tarunabh Khaitan and Ashish Chugh[52] disagree with this conflation, who have also criticised it arguing that strict scrutiny is in fact a higher threshold to scrutinize a law since laws under this standard do not enjoy a presumption of constitutionality.[53] This case has also served as the pavement of roadway of conflation of the principle of proportionality and Wednesbury unreasonableness and the aftermath of this judicial

[47] *Id.*, at 419.
[48] *Id.*, at 416.
[49] 1952 Cri LJ 966. Justice Patanjali held that The nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, should all enter into the judicial verdict, with reference to imposition of restrictions on fundamental right to freedom.
[50] *Supra* Note 14, at pp 220-21.
[51] (1996) 2 WLR 305.
[52] Tarunabh Khaitan, 'Beyond Reasonableness'- A Rigorous Standard of Review for Article 15 Infringement, 50(2) Journal of Indian Law Institute 177-208 (2008) at 180.
[53] A. Chugh, "Is the Supreme Court Disproportionately Applying the Proportionality Principle?" 8 SCC (J) 33 (2004), available at www.ebcindia.com/lawyer/articles/2004_8_33.htm.

pronouncement can be understood through the subsequent cases that have used these two tests inter-changeably; thereby conflating the two tests.[54]

6. K T Plantation (P) Ltd v State of Karnataka[55]

The Karnataka State Government in exercise of its powers under Section 110 of the Karnataka Land Reforms Act of 1961, issued a notification to withdraw the exemption granted by the Legislature in regard to agricultural land under Section 107(1)(vi) of the Act. Both the notification and the power conferred by Section 110 of the Act were challenged on the ground of excessive delegation.

While upholding the validity of the notification and the Act, the Court made several observations as to the grounds that could be adopted in order to invalidate a legislation. When senior counsel T. R. Andhyarjina, argued that Article 14 is invoked when the legislation is disproportionate,[56] the court rejected the argument of doctrine of proportionality under Article 14 as a standard of legislative review, and observed that the doctrine of proportionality raises an element of subjectivity on which a court cannot strike down a statute or a statutory provision.[57] The Constitutional bench unanimously observed that if such standards are allowed, then in effect *the Court will be substituting its wisdom to that of legislature, which is impermissible in our Constitutional Democracy*.[58]

The Court stressed on the aspect of doctrine of separation of powers that forms the core of the basic structure of the Constitution, which cannot be over looked to permit liberal interpretation of Article 14.[59] The same should only be understood in the context of Article 14 and not in the context of Article 19 or 21. This is indeed the correct position of law and high probability of subjectivity is one of the standard criticism that even prominent scholars like Bernhard Schlink

[54] For example, See: Maharashtra Law Development Corporation v. State of Maharashtra2011 15 SCC 616;
[55] (2011) 9 SCC 1.
[56] *Id.* at 74.
[57] *Supra* Note 53, at 130.
[58] *Id*.
[59] Indira Nehru Gandhi v. Raj Narain and Ors. 1975 (Supp) SCC 1, at para 136.

put forth against the doctrine of proportionality.[60] One of the limb of doctrine of proportionality is the value judgment in terms of what could be a least restrictive measure to achieve the same objective,[61] which is not the nature of enquiry under either of the standards of rational review or arbitrariness.

7. Shayara Bano and Ors v Union of India[62]

Shayara Bano is one of the landmark judgments with respect to the jurisprudence of grounds of legislative review under Article 14 of the Constitution of India. A Muslim wife had challenged the act of triple talaq pronounced by her husband (which in effect meant that the husband has divorced the wife) and in essence also the validity of section 2 of the Muslim Personal Law Application (Shari'at) Act, 1937. The court while striking down the law made numerous observations in which Justice Nariman's observations are crucial and relevant to the discussion in the paper.

Justice Nariman referred to *Om Kumar case* observed that the test of proportionality had been validly incorporated in Article 14.[63] Since, I have previously argued against it, the same will not be covered here again to avoid repetitions. Second, he has conflated the doctrine of proportionality into the doctrine of non-arbitrariness.[64] The conflation of the doctrine of proportionality and non-arbitrariness is problematic. Justice Nariman held that a law could be challenged if it is manifestly arbitrary (a threshold of arbitrariness) on the basis of it being excessive, disproportionate and without adequate determining principle(irrational).[65] One of the possible consequences of this conflation is both the doctrines being used interchangeably and Proportionality (and arbitrariness) being both a ground and a standard of review as proposed by Prof. Tarunabh Khaitan.

[60] Bernard Schlink, Proportionality In Constitutional Law: Why Everywhere But Here? 22 Duke Journal of Comparative & International Law 291-302 (2012), at 300. Available at: https://scholarship.law.duke.edu/djcil/vol22/iss2/5.
[61] K S Puttaswamy (Retd.) & Anr. v. Union of India & Ors., 2017 (10) SCC 1.
[62] (2017) 9 SCC 1 (hereinafter referred to as "Shayara Bano").
[63] *Id.*, at para 271.
[64] *Supra* Note 59, at para 272.
[65] *Supra* Note 59, at para 289.

8. Pravin Kumar v Union of India & Ors.[66]

This is a service law matter decided in 2020 by a three-judge bench led by Justice N V Ramana. In this case Pravin Kumar was a sub-inspector with the Central Industrial Security Force (CISF) was charged for corruption because he was found with large denomination of monies. While reporting the same to Anti-Corruption Branch of the CBI, a simultaneous enquiry was also held in the department within the ambit of departmental rules and Pravin was dismissed from his services. While this matter reached the Supreme Court of India, it invoked Article 14 and the test of proportionality in terms of decisions of disciplinary boards. It held that principles of "*Proportionality and fair play*" flows from Article 14 mandating the equal treatment of everyone in the state.[67] It further held that the courts could "only" interfere on the ground of proportionality when the punishment is inordinate to a high degree enough to shake the conscience of the court itself.

The administrative test of proportionality has been read into Article with very less valid jurisprudence to offer. The court held that it was "well settled" that proportionality flows from Article 14 of the Constitution of India but this reference only adds up to the confusion even further. The same conclusion would be possible if the means was just an administrative test and not necessarily referring to Article 14 which only adds up to the confused jurisprudence. It disturbs the thin line of distinction that is present between administrative law and constitutional law as they exist in jurisprudence and in practise notwithstanding the reality that most of the administrative law jurisprudence refers to Article 14 itself.

Conclusion

In this paper, I have discussed the history and the origins of the doctrine of proportionality. It is clear that the inception of proportionality into Constitutional law was in the context of limitation clauses. As German Basic Law has a general limitation clause, proportionality was more or less applicable to all the laws/articles enshrined in German Basic Law. The same cannot be applied to India as we have restrictions specific to Articles (viz.

[66] (2020) 9 SCC 471.
[67] *Supra*, at page 20, para 36.

Article 19(2)). As argued above, the context in which Australian or Canadian Courts adopted the principle was also different from how the Indian Court has understood it to be. Thus, there is a primary problem of adoption of the doctrine with a flawed translation into Indian Jurisprudence by Indian Courts. If we were to accept what Barak argues and what *Omkumar* observes that it was initially only brought into Indian jurisprudence in the context of "reasonableness" in the Article 19(2), its extension to Article 14, even in intertextual reading of Article 19 and 14 is absurd. There is no need for inter-textual reading of the Constitution when it is absolutely not necessary or absurd.[68]

Secondly, even India adopted the doctrine and applied it initially in the context of Article 19 and 21. Its extension to Article 14 is unprecedented. It is submitted that Omkumar's observations that Article 14 including proportionality as a standard, which was not backed by any textual basis or precedents for the same. The correct position of law was laid down by the case of K T Plantation and Ganayutham to the extent that proportionality as a doctrine and standard of review is not applicable to Article 14 and is only limited to Articles 19 and 21.

Thirdly, one of limbs of the doctrine of proportionality asks the question of whether the said act was the least restrictive means available to achieve certain goals. While there can be an agreement that Article 19 rights could be restricted by Article 19(2), the question of restricting Article 14 still remains answered. Introducing the test of least restrictive measure into article 14, which was originally drafted as a provision without any "reasonable restrictions" goes against the intention of the drafters and its original understanding.

Fourthly, another way of asking the same question of proportionality would be whether the means adopted is proportionate to the intended ends/objective. Justice Jagannatha Rao observed in Omkumar that this test is nothing but another way of putting the test of reasonable classification. In such a situation where it is just the difference in the terminology used, where is the need to introduce this entire new doctrine for that purpose? In addition to this, India also has the non-arbitrariness doctrine as another ground of review provided by the Supreme Court of India. In wake of non-arbitrariness doctrine, the doctrine of proportionality is not necessary as such. Having both the doctrines and conflating them like how Justice Nariman conflated in

[68] A K Gopalan v State of Madras, 1950 SCR 88.

the recent case of Shayara Bano only adds up to its further vagueness and ambiguity.[69] In effect, it makes the test proportionality as both a ground and a standard of review as defined by Prof. Tarunabh Khaitan.

Therefore, it is concluded that the position of doctrine of proportionality in the context of Article 14 is something that needs to be clarified removing all the doubts and undoing all the errors committed by the Courts in the journey of its attempt to incorporate the doctrine into Article 14. The Supreme Court must constitute a seven-judge bench to finally decide on the issues discussed above as most of the benches that had made observations on this matter are either a two-judge bench or a Constitutional Bench. The seven judge bench must clarify the position of the three standards of tests as proposed by Prof Tarunabh Khaitan and theorise its application in the future cases to avoid any further confusions and misapplications.

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[69] Bernard Schlink, Proportionality In Constitutional Law: Why Everywhere But Here? 22 Duke Journal of Comparative & International Law 291-302 (2012), at 297 argues that one of the classic criticism to the doctrine of proportionality is its vagueness and ambiguity.

THE CONSTITUTIONAL VALIDITY OF A STATE TAX ON CONSUMPTION OF ELECTRICITY SOURCED FROM OUTSIDE THE STATE

Rishabh Joshi & Rishab Aggarwal[Y]

Abstract

The Karnataka Electricity (Taxation on Consumption or Sale) Act, 1959 ("Act"), by virtue of the 2013 amendment ("Amendment") in its Section 3, imposes tax not only on the sale but also on the consumption of "electricity" within the state. As per the Supreme Court's judgment in State of Andhra Pradesh v. National Thermal Power Corporation Limited ("NTPCL"), State is not competent to levy taxation on inter-state sale of electricity.

The present paper argues that this provision of the Amendment is unconstitutional because: first, the decision of the Supreme Court in NTPCL is a precedent on the competence of the State to impose tax on inter-State sale and consumption of electricity. Second, the State of Karnataka is not competent to enact the said Amendment because of lack of "territorial nexus" to impose taxes on inter-State sale and consumption of electricity, especially when the electricity is sourced from open access grid. Third, the said Act is unconstitutional since it violates the rights enshrined in the Constitution. The vires of State's Act to levy a tax not only on "sale" but also on "consumption" is critically examined using these above-mentioned constitutional law principles.

Further, Karnataka High Court in its ruling in 2016 upheld the impugned provision of the Amendment on the ground that levy of tax is not on inter-State transaction, but on the "consumption" of electricity within the State. The article argues that this judgment is per incuriam because of the NTPCL judgement holding that the sale and consumption of electricity cannot be separated.

Keywords: Electricity, Taxation, Territoriality, Lists, Constitutionality, Per Incuriam

[Y] Rishabh Joshi and Rishab Aggarwal are Final Year students from Gujarat National Law University. Please feel free to contact the authors at rishabhjoshi67@gmail.com and rishabhaggarwal213@gmail.com for any constructive feedback.

Introduction

Article 245 of the Indian Constitution is the *fountainhead* of the legislative powers of both the Centre and the State.[1] The Legislature of a State can only make laws for "*whole or any part of the state.*"[2] The respective law must conform to other provisions of the Constitution, otherwise, the same can be declared unconstitutional by courts by exercising the power of judicial review.[3] Hence, the law must comply with the distribution of legislative powers so provided within the Constitution, i.e., Article 246.[4] There is a three-fold distribution of power prescribed, one under the exclusive domain of the Centre, second under the exclusive domain of the States, and the third being common to both Centre and State with the supremacy of the Centre, and this distribution is exemplified with the three lists in the seventh schedule of the Constitution, namely, Union List (**List I**), State List (**List II**) and the Concurrent List (**List III**) respectively.[5]

In light of such clear distribution of legislative powers, the present paper argues that there is no legislative competence with the State of Karnataka to impose inter-state tax on "consumption" of electricity through the Amendment. The paper would address this argument in the following manner; *first*, given the nature of electricity, its sale and consumption would constitute single transaction, as has been noted by the Supreme Court of India in State of Andhra Pradesh v. NTPCL. *Second*, this entire inter-state transaction of electricity including its consumption would come within the legislative domain of the Centre. *Third*, there is a requirement of degree of relationship or "Nexus" for legislative competence, which is not getting established because of the inter-state transmission system in place. *Fourth*, State of Karnataka does not have legislative competence as per Interpretation of the Three Lists in Seventh Schedule, in terms of, doctrines, namely, colourable legislation, pith and substance, and harmonious construction. *Fifth*, the Amendment is unconstitutional, because, it contravenes right to equality (Article 14), right to carry on any occupation, trade or business

[1] Jindal Stainless Limited and Anr. v. State of Haryana and Ors., (2017) 12 SCC 1.
[2] INDIA CONST. art. 245, cl. 1.
[3] A.K. Gopalan v. State of Madras, AIR 1950 SC 27; Atiabari Tea Co. Ltd. v. State of Assam, AIR 1961 SC 232; Golak Nath v. State of Punjab, AIR 1967 SC 1643; State of Bihar v. Bal Mukund Sah, (2000) 4 SCC 640; VS DESHPANDE, JUDICIAL REVIEW OF LEGISLATION 55 (Eastern Book Company 1975); DD BASU, LIMITED GOVERNMENT AND JUDICIAL REVIEW 291 (Eastern Book Company 1972).
[4] Synthetics and Chemicals Ltd. v. State of U.P., (1990) 1 SCC 109.
[5] State of West Bengal v. Committee for Protection of Democratic Rights, West Bengal, AIR 2010 SC 1476.

(Article 19), right to life (Article 21) and freedom of trade, commerce and intercourse (Article 301). *Finally*, it is argued that the judgment given by Karnataka High Court in *Vijaya Steels Limited v. Bangalore Electricity Supply Company Limited*, wherein the inter-state taxation on "consumption" of electricity was held valid, is per incuriam in law.

Nature of Electricity

Electricity coming under the category of goods, being movable in nature,[6] is of a special type since its sale and consumption cannot be separated. This is because:

> *Electricity is assumed to be a highly subtle, imponderable fluid, identical with lightning, which pervades the pores of all bodies, and is capable of motion from one body to another*.[7]

Electricity is lost in its course of transmission and does not remain uniformly available between sale and consumption.[8] It is a commodity that cannot be stored in the grid where demand and supply have to be continuously balanced.[9]

In *Indian Aluminium Co. v. State of Kerala*[10], the Supreme Court had observed that the continuity of supply and consumption commences the very moment electricity passes through the meters and the sale of such electricity takes place as soon as the meter reading is recorded. These three steps, namely supply, sale and consumption take place without any interruption.[11] The Court further noted that the term 'supply' in the case of electricity is inclusive of sale as well as consumption.[12] This view was reiterated in *NTPCL*[13] wherein the Court stated that a sale of electricity cannot be effected without its consumption "*as it cannot be stored*."

[6] Commissioner of Sales Tax, Madhya Pradesh v. Madhya Pradesh Electricity Board, 1969 (2) SCR 939; State of Andhra Pradesh v. National Thermal Power Corporation Ltd., (2002) 5 SCC 203; INDIA CONST.art.366, cl.12
[7] Spensley v. Lancashire Ins. Co, 54 Wis. 433, 442, 11 NW 894.
[8] State of Mysore v .West Coast Papers Mills Ltd., (1975) 3 SCC 448.
[9] National Electricity Policy, 2005, Policy 1.5, Gazette of India, pt. I sec. 1 (Feb. 12, 2005); Harsha Rajwanshi, *Electricity is Different— A legal commodity*, SCC ONLINE (Oct. 17, 2020), https://www.scconline.com/blog/post/2020/10/17/electricity-is-different-a-legal-commodity/.
[10] Indian Aluminium Co. v. State of Kerala, (1996) 7 SCC 637.
[11] *Id.*
[12] *Id.*
[13] State of Andhra Pradesh v. National Thermal Power Corporation Ltd., (2002) 5 SCC 203.

As these two activities form one transaction, when occurring across States, it still would remain a single inter-State transaction. The state legislature is not legislatively competent to bring this within its purview. Further, it leads to the violation of certain fundamental rights, which would be examined in the later part of the article.

The view of Supreme Court on inter-state taxation

The question before the Supreme Court in the *NTPCL* case was whether the sale of electricity by NTPCL to the Electricity Boards situated outside the State of Andhra Pradesh and to the State of Goa, attracted taxation under Section 3 of the Andhra Pradesh Electricity Duty Act, 1939. Supreme Court held that the taxation on sale or purchase which takes place in the course of an inter-State trade is excluded from the competence of State legislature.[14]

Even as per the Central Sales tax Act, all that is required to be seen is whether the movement of goods itself or the transfer of documents of title to the goods during its movement is taking place or not.[15] If either of the two is satisfied, then the sale or purchase shall be deemed to be an *inter-State trade* upon which Article(s) 269 and 286 of the Constitution shall be applicable.[16] Hence, it shall be beyond the legislative competence of a State to tax the sale or purchase of electricity. This prohibition works irrespective of whether it is provided in the description of legislative entries (which are to be seen as legislative heads and not the source of legislative empowerment) in Seventh Schedule or not.[17]

The Supreme Court relied on this reasoning in *NTPCL* to note that the Entries in List-II of the Seventh Schedule shall always remain subject to the limits set by the Constitution and these barriers created by the Constitution should not be spilt over based on these entries.[18] The Apex Court thus concluded that there are twofold limitations upon the State's power to impose taxes as per List II: *first*, arising out of the entry itself; *second*, arising out of the restrictions

[14] Tata Iron and Steel Co. Ltd. Bombay v. S.R. Sarkar and Ors., 1961 (1) SCR 379.
[15] 20th Century Finance Limited v. State of Maharashtra, AIR 2000 SC 2436.
[16] *Id.*
[17] *Id.*
[18] State of Andhra Pradesh v. National Thermal Power Corporation Ltd., (2002) 5 SCC 203.

enumerated in the Indian Constitution.[19]

NTPCL is a reasoned judgment based on law set in the legislation and judicial pronouncement and not *per incuriam* in law. As noted by the Supreme Court in *B. Shama Rao v. Union Territory of Pondicherry*[20], a judgment is binding because of its rationale and the principles laid down therein and not the conclusion. The principles laid down by the Apex Court in *NTPCL* are directly applicable as they deal with the same issue of imposition of taxes by the State on inter-State sale and purchase of electrical energy.

NTPCL[21] is a precedent on the issue of taxability on inter-State electricity and therefore owing to the principle of *stare decisis*, the law set by the Supreme Court in the said judgment shall prevail. The meaning of the principle, *stare decisis et non quieta movere* is "*to stand by the decisions and not to disturb what is settled*".[22] Those issues which have been adjudged ought to rest in peace.[23] This principle has found a place in the Indian Constitution under Article 141 as per which *a law declared by Supreme Court shall be binding on all courts within the territory of India.*[24] Accordingly, a principle laid down in the judgment of the Supreme Court shall be binding law under Article 141 of the Constitution.[25] In fact, such precedents are not only binding on the judgments of smaller strength but also on the judgments of a co-equal strength bench.[26]

Determining legislative domain for Inter-state transaction of electricity

1. Sale and consumption of electricity through open access grid

Regulation 2 (qq) of the Grid Code Regulation defines an inter-State transmission system as per which, it is a system for the conveyance of electricity from one State to another

[19] *Id.*
[20] B. Shama Rao v. Union Territory of Pondicherry, 1967 SCR (2) 650.
[21] State of Andhra Pradesh v. National Thermal Power Corporation Ltd., (2002) 5 SCC 203.
[22] Waman Rao v. Union of India, (1981) 2 SCC 362.
[23] *Id.*
[24] INDIA CONST. art. 141.
[25] Dr. Shah Faesal and Others v. Union of India and another (2020) 4 SCC 1.
[26] Siddharam Satlingappa Mhetre v. State of Maharashtra and Others, (2011) 1 SCC 694.

via a main transmission line. [27] It further involves the conveyance of electricity across an intervening State as well as within the State incidental to such transmission.[28] Interstate trade and commerce is defined in Section 3 of the Central Sales Tax Act as aforementioned.[29]

An inter-State trade thus has three key ingredients. *First*, a contract of sale stipulating inter-State movement of the goods; *second*, such movement must take place in pursuance of the contract wherein the sale is the cause behind the movement; *third*, the movement must be to another State where the Sale concludes.[30]

Electricity's coming into existence and its consumption takes place simultaneously. Thus, the generation of electricity in one State from where it is supplied to another where it is received and consumed, is in its entirety a single transaction which is nothing other than an inter-State trade taking place through the instantaneous movement of goods from one State to another.[31]

The position of law with respect to the imposition of taxes on an inter-State sale was made clear by the Supreme Court in the case of *Bengal Immunity Company Limited v. State of Bihar and Ors.* It was held that until the Parliament has exercised its power under the then clause (2) of Article 286 to state otherwise, a State cannot impose or authorize the imposition of any tax on sale or purchases of goods taking place in the course of inter-State trade.[32] It is imperative to note that the *situs* of sale or purchase is entirely immaterial in cases involving inter-State trade[33] since an inter-State sale or purchase is a single transaction irrespective of the State where the sale can be under the general law or by fiction which is created by the explanation of Article 286(1).[34] Further, Article 269 prohibited the levy and collection of tax by State on that sale or purchase which takes place in the course of inter-State trade or commerce.[35] This position of law was further elucidated by the Apex Court in *Iron and Steel Co. Ltd., Bombay*

[27] Central Electricity Regulatory Commission (Indian Electricity Grid Code) Regulations, 2010, Regulation 2(qq) (i), Gazette of India, pt. III sec. 4 (Apr. 28, 2010).
[28] *Id* at Regulation 2(qq) (ii).
[29] Central Sales Tax Act, 1956, § 3, No. 74, Acts of Parliament, 1956 (India).
[30] State of Andhra Pradesh v. National Thermal Power Corporation Ltd., (2002) 5 SCC 203.
[31] *Id.*
[32] Bengal Immunity Company Limited v. State of Bihar and Ors., 1955 (2) SCR 603.
[33] 20th Century Finance Limited v. State of Maharashtra, AIR 2000 SC 2436.
[34] Bengal Immunity Company Limited v. State of Bihar and Ors., 1955 (2) SCR 603.
[35] Gannon Dunkerley & Co. v. State of Rajasthan, (1993) 1 SCC 364; M/S. Kalpana Glass Fibre Pvt. Ltd. Maharashtra v. State of Orissa, (2013) 57 VST 357.

v. S.R. Sarkar[36] wherein it was held that *the field of taxation on sale or purchase in course of an inter-State trade is entirely excluded from the competence of the State Legislature.*

2. Tussle between Centre and State over Inter-State Trade and Commerce

Before 1956, states applied the doctrine of territorial nexus and levied taxes on a taxable event, which was a single ingredient out of the multiple ingredients which constituted the said transaction.[37] Hence to restrict this multiple taxation, Constitution restricted States from imposing taxes on the sale and purchase of goods taking place outside the State or the country as per the then existing Article 286.[38] *Explanation* in the said article allowed for considering a State in which goods arrived for consumption from outside the State to levy tax on the involved traders, which was ultimately struck down by the Supreme Court in the case of *Bengal Immunity Co. v. State of Bihar*.[39]

In light of ensuring free flow of trade and commerce and to protect the traders from undue harassment, the court took the subject of inter-State trade and commerce out of the State's purview for legislation. So as to not let the local trade be adversely affected at the cost of inter-State trade; Taxation Enquiry Commission recommended inter-State taxation to be under Union's power and the revenue be devolved upon States.[40] Hence, Parliament brought inter-State taxation under the Union list.[41]

Accordingly, in the context of a sale, by virtue of the Central Sales Tax Act, 1956,[42] Parliament determined the principles for determining when sale or purchase takes place in inter-State trade or commerce.[43] The test to determine if a transaction is inter-State or not, the court sees, if there is a movement of goods from one State to another, or is effected through a transfer of

[36] Iron and Steel Co. Ltd., Bombay v. S.R. Sarkar, 1961 (1) SCR 379.
[37] Municipal Corporation of Jullundur City v. Union of India, AIR 1981 P&H 287.
[38] State of Bombay v. United Motors Ltd., AIR 1953 SC 252.
[39] Bengal Immunity Co. v. State of Bihar, AIR 1955 SC 661.
[40] MP JAIN, INDIAN CONSTITUTIONAL LAW 704 (Lexis Nexis 2018).
[41] INDIA CONST. sch. 7, list 1, ent. 92A.
[42] Central Sales Tax Act, 1956, § 6, No. 74, Acts of Parliament, 1956 (India).
[43] Ashok Leyland Ltd v. State of Tamil Nadu, (2004) 3 SCC 1.

documents of title to the goods during their movement from one State to another.[44]

The rationale for making **inter-State transactions** immune from State taxation is found in consumer welfare, which is evident from the court's interpretation of the earlier existing Article 286 of the Constitution, which restricted State taxation with regards to goods of special importance so declared by Parliament. The intention of the legislature was to protect important raw materials. Due to intra-State sales of such raw materials, the cost of manufactured articles could arise and since manufactured goods are sold directly outside the State, an increase in cost would be of direct concern to the consumers in other States.[45] After the One Hundred and First Constitutional Amendment also, inter-State supplies, supplies outside the State and those in the course of export and import from India are exempt from State taxation.[46] Position of law is well settled that in case of electricity, the word "supply" includes sale as well as consumption[47] and definition of supply in CGST Act and IGST Act is also inclusive hence illustrative.[48]

Therefore, Karnataka cannot impose a tax on the consumption of electricity from an inter-State transaction, as constitutionally and as per the intention of legislature evident from the legislative history, inter-State transactions are kept out of the purview of State legislatures.

Degree of relationship or "Nexus" for legislative competence

A law having an extra-territorial operation can be only enacted by Parliament and not by the State, with the only exception of "territorial nexus."[49] For Parliament, extraterritorial operation of law is permitted.[50] Such laws were considered to be not directly enforceable rather with the machinery available within the territorial jurisdiction.[51] But, a State can levy

[44] Cement Marketing Co. v. State of Mysore, AIR 1963 SC 980; State Transport Corporation v. State of Mysore, AIR 1967 SC 585; Ballabhadas Hulaschand v. State of Orissa, AIR 1976 SC 1016; State of Orissa v. K.B. Saha and Sons Industries (P) Ltd., (2007) 9 SCC 97.
[45] JAIN *supra* note 40, at 708; Satnam Overseas (Export) v. State of Haryana, (2003) 1 SCC 561.
[46] INDIA CONST. art. 286.
[47] Indian Aluminium Corporation v. Union of India, AIR 1996 SC 1431.
[48] Ramala Sahkari Chini Mills Ltd. v. Commissioner of Central Excise, (2016) 7 SCC 585; ESI Corporation v. High Lands Coffee Works, (1991) 3 SCC 617; CCT v. T.T.K. Health Care Ltd., (2007) 11 SCC 796; Ramanlal Bhailal Patel v. State of Gujarat, (2008) 5 SCC 449.
[49] State of Andhra Pradesh v. National Thermal Power Corporation Ltd., (2002) 5 SCC 203.
[50] AH Wadia v. Commissioner of Income Tax, (1949) 51 Bom LR 287.
[51] British Columbia Electric Railway Company Ltd. v. King [1946] 1 AC 527 (PC) (appeal taken from S.C.C.).

taxation on any person, object or transaction only when it is situated within its territorial limits or when it has sufficient and real territorial connection with the State.[52] A State law would not be thus valid if it has an extra-territorial operation. To decide upon the same, courts have applied the doctrine of territorial nexus.[53] Illustration of the application of this doctrine is found in the case of *Wallace v. Income-tax Commissioner*,[54] wherein a company having its control and management exclusively situated in the United Kingdom was mandated to pay income tax on the income arising to the company since the court had found a sufficient territorial nexus in the form of a major portion of the profit arising from the Indian territory.[55]

Broadly, the legal principle is that the object of the legislation has to be related to the territorial limits so that the extra-territorial operation has its provocation from within the territory.[56] In the case of *GVK industries v. ITO*,[57] the appellant company wanted to transfer its payment for financial consultancy received from a Swiss company, a tax was levied upon the transaction as being deemed to be accruing and arising from India. Question was to determine whether the extra-territorial operation of law is valid. The Court while answering the question evolved the test to establish a degree of relationship in the law.

Hence, an extra-territorial law would not be permitted but a law with extra-territorial operation would be allowed if that law is in respect of causes that arise, occur, exist or expected to arise, occur or exist within the territory. This is how the "nexus" with the territory would be established. [58] When the law strikes a sufficient territorial nexus between law and object, it is upheld.[59] Once this nexus stands established, the court even validates a prosecution of an offence for which the charge sheet was filed in another state.[60]

[52] JAIN, *supra* note 40, at 556.
[53] State of Bihar v. Bhabapritananda, AIR 1959 SC 1073; Ananta Prasad v. State of Andhra Pradesh, AIR 1963 SC 853.
[54] Wallace v. Income-tax Commissioner, AIR 1948 PC 118.
[55] *Id.*
[56] Electronics Corporation of India Ltd. v. Commissioner of Income Tax and Anr., AIR 1989 SC 1707.
[57] G.V.K. industries v. Income Tax Officer, (2011) 4 SCC 36.
[58] G.V.K. Industries v. Income tax officer, [2015] 371 ITR 453 (SC); Republic of Italy v. Union of India, (2013) 4 SCC 721; Vodafone International Holdings BV v. Union of India, (2012) 6 SCC 613; Securities Exchange Board of India v. PAN Asia, AIR 2015 SC 2782.
[59] Tata Iron and Steel Co. Ltd v. State of Bihar, AIR 1958 SC 452.
[60] State (NCT of Delhi) v. Brijesh Singh alias Arun Kumar and Anr., (2017) 10 SCC 779.

In the case of *State of Bombay v. RMDC company*, the company running crossword lottery competitions, though established in Bangalore, was having an extensive presence in Bombay, through its wide circulation in a local newspaper and had earned profits. The Supreme Court thus held that the connection with the territorial limit which must be established, has to be real and not illusory. Hence, the liability sought to be imposed upon the subject matter must have a connection with the territory.[61]

This principle of territorial nexus has been applied in further cases where a trust whose properties were located outside the state's territory were also held to be falling within the purview of taxation because the trust itself was created within the State, wherein the creation of the trust was mentioned in the respective statute, hence invoking the degree of relationship and establishing the nexus.[62]

The concluding test for determining the territorial nexus, formed by courts through the catena of judgments as discussed above is involving two elements:

a) Connection with the territory has to be real and not illusory.
b) Liability sought to be imposed under the law must be relevant to that connection.[63]

Due to the differentiating nature of electricity, the same position of law cannot be applied. In line with the decision of *NTPCL*,[64] as the acts of sale and consumption remain inseparable, owing to the special nature of electricity as a good, a state cannot have territorial nexus in a case where these two acts take place in separate jurisdictions. Liability sought to be achieved travels beyond the scope of the permissible Constitutional limit of state jurisdiction. Merely by picking one ingredient of an entire transaction[65], the state cannot bring a non-permitted subject matter within its jurisdiction. Hence, it is submitted that state law is without legislative competence.

The reason for allowing open access or non-discriminatory access to the transmission and

[61] Shrikant Bhalchandra Karulkar and Ors. v. State of Gujarat and Anr., (1994) 5 SCC 459.
[62] State of Bihar v. Charushila Dasi, AIR 1959 SC 1002.
[63] Shrikant Bhalchandra Karulkar v. State of Gujarat, (1994) 5 SCC 459.
[64] State of Andhra Pradesh v. National Thermal Power Corporation Ltd., (2002) 5 SCC 203.
[65] Tata Iron And Steel Co., Limited, Bombay v. S.R. Sarkar and Others, AIR 1961 SC 65.

distribution system by an entity[66] is the "freeing" of avenues of procurement and sale of power (as per the Statement of Objects and Reasons of the Electricity Act, 2003).[67] Supervision and control over inter-State transmission system is vested in the Regional Load Despatch Centres[68] and for collective transactions, it is the National Load Despatch Centre.[69]

The Inter-State transmission system is defined[70] in three components:

> "*(a) by means of main transmission line from the territory of one State to another State;*
> *(b) Conveyance of electricity across the territory of an intervening State as well as conveyance within the state which is incidental to such inter-State transmission of energy;*
> *(c) Transmission of electricity within the territory of State on a system built, owned, operated, maintained or controlled by Central Transmission Utility*."

Since tax can only be imposed by virtue of the force of law[71] which has to be valid under the Constitution otherwise it would be struck down,[72] the Amendment in question becomes *ultra vires* due to lack of legislative competence. Therefore, the aforementioned legislation cannot be levied on consumers taking in electricity from outside the State.

Interpretation of the Three Lists in Seventh Schedule

The distribution of legislative powers among different lists is interpreted and constructed by courts to decide upon their constitutionality.[73] It has been held that the entries provided in the three lists are mere outlines of the respective matters of legislation concerned; hence, the entries are given the widest amplitude.[74] It is because entries are *enumeratio simplex*

[66] Electricity Act, 2003, § 2, No. 36, Acts of Parliament, 2003 (India).
[67] IIT Kanpur, *Indian Power Markets and Open Access*, INDIAN ENERGY EXCHANGE (Oct. 14, 2006, 09:00 AM), https://www.iitk.ac.in/ime/anoops/for16/photos/PPTs/IITK_Day_2/Mr.%20Rajesh%20Mediratta%20-%206%20-%20Indian%20Power%20Markets%20&%20open%20Access.pdf.
[68] Central Electricity Regulatory Commission (Indian Electricity Grid Code) Regulations, 2010, Regulation 2.3.1(3)(d), Gazette of India, pt. III sec. 4 (Apr. 28, 2010).
[69] *Id.* at Regulation 2.2.
[70] *Id.* at Regulation 2 (qq).
[71] INDIA CONST. art. 265; Kunnathat Thathunni Moopil Nair v. State of Kerala, AIR 1961 SC 552.
[72] CIT v. B.C. Srinivasa Setty, (1981) 2 SCC 460; Sunil Sidharthbhai v. CIT, (1985) 4 SCC 519; PNB Finance Ltd. v. CIT, (2008) 13 SCC 94.
[73] Federation of Hotel & Restaurant v. Union of India, AIR 1990 SC 1637.
[74] Karnataka Bank Ltd. v. State of Andhra Pradesh, (2008) 2 SCC 254.

of broad categories.[75] But, it is also held that an entry would extend only to those ancillary and subsidiary matters which can be fairly and reasonably be said to be comprehended within it.[76] The meaning so arrived at after applying liberal construction must be one that is fairly capable.[77] Thus, the legislatures are not empowered to make law regarding a matter which has no *rational connection* with the subject matter mentioned in the respective entry.[78]

It has been stated that:

> *"The duty of Courts is to interpret and it cannot rewrite, recast or redesign the section because it is not for the Court to reframe the legislation for the very good reason that the powers to 'legislate' have not been conferred on the court."*[79]

Interpreting the legislative entries in light of the contemporary position would be in line with the constitutional principle of interpretation, allowing for such interpretation which serves the needs for the day as well as moves ahead with changing scenarios.[80] The constitutional ideal of establishing a common market free of all restrictions and barriers must be sought to be the primary goal of such interpretation.[81]

Entry 92A of the Union list reserves power in favour of the Union to levy taxes for sale and purchase for goods other than newspaper in the course of inter-State trade and commerce. Entry 53 of the State list permits the State to levy tax on sale and consumption of electricity[82] and entry 54 permits tax on the sale of specified goods subject to Union taxation.[83] Thus, the taxation on consumption of electricity not sourced from within the State is not within the scope of legislative Competence of the State of Karnataka.

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[75] State of Rajasthan v. G. Chawla, AIR 1959 SC 544.
[76] Hans Muller v. Superintendent, Presidency Jail, Calcutta, AIR 1955 SC 367; Navinchandra Mafatlal v. Commissioner of Income-tax, Bombay, AIR 1955 SC 58; Welfare Association ARP v. Ranjit P. Gohil, (2003) 9 SCC 358.
[77] United Provinces v Atiqua Begum, AIR 1941 FC 16; Calcutta Gas Co. v. State of West Bengal, AIR 1962 SC 1044; Waverly Jute Mills v. Raymon and Co., AIR 1963 SC 90; Harakchand Ratanchand Banthia v. Union of India, AIR 1970 SC 1453; Synthetics and Chemicals v. State of Uttar Pradesh, AIR 1990 SC 1927; Indian Aluminium Co. Ltd. v. Karnataka Electricity Board, (1992) 3 SCC 580; P.N. Krishan Lal v. Govt. of Kerala, 1994 Suppl. (5) SCR 526.
[78] Union of India v. Shah Goverdhan L. Kabra Teachers College, (2002) 7 SCALE 435.
[79] State of Kerala v. Mathai Verghese, (1986) 4 SCC 746.
[80] Ashok Tanwar v. State of H.P., (2005) 2 SCC 104.
[81] INDIA CONST. art. 301; Jindal Stainless Ltd. v. State of Haryana, (2017) 12 SCC 1.
[82] INDIA CONST. sch. 7, list 2, ent. 53.
[83] *Id.* at ent. 54.

1. Doctrine of colorable legislation

Courts have struck down the laws wherein legislatures have transgressed the limits of constitutional powers *patently, manifestly* and *directly*.[84] This test has evolved to be known as the doctrine of colourable legislation where only the competence of the legislature is investigated by the courts and the motive for passing the respective law remains irrelevant.[85] The legislature does not have any legislative competence, rather the same is pretended by the state to do indirectly what cannot be done directly. Apparently, the legislature purports to act within the constitutional limits but in substance and reality, transgresses the said limits, and veils this transgression by a pretence or disguise.[86]

Courts thus read the true nature and character of the challenged legislation and accordingly determine if the same is within the legislative scope of the particular legislature, and if not, it cannot be saved from condemnation.[87] Hence, to decide whether the legislature did indirectly, what it could not do directly, the court examines whether the legislature had the competence to bring an enactment on the respective subject matter.[88] Once it is shown that legislative competence does not exist with the State, the law becomes void and it is of no relevance to test the intent of bringing the legislation.[89]

It is exemplified from courts' decision wherein disguise of law, fields coming under other legislative heads is covered, for example, the US Congress enacting on Child labour tax, essentially legislates on labour regulations, coming under States' powers.[90] In India, when the State determined tax with deductions provided on the basis of subject matters of cost of works for the benefit of intermediaries and arrears of rent, these were beyond the State's legislative

[84] State of Kerala v. Peoples Union for Civil Liberties, Kerala State Unit, (2009) 8 SCC 46.
[85] R.S Joshi & Ors. v. Ajit Mills Ltd., (1977) 4 SCC 98.
[86] K.C. Gajapati Narayana Deo v. State of Orissa, AIR 1953 SC 375; Gullapalli Negeswara Rao v. A.P. State R.T.C., AIR 1959 SC 308; K. Kunhikoman v. State of Kerala, AIR 1962 SC 723; Jayvantsinghji v. State of Gujarat, AIR 1962 SC 821; Jalan Trading Co v. Mill Mazdoor Sabha, AIR 1967 SC 691; Jabalpur Bus Operators Ass. v. Union of India, AIR 1994 MP 62.
[87] Ashok Kumar v. Union of India, AIR 1991 SC 1792.
[88] Naga Peoples Movement for Human Rights v. Union of India, AIR 1998 SC 431.
[89] K.C. Gajapathi Narayandeo v. State of Orissa, AIR 1953 SC 375.
[90] Baillee v. Drexel Furniture Company, 259 U.S. 20 (1922).

powers, hence the law was struck down on the basis of colourable legislation.[91] In the landmark case of *Prof. Yashpal v. State of Chhattisgarh*,[92] the Court struck down the Chhattisgarh Adhniyam of 2002 permitting the creation of universities as a colourable piece of legislation, since university could not be established only to provide consultancy work to industry and public organizations.[93]

The subject matter of inter-State trade and commerce remains solely under the purview of the Centre[94] and under the garb of consumption tax, Karnataka has levied a tax on the inter-State trade and commerce of electricity through the open-access regime. A licensee, so licensed to trade in electricity, is supposed to collect the tax and pay it to the State government.[95] Hence, the Amendment is a colourable piece of legislation liable to be struck down.

2. Doctrine of pith and substance

Another test evolved by courts to adjudge whether a law with respect to the matter in one list touching upon another matter from another list is bad or not is the doctrine of pith and substance.[96] Courts look into enactment as a whole, study its main objects along with the scope and effect of its provisions, and if the substance of the enactment falls within one list, its incidental encroachment on other lists would not make it invalid.[97] However, if the substance of the impugned law deals with a subject matter reserved for other legislature, it is liable to be struck down.

Courts have not interfered in the cases of incidental encroachment,[98] for instance in the case when the law concerned money lending but merely incidentally touched upon the subject of

[91] State of Bihar v. Kameshwar Singh, (1952) 1 SCR 889.
[92] Prof. Yashpal v. State of Chhattisgarh, (2005) 5 SCC 420.
[93] *Id*.
[94] INDIA CONST. sch. 7, list 1, ent. 92A.
[95] Karnataka Electricity (Taxation on Consumption or Sale) Act, 1959, § 4, No. 14, Acts of Karnataka State Legislature, 1959 (India).
[96] Citizens Insurance Company v. Parsons [1881] 7 AC 96 (PC) (appeal taken from S.C.C.); Russell v. The Queen [1882] 7 AC 829 (appeal taken from S.C.C.); Attorney General for Canada v. Attorney General for British Columbia [1930] 1 AC 111 (appeal taken from S.C.C.); Attorney General for Saskatchewan v. Attorney General for Canada, AIR 1949 PC 190.
[97] Bharat Hydro Power Corporation Ltd. v. State of Assam, (2004) 2 SCC 553.
[98] K.K. Bhaskaran v. State represented by its Secretary, Tamil Nadu and Ors., AIR 2011 SC 1485; A.S. Krishna v. State of Madras, AIR 1957 SC 297.

banking and negotiable instruments.[99] When the amplifiers around hospitals were regulated by the State, it was considered as a measure under "health", as State's power and not as "communication" which comes within Parliament's power.[100]

But for the instances of substantial encroachment, when a State devoid of legislative power tends to legislate on a Union matter, that law is liable to be struck down. In the case of *Association of Natural Gas v. Union of India*[101] when the State law covered the subject of natural gas as well, which was under the Union's power, apart from manufactured gas, this was held to be a substantial encroachment, thus, struck down by the court.

Presently, though the State can legislate upon consumption of electricity, it cannot legislate on inter-State trade and commerce, especially for electricity in an open-access inter-state framework, since its consumption is intrinsically connected with the sale, occurring simultaneously. Hence, in pith and substance, the Amendment is legislating on consumption in inter-State trade and commerce, devoid of legislative competence, and therefore is liable to be struck down. Further, the constitutional limit of Article 286 would apply in the present case, restricting the State of Karnataka from levying a tax upon the inter-State transaction, i.e., supply, including consumption.[102]

3. Doctrine of harmonious construction

In a situation where the entries in different lists contradict and overlap due to a direct conflict with each other, courts reconcile the conflict through the doctrine of harmonious construction.[103] When such reconciliation fails, courts can give primacy to the Union over State, by virtue of the non-obstante clause[104] as "*a witness to the imperfections of human*

[99] Prafulla Kumar Mukherjee v. Bank of commerce, Khulna, AIR 1947 PC 60.
[100] State of Rajasthan v. G. Chawla, AIR 1959 SC 544.
[101] Association of Natural Gas and Ors. v. Union of India and Ors., (2004) 4 SCC 489.
[102] Indian Aluminium Corporation v. Union of India, AIR 1996 SC 1431.
[103] Harakchand Ratanchand Banthia v. Union of India, AIR 1970 SC 1453; Hoechst Pharmaceuticals Ltd. v. State of Bihar, AIR 1983 SC 1019; State of Bombay v. Balsara, AIR 1951 SC 318; State of A.P. v. K. Purushotham Reddy, (2003) 9 SCC 564; Calcutta Gas Co. v. State of West Bengal, AIR 1962 SC 1044.
[104] Waverly Jute Mills v. Rayman Co., AIR 1963 SC 90; K.S.E. Board v. Indian Aluminium Co., AIR 1976 SC 1031; The Elel Hotels and Investment Ltd. v. Union of India, AIR 1990 SC 1664; Ajay Kumar Singh v. State of Bihar, (1994) 4 SCC 401.

expression and the fallibility of legal draftsmanship".[105] In the case of *State of W.B. v. Kesoram Industries Ltd*,[106] a conflict between the Union's power to tax on the capital value of assets and the State's power to tax on land and buildings was reconciled to mean that Union could levy tax on an aggregation of assets, whereas State was empowered to levy tax on separate lands and buildings.[107]

Presently, reading both entries of Union list and State list together, since inter-State trade is fully vested within the power of the Union[108] and State can also tax on consumption, for electricity, considering its special nature, a State can thus tax on such consumption which is sourced from within the State so as to make both entries workable. In case the court does not find the construction workable, it is submitted that matter under the Union list must be allowed to supersede in light of the non-obstante clause.

Moreover, in the case of *Godfrey Phillips India Ltd. v. State of U.P.*,[109] the scope of an entry in the State list can be widened due to subsequent amendments, but the levy of tax would be subject to the corresponding constitutional limitations. In that case, List II, entry 54 concerning, as existing then, giving power to States to levy sales tax, was widened due to Article 366 (29A), which elaborately defined "tax on sale or purchase", but constitutional limit contained in Article 286 was applied with regards to restriction on State's power to levy such taxes.[110]

Unconstitutionality of the Amendment

To be valid in law, any legislation must satisfy that *first*, the appropriate legislature is within its legislative competence to formulate the law, and *second*, that the law does not abridge or take away any of the fundamental rights enshrined in Part III of the Indian Constitution.[111] Further, the fundamental rights, especially Article 14, 19 and 21, form the test to check the validity of any legislative or executive action on being subject to judicial scrutiny.[112]

[105] Ajay Kumar Singh v. State of Bihar, (1994) 4 SCC 401.
[106] State of W.B. v. Kesoram Industries Ltd, (2004) 10 SCC 201.
[107] *Id*.
[108] INDIA CONST. sch. 7, list 1, ent. 42.
[109] Godfrey Phillips India Ltd. v. State of U.P., (2005) 2 SCC 515.
[110] *Id.*
[111] Kottarathil Kochuni & Moopil Nair v. State of Madras, AIR 1960 SC 1080.
[112] Maneka Gandhi v Union of India, (1978) 1 SCC 248.

1. Evaluation under Article 14

Rule of law contemplates governance by laws and not by humour, whims or caprices of the men to whom the governance is entrusted for the time being.[113] 'Rule of law' means that the exercise of powers of Government shall be conditioned by law and that subject to the exceptions to the doctrine of equality, no one shall be exposed to the arbitrary will of the Government. Article 14 of the Constitution of India states that "*the State shall not deny any person equality before law or equal protection of the laws within the territory of India*."[114]

Supreme Court has held that for the purpose of Article 14, classification must be based on an *intelligible differentia* which distinguishes persons or things that are grouped together from those that are left out of the group and such differentia must have a rational nexus to the object sought to be achieved by the statute in question.[115] Further, the assumption in favour of the constitutionality of a law can be disproved if it is shown that there is no explicit order or distinction peculiar to any individual or class in the statute and yet the law hits a specific individual or class.[116] It is necessary that the State action is fair, reasonable, transparent, non-capricious, unbiased, non-discriminatory, without nepotism or favouritism, in pursuit of promotion of healthy competition and equitable treatment for being valid in the eyes of law.[117]

However, the amendment does not create a reasonable distinction between those consumers of electricity who are buying electricity from outside the State and those within it while imposing taxes. Allowing the same shall expose the taxpayers to the burden of double taxation which violates the freedom of trade especially at an inter-state level since they would be required to pay Goods and Services Tax for the supply of goods simultaneously as well. This is a discriminatory burden that puts inter-State transactions at a disadvantage in competition with local trade.[118]

[113] Shrilekha Vidyarthi v. State of U.P., (1991) 1 SCC 212.
[114] INDIA CONST. art. 14.
[115] D.S. Nakara v. Union of India, AIR 1983 SC 130.
[116] Ram Krishna Dalmia v. Tendolkar, AIR 1958 SC 538.
[117] Natural Resources Allocation, In re, Special Reference No.1 of 2012, (2012) 10 SCC 1.
[118] State of Bombay v. United Motors (India) Ltd., AIR 1953 SC 252.

Article 14 directly strikes arbitrariness in the actions of the State, be it for the legislature or executive or any other authority given under Article 12 of the Constitution,[119] and also ensures equality and fairness of treatment.[120] Equality and arbitrariness are sworn, enemies.[121] The Supreme Court laid down in a landmark judgment that if legislation is manifestly arbitrary, i.e. if it's not reasonable, fair or transparent, biased, discriminatory, capricious and not in pursuit of promoting equitable treatment, such legislation is violative of Article 14 and liable to be struck down.[122]

Therefore, the State legislature has exceeded its realm of competence by entering into uncharted waters (i.e. inter-State sale and purchase of electricity) and creating a law imposing taxes in the arbitrary exercise of its power. The legislation is wholly non-rational, unreasonable and brought forth capriciously at the pleasure of State without reason or judgment but will alone, and is hence arbitrary.[123] Reasonability is like a brooding omnipresence and an essential feature of equality[124], and it can also be considered as a test that may be applied to see whether it has been satisfied by the impugned act to determine its validity.[125]

A legislation must conform to the norms which are rational, informed with reasons and must be guided by public interest.[126] If a legislation is found to be arbitrary in the sense of being unreasonable, it can be struck down.[127] In the present case, the imposition of the tax was done in an unreasonable manner without taking into consideration its impact on public interest. As aforementioned, it shall result in double taxation and since electricity is an essential commodity, such tax shall affect the prices in all sectors. The burden of such an increase shall eventually fall on the masses being the consumer of various sectors of the economy.

[119] State of Tamil Nadu v. K. Shyam Sunder, (2011) 8 SCC 737; A.P. Dairy Development Corpn. Federation v. B. Narasimha Reddy, (2011) 9 SCC 286.
[120] Maneka Gandhi v Union of India, (1978) 1 SCC 248.
[121] E. P. Royappa v. State of Tamil Nadu & Anr., (1974) 4 SCC 3.
[122] Shayara Bano and Ors. v. Union of India and Ors., (2017) 9 SCC 1.
[123] Sharma Transport v. Government of A.P., (2002) 2 SCC 188.
[124] Shayara Bano and Ors. v. Union of India and Ors., (2017) 9 SCC 1.
[125] Kumari Shrilekha Vidyarthi v. State Of U.P., AIR 1991 SC 537.
[126] *Id.*
[127] Air India v. Nergesh Meerza, (1981) 4 SCC 335.

2. Evaluation under Article 19

Arbitrariness in law is also a facet of unreasonableness under Article 19(2) to (6) of the Constitution.[128] Thus, the imposition of a tax that is authorized by law may be challenged if it offends the fundamental freedom enshrined under Article 19 of the Indian Constitution.[129] The question to be determined when such challenge is brought is that whether the legislation imposes reasonable restrictions on the fundamental freedoms guaranteed under the Constitution or not.[130] A proper balancing of the fundamental rights with the restriction imposed is necessary.[131] The burden of proof to show that the restriction is reasonable and not disproportionate lies upon the State.[132]

The position of law is thus further solidified since the Apex Court has clarified that if a tax law is beyond the competence of legislature which has enacted it or is in violation of Article 276 or 286, then such law shall be invalid as being ultra vires and the assessee can approach the Court claiming that its fundamental right provided under Article 19(1)(g) is breached.[133] Thus, a tax imposed by an authority that does not possess the power to impose it shall be unauthorized and consequently the decision to impose such a tax would be a nullity.[134]

Further, the imposition of restrictions that are unreasonable, arbitrary and beyond what is required in the interest of the public is not permissible.[135] The Apex Court has noted that a statute shall be hit by Article 19 if it is disguised as a taxation law but in substance is the law that is intended to destroy or even burden trade and not raise revenue.[136] This shall result in a colourable legislation that cannot claim the benefit of Article 265 and must be held to contravene Article 19(1)(g) unless it is in the public interest under Article 19(6).[137]

The imposition of taxes on electricity shall result in a proportional increase in the rates by all

[128] Shayara Bano and Ors. v. Union of India and Ors., (2017) 9 SCC 1.
[129] Balaji v. Income-Tax Officer, 1962 AIR 123.
[130] Om Kumar v. Union of India, (2001) 2 SCC 386.
[131] Union of India v. G. Ganayutham, (1997) 7 SCC 463.
[132] Om Kumar v. Union of India, (2001) 2 SCC 386.
[133] *Id.*
[134] *Id.*
[135] Chintamanrao v. State of M.P., AIR 1951 SC 118.
[136] Ujjam Bai v. State of Uttar Pradesh, AIR 1962 SC 1621.
[137] *Id.*

industries. Thus, the onus of such an unreasonable taxe shall ultimately befall the end-user of goods, which is the general public. Therefore, the Amendment is not in the public interest and shall cause more harm than benefit to the public. Thus, the amendment is in contravention of Article 19.

3. Evaluation under Article 301

Trade and commerce are held to be free throughout India.[138] The constitution ensures an unhampered free flow of trade, commerce and intercourse from one territory to another. In case a state imposes a restriction upon this freedom, it must be reasonable and the bill cannot be moved in the state legislature without the previous sanction of the President.[139] It is a testimony to economic unity which is termed as essential to the stability and progress of federal polity.[140] It is a step towards fiscal integration taking into account the interests of India as a developing economy.[141] Hence, when an individual or an entity is prevented from sending goods across the state, Article 301 concerning freedom of trade and commerce gets invoked to protect the right to trade in motion.[142]

In the landmark case of *Atiabari Tea Co. Ltd. v. State of Assam*,[143] when the state of Assam levied a tax on the carriage of tea by road or inland waterways through its territory, merely on the basis of the movement of goods, the court held it against freedom of trade and commerce and thus struck it down.[144] To secure the financial autonomy of states, the Supreme court also evolved the concept of compensatory tax, allowing states to tax such movement of goods across states if they provide facilities for the better conduct of business, for instance, if the tax is used for maintenance of roads.[145] The Court further noted that the freedom enshrined under Article 301 would become imaginary and non-existent if the movement of goods is obstructed without meeting the criteria laid in Article 302 to Article 304 of the Constitution.[146] Therefore the levy

[138] INDIA CONST. art. 301, cl. 1.
[139] *Id*. at art. 304, cl. b.
[140] Atiabari Tea Co. Ltd. v. State of Assam, AIR 1961 SC 232.
[141] Automobile Transport (Rajasthan) Ltd. v. State of Rajasthan, AIR 1962 SC 1406.
[142] Bapubhai v. State of Maharashtra, AIR 1956 Bom 21; Usman v. State, AIR 1958 MP 33.
[143] Atiabari Tea Co. Ltd. v. State of Assam, AIR 1961 SC 232.
[144] *Id*.
[145] Automobile Transport v. State of Rajasthan, AIR 1962 SC 1406.
[146] *Id.*

of tax under the Amendment violates freedom of trade and commerce without any sound justification.

4. Evaluation under Article 21

Protection of life and personal liberty, except with procedure established by law, has been given wide interpretation by courts over the years. A law must be valid within the constitutional contours.[147] Life is something more than animal existence[148] which includes the right to live with human dignity and bare necessities of life such as nutrition, clothing, shelter and related facilities.[149] *Human dignity* is said to be existing in a society where economic, social and cultural rights are presented to an individual to realise the full potential and also when the economic inequalities disappear.[150]

In the context of a welfare state, several protective measures are expected to ensure rights to persons in distributing the largess of the state.[151] Accordingly, the socio-economic rights are read into the fundamental rights in the context of the humanistic approach of human dignity.[152] Even a decent environment and a reasonable accommodation to live in have been construed to be falling within the scope of "right to life."[153] The right to life of people would be violated if the state of Karnataka is allowed to levy consumption tax.

National Steel Policy, 2017 of the Government of India pushed for increasing the per capita steel consumption as steel demand would grow by 7.2% by 2020-2021, as per Indian Steel Association.[154] The per capita consumption of steel is an important index of the level of socio-economic development and living standards of the people in any country.[155] Due to enhanced power tariff, freight rates, coal prices, the input costs of steel are already on a hike.[156]

[147] Maneka Gandhi v Union of India, (1978) 1 SCC 248.
[148] Munn v. Illinois, 94 U.S. 113 (1877).
[149] Francis Coralie v. Administrator, Union Territory of Delhi, AIR 1981 SC 746.
[150] Samatha v. State of A.P. and Ors., AIR 1997 SC 3297.
[151] Superintendent of Post Offices, Khammam Division and Ors. v. Kalluri Vasayya, 1983 (3) SLR 629.
[152] Jeeja Ghosh and another v. Union of India and others, (2016) 7 SCC 761.
[153] Shantisar Builders v. Narayanan Khimalal Totame (1990) 1 SCC 520.
[154] INDIA BRAND EQUITY FOUNDATION, https://www.ibef.org/industry/steel.aspx (last visited Mar. 11, 2021).
[155] MINISTRY OF STEEL, https://steel.gov.in/sites/default/files/Chapter%20II.pdf (last visited Mar. 11, 2021).
[156] *Id.*

Other industries are closely dependent upon steel producers which contribute to national development.[157] As steel is used in almost all products, from cars to refrigerators, along with extensive use in engineering and construction work, the production of steel is connected with the development of the economy and propelling of the market.[158] Due to this supply chain impact in a wide range of steel-using sectors, steel has an overall impact of US $ 2.9 trillion value addition with 96 million jobs globally.[159]

Hence, taxation on consumers of electricity for steel would further lead to an increase in prices of steel due to a hike in input cost, which would have a spiral effect on the prices of other manufactured goods in the market. Considering the COVID-19 pandemic which has already taken a huge toll on the industrial sector, this added onus shall further weaken the economy of the State, consequently affecting the right to life of citizens. Therefore, due to the aforementioned reason, this amendment shall be violative of Article 21, denying the public their Right to Life.

Assessing Karnataka High Court's judgment on inter-state taxation of electricity

The Apex Court in its recent decision deliberated upon the meaning of *per incuriam* to hold that the term "*per incuriam*" literally means "*through inadvertence*".[160] The Court stated that "*a decision can be considered per incuriam if the Court of Record has acted in ignorance of any of its own previous decision, or a lower court has acted in ignorance of a decision of Court of Record.*"

The Karnataka High Court has erroneously interpreted in the *Vijaya Steels Limited v. Bangalore Electricity Supply Company Limited*[161] that the tax is not levied on the inter-State

[157] Essington Lewis, *The Importance of the Steel and Iron Industry*, *in* 1 AUSTRALIA'S ECONOMY IN ITS INTERNATIONAL CONTEXT: THE JOSEPH FISHER LECTURES 603 (Joseph Fisher ed., 2009).
[158] Construction World, *Global and Indian Steel Industry and its Role in the Development of Economies*, CONSTRUCTION WORLD (Apr. 30, 2020, 08:00 AM), https://www.constructionworld.in/steel-news/Global-and-Indian-steel-industry-and-its-role-in-the-development-of-economies/23547.
[159] Eldar Askerov, *Economic Impact of The Global Steel Industry*, WORLD STEEL ASSOCIATION (May 28, 2019, 09:00 AM), https://www.worldsteel.org/media-centre/blog/2019/economic-impact-of-the-global-steel-industry.html
[160] Hyder Consulting (UK) Ltd. v. State of Orissa, (2015) 2 SCC 189.
[161] Vijaya Steels Limited and Ors. v. Bangalore Electricity Supply Company Limited and Ors., 2017 (1) Kar LJ 7.

trade and commerce but it is levied only on the consumption of electricity in Karnataka. In its judgment, the Karnataka High Court pronounced that the electricity which is wired from outside on open access has not been taxed by the State Government but is taxed on its consumption within the State, which is permissible in law.

However, the position of the Supreme Court with respect to the law was evidently made clear in *NTPCL*, that sale and consumption with respect to electricity are inseparable. The Court clearly stated that any State legislation which levies a tax on the sale of electricity by either artificially or fictionally assuming that sale and consumption has taken place in separate States shall be invalid and consequently vitiated due to extra-territorial operation of State legislation.[162] Thus the mentioned judgment of the Karnataka High Court is *per incuriam.*

Conclusion

As the decision of *NTPCL* applies in cases of inter-State sale and consumption of electricity, by virtue of *stare decisis*, the state legislature cannot levy taxes on such transactions. The Apex Court has not yet taken cognizance of and delved with the issue of consumption separately. Electricity comes under the category of "good" and is a subtle and imponderable fluid, where its sale and consumption takes place simultaneously; hence both these acts cannot be separated. When electricity is sourced from an inter-State open access grid, the transaction becomes inter-State in nature, not liable to be taxed by a State. This is because there is a lack of territorial nexus, due to sale and consumption being inseparable in the open-access regime. Matter of inter-State trade and commerce vests solely under the jurisdiction of Union government, hence by applying the doctrines of interpretation, namely, colourable legislation, pith and substance, and harmonious construction, the Amendment passed by the State of Karnataka is liable to be struck down.

The said Amendment contravenes Article 14 of the Constitution since it does not create a reasonable classification between consumers buying electricity from outside the State and those buying from within the State. This puts consumers sourcing electricity from outside at disadvantage and discriminates against them as they have to bear the burden of tax twice. The

[162] State of Andhra Pradesh v. National Thermal Power Corporation Ltd., (2002) 5 SCC 203.

State enactment is also in violation of Article 19 of the Constitution deterring the parties from conducting business through open access grid. The aforementioned legislation also directly infringes the movement of goods, i.e., electricity, and consequently is in violation of Article 301. Further, Article 21 is also contravened since the tax creates an additional burden upon persons who are already affected by the COVID crisis, thereby violating their right to life. Hence, it is concluded that the said Amendment is unconstitutional.

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PROVISO TO SECTION 44(2) OF THE GOVERNMENT OF NATIONAL CAPITAL TERRITORY OF DELHI ACT, 1991: A CONSTITUTIONAL PERSPECTIVE

Devansh Garg[ר]

Abstract

Recently, the Government of National Capital Territory of Delhi (Amendment) Act, 2021, which amends the Government of National Capital Territory of Act, 1991, received the Presidential assent and became an enacted law. Broadly speaking, the Amendment Act enhances the powers of the Lieutenant Governor and limits the elected government's powers in Delhi. Despite enjoying immense support from the Central Government, the Amendment Act has faced harsh criticism from the Government of Delhi and various legal luminaries. One such amendment made by the Amendment Act to section 44 of the Government of National Capital Territory of Delhi Act, 1991 forms the main subject of this article. The article, along with the amendment made to section 44, discusses in detail the legal and constitutional challenges associated with it. The article is divided into five parts, where Part-I conducts a detailed diagnosis of Article 239AA of the Constitution, Part-II spells out the amendments made by the Government of National Capital Territory of Delhi (Amendment) Act, 2021, Part-III illustrates the functioning of the executive branch of the government of Delhi before the amendment was made to section 44, Part-IV deciphers the amendment made to section 44 and attempts to shed light upon the various legal challenges faced by it, and lastly, Part-V cumulates all the arguments and findings of the article into a conclusion. The article is written in an interpretative style and draws heavily from the 2018 decision of the Supreme Court of India in the Government of National Capital Territory of Delhi v. Union of India.

Keywords: Executive, Article 239AA, Constitution, Supreme Court, Assembly, Council.

[ר] Devansh Garg is a penultimate year law student at Vivekananda Institute of Professional Studies, GGSIP University, New Delhi. His focus areas of study are constitutional law and indirect taxes. Please feel free to contact the author at devanshgarg100@gmail.com.

Constitutional Status of Delhi— State or Union Territory

The fundamental purpose behind inserting Article 239AA in the Constitution of India, as observed by the Hon'ble Supreme Court of India in *Government of National Capital Territory of Delhi v. Union of India*[163] (hereinafter the "*LG Case*"), was to *"...establish a democratic setup and a representative Government [in Delhi] wherein the majority has a right to embody their opinion in laws and policies"*.[164] Delhi, a union territory, was granted special constitutional status in 1991 by Parliament in the exercise of its power under Article 246(4) of the Constitution. Articles 239AA and 239AB were added in Part-VIII of the Constitution (dealing with general provisions for administration of UTs) vide the Constitution (Sixty-ninth Amendment) Act, 1991. As per the Balakrishnan Committee[165], the objective behind the Sixty-ninth Amendment was ensuring *"stability and permanence"* in the national capital.

A nine-Judge Bench of the Supreme Court in the 1999 case of *New Delhi Municipal Corporation v. State of Punjab*[166] held that Delhi, though a "class apart" and not on the same pedestal with other UTs, cannot be considered a State and thus, in substance remains a UT governed by an elected legislature. However, "Union Taxation" being the main issue before the Court in this case, it didn't provide detailed reasoning while making this observation. Article 239AA of the Constitution lays down *'Special provisions with respect to Delhi'* mandating the existence of a legislative assembly, a council of ministers, and a lieutenant governor for governing the affairs of the NCT. In order to analyse the status of Delhi and to truly ascertain whether it is a state or union territory, it is pertinent to study the constitutional mechanism governing Delhi.

1. Legislative Assembly

Clause (1) to Article 239AA renamed Delhi as the National Capital Territory of Delhi (hereinafter "NCT of Delhi"). Article 239AA(2) established a participatory, representative and responsive government in the NCT of Delhi. It provides for the mandatory existence of a

[163] Government of National Capital Territory of Delhi v. Union of India and Another, (2018) 8 SCC 501.
[164] *Id.*
[165] Report of Committee on Reorganisation of Delhi Set-Up, 1989, Ministry of Home Affairs, Report, India.
[166] New Delhi Municipal Corporation v. State of Punjab, (1997) 7 SCC 339.

Legislative Assembly *"chosen by direct elections from territorial constituencies"*.[167] To ensure free and fair elections in Delhi, clause (c) to Article 239AA(2) further provides that provisions pertaining to superintending, directing and controlling the conduct of elections viz. Articles 324 to 327 and 329 under Part XV of the Constitution will be applied in NCT of Delhi, in the same manner, the said provisions apply to other States. This clearly shows the degree of importance attached by the Constitution to the Legislative Assembly of NCT of Delhi.[168]

Clause (3) to Article 239AA defines the powers of the Legislative Assembly. Article 239AA(3)(a) grants the Legislative Assembly the power to legislate over all matters in List-II, except the ones enumerated in Entries 1, 2, and 18 viz. land, public order, and police (and also the matters in Entries 64, 65, and 66 viz. offences, jurisdiction of courts, and fees, inasmuch as they relate to Entries 1, 2, and 18) and overall, the matters under List-III. Parliament has also been granted the power to make laws for NCT of Delhi vide Article 239AA(3)(b) on all the matters enumerated under Lists-II & III, including the ones which are specifically carved out by clause (a) to Article 239AA(3) from the purview of legislative powers of the Assembly (viz. Entries 1, 2, 18, 64, 65, and 66). This indicates that the legislative powers of the Assembly for NCT is not coextensive with that of State Legislatures, as unlike the latter who has exclusive power to legislate over all matters in List-II under Article 246(3), the former does not possess exclusive legislative competence over the List-II subjects. Clause (c) to Article 239AA(3) makes it clear that the doctrine of repugnancy will govern any inconsistency between the laws made by Parliament and those by Legislative Assembly and the law of Parliament is to prevail unless Legislative Assembly's law has received presidential assent.

Hence, from the above discussion it can be concluded that while clause (2) to Article 239AA grants special constitutional status on the Legislative Assembly for NCT coextensive with that of State Legislatures, clause (3) circumscribes the ambit of its legislative powers. Clause (3) does so, firstly by excluding certain subjects from Legislative Assembly's competence and vesting them in Parliament, secondly by *"enabling Parliament to enact law on matters falling*

[167] India Const. art. 239AA, cl. 2.
[168] Government of National Capital Territory of Delhi v. Union of India and Another, (2018) 8 SCC 501.

both in the State and Concurrent lists"[169], and thirdly by subjecting the laws made by the Legislative Assembly to laws which are enacted by the Parliament.

2. Council of Ministers and Lieutenant Governor

While legislative powers with respect to the NCT are dealt with under clause (3) to Article 239AA, executive powers form the subject matter of clause (4). There are majorly two bodies that exercise control over the executive sector in the NCT, i.e., the Council of Ministers and the Lieutenant Governor (hereinafter the "LG").

Article 239AA(2) mandates the existence of a Council of Ministers. It is headed by the Chief Minister and consists of *"not more than ten per cent. of the total number of members in the Legislative Assembly"*.[170] Observing the principle of collective responsibility, Article 239AA(6) provides that the Council shall be collectively responsible to the Legislative Assembly. Both the Council and the Assembly are to act as a *responsible government* in the NCT of Delhi. Clause (1) to Article 239AA, on the other hand, talks about the LG, it says that the Administrator appointed under Article 239 for the NCT of Delhi shall be designated as the LG. Article 239 is a general provision talking about *"Administration of Union Territories"*. It says a union territory is administered by the President through an administrator appointed by them under any designation.[171]

Clause (4) to Article 239AA provides that the Council of Ministers is to aid and advise the LG in relation to matters on which the legislative assembly has the legislative power to make laws.[172] This implies two things, a) executive power of Council of Ministers extends to all subjects on which the Legislative Assembly can legislate and b) *"What is beyond the legislative competence of the Assembly is ultra vires the executive powers of the Council of Ministers"*.[173] Thus, it can be said that the executive powers of the Council are co-extensive with the powers of the Assembly.

[169] *Id.*
[170] India Const. art. 239AA, cl. 4.
[171] India Const. art. 239, cl. 1.
[172] India Const. art. 239AA, cl. 4.
[173] Government of National Capital Territory of Delhi v. Union of India and Another, (2018) 8 SCC 501.

Secondly, as per the Supreme Court, the LG is *bound* by the aid and advice of the Council of Ministers and has to act in accordance with such aid and advice.[174] However, in case of *"any difference"* between the LG and the Council, the LG is granted the power under proviso to clause (4) of Article 239AA to refer the said matter to the President for a binding decision. This means that the LG is bound by the aid and advice of the Council of Ministers so long as they do not exercise their abovementioned power of reference. The Apex Court expounded on the true nature of the said power of the LG and observed:

> *"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… 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."*

The Apex Court, therefore, has considerably narrowed down the scope for LG to refer matters to the President. In reference to this, Chandrachud, J. makes a very important observation that is worth reproducing in the article. He says:

> *"…save and except in regard to areas <u>which are reserved for the exercise of his discretion</u>, the Lieutenant Governor must act on the aid and advice tendered to him by the Council of Ministers."*

The above quoted passage indicates that the LG can exercise their power of making a reference to the President only regarding those matters which are specially and specifically reserved under any law for the exercise of their discretion. The Parliament has been conferred the power to make any such law under clause (7) of Article 239AA.

[174] Government of National Capital Territory of Delhi v. Union of India and Another, (2018) 8 SCC 501.

The proviso to Article 239AA(4) lays down the detailed course of action to be followed in case of any *"difference of opinion"* between the Council and LG. It says that in such a situation the LG is under a constitutional mandate to refer the matter to President, meaning that they cannot take any action as per their personal discretion. As a consequence, to such reference, LG is bound to act in accordance with the decision given by the President. Pending a decision of the President, the LG is empowered to take any action they deem fit, where the matter is of an emergent nature as to require immediate action. Therefore, the LG has two courses of action to follow, i.e., either to act in accordance with aid and advice of the Council or to refer the matter to the President and follow the above procedure. In *New Delhi Municipal Corporation v. State of Punjab,*[175] the Apex Court, while drawing distinction between LG of NCT and an Administrator of Delhi, observed that LG does not possess any special power like that of a governor of state and the status of LG is not akin to that of a Governor of a State rather they remain an Administrator under Article 239.

3. Executive Powers of the Council of Ministers for Delhi vis-à-vis the Union Executive

The Constitution has expressly provided that the executive powers of the Council of Ministers for Delhi extend over all those matters on which the Legislative Assembly for Delhi has the power to make laws. However, this seems to be in contradiction with Article 73. Article 73 of the Constitution defines the *"Extent of executive powers of the Union"*. Clause (a) to Article 73(1) says that the executive powers of the Union extend to all the matters with respect to which Parliament has power to laws. In respect to this, Article 239AA(2) confers concurrent powers on Parliament to make laws for NCT on all matters in List-II and III. This means that the Union, by application of Article 73(1)(a), shall possess executive powers in NCT with respect to all matters under List-II and III. Nonetheless, the Supreme Court rejected this reasoning. Defining the powers of Union over NCT, it observed:

> *"…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*

[175] New Delhi Municipal Corporation v. State of Punjab, (1997) 7 SCC 339.

> *the Delhi Legislative Assembly has legislative powers. Thus, it can be…said that the executive power of the Union in respect of NCT of Delhi is confined to the matters in the State List for which the legislative power of the Delhi Legislative Assembly has been excluded under Article 239AA(3)(a).”*

Thenceforth, the Council of Ministers has exclusive executive powers over all but 6 matters (viz. matters under Entries 1, 2, 18, 64, 65, 66) of List-II and over all matters of List-III, while the Union has executive powers over NCT of Delhi in respect of only those matters on which Legislative Assembly for Delhi does not have powers to make laws. As per the Supreme Court, *“Such an interpretation would thwart any attempt on the part of the Union Government to seize all control”* over NCT of Delhi.

It is pertinent to mention that a proviso is attached to Article 73(1) which says that the executive powers of Union under clause (a) to Article 73(1) do not extend over matters *“with respect to which the Legislature of State has also power to make laws”*.[176] This view is supported by Article 162 of the Constitution which defines the *“Extent of executive powers of the State”*. As per Article 162, *“executive power of a State shall extend to the matters with respect to which the Legislature of the State has power to make laws”*. In *Rai Sahib Ram Jawaya Kapur v. State of Punjab,*[177] the Supreme Court said that:

> *“…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…”*

This means that the executive powers of NCT of Delhi differ from that of the States. This is because the former does not have exclusive executive powers with respect to all matters in List-II, for the Union may exercise executive powers on the matters excluded from the legislative purview of Legislative Assembly for NCT.

[176] Government of National Capital Territory of Delhi v. Union of India and Another, (2018) 8 SCC 501.
[177] Rai Sahib Ram Jawaya Kapur and Ors. v. State of Punjab, AIR 1955 SC 549.

The executive powers of the government of NCT of Delhi are substantially wider as compared to the other union territories. Article 239 provides that every Union Territory is to be administered by the President of India. As per Article 53(1), the powers of the Union executive are vested under the President and shall be exercised by them. This reflects that the Union Territories are under the control of the Union executive through the President. However, the opening words of Article 239 are *"save as otherwise provided by Parliament by law*", which means that Parliament by law can provide different schemes of administration for such Union Territories, i.e., different than what is stated in Article 239.[178] In pursuance of this power, read with Article 246(4), Article 239AA was introduced in the Constitution by Parliament, providing a departure from the then existing structure for governance of Delhi under Article 239. As observed, now Delhi has an executive collectively responsible to the Legislative Assembly, having powers over matters *"with respect to which the Legislature of State has also power to make laws"*, thereby, making it different from the other Union Territories.

Government of National Capital Territory of Delhi (Amendment) Act, 2021

The preceding part of the article provided a brief constitutional background surrounding the NCTD. Now, coming to the "meat of the matter"; the much-debated Government of National Capital Territory of Delhi Bill, 2021[179] (hereinafter the "GNCTD-Bill") after receiving the President's assent on March 27, 2021, became an Act of the Parliament and thus, hereinafter, is referred to as the "GNCTD-Amendment Act" or simply the "Amendment Act". The said Amendment Act amended 4 provisions viz. sections 21, 24, 33, and 44 of the Government of National Capital Territory of Delhi Act, 1991 (hereinafter the "GNCTD Act" or the "Act").

Section 21 of GNCTD Act dealing with *"Restrictions on laws passed by Legislative Assembly with respect to certain matters."* is amended and a new sub-clause (3) is added, which provides that the term "Government" shall mean "Lieutenant Governor" in any law made by the Legislative Assembly for NCT. This amendment is prospective in nature and will be applicable

[178] Government of National Capital Territory of Delhi v. Union of India and Another, 2019 SCC OnLine SC 193.
[179] Government of National Capital Territory of Delhi Bill, 2021, Bill No. 55 of 2021.

to only those laws which will be made by the Legislative Assembly after this amendment is notified by the Central Government in the Official Gazette.[180]

Section 24 contains substantive and procedural laws prescribing mechanism for LG to either assent to a Bill, withhold their assent or reserve the Bill for reference of President. The second proviso to section 24 provides three distinguished grounds upon which LG is prohibited from giving their assent to any Bill passed by the Legislative Assembly and is further directed to reserve such Bill for the consideration of President. The GNCTD-Amendment Act amended this proviso to add one more such ground in Clause (d) to the second proviso to Section 24. As per this ground, the LG is barred to convey their assent to any such bill which deals with matters falling outside the purview of the Legislative Assembly for NCT. It reads *"the Lieutenant Governor shall not assent to, but shall reserve for the consideration of the President, any Bill which…. incidentally covers any of the matters which falls outside the purview of the powers conferred on the Legislative Assembly."*

As per section 33 of the Act, the Legislative Assembly is permitted to make rules of procedure for regulation of the conduct of business in the Assembly. However, this provision stands changed after the amendment made in clause (1) to section 33, inasmuch as it now requires that the rules made by the Legislative Assembly for regulating the conduct of its business must conform to and be consistent with the Rules of Procedure and Conduct of Business in House of People. This section is further amended to prohibit the Legislative Assembly from making any rules to enable itself or its committees from:

i. considering the day-to-day matters of administration of NCT, and;
ii. conducting any inquiry with respect to administrative decisions.

The Amendment Act also amended section 44 of the Act. However, it is discussed in Part-IV of this article. The author feels that except for the amendment made to section 24, all other amendments face certain legal challenges. Nevertheless, this article will discuss only the amendment made to section 44 of the Act.

[180] Government of National Capital Territory of Delhi Act, 1991, No.1, Acts of Parliament, 1991.

Government of National Capital Territory of Delhi Act, 1991- Before Amendment

Before reading the amendment made to section 44 of the Act, it is pertinent to study the functioning of the executive branch of the government of NCT of Delhi in the pre-amendment era of the GNCTD Act. The GNCTD Act was enacted by Parliament in pursuance of the authority given to it under Article 239AA(7)(a) to *"...supplement the provisions of the Constitution relating to the legislative assembly and a Council of Ministers for the National Capital Territory of Delhi"*[181]. This Act is divided into five parts, Part-I deals with preliminary provisions, Part-II with provisions dealing with the Legislative Assembly, Part-III with the delimitation of constituencies, Part-IV with provisions relating to LG and Council of Ministers, and Part-V with certain miscellaneous provisions. This article is primarily concerned with Part-IV of the Act. Part-IV contains five provisions i.e., from sections 41 to 45.

Section 41 of the Act lays down the matters in which the LG shall act in their discretion. The LG can broadly act as per their discretion in two categories of matters, namely: (a) matters which are outside the ambit of legislative powers of the NCT Assembly but in respect of which the President has delegated powers and functions to the LG and (b) matters where the LG is required to act in their discretion by or under any law or under which they exercises judicial or quasi-judicial functions.[182] This means that LG is free from the constitutional mandate of complying with the aid and advice of Council of Ministers on matters coming under section 41. Expanding on this, the Apex Court said, on all other matters, except the ones enumerated under section 41(1), the LG is bound to act as per the aid and advice of the Council.[183] All executive decisions in NCT of Delhi are to be taken in the name of the LG whether taken with or without the aid or advice of the Council of Ministers.[184] Section 44(3), similarly, provides for the manner of authentication of the orders and instruments made and executed in the name of the LG. It further says that the orders or instruments so authenticated shall not be challenged on the ground that they are not made or executed by the LG.

[181] Government of National Capital Territory of Delhi Act, 1991, No.1, Acts of Parliament, 1991, Preamble.
[182] Government of National Capital Territory of Delhi Act, 1991, No.1, Acts of Parliament, 1991, section 41, cl. (1).
[183] Government of National Capital Territory of Delhi v. Union of India and Another, (2018) 8 SCC 501.
[184] Government of National Capital Territory of Delhi Act, 1991, No.1, Acts of Parliament, 1991, section 44, cl. (2).

Section 41(1) of the Act must be read with rules 14 and 23 of the Transaction of Business of the Government of National Capital Territory of Delhi Rules, 1993 (hereinafter the "TB-Rules" or the "Rules"). The TB-Rules were formulated by the President in 1993 in the exercise of his powers under section 44(1)(b) of the Act. Clause (b) to Section 44(1) vests the power to frame rules for the convenient transaction of business among ministers and for laying down the procedure to be followed where there is a difference of opinion between the LG and the Council of Ministers on the President.

Rule 14 of the TB-Rules 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 presiding minister, the said approved decision shall be forwarded by the Council to the LG. Sub-rule (2), on the other hand, vests on ministers the duty to give effect to the decision. It says that when an executive proposal has been approved by the Council, the concerned ministers shall take necessary action to give effect to the decision.

As distinguished from rule 14, rule 23 sets out a list of nine matters which are essential to be submitted to the LG by the Council before issuing any orders. Therefore, ministers can "take necessary action to give effect to the decision" of Council under rule 14(2) in situations except the ones mentioned under rule 23. The Court, in respect of the relationship between rules 14 and 23 of the TB-Rules, observed that[185] various provisions of the TB-Rules cast a duty upon the Council to appraise the LG on matters relating to the administration of NCT of Delhi, however, no provision, either under Article 239AA or under the TB-Rules require the Council to take concurrence of LG before implementing executive decisions taken by it. Rule 14 of TB-Rules, in fact, explicitly indicates that the legal duty of the Council is only to inform, either before the implementation of the decision or after it, and not to seek the concurrence of the LG. Only the matters mentioned under rule 23 are to be submitted to the LG before any orders could be issued on them.

This reasoning of the Supreme Court seems to be in consonance with section 45 of the Act which provides that the Chief Minister has a duty to furnish information to the LG with respect to (a) the decisions of the Council of Ministers relating to the administration of NCT and (b)

[185] Government of National Capital Territory of Delhi v. Union of India and Another, 2019 SCC OnLine SC 193.

information which LG may call for regarding the administration of the affairs of the Capital and proposals for legislation. Therefore, the law broadly casts a duty upon Chief Minister to merely inform the LG, but does not mandate them to seek LG's prior assent before implementing any executive decision.

Amendment to Section 44 of the GNCTD Act

The preceding section showed how the executive procedure roughly worked in NCTD, until section 44 was amended. The amendment to section 44 of the Act adds a proviso to section 44(2) which mandates the Council to take the *"opinion"* of LG *"on all such matters as may be specified by… Lieutenant Governor"* before *"taking any executive action in pursuance of the decision of the Council of Ministers or a Minister"* This means that once the Central Government notifies this amendment, the Council of Minister for NCT will be obligated to take the "opinion" of the LG before issuing any executive action on all such matters which may be notified by them. The forthcoming sections of this article critically examine the various flaws associated with the impugned proviso to section 44(2).

1. Structural Flaws of the Amendment

Before discussing the legal flaws with this amendment, it is pertinent to discuss the structural flaws first. Apropos to this, the said amendment is firstly, *silent upon the time frame* within which the LG shall give their *opinion*. LG can, therefore, go as long as their conscience may instruct them without giving any opinion of theirs, thereby, critically delaying the executive action. This may hamper the smooth functioning of the government which is often tasked with implementing important yet urgent decisions on issues concerning the lives of people. Secondly, there is *no clarity* as to what the term *"opinion"* may amount to in the newly added proviso. On an honest reading of the provision, it tends to indicate that here the term *"opinion"* amounts to some sort of validation or rejection by the LG. In that, the implementation of the executive decision will depend on the LG's validating or a concurring *"opinion"*. The usage of the term *"opinion"* in the impugned proviso, therefore coveys that now the Council is bound to take the validation or concurrence of the LG on all matters specified by them before implementing them.

2. Legal Deformities

As per the Statement of Objects and Reasons to the GNCTD-Bill, *"no structural mechanism [was] provided in the Act for effective time bound implementation of said section [section 44]. Further, there is no clarity as to what proposal or matters are required to be submitted to Lieutenant Governor before issuing order thereon."*[186] After reading part-III of the article, it becomes extremely hard to subscribe to the reasons enlisted by the Government for making the said amendment to section 44. This is because rule 23 of the TB-Rules clearly provides the list of matters which are required to be submitted to the LG before issuing executive orders.

Nonetheless, the impugned amendment fatally frustrates the existing mechanism laid down under the aforementioned legal provisions. It has now been made *compulsory* for the Council to take the opinion of LG *on all* the executive decisions *specified by* LG *before* they are implemented, otherwise, any implementation on the contrary would, by necessary legal implications, lack the authority of law. Earlier, the Council could inform the LG about the decisions taken, either before their implementation or shortly after they had been implemented, except the decisions taken on matters which fall under rule 23 of the TB-Rules (as in these matters the LG must be appraised before the implementation of the decision) and once apprised about the decision, LG was bound to act as per the said aid and advise, i.e. decisions taken by the Council, as far as the decisions so apprised were not related to matters falling under the purview of section 41(1) of the Act, where the LG is not bound by the aid and advise of the Council.

3. Amendment Offends the Collective Responsibility Principle

This amendment also offends the well-known *collective responsibility principl*e. As per the Supreme Court, *"the Westminster style cabinet system of government*" was introduced by Article 239AA in Delhi, like in the rest of the States and the Union. As per Chandrachud, J., the principle of *collective responsibility* is *"a cornerstone of the Westminster model"*. Speaking

[186] Government of National Capital Territory of Delhi Bill, 2021, Bill No. 55 of 2021.

on *collective responsibility*, the Apex Court, in the case of *R.K. Jain v. Union of India,*[187] observed that every member of the Council of Ministers *"has personal responsibility to his conscience and also responsibility to the Government"*. While in *Amrinder Singh v. Special Committee, Punjab Vidhan Sabha,*[188] the Apex Court opined that *collective responsibility principle* makes a government liable for every act it does to the electorate, through the legislature. As per Chandrachud, J., collective responsibility manifests itself in two senses, in that it first makes ministers collectively responsible for the policies of the government and secondly it also makes them collectively responsible for the *work* performed by their government.[189] In *Common Cause, A Registered Society v. Union of India,*[190] the Supreme Court, in the context of Parliament, said, collective responsibility of the Council ensures transparency in government decisions.

Rule 4(1) of the TB-Rules embodies the principle of collective responsibility and says that the Council in NCT of Delhi shall be collectively responsible to the Legislative Assembly. It shall be kept in mind that the LG is merely the titular head of the NCT of Delhi and thus, not collectively responsible to the electorate. The Supreme Court in this context observed that *"If a well deliberated legitimate decision of the Council of Ministers is not given effect to due to… the Lieutenant Governor, then the concept of collective responsibility would stand negated"*. Therefore, allowing the LG to interfere in the implementation of the executive's decisions as per their discretion would unreasonably harm the executive, as the executive would now be answerable to the electorate, through the legislature, for the LG's *opinions*. The powers given to the LG under proviso to section 44(2) empowers them in two ways to unreasonably interfere with the functioning of the executive in Delhi. First, they have been granted the power to notify any matter, which they may think fit, on which Council shall seek their "opinion" before implementing the executive decision taken by it. Secondly, they have been impliedly given the liberty to take as much time as they wish for giving their "opinion" upon the decisions taken by Council. Both these powers are extremely wide and bound to be abused. For any such abuse or misuse of the powers by the LG, the Council and not the LG would be collectively responsible, thereby, harming the principle of collective responsibility.

[187] R.K. Jain v. Union of India and Ors., (1993) 3 SCR 802.
[188] Amrinder Singh v. Special Committee, Punjab Vidhan Sabha, (2010) 6 SCC 113.
[189] Government of National Capital Territory of Delhi v. Union of India and Another, (2018) 8 SCC 501.
[190] Common Cause, A Registered Society v. Union of India and Ors., (1999) 6 SCC 667.

4. Ultra vires the Constitution

It is argued that the impugned proviso to section 44(2) is ultra vires the clause (4) of Article 239AA of the Constitution. Before proceeding with the argument, a relevant extract of the said proviso is reproduced below:

> *"…before taking any executive action in pursuance of the decision of the Council of Ministers… the opinion of Lieutenant Governor in term of proviso to clause (4) of article 239AA of the Constitution shall be obtained..."*[191]

The focus must be kept on the words *"in term of proviso to clause (4) of article 239AA of the Constitution"* in the proviso to section 44(2) of the Act. As seen above, proviso to Art.239AA(4) grants power to LG to only refer any matter to the President upon which there is a difference of opinion between them and the Council. However, the proviso to Article 239AA(4) does not provide the LG with the power to specify matters based on their own will and discretion, upon which their prior opinion must be taken by the Council. This amendment empowers the LG to specify literally any matter which they may think is appropriate. By virtue of this new proviso, the LG may unreasonably enlarge the scope of the matters, on which the Council would be obligated to take their opinion. Chandrachud, J., in the ***LG case*** opined that:

> *"The proviso to Article 239AA(4) 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."*[192]

[191] Government of National Capital Territory of Delhi v. Union of India and Another, (2018) 8 SCC 501.
[192] *Id.*

It is fairly discernible from the above observation of the Supreme Court that the proviso to Article 239AA(4) deals with matters which are of national interest or which impact the very status of NCT of Delhi. Every trivial difference of opinion does not fall in the proviso, meaning that LG's opinion will not mandatorily matter in trivial issues i.e., issues that do not fall under the two abovementioned categories. In such cases, LG will be bound by the aid and advice i.e. the decision of the executive. However, by the impugned amendment the LG has been empowered to include even these trivial issues under the domain of the proviso to section 44(2), thereby, necessitating the executive to take their opinion before the decision could be executed.

The said amendment equips the LG with powers that were not originally granted to them under the Constitution. The amendment clearly travels past Article 239AA(4), ironically though, through which it partakes its quiddity. For this reason, the amendment is called being ultra vires the Constitution. The said change should have only been brought by a constitutional amendment in accordance with Article 368.

5. Underscores Supreme Court's Verdict in the LG Case

Last but not the least, this amendment clearly underscores the Supreme Court's verdict in the *LG case* as well. In this case, the Court observed that the *"real decision-making authority in a democratic form of government vests in the executive"* and the LG is merely the constitutional head of NCT of Delhi and that *"the Lieutenant Governor has not been entrusted with any independent decision-making power [like Governor of a State or the President]. 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."*[193]

Court also observed that *"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."*[194] However, it is argued that the impugned proviso to section 44(2) of the Act steals the decision-making power of the executive from it and gives it to the LG, inasmuch as the LG would now

[193] *Id.*
[194] *Id.*

possess the ultimate power to either validate the decision of the executive or reject it by virtue of their *opinion*. The very fate of the executive decisions now depends on the LG's *opinion*.

In *People's Union of Civil Liberties v. Union of India,*[195] the Supreme Court said that the legislature has no power to set at nought the decisions of the courts. Similarly, in the case of *Assistant Commissioner of Agricultural Income-Tax v. M/s Netley 'B' Estate,*[196] the Apex Court held that *"In exercising legislative power, the legislature by mere declaration, without anything more, cannot directly overrule, revise or override a judicial decision."*

Conclusion

The arguments made under part-IV of the article must be seen in the view of the fact that the Supreme Court had time and again observed the *sui generous* status of the NCT of Delhi and had called it a class apart from the other union territories. However, the impugned proviso to section 44(2) dilutes this *sui generous* status of Delhi as pushes it back towards the old regime of Article 239. Since this amendment offends the principle of collective responsibility, is ultra vires the Constitution, undermines the decision of the Supreme Court of India, and lastly suffers from various structural flaws and legal deformities, it should be struck down. However, one can really do nothing but expect that until corrective measures are taken, the powers granted to LG under this amendment will not be misused, either by themself or by any other person through them, directly or indirectly. That the LG will continue to resolve their differences of opinion with the Council by the process of dialogue and discussion through the course of action prescribed in the TB-Rules. That blind references to the President will not be made on every second matter which comes before the LG, and that the said amendment will not affect co-operative federalism, a concept deeply embedded in our beloved Constitution.

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[195] People's Union of Civil Liberties v. Union of India and Anr., Writ Petition (Civil) 490 of 2002.
[196] Assistant Commissioner of Agricultural Income-tax and Ors. v. M/S. Netley 'B' Estate & Ors., Civil Appeal Nos. 8617-8635 Of 2003.

GOVERNMENT OF NCT OF DELHI V. UNION OF INDIA: A TALE OF TWO JUDGMENTS

Aditya Anand[ר]

Abstract

The 'Government of NCT of Delhi v. *Union of India' judgment delivered by the Constitution Bench of the Supreme Court with respect to the powers of the Lieutenant Governor vis-à-vis the elected government of the union territory of Delhi can be described as a milestone judgment, not only because of the substantial interpretative questions that it answers concerning Article 239AA of the Constitution, but also because of the fact that it is one of those rare constitutional law judgments wherein the Supreme Court undertook a substantial analysis of the various, multi-faceted themes of constitutional theory, such as constitutional morality. However, the impact of the same was short-lived as the state of affairs became murkier after the division bench sat in the year 2019 for deciding certain specific questions of law and issues pertaining to the division of powers. There were several conjectures wherein there was judicial ambiguity and contradictions to what the constitution bench had decided. At certain points, the division bench's judgment can also be seen as tilted in the favour of the centre, which directly affects the federal structure and division of powers between the centre and the state. This paper will give the background of the entire dispute, while covering the overarching themes of both the judgments and the limitations in the approach of the respective Courts. Towards the end, the paper will analyse the judgments from the focal lens of prominent constitutional law scholars Philip Bobbitt and Richard H. Fallon Jr.*

Keywords: federalism; federal governance; Article 239AA; separation of powers; constitutional morality; constitutional theory

[ר] Aditya Anand is a graduate of the National Law University, Delhi. Please feel free to contact the author at aditya.anand16@nludelhi.ac.in for any constructive feedback or suggestions.

Constitutional Morality: Overview & Need

"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."

- Dr. B.R. Ambedkar[1]

1. Overview

The above quote by Ambedkar highlights both the vision as well as the susceptibility that he saw in the Constitution. As per him, constitutional morality would mean effective coordination between the conflicting and myriad interests of people and administrative cooperation to resolve the conflicts amicably without confrontation amongst the various stakeholders.

Over time, constitutional morality has been of paramount reverence for the Constitution. Constitutional morality provides a principled understanding with respect to the task of governance and specifies the norms necessary for the democratic institutions to survive.[2] It also ensures that they function not only as per the text but also as per the soul of the Constitution. It affixes accountability on these institutions and ensures that they represent the true values that have been enshrined in the Constitution .

Recently, we have seen interesting discourses and applications of the same by the Supreme Court in the realm of issues surrounding fundamental rights in several important judgments such as *Navtej Singh Johar,*[3] *Puttaswamy,*[4] *Sabarimala,*[5] etc. The court dwelled upon certain important elements of constitutional morality such as individual liberty, freedom of choice,

[1] AMBEDKAR BHIMRAO RAMJI, ANNIHILATION OF CASTE – AN UNDELIVERED SPEECH, ARNOLD PUBLISHERS, DELHI (1990).
[2] Mohammad Ahmad, *'The Challenge of Constitutional Morality Before the Supreme Court*,' THE LEAFLET, (MARCH 26, 2021), https://www.theleaflet.in/the-challenge-of-constitutional-morality-before-the-supreme-court/.
[3] Navtej Johar v. Union of India, 2018 10 SCC 1.
[4] KS Puttaswamy v. Union of India, 2017 10 SCC 1.
[5] Indian Young Lawyers Association & Ors v. The State of Kerala & Ors, 2019 SCC 11 1.

right to equality etc. In the *Sabarimala* case, the court bypassed the *Doctrine of Essentiality*[6] to uphold the virtue of Constitutional morality.

It was interesting to see the same being made a part of judicial discussions. After all, it was by virtue of constitutional morality that the Basic Structure Doctrine was propounded in the landmark judgment of *Kesavananda Bharti v. Union of India.*[7]

2. Why Constitutional Morality?

Constitutional morality does not just restrict itself to the allegiance of substantive provisions and principles of the Constitution. It signifies a constitutional culture that should be imbibed by every individual in the Indian Democracy.[8] One of the key aspects of constitutional morality is the ability to arrive at decisions on issues in a consensual manner. The Constitutional institutions should, despite all their differences, be a part of the common deliberative process.

This prevents the institutions and the administration from becoming tyrannical while ensuring checks and balances on the power of the majority. The institutions of democracy ought to provide for cooperation and coordination so that constitutional aspirations can be achieved.[9] Hence, the Constitution places duties on individuals who occupy the institutions and offices. Hon'ble Justice Dipak Misra, in the case of *Manoj Narula v Union of India,* [10] held that,

> *"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*

[6] Explained Desk, *Sabarimala order: What is the 'essentiality' test in religious practice?*, THE INDIAN EXPRESS, (MAY 25, 2021), https://indianexpress.com/article/explained/explained-supreme-courts-sabarimala-order-and-the-essentiality-test-in-religious-practice-6119369.

[7] KESAVANANDA BHARATI V. UNION OF INDIA, (1973) 4 SCC 225.

[8] Pratap Bhanu Mehta, *What is constitutional morality?*, INDIA SEMINAR (2010), (December 28, 2020), http://www.indiaseminar.com/2010/615/615_pratap_bhanu_mehta.html.

[9] ANDRE BATEILLE, DEMOCRACY AND ITS INSTITUTIONS (2012).

[10] Manoj Narula v Union of India, (2014) 9 SCC 1.

primary concern to maintain institutional integrity and the requisite constitutional restraints".

Therefore, for upholding constitutional morality, it is important that the constitutional principles are enforced through proper negotiation and accommodation. These principles can also be used to fill the gaps that exist in the text so as to provide completion and enhancement to the spirit of the Constitution. They act as a source of direction for the interpretation of the Constitution and were utilized by the Supreme Court while hearing the case of *Government of NCT Delhi v Union of India,*[11] which revolved around interpretation of Article 239AA of the Constitution. While interpreting the same, the court not only looked into the text and its background but also used constitutional theory, the ideas of constitutional governance, pragmatic federalism, the balance of power, constitutional objectivity and of course, constitutional trust and morality.

The battle for the Capital - How did it start?

1. Federalism & The Changing Dynamics of the Centre-State Relations

Federalism has been a basic feature of our Constitution.[12] Article 245 can be understood as the source behind federalism, which grants powers to the Parliament to make laws for the Union of India and to the State legislatures to make laws for the States.[13] Article 245 in the form of Schedule VII also provides for three lists that mention the subjects on which both the State and Central legislatures have jurisdiction.[14]

The disputes between the Centre and the States have been a burning question with regard to the separation of powers between the two.[15] The outcomes of all those disputes are the fact that the States have certain powers that the Centre *cannot* take away in the ordinary course of business.[16]

[11] Government of NCT Delhi v Union of India, (2018) 8 SCC 501.
[12] Bharati *supra note* 7
[13] INDIA CONST. art. 245.
[14] INDIA CONST. sch 7.
[15] Alok Prasanna Kumar, '*Statehood for Delhi – A Legitimate Demand',* Economic & Political Weekly, Vol.53, Issue No.28, (2018).
[16] COMMITTEE ON REORGANISATION OF DELHI, S. BALAKRISHNAN (BALAKRISHNAN REPORT) 1989.

Talking about the historical origins of the federal structure, the framers of the Indian Constitution divided the States into different classes – Part A, Part B, Part C and Part D States. Not all of these States had a representative form of governance, some were special territorial units that were ruled directly by the Centre. Prominent example being the National Capital Territory of Delhi. After the States Reorganisation Act, 1956 removed the categorization based on Part A, B, C and D, there were two categories left – states and union territories.[17]

2. Post *States Reorganisation Act* & the Balkrishna Committee Report

The Government of Union Territories Act, 1963 was enacted and it provided for Legislative Assemblies and Council of Ministers for various union territories but it was not made applicable to Delhi.[18] There was a Delhi Administration Act, 1966 that was passed later that provided for a limited representative Government for Delhi through a Metropolitan Council. [19]

Finally, in the year 1987, the Balkrishna Committee[20] was set up with the objective of submitting its recommendations about the status to be conferred upon Delhi and the 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. The Committee believed that if Delhi became a full-fledged state, then it would lead to the constitutional division of sovereign, legislative and executive powers, which would make it impossible for the Union to discharge its special functions in relation to the National Capital.[21] If the administration of Delhi is divided into the rigid compartments of Union & State, then it would lead to conflicts over a lot of vital matters, especially, if there are two different political parties, at the Centre and the State.

[17] Nehmat Kaur, *'Delhi, a history of governance: A look back at legal journey 1858 – 2018',* THE LEAFLET, (February 21, 2021), https://www.theleaflet.in/delhi-a-history-of-governance-a-look-back-at-the-legal-journey-from-1858-to-2018/.
[18] The Government of Union Territories Act, 1963, No. 20, Acts of Parliament, 1963 (India).
[19] The Delhi Administration Act, 1966, No. 19, Acts of Parliament, 1966 (India).
[20] Krishandas Rajgopal, *'The Supreme Court Relies on 1987 Report to Declare Delhi Is Not a State',* THE HINDU, (DECEMBER 28, 2020), https://www.thehindu.com/news/cities/Delhi/supreme-court-relies-on-1987-report-to-declare-delhi-is-not-a-state/article24332519.ece.
[21] *Id.*

Delhi was supposed to '*belong*' to the nation as a whole and as it was the seat of National Governance. Hence, Delhi was never accorded the status of a 'State' and was administered by the Lieutenant Governor (LG) appointed by the Central Government. However, with the increasing demand for self-governance, the Constitution in 1991, was amended and Delhi was provided with an elected Legislative Assembly.[22] The Assembly was given the power to legislate for the items in the State list except for three items – police, public order and land.

3. Beginning of the Dispute

Article 239AA introduced two parallel authorities in Delhi. One was the elected Assembly and the second was the appointed Lieutenant Governor. A very important proviso was sub-clause (4) which stated that:

> *"....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"*

This scheme made functioning difficult, depending upon which Government was in power at the Centre and in Delhi. Prior to 2015, for the longest time, the United Progressive Alliance (UPA) which was an alliance comprising of the Indian National Congress, was in power and had the Government both at the Centre and at the state. In 2015, the *Aam Aadmi Party*, led by Arvind Kejriwal came to power with a landslide victory crushing the National Democratic Alliance (NDA), which occupied the annals of power at the centre. This led to continuous rounds of tussles between the Centre and the elected Government.[23]

The Lieutenant Governor of NCT of Delhi and the Union Government were causing hurdles in the functioning of the elected Government of Delhi. The LG was not sending files to the Chief

[22] The Constitution (Sixty-ninth Amendment) Act, 1991, No. 1, Acts of Parliament, 1992 (India).
[23] Pratyush Kumar, *'Asymmetrical Symmetricalism of Indian Constitutional Structure & Practice', Corte Suprema dell' Unione Indiana*. SENTENZA 4 LUGLIO 2018.

Minister on the following three entries of the State List (Schedule VII) – *Police* (Entry 1), *Public Order* (Entry 2) and *Land* (Entry 18) affecting the routine functioning of the Government.[24]

4. Contentions of the Parties & Judicial Recourse

The Delhi Government contended that the NCT of Delhi is tantamount to a full-fledged 'State' as per Article 239AA of the Constitution of India when read with the Government of National Capital Territory of Delhi Act 1991. The Government of NCT claimed to derive its powers from its democratically elected nature and thereby claimed that it was qualified to legislate on State subjects. The LG does not have any independent decision-making power and has to act on the 'aid and advice' of the council of ministers. The Government claimed that the executive power is always 'co-extensive' with the legislative power and just like the President is bound by the '*aid and advice*'[25] of the Union Cabinet, the Governor is bound by the '*aid and advice*' of the council of ministers of the state, similarly the LG is bound by the aid and advice of the democratically elected council of ministers of Delhi.

The second contention was that the provision that has been mentioned above. The proviso stated that the LG can refer *'any matter'* upon which there was a disagreement with the Council of Ministers to the President. While the Central Government contended that the same should be given a literal reading, the Delhi Government contended that '*any matter'*[26] was treated by the LG as 'every matter'[27] and this would vest all the powers with the LG, making him the supreme ruling authority with all the powers getting accumulated with the centre with respect to Delhi.

Interesting aspect is that the Supreme Court has delivered *three* judgments on this matter, of which two judgments were delivered by the benches comprising of Justice Dipak Misra, Justice AK Sikri and Justice AM Khanwilkar while the second judgment was authored by Justice Ashok Bhushan and Justice DY Chandrachud. Both of these judgments were delivered together in the month of July 2018.

[24] INDIA CONST. Schedule VII.
[25] Para 25, *supra* note 11.
[26] Para 44, *supra* note 11.
[27] Para 232, *supra* note 11.

Finally, in the month of February, 2019, a bench comprising of Justice AK Sikri and Justice Ashok Bhushan faced with certain specific issues that were not addressed lucidly in the majority judgment and thereby clarified certain key aspects. This paper will analyse the key elements from all the three judgments.

The Court in all the three judgments reiterated the position that the LG is not a superior authority and is only a representative of the Central Government. The Court also advocated for the executive power vested in the hands of the elected government and observed that the executive power is co-extensive with the legislative power. While on the surface, it appears to back the principles of democracy, political accountability and representative democracy, there should be a closer look given to the same to get a 'clearer' picture, beyond the fog.

A Tale of Two Judgments

1. Constitutional Bench Judgment (2018)[28]

Justice Misra in Para 204[29] of the judgment observed that:

> "*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 the power to legislate for the NCT of Delhi*."

a. First Issue

The then Chief Justice went into the context of Article 239AA and observed that the Constitution specifically provides for the representative structure for Delhi. The executive power of the Union with respect to NCT of Delhi was said to be confined to the three matters in the State List for which the legislative powers of the legislature of Delhi were specifically excluded under Article 239 AA (3).[30]

[28] *supra* note 11.
[29] *supra* note 11.
[30] Para 218, *supra* note 11.

b. Second Issue

As regarding the proviso under Article 239 AA (4)[31] was concerned, Justice Misra observed that the word 'any' if given a literal interpretation would lead to a situation wherein the Central Government through the LG would obstruct the '*stream of governance*.'[32] The Delhi Government suggested that the proviso can be made applicable to only three subjects in the State list and it should have a free hand as far as the other subjects are concerned, but the same was rejected by the Chief Justice, stating that the Constitutional text did not provide for doing so.

c. Taking the Normative Route?

Justice Misra did not address the concern pragmatically but rather ended up giving a normative standard as mentioned in the following para 233[33] of the judgment:

> *"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"*

The paragraph signifies the normative and procedural framework enshrined in the text but does not elaborate much upon the substantial part of it. Interestingly, Justice Chandrachud in his separate opinion tried to give some clarity on the same. In para 141[34] of his opinion, he gives certain scenarios such as issues of policy, financial concerns etc. in which Article 239 AA (4) can be relied on. The same has been produced here for a better understanding -

[31] Para 219, *supra* note 11.
[32] Para 223, *supra* note 11.
[33] *Supra* note 11.
[34] *Supra* note 11.

> *"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."*

The majority opinion did not really place any constraint on the powers of LG as he still had the right to disagree with the Government and to escalate the same to the President for decision. In addition, in Para 284, the majority arrived at 23 *conclusions in seriatim* that talked more about the constitutional principles and less about the interpretation of the text.

2. Division Bench Judgment (2019)[35]

After the Constitution bench set out the principles regarding the interpretation of Article 239AA and defined the scope of the legislative and executive power, in order to address the specific disputes between the parties, the case was reverted to the division bench. Six issues were identified by the division bench in total, which in addition to the Constitutional law questions, dealt with a variety of substantive and procedural laws like the Code of Criminal Procedure, Commission of Inquiry Act, 1952, Delhi Electricity Reforms Act, 2000, Electricity Act. [36] This paper will primarily focus on questions of constitutional law.

a. The 'Services' Issue

The most significant issue was over the subject 'services.' The question was over the control of Government regarding the transfers and postings of the Civil Servants once they are assigned to the Union Territory of Delhi. The Central Government, through certain

[35] 2019 SCC Online SC 193 (Division Bench).
[36] Para 7, *supra* note 32.

notifications, had excluded 'State Public Services and State Public Service Commissions' from the ambit of the Delhi Government.

Justice Sikri on the same case observed that as far as the allocation of personnel belonging to various services is concerned, the Central Government through the Ministry of Home Affairs passes the necessary orders. The Central Government is therefore empowered to transfer personnel from one Union territory to another.
In Para 89[37] of the judgment, he remarked:

> "*The fulcrum of dispute pertains to the control of GNCTD over these personnel after they are allocated to the NCTD. As per GNCTD, it has the power to post such workforce at different places and the LG is to act on the aid and advice of the Council of Ministers. For this purpose, the executive power is sought to be drawn by virtue of Entry 41 of List II in the Seventh Schedule of the Constitution. The submission on behalf of the Union of India is that it comes within the discretionary powers of the LG as the subject matter is not covered by Entry 41 of List II and, therefore, by virtue of Section 41 of GNCTD Act, the LG is empowered to act in his discretion in such a matter*."

b. The Contradictions in the opinion

Justice Sikri, however, gave rise to certain ambiguities as well. First, it was the majority bench which held that barring the three subjects in the state list i.e., *land, police* and *public order*, the legislature had the power to make laws on any other subject in the state list. But now, Justice Sikri raised the contention that Entry 41, which deals with 'State Public Services and State Public Service Commissions' will not apply to Delhi as it did not have a Public Service Commission of its own.[38] The Government of Delhi, even cited the rulings of the Supreme Court which mentioned that with respect to the Indian Administrative Rules (Cadre), 'States' would include Union Territories but Justice Sikri was firm in his opinion. In fact, he seconded the suggestion proposed by Senior Counsel CA Sundaram, which is as follows – [39]

[37] Para 89, *supra* note 32.
[38] Para 86, *supra* note 32.
[39] Para 82, *supra* note 32.

> "*The transfers and postings of Secretaries, HODs and other officers in the scale of Joint Secretary to the Government of India and above can be done by the Lieutenant Governor and the file submitted to him directly. For other levels, including DANICS officers, the files can be routed through the Chief Minister to Lieutenant Governor. In case of difference of opinion between the Lieutenant Governor and the Chief Minister, the view of the Lieutenant Governor should prevail and the Ministry of Home Affairs can issue a suitable notification in this regard."*

Gautam Bhatia describes the same as, "*Solomon ordering the dismemberment of the child instead of settling the dispute over who the mother really was.*"[40] The reason why he uses this phrase to describe the situation is that first of all Sikri contradicted the judgment on which he himself was a signatory, and secondly while answering the question about the distribution of power, he did not substantially 'answer' the issue but made a trite remark that a 'harmonious working relation should exist between the LG and the Chief Minister.'

c. Analysis of other issues decided in favour of the Centre

Another issue of constitutional law was whether the Central Government was within its power to exclude the jurisdiction of the Anti – Corruption Bureau of Delhi to investigate the offences which were committed by the officials of the Central Government.[41] The subject 'Police' was a List II entry that was excluded from the legislative purview of the Delhi legislature. Justice Sikri observed that the subject of 'Criminal Procedure'[42] falls in the concurrent list and that the legislative entries should always be interpreted broadly and liberally which would impute them the widest amplitude including all ancillary as well as subsidiary matters.

Thereby, it was observed that 'police' would not only include the constitution of the force but also supervise and control by issuing directions that would delineate the powers, functions, and

[40] BHATIA, GAUTAM, *JUDICIAL EVASION, JUDICIAL VAGUENESS, AND JUDICIAL REVISIONISM: A STUDY OF THE NCT OF DELHI VS UNION OF INDIA JUDGMENT(S)*, (JUNE 27, 2020).
[41] Para 73, *supra* note 32.
[42] Para 104.

jurisdiction of the different wings of the police. However, despite all this rationale, Justice Sikri relied on the Delhi Police Act and its provisions and held that the power is vested with the Administrator or the LG. [43]

He believed that the CrPC did not provide for a "*parallel jurisdiction*"[44] and any such jurisdiction would result in chaos and anarchy and would frustrate the very purpose of investigation. Justice Sikri vested the power solely in the hands of the Central Government so that there is no confusion in the future and no overlapping of jurisdiction.

Now, this might look like a clear demarcation on the surface but in reality, the balance of power was tilted in the favour of the Central Government. The Court took a wide approach to the contention, to say the least, and answered the same in a very vague and platitudinal manner. The dispute was between two federal units and a broad reading would mean that the powers of one would necessarily encroach upon the power of the other.

While deciding on the other two issues as to whether the word 'State Government' under the Commission of Inquiry (COI) Act, 1952 includes union territories, the court relied on the *Goa Sampling Employees*[45] case and held that there is no concept of state government with respect to union territories. It is interesting to note that the *Goa Sampling* case was decided before the insertion of Article 239AA into the Constitution , thereby, the understanding of 'Union Territory' was very limited at that time. The *sui generis* status of Delhi was not in existence back then, as was stated in the text that, "*every union territory is to be administered by the President*" , therefore the understanding of Justice Sikri was based on this restricted premise.

d. Analysis of issues decided in favour of the NCT of Delhi

The division bench did accord certain important powers to the elected Government and gave the decision in their favour on certain other key issues. For instance, while deciding on the issue pertaining to Delhi Electricity Reforms Act, 2011, the Court held that the 'Appropriate

[43] Para 108, *supra* note 32.
[44] Para 110, *supra* note 32.
[45] Goa Sampling Employees' Association v. General Superintendence Co. Of India Pvt. Ltd., 1985 AIR 357.

Government'[46] under the Electricity Act is different from the 'State Government'[47] under the COI Act. With respect to Delhi, the Delhi Electricity Reform Act 2011 had been enacted by the state legislature and the President accorded his assent to the same.

The Delhi Electricity Regulatory Commission (DERC) was also established to exercise powers under the Act and the Delhi Government has the power to issue directions to the DERC over public policy matters involving public interest. If the term Central Government is read in the definition of "*government*" then this would lead to conflict in the provisions of the DERC Act. Further, the Court also held that the LG cannot appoint the 'Public Prosecutor' under Section 24 of the CrPC without the aid and advice of the council of ministers as the same was considered an executive function as per Section 24(8) of CrPC, whereas the LG alone can decide on judicial and quasi-judicial functions. For legislative and executive functions, the powers were vested in the hands of the elected government, as held by the Constitution Bench.[48]

Further, with respect to the notifications issued under the Indian Stamp Act and Delhi Stamp (Prevention of Under Valuation of Instruments) Rule, 2007, the court held that circle rates are fixed for the purpose of payment of stamp duty and they do not pertain to 'land', namely rights over land, land tenures, transfer of alienation of agricultural land, etc. Stamp duty is not on a duty on the instrument but it is, in reality, a duty on transfer of property. The occasion of levy of stamp duty is the document which is executed as distinguished from the transaction which is embodied in the document.[49]

While the Council of Ministers is well within their rights to issue such notifications, still it cannot be said that the LG is bound to act on the aid and advice of the council of ministers. Even with respect to matters upon which the legislature is competent to make laws, the same needs to be communicated to the LG as per the Constitutional scheme.

Thereby, in a nutshell, certain issues were discussed at length and then were accorded to the

[46] Section 2(5), Electricity Act, 2003.
[47] Section 2(a), Commission of Inquiry Act, 1952.
[48] Para 168, *supra* note 32.
[49] Para 158, *supra* note 32.

domain of Centre or the elected Government of NCT. However, how coherent and rational it was, keeping in mind the judgment of the Constitution bench is an interesting question to ponder upon, in the light of the above-mentioned arguments.

Constitutional theory and Interpretation

1. Constitutional Interpretation, Constitutional Culture & Importance of Constitutional Theory

The task of interpreting the Constitution is extremely important in a democracy. There has to be an expansion of the provisions to align them with modern times, but at the same time, there is a duty on the judiciary to preserve the rights and liberties of the citizens without disturbing the fundamental principles of the Constitution.[50]

Primarily, the approach towards the same was the 'literal rule' which was the normative approach taken for interpreting statutory as well as constitutional provisions. However, the adherence to the literal meaning of words might lead to a lack of flexibility and the requisite 'societal progressive adjustability'. [51]

This is the reason Justice Dipak Misra mentions in the judgment that a bird's eye view[52] is important in order to observe how the American theorists and academicians have approached the science of constitutional interpretation. An interesting observation over here is the usage of the word 'science', which shows that maybe Justice Misra had in his mind certain checkboxes or criteria which would act as parameters in order to bring certain objectivity in the process of providing constitutional interpretation.

Justice Misra also elaborates the fact that the principles of constitutional interpretation occupy a prime place in the method of adjudication. There exist two methods of reading and interpreting the Constitution - *originalist* and *living tree doctrine*. The *originalist* school is of the opinion that the provisions of the Constitution should be interpreted as it was understood

[50] CARDOZO, THE NATURE OF JUDICIAL PROCESS, YALE UNIVERSITY (1921).
[51] BODENHEIMER, EDGAR, JURISPRUDENCE – THE PHILOSOPHY AND METHOD OF THE LAW, HARVARD UNIVERSITY PRESS (1974).
[52] Para 134, *supra* note 11.

at the time of the framing of the Constitution, while being unmindful of the circumstances at the time when it was subsequently interpreted. On the other hand, the *living tree doctrine* prescribes that the constitutional provisions should be interpreted in the light of contemporaneous needs, experiences, and knowledge.[53]

Justice Misra observed that *our Constitution is an organic and living document and the provisions should be interpreted to meet and cover the changing conditions of social and economic life*.[54]

Justice Chandrachud, in his separate opinion, [55] observed that each provision, when placed in the wide canvas of constitutional values can lead to a true understanding of the text. To perceive the Constitution as a mere legal document would thereby be a huge injustice as it is a political document that provides a blueprint for democratic governance. The legislative entries are to be interpreted in a broad or liberal manner consistent with the widest possible meanings.

The room for discretion in the process of constitutional interpretation allows the judges to come up with methods that not only result in solving the disputes but also are in consonance with the spirit of the Constitution and constitutional theory, acting as an important tool in the entire process. Moreover, it reminds the judges that the Constitution was never intended to be a rigid and obstinate document and the concepts present in it are supposed to evolve as per the needs and demands of the situation.

Lastly, it is also important for the courts to take into account the constitutional culture while giving meaning to the provisions to reflect the purpose and objective of the Constitution. 'Constitutional Culture' can be defined as a set of norms and practices that breathe 'life' into the words of the Constitution.[56] The State and the Sovereign usually cultivate the same in the populace, but the Courts also have to be pragmatic in their approach, for fostering the same.

[53] State v Superior Court 103 Ariz. 208 (1968).
[54] Para 163, *supra* note 11.
[55] Para 17, *supra* note 11 (Chandrachud J's Opinion).
[56] Mazzone, J. (2005), *The Creation of a Constitutional Culture, 40* (4), TULSA LAW REVIEW, 671-698.

This can also be done while keeping in mind certain parameters that have been given by various political theorists. The paper would focus on two theorists in this regard – Philip Bobbitt & Richard H. Fallon. After analysing their theory in brief, would try to identify the same in the *NCT of Delhi*[57] judgment.

The reason for choosing these theories is that choosing one out of the two ways of reading the Constitution – *originalist* and *living tree*[58] method has both merits and demerits associated with it, thereby a more holistic approach should be taken to understand the complete spirit of the Constitution. The two scholars provided for more holistic methodologies. In layman terms, their methods tick off the most items in the 'checklist' and make the entire process objective in nature rather than leaving it to the judges for applying their subjective discretion.

2. Bobbitt's Modalities & their application

Philip Bobbitt, [59] in his seminal work on the nature of constitutional theory, came up with six modalities, i.e., the ways in which legal propositions are characterized as true from a constitutional perspective. These are – *historical* (relying on the intentions of the framers and drafters of the constitution), *textual* (looking to the meaning of the words of the Constitution), *structural* (inferring rules from the relationships that the Constitution mandates among the structural setup), *doctrinal* (applying rules by precedent), *ethical* (deriving rules from the moral commitments of the ethos reflected in the Constitution) and *prudential* (seeking to balance the costs and benefits).

The Constitution as well as the Division Bench highlighted the importance of constitutional morality and theories in their respective judgments. Further, the emphasis on various modalities can also be observed throughout the two judgments. Firstly, the court analysed the entire dispute by looking at the *historical*[60] background of Delhi as to how it became the capital in the year 1911 up to the insertion of Article 239 AA in the Constitution. The court went into the

[57] Both the Constitution Bench & the Division Bench.
[58] Miguel Schor, *Contextualizing the Debate Between Originalism & Living Constitution*, LEGAL STUDIES RESEARCH PAPER SERIES, Drake University (12-29).
[59] PHILLIP BOBBITT, THE MODALITIES OF CONSTITUTIONAL ARGUMENT, CONSTITUTIONAL INTERPRETATION 12–22 (1991).
[60] Para 15, *supra* note 32.

entire Part A, B, C, D differentiation which was followed by the differentiation based on states and Union Territory.

As far as the *textual modality* is concerned, the judgments focused on the term 'aid and advise' used in Article 239 AA (4) in order to arrive at the power vested with the LG and it was held that LG did not possess any individual power and has to act on the 'aid and advice' of the council of ministers.[61]

The *structural modality* involved the court going into elaborate discussions about the federal structure[62] which is provided in our Constitution and the same was supported by the *doctrinal modality* by relying upon certain important precedents in order to answer the questions about constitutional interpretation. For instance, the court cited Para 12 of *Ram Jawaya Kapur*[63] while talking about the doctrine of separation of powers with respect to the legislature, executive, and judiciary –

> *"The Indian Constitution has not indeed recognized the doctrine of separation of powers in its absolute rigidity but the functions of the different parts or branches of the Government have been sufficiently differentiated and consequently it can very well be said that our Constitution does not contemplate assumption, by one organ or part of the State, of functions that essentially belong to another. The executive indeed can exercise the powers of departmental or subordinate legislation when such powers are delegated to it by the legislature."*

On coming to *ethical modality*, the Court, while referring to the Balakrishna Committee Report[64] observed the importance which the National Capital and why the framers of the Constitution aimed at keeping the powers vested in the hands of the Union regarding key matters of the State list and why full Statehood was not granted to Delhi. In fact, relying on the *ethical modality* itself, Delhi was granted *sui generis*[65] status.

[61] Para 284, *supra* note 32.
[62] Para 16, *supra* note 11.
[63] Rai Sahib Ram Jawaya Kapur And Ors. vs The State Of Punjab, AIR 1955 SC 549.
[64] Para 16, *supra* note 11.
[65] Para 207, supra note 32.

Lastly, in relation to *prudential modality*, the best example is the division bench's judgment in which Justice Sikri reads the term 'Government' or 'Appropriate Government' in statues like the Electricity Act and Delhi Stamp Rules, but does not read the same in CrPC and Commission of Inquiry Act. In fact, for balancing the costs and benefits, he even excludes 'State Public Services' from the ambit of the Delhi Legislature even though it was a part of the state list and only *land, police* and *public order* were excluded from the ambit of Delhi Legislature as per Article 239AA. The argument which was agreed upon by Justice Sikri was that since Delhi is not a state, it cannot have a State Public Service Commission and only the State Public Service Commission can decide with respect to the postings and transfer of the State Public Service officials.[66]

3. Fallon's Theory & Application

Professor Richard H. Fallon[67], identified five different aspects that should be taken into account by the judges, which are: –

i. Arguments from the plain, necessary or meaning of the constitutional text
ii. Arguments about the intent of the framers
iii. Arguments of constitutional theory that explain either particular provisions or constitutional text as a whole
iv. Arguments based on judicial precedent
v. Value arguments that assert claims about justice and social policy

Fallon insists that judges should play the role of practical lawyers[68] and try to find workable solutions to the institutional, structural and political difficulties. It is the duty of the Supreme Court to not only determine the general moral principles but to implement them as well. This can be seen in application in the *NCT of Delhi* case, wherein not only the five considerations were taken into account by relying on arguments from plain text, argument from original intent, constitutional theory and judicial precedent but the Constitutional Bench of the Supreme Court first decided the moral principles and interpretation of the Constitution and then subsequently the division bench was set up in order to provide for the implementation of the same.

[66] Para 86, supra note 32.
[67] Fallon, *'A Constructivist Coherence Theory of Constitutional Interpretation'*, Vol.100 No. 6 HARVARD LAW REVIEW (April 1987).
[68] FALLON, 'IMPLEMENTING THE CONSTITUTION', HARVARD UNIVERSITY PRESS (2001).

Fallon also provides for doctrinal rules and texts which are essentially the judicial precedents, which are also covered in both the judgments. Certain elements of Fallon and Bobbitt are overlapping but essentially, the judgments by the Constitution Bench as well as the Division bench encapsulated the discussions around the constitutional theory in a holistic manner.

Conclusion

The Constitution Bench judgment can be understood as a normative judgment that did not decide on the practical application of Article 239AA. It is therefore difficult to show glaring discrepancies in them, as much as it is possible to see them in the judgment of the division bench. Justice Sikri, for instance, could not have arrived at the conclusion that he did, if he had relied on the interpretation of the Constitution Bench. Every point that was decided by Justice Sikri could be given two interpretations, in the favour of both the centre as well as the government of NCT Delhi.

The judgments talk about certain important constitutional values but do not list or carve out the pragmatic application of the same. The pronouncements are so vague that they do not place any significant restriction on the powers of the Union. This has failed to put an end to the administrative chaos. A recent example being of the Covid19 pandemic where even though 'Health' is a state list subject, the LG passed orders that had an overriding effect on the orders of the Delhi Government and led to a lot of maladministration. These orders were subsequently reversed.[69] This could have been avoided, if only the Supreme Court had been clearer and had not given a vague judgment.

In addition to that, the division bench highlighted a conundrum in itself wherein Justice Bhushan stated that the Constitution Bench has decided upon the issues in a 'general manner' and that he can ignore the same and can express his own position with respect to the law. Justice Sikri also changed his stance from the Constitution Bench's judgment on certain issues and this is ironical as he himself had signed on that judgment. This shows a lack of clarity of both

[69] Press Trust of India, '*Delhi LG orders mandatory 5-day institutional quarantine'*, FIRSTPOST, (December 31, 2020), https://www.firstpost.com/health/delhi-l-g-anil-baijal-orders-mandatory-5-day-institutional-quarantine-for-covid-19-cases-under-home-quarantine-aap-calls-decision-arbitrary-8504271.html.

the judges regarding the original judgment rendered by the constitution bench and highlights an interesting situation, which can be a terrible precedent for the future. There has to be a common yard-stick in place based on which the judges should approach matters pertaining to constitutional interpretation.

Further, the entire scheme of the decision-making reeks of judicial delay. The notifications and circulars that led to these disputes were issued in the year 2015, the Delhi High Court gave its judgment in 2016[70] and after adjournments through November 2016 – January 2017, the division bench of the Supreme Court referred the matter to the Constitution Bench which took nine months in its hearing and concluded in December 2017.

The Constitution bench took another eight months in delivering its judgment and delivered the same in July 2018. The division bench then held various hearings throughout the months of August – November 2018, in order to decide on the modalities of certain issues, however, when the judgment was given in February 2019, there was a split regarding the issue of 'services.' The three-judge bench assembled to decide on the same but there has not been a substantive hearing so far. The COVID pandemic further delayed the scheme of things. As on the date of writing, the last hearing was made on 18 February 2020.

The disputes started when the AAP government came to power, the first time with a complete majority and continued till the next Delhi Assembly state elections wherein AAP emerged victorious again. One of the Supreme Court's key functions is to resolve constitutional disputes and to settle disputes between different federal units in order to ensure the smooth functioning of the Constitution. But the decisions give an impression of a strong centre, which is highly problematic.

Another prominent delay was also caused in the matter of Aadhaar, where the constitutional challenges were filed in the year 2012 itself but the judgment was only delivered finally came in 2018, which gave a '*Hobson's choice'* to the people to opt-out of the program if they wished

[70] Soibam Singh, *'LG is the boss in Delhi', Delhi HC tells AAP Govt'*, HINDUSTAN TIMES, (December 31, 2020), https://www.hindustantimes.com/delhi-news/court-blow-to-aap-all-delhi-decisions-have-to-go-through-l-g/story-9fB7KV9NgsjgaP9TQyENiJ.html.

but in reality, people could not, as Aadhaar was considered mandatory for availing the subsidies and direct benefits programs by the Supreme Court. This was because there existed a strong Centre and the legislative power was tilted in its favour. There were no checks and balances in place to curb the illegal data collection carried out by the Government before any legal validity was granted to Aadhaar.

Thereby, what appears to be a solution for the federal units and a proper interpretation of the constitutional text, is vague, incoherent and shifts the balance of power to the pavilion of the centre in reality. The same has wide political ramifications as was observed in the Delhi Riots case wherein a lot of tussles took place with respect to the appointment of the Public Prosecutor.[71] This highlighted how helpless the Delhi Government really is; this further affects the system of checks and balances, which the framers intended would have primary importance while drafting the Constitution.

Suggestions

The three limbs of the State – *the legislature, the executive and the judiciary* must remain true to the Constitution by upholding the trust reposed in them by the Constitution. The decisions taken by these functionaries should not only be reasonable but also acceptable as per the constitutional norms. The decisions must be 'constitutionally objective' and should be in synchronisation with the spirit of the Constitution. The Constitution is the supreme instrument providing for the system of checks and balances, that establishes the trust which is to be showcased by all constitutional functionaries.

Thereby, when the Supreme Court delayed the proceedings of matters pertaining to the administration and functioning of one of the key federal units of our federal structure i.e., the NCT of Delhi, it gave a strong impression of an evasion of judicial duties and responsibilities.

[71] Ashish Khetan, *Delhi Riots – LG's Order on Appointment of Prosecutor Smacks of Bad Faith,* THE WIRE, (December 31, 2021), https://thewire.in/government/delhi-riots-lgs-order-on-appointment-of-prosecutors-smacks-of-bad-faith-immorality.

On the surface, both the judgments given by the Supreme Court seem to be balanced, adhering to constitutional principles, theory, morality and suggest a solution that can improve the federal structure, while establishing a strong system of 'checks and balances.' However, a closer observation would communicate the fact that the evasion, delay and vagueness on behalf of the Supreme Court, ended up putting more restraints on the federal unit i.e., the Government of NCT of Delhi and lesser restraints on the Union. This damaged not only the system of checks and balances but also damaged the overall constitutional scheme.

There should be a collaborative federal structure wherein harmonious co-existence and interdependence amongst the Union and State Governments should prevail. The difference of opinions between the Lieutenant Governor and the Council of Ministers should be solved, keeping in mind the standards of constitutional trust and morality and the principle of collaborative federalism, maintaining the constitutional balance.

It is correct that the Union of India has executive powers with respect to the NCT of Delhi relating to certain subjects in the State List but what also needs to be kept in mind is that Article 239AA provides for the Delhi Legislative Assembly the power to make laws as well. The Lieutenant Governor has not been entrusted with any independent decision-making power and has to either act on the 'aid and advice' of Council of Ministers or can make a reference to the President, if not satisfied with the recommendation. However, he is bound to implement the decision given by the President on any reference, that has been made to the President by the Lieutenant Governor.

The Lieutenant Governor should therefore not act in a mechanical or strict manner, without due application of mind. Rather, he should solve the difference of opinions with the Council of Ministers, if any, with affirmative constructionism and sagacity. There should not be any undue obstruction caused by him in the governance of the NCT of Delhi.

The Constitution has been carefully drafted to ensure that there is no scope for any form of 'absolutism' and the constitutional functionaries should also cultivate this understanding by exhibiting the same in their public functioning.

Towards the end, these words which were spoken by Dr. Ambedkar in the Central Hall of the Parliament (among the greatest speeches made in the Indian Parliament) on 25 November 1949, a day before the Constitution was formally adopted, pave way for an interesting after-thought:[72]

> *"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."*

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[72] Dr BR Ambedkar, 'Grammar of Anarchy' Speech, 1949.

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Syamantak Sen

EDITOR-IN-CHIEF

On behalf of the esteemed members of the Editorial Board, the Coordinators, and the Publishing Unit.