REPORTABLE

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

CIVIL APPEAL No. 2357 OF 2017

GOVT OF NCT OF DELHI .....APPELLANT

Versus

UNION OF INDIA ....RESPONDENT

WITH

CONTEMPT PETITION (C) No.175/2016
In

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

CIVIL APPEAL No.2360/2017,

CIVIL APPEAL No.2359/2017,

CIVIL APPEAL No.2363/2017,

CIVIL APPEAL No.2362/2017,

CIVIL APPEAL No.2358/2017,

CIVIL APPEAL No.2361/2017,

CRIMINAL APPEAL No.277/2017,

AND

CIVIL APPEAL No.2364/2017

J U D G M E N T

Dr D Y CHANDRACHUD, J

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A Introduction

1 A batch of petitions in the Delhi High Court addressed unresolved issues between the Lieutenant Governor of the National Capital Territory and its Council of Ministers headed by the Chief Minister. The judgment of the Delhi High Court, delivered on 4 August 2016, travelled to this Court. When the Civil Appeals were heard, a Bench consisting of Hon'ble Mr Justice A K Sikri and Hon'ble Mr Justice R K Agrawal, in an order dated 15 February 2017 was of the opinion that the appeals should be heard by a Constitution Bench as substantial questions of law about the interpretation of Article 239AA of the Constitution are involved.

2 This batch of cases is about the status of Delhi, after the Sixty-ninth constitutional amendment[1], but more is at stake. These cases involve vital questions about democratic governance and the role of institutions in fulfilling constitutional values. The Constitution guarantees to every individual the freedom to adopt a way of life in which liberty, dignity and autonomy form the core. The Constitution pursues a vision of fulfilling these values through a democratic polity. The disputes which led to these cases tell us how crucial institutions are to the realization of democracy. It is through them that the aspirations of a democratic way of life, based on the rule of law, are fulfilled. Liberty, dignity and autonomy are constraining influences on the power of the

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

state. Fundamental human freedoms limit the authority of the State. Yet the role of institutions in achieving democracy is as significant. Nations fail when institutions of governance fail. The working of a democratic institution is impacted by the statesmanship (or the lack of it) shown by those in whom the electorate vests the trust to govern. In a society such as ours, which is marked by a plurality of cultures, a diversity of tradition, an intricate web of social identity and a clatter of ideologies, institutional governance to be robust must accommodate each one of them. Criticism and dissent form the heart of democratic functioning. The responsiveness of institutions is determined in a large measure by their ability to be receptive to differences and perceptive to the need for constant engagement and dialogue. Constitutional skirmishes are not unhealthy. They test the resilience of democracy. How good a system works in practice must depend upon the statesmanship of those who are in decision making positions within them. Hence, these cases are as much about interpreting the Constitution as they are about the role of institutions in the structure of democratic governance and the frailties of those who must answer the concerns of citizens.

3 In the first of a series of articles in the New York Times of 14 December 2017, David Brooks laments events which occurred in various parts of the world, casting a shadow on democracy. Liberal democracy seemed to triumph with the fall of the Berlin wall in 1989 and the dismantling of apartheid in South Africa.

Many of those aspirations are continuously under challenge. The foundation for addressing the aspirations of a democratic spring are reflected in Brooks' article titled – ironically – "the Glory of Democracy". Drawing from Thomas Mann's "The Coming Victory of Democracy" (1938), he has this to say:

> "Democracy, Mann continues, is the only system built on respect for the infinite dignity of each individual man and woman, on each person's moral striving for freedom, justice and truth. It would be a great error to think of and teach democracy as a procedural or political system, or as the principle of majority rule.
>
> It is a "spiritual and moral possession." It is not just rules; it is a way of life. It encourages everybody to make the best of their capacities – holds that we have a moral responsibility to do so. It encourages the artist to seek beauty, the neighbour to seek community, the psychologist to seek perception, the scientist to seek truth.
>
> Monarchies produce great paintings, but democracy teaches citizens to put their art into action, to take their creative impulses and build a world around them. "Democracy is thought; but it is thought related to life and action." Democratic citizens are not just dreaming; they are thinkers who sit on the town council. He quotes the philosopher Bergson's dictum: "Act as men of thought, think as men of action."[2]

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

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

B Constitutional Morality

4 The Constitution was adopted in an atmosphere of expectation and idealism. The members of the Constituent Assembly had led the constitutional project with a commitment to the future of a nascent nation. "India's founding fathers and mothers", Granville Austin observes, "established in the Constitution both the nation's ideals and the institutions and processes for achieving them".[3] These ideals were "national unity and integrity and a democratic and equitable society"[4]. The Constitution was designed "to break the shackles of traditional social hierarchies and to usher in a new era of freedom, equality, and justice"[5]. All this was to be achieved through a democratic spirit using constitutional and democratic institutions.[6]

5 Democracy is not limited to electing governments. It generates aspirations and inspires passions. Democracy is based on "the recognition that there is no natural source of authority that can exercise power over individuals".[7] When India attained independence, it faced a major dilemma. Democracy as an ideal had developed in the course of the nationalist struggle against colonial rule. Democratic political institutions were still to develop, at any rate fully:

> "Democracy emerged in India out of a confrontation with a power imposed from outside rather than an engagement with the contradictions inherent in Indian society … In the West, the democratic and industrial revolutions emerged together,

[3] Granville Austin, The Indian Constitution: Cornerstone of a Nation, Oxford University Press (1966), page xi
[4] Ibid
[5] Rajiv Bhagava (ed.), Politics and Ethics of the Indian Constitution, Oxford University Press (2008), at page 15
[6] Granville Austin (Supra Note 3)
[7] Pratap Bhanu Mehta, The Burden of Democracy, Penguin Books (2003), at pages 35-36

> reinforcing each other and slowly and steadily transforming the whole of society. The economic and social preconditions for the success of democracy grew along with, and sometimes in advance of, the political institutions of democracy. In India, the political argument for democracy was adopted by the leaders of the nationalist movement from their colonial rulers and adapted to their immediate objective which was freedom from colonial rule. The building of new political institutions took second place, and the creation of the economic and social conditions for the successful operation of those institutions, such as education, health care, and other social services, lagged well behind."[8]

6 The framers of the Constitution were aware of the challenges which the newly instituted democracy could face. In his address to the Constituent Assembly, Dr Ambedkar stated: "Democracy in India is only a top-dressing on an Indian soil, which is essentially undemocratic".[9] To tackle these challenges, the Constitution envisaged the existence of a responsible and representative government. Provisions regarding administration of democracy were incorporated, in detail, into the Constitution by the members of the Constituent Assembly. Dr Ambedkar made an impassioned plea that the core values of Indian democracy, to be protected and sustained, ought to be guided by the presence of constitutional morality.

7 While moving the Draft Constitution in the Constituent Assembly on November 4, 1948[10], Dr Ambedkar quoted the Greek historian, Grote:

> "By constitutional morality, Grote meant… a paramount reverence for the forms of the constitution, enforcing obedience to authority and acting under and within these

[8] Andre Beteille, Democracy and its Institutions, Oxford University Press (2012)
[9] Constituent Assembly Debates, Vol. 7 (4th November 1948)
[10] Ibid

> forms, yet combined with the habit of open speech, of action subject only to definite legal control, and unrestrained censure of those very authorities as to all their public acts combined, too with a perfect confidence in the bosom of every citizen amidst the bitterness of party contest that the forms of constitution will not be less sacred in the eyes of his opponents than his own."

Dr Ambedkar made it clear that constitutional morality was to be cultivated and learned. Constitutional morality was not a "natural sentiment" and its diffusion could not be presumed. While highlighting that the diffusion of constitutional morality is indispensable for "the *peaceful working of the democratic constitution",* Dr Ambedkar observed that the form of the Constitution had to be in harmony with the form of its administration:

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

8 If the moral values of our Constitution were not upheld at every stage, the text of the Constitution may not be enough to protect its democratic values. In order to truly understand what constitutional morality reflects, it is necessary to answer "what it is that the Constitution is trying to say" and to identify "the broadest possible range… to fix the meaning of the text"[11]. Bhargava's work

[11] Rajiv Bhagava (Supra note 5), at page 6

titled "Politics and Ethics of the Indian Constitution"[12] focuses on the necessity to identify the moral values of the Constitution:

> "There is… a pressing need to excavate the moral values embedded in the Constitution, to bring out their connections, and to identify the coherent or not-so-coherent ethical worldviews within it. It is not implausible to believe that these values are simply out there, holding their breath and waiting to be discovered. The Constitution is a socially constructed object, and therefore it does not possess the hard objectivity of natural objects. This element of the Constitution is the ground for contesting interpretations. It is high time we identified these interpretations and debated their moral adequacy."[13]

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

> "The Constitution was made possible by a constitutional morality that was liberal at its core. Not liberal in the eviscerated ideological sense, but in the deeper virtues from which it sprang: **an ability to combine individuality with mutual regard, intellectualism with a democratic sensibility, conviction with a sense of fallibility, deliberation with decision, ambition with a commitment to institutions, and hope for a future with due regard for the past and present.**"[14] (Emphasis supplied)

[12] Ibid
[13] Ibid, at page 9
[14] Pratap Bhanu Mehta, "What is constitutional morality?", Seminar (2010), available at http://www.india-seminar.com/2010/615/615_pratap_bhanu_mehta.htm.

One of the essential features of constitutional morality, thus, is the ability and commitment to arrive at decisions on important issues consensually. It requires that "despite all differences we are part of a common deliberative enterprise."[15] It envisages partnership and coordination between various institutions created by the Constitution. Mehta has underlined the importance of constitutional partnerships by referring to the working of the Constituent Assembly:

> "The ability to work with difference was augmented by another quality that is rarer still: the ability to acknowledge true value. This may be attributed to the sheer intellectualism of so many of the members. Their collective philosophical depth, historical knowledge, legal and forensic acumen and sheer command over language is enviable. It ensured that the grounds of discussion remained intellectual. Also remarkable was their ability to acknowledge greatness in others. It was this quality that allowed Nehru and Patel, despite deep differences in outlook and temperament, to acknowledge each other. Their statesmanship was to not let their differences produce a debilitating polarization, one that could have wrecked India. They combined loyalty and frankness."[16]

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

> "Constitutional moralities… can be understood as anticipated norms of behavior or even duties primarily on the part of individuals within our constitutional institutions. We use the term morality and refer to constitutional morality with regard to these norms or duties principally because of the purpose they serve; they can be viewed as imposing an obligation on individuals and institutions to ensure that the constitutional system operates in a coherent way, consistent with its basic principles and objectives."[17]

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

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

> "It is important not to forget that human beings are fallible, that they sometimes forget what is good for them in the long run, and that they yield to temptations which bring them pleasure now but pain later. It is not unknown for people to acquire the mentality of the mob and act on the heat of the moment only to rue the consequences of the decision later. By providing a framework of law culled over from years of collective experience and wisdom, constitutions prevent people from succumbing to currently fashionable whims and fancies. Constitutions anticipate and try to redress the excessively mercurial character of everyday politics. They make some dimensions of the political process beyond the challenge of ordinary politics."[18]

12 No explanation of constitutional morality will be complete without understanding the uniquely revolutionary character of the Constitution itself. Granville Austin has referred to the Indian Constitution as a "social revolutionary" document, the provisions of which are aimed at furthering the goals of social revolution.[19] Austin described the main features of the Indian Constitution as follows:

> "It was to be a modernizing force. **Social revolution and democracy were to be the strands of the seamless web most closely related. Democracy, representative government, personal liberty, equality before law, were revolutionary for the society.** Social-economic equitableness as expressed in the Directive Principles of State Policy was equally revolutionary. So were the Constitution's

[18] Rajiv Bhagava (Supra note 5), at pages 14-15
[19] Granville Austin (Supra note 3), at page 63

> articles allowing abolishing untouchability and those allowing for compensatory discrimination in education and employment for disadvantaged citizens."[20] (Emphasis supplied)

The core of the commitment to social revolution, Austin stated, lies in the Fundamental Rights and in the Directive Principles of State Policy, which are the "conscience of the Constitution" and connect India's future, present, and past.[21] Constitutional morality requires the existence of sentiments and dedication for realizing a social transformation which the Indian Constitution seeks to attain.

13 Constitutional morality highlights the need to preserve the trust of the people in institutions of democracy. It encompasses not just the forms and procedures of the Constitution, but provides an "enabling framework that allows a society the possibilities of self-renewal"[22]. It is the governing ideal of institutions of democracy which allows people to cooperate and coordinate to pursue constitutional aspirations that cannot be achieved single-handedly. Andre Beteille in "Democracy and its Institutions" (2012) speaks of the significance of constitutional morality:

> "To be effective, constitutional laws have to rest on a substratum of constitutional morality… In the absence of constitutional morality, the operation of a Constitution, no matter how carefully written, tends to become arbitrary, erratic, and capricious. It is not possible in a democratic order to insulate completely the domain of law from that of politics. A Constitution such as ours is expected to provide guidance on what should be regulated by the impersonal rule of law and

[20] Ibid, at page xiii
[21] Ibid, at page 63.
[22] Pratap Bhanu Mehta (Supra note 14)

> what may be settled by the competition for power among parties, among factions, and among political leaders. It is here that the significance of constitutional morality lies. Without some infusion of constitutional morality among legislators, judges, lawyers, ministers, civil servants, writers, and public intellectuals, the Constitution becomes a plaything of power brokers."[23]

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

> "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."[24]

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

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

[23] Andre Beteille, Democracy and its Institutions, Oxford University Press (2012)
[24] Constituent Assembly Debates, Vol. 11 (25th November, 1949)

> the soul. But in politics, Bhakti or hero-worship is a sure road to degradation and to eventual dictatorship."[25]

Institution building is thus a facet of constitutional morality. It envisages an institutional basis for political behaviour. It involves that the political parties and the political process address issues affecting the public at large. Constitutional morality reduces the gap between representation and legitimacy.[26] Justice Dipak Misra (as the learned Chief Justice then was) held in **Manoj Narula** v **Union of India**[27] 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 primary concern to maintain institutional integrity and the requisite constitutional restraints".

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

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

[25] Ibid
[26] Sujit Choudhry, Madhav Khosla and Pratap Bhanu Mehta, The Oxford Handbook of the Indian Constitution, Oxford University Press (2016), at page 12
[27] (2014) 9 SCC 1

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

> "Of necessity, constitutions are unfinished. What is explicit in the text rests on implicit understandings; what is stated rests on what is unstated."[28]

16 Constitutional morality provides a principled understanding for unfolding the work of governance. It is a compass to hold in troubled waters. It specifies norms for institutions to survive and an expectation of behaviour that will meet not just the text but the soul of the Constitution. Our expectations may be well ahead of reality. But a sense of constitutional morality, drawn from the values of that document, enables us to hold to account our institutions and those who preside over their destinies. Constitutional interpretation, therefore, must flow from constitutional morality.

C Constitutional Interpretation

17 The primary task before the Court here, as in other constitutional cases, is to interpret the Constitution. This reflects a truism. For, while deciding what the Constitution means, we must understand what it says. First and foremost, in understanding the text of the Constitution, it must be borne in mind that the Constitution is not merely a legal document. The Constitution embodies a political vision of a plural democratic polity. This political vision combines with

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

the values which the founding fathers infused to provide a just social compact in which individual aspirations for dignity and liberty would be achieved. Hence, any interpretation of the Constitution must be unabashed in accepting the importance of the Constitution as a political document which incorporates a blue print for democratic governance. The values which the Constitution as a political document incorporates, provide the foundation for understanding its text. It is in that sense that successive generations of judges have reminded themselves that it is, after all, a Constitution that we are expounding. The words of the Constitution cannot be construed merely by alluding to what a dictionary of the language would explain. While its language is of relevance to the content of its words, the text of the Constitution needs to be understood in the context of the history of the movement for political freedom. Constitutional history embodies events which predate the adoption of the Constitution. Constitutional history also incorporates our experiences in the unfolding of the Constitution over the past sixty eight years while confronting complex social and political problems. Words in a constitutional text have linkages with the provisions in which they appear. It is well to remember that each provision is linked to other segments of the document. It is only when they are placed in the wide canvas of constitutional values that a true understanding of the text can emerge. The principle that the text has to be deduced from context reflects the limitations in understanding the Constitution only as a legal document. To perceive the Constitution as a purely legal document would be an injustice to the aspirations of those who adopted it and a disservice to the experience of our society in

grappling with its intractable problems. Justice HR Khanna in **Kesavananda Bharati** v **State of Kerala**[29] **("Kesavananda")** held thus:

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

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

[29] AIR (1973) SC 1461

19 There are four abiding principles which are essential to understanding the content of the Constitution. The first is that as a political document, the Constitution is an expression of the sovereignty of the people. The second is that the Constitution seeks to achieve its vision of a political and social ordering on the basis of democracy. A democratic form of government recognises that sovereignty resides within the people. Popular sovereignty can exist when democracy is meaningful. The third principle is that the Constitution adopts a republican form of government in which the powers of sovereignty are vested in the people and are exercised directly or through their elected representatives. The fourth, which is not the least in importance, is the secular ideology of the Constitution. For, it is on the foundation of a secular order that freedom, liberty, dignity and equality to every citizen is achieved.

20 These principles, it is well to remind ourselves, are not just political exhortations. They constitute the essence and substance of the Constitution and provide the foundation for the fine print of governance. It is through the expression of popular sovereignty that the Constitution has provided an assurance for the enforcement of equality and of equal protection of the law. The four founding principles constitute the means of achieving accountability and amenability to the rule of law. The democratic method of governing the country is a value which is intrinsic to the Constitution. Democracy as a way of life is also instrumental in achieving fundamental freedoms which the Constitution assures to each individual. Each of the four principles has an

inseparable connect. They provide the basis on which the Constitution has distributed legislative and executive power between the Union and the states. They provide the foundation for ensuring basic human freedoms in the realisation of dignity, liberty and autonomy. They embody the architecture for the governance of the nation. In many respects, the complexity of our Constitution is a reflection of the intricate cultural and social structures within Indian society. The Constitution has attempted to bring about an equilibrium in which a diversity of tradition, plurality of opinion and variations of culture can co-exist in one nation. To ignore the infinite variety which underlies our constitutional culture is to risk its cohesion. The integrity of the nation is founded on accepting and valuing co-existence. Constitutional doctrine must be evolved keeping in mind these principles.

21 Unlike many other constitutional texts in the democratic world, the Indian Constitution has lived through a multitude of amendments. In **Puttaswamy**[30], this Court had held:

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

[30] (2017) 10 SCC 1

The exercise of the amendatory power cannot be construed as a reflection of the deficiency of its original text, as much as it is a reflection of the felt need to create new institutions of governance, recognize new rights and to impose restraints upon the assertion of majoritarian power. Over time, the Constitution was amended to provide constitutional status to local self-governing bodies, such as the Panchayats in Part IX, the municipalities in Part IXA and co-operative societies in Part IXB. These structures of governance have been constitutionally entrenched to enhance participatory and representative democracy. In other amendments, new rights have been expressly recognized such as the right to free and compulsory education for children between the ages of six and fourteen in Article 21A. As the nation gained sobering experiences about the excess of political power during the Emergency, the constituent power responded by introducing limitations (through the Forty Fourth Amendment) on the exercise of the emergency powers under Article 352 and by circumscribing the power to override elected governments in the states under Article 356.

22 The basic structure doctrine was evolved by judicial interpretation in **Kesavananda** to ensure that the fundamentals of constitutional governance are not effaced by the exercise of the constituent power to amend the Constitution. The postulate of the doctrine is that there are values which are so fundamental and intrinsic to the democratic way of life, a republican form of government and to the preservation of basic human freedoms, that these must lie outside the

power of legislative majorities to override by the exercise of constituent powers. The doctrine was a warning to "a fledgling democracy of the perils of brute majoritarianism"[31]. The basic structure doctrine and the power of judicial review have ensured (in the course of the previous thirty four years) the preservation of basic constitutional safeguards and the continuance of constitutional institutions accountable to the sovereignty of the people. The basic structure doctrine imposes a restraint on the exercise of the constituent power. Equally, it is necessary to remember that the exercise of the constituent power may in certain cases be regarded as enhancing the basic structure. The constituent power enhances the basic structure when it recognizes new sets of human freedoms, sets up new structures of representative governance in the constitutional text or imposes restraints on the power of the state to override popularly elected institutions. Secularism, which is inherent in the entire constitutional framework and flows from fundamental rights guaranteed in Part III, is a part of the basic structure of the Constitution.[32] Secularism is based on the foundations of constitutional morality and reflects the idea of our democracy. The insertion of the word "Secular" into the Preamble of the Constitution, by the 42nd amendment, did not redefine the Constitution's identity. The amendment formally recognized the bedrock of the constitutional scheme. The amendment solidified the basic structure of the Constitution.

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

[32] Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225; SR Bommai v. Union of India, (1994) 3 SCC 1

23 Democracy has been held, by a Constitution Bench of this Court in **Kihoto Hollohan** v **Zachillhu**[33], to be a part of the basic structure of our Constitution. The insertion of Article 239AA by the exercise of the constituent power is an instance of an amendment elevating a democratic form of governance to a constitutional status for the National Capital Territory. In interpreting such exercises of the constituent power which fortify the basic structure, the meaning of the constitutional text must be guided by the intent underlying such exercises of the constituent power. A nine-judge Bench of this Court in **I.R. Coelho** v **State of Tamil Nadu**[34] had held thus:

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

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

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[33] 1992 SCC Supl. (2) 651
[34] (2007) 2 SCC 1

D Part VIII of The Constitution: The Union Territories

24 Part VIII of the Indian Constitution, prior to 1956, dealt with Part C of the First Schedule. Part VIII was amended by the Seventh Amendment to the Constitution in 1956. Simultaneously, the First Schedule was amended by the Seventh Amendment (together with Article 1). In place of the Part A, B and C States, the Constitution now provides a division of the territory of the nation between the States and the Union Territories. While clause 1 of Article 1 stipulates that India is a Union of States, clause 2 incorporates the States and the Union Territories of the First Schedule. The territory of India, as Clause 3 of Article 1 provides, comprises of :

(i) The territories of the States;

(ii) The Union territories; and

(iii) Territories which may be acquired.

25 Article 239 provides thus:

> "239. (1) Save as otherwise provided by Parliament by law, every Union territory shall be administered by the President acting, to such extent as he thinks fit, through an administrator to be appointed by him with such designation as he may specify.
>
> (2) Notwithstanding anything contained in Part VI, the President may appoint the Governor of a State as the administrator of an adjoining Union territory, and where a Governor is so appointed, he shall exercise his functions as such administrator independently of his Council of Ministers."

Clause 1 of Article 239 has several elements, which are significant to understanding its content:

(i) Clause 1, as its opening words indicate, is subject to Parliament providing "otherwise… by law";
(ii) Every Union territory is administered by the President;
(iii) Administration of a Union territory by the President is to such extent as the President "thinks fit";
(iv) Administration by the President is through the office of an Administrator; and
(v) The Administrator is appointed by the President with a designation as he will specify.

Article 239A, which was inserted by the fourteenth amendment to the Constitution in 1962, provides as follows:

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

Article 239A applies to the Union territory of Puducherry (Goa, Daman and Diu were excluded with effect from 1987 by the Goa, Daman and Diu Reorganisation Act, 1987).

26 Article 239A is enabling. It enables Parliament to enact a law for the Union territory so as to create a legislature or a Council of Ministers or both. In creating a legislature, Parliament is left free to determine whether the legislative body should be entirely elected or should consist of a certain number of nominated legislators. Parliament, in its legislative power, may decide either to create a legislature or a Council of Ministers. Whether to do so, in the first place, is left to its discretion. Whether one or both of such bodies should be created is also left to the legislative authority of Parliament. If it decides to enact a law, Parliament is empowered to specify the constitutional powers and functions of the legislature and of the Council of Ministers. While the Constitution provides an enabling provision, the setting up of a legislature, the creation of a Council of Ministers and the ambit of their authority are to be governed by an ordinary law to be enacted by Parliament. Such a law, clause 2 clarifies, would not constitute an amendment of the Constitution under Article 368 even if it were to contain provisions which amend or have the effect of amending the Constitution. Creating democratic institutions for governing Union territories under Article 239A was left to the legislative will of Parliament.

27 In contrast to the provisions of Article 239A is the text which the Constitution has laid down to govern Delhi. The marginal note to Article 239AA provides that the Article makes "special provisions with respect to Delhi". Article 239AA provides thus:

> "239AA. Special provisions with respect to Delhi.—
>
> (1) As from the date of commencement of the Constitution (Sixty-ninth Amendment) Act, 1991, the Union territory of Delhi shall be called the National Capital Territory of Delhi (hereafter in this Part referred to as the National Capital Territory) and the administrator thereof appointed under article 239 shall be designated as the Lieutenant Governor.
>
> (2) (a) There shall be a Legislative Assembly for the National Capital Territory and the seats in such Assembly shall be filled by members chosen by direct election from territorial constituencies in the National Capital Territory.
>
> (b) The total number of seats in the Legislative Assembly, the number of seats reserved for Scheduled Castes, the division of the National Capital Territory into territorial constituencies (including the basis for such division) and all other matters relating to the functioning of the Legislative Assembly shall be regulated by law made by Parliament.
>
> (c) The provisions of articles 324 to 327 and 329 shall apply in relation to the National Capital Territory, the Legislative Assembly of the National Capital Territory and the members thereof as they apply, in relation to a State, the Legislative Assembly of a State and the members thereof respectively; and any reference in articles 326 and 329 to "appropriate Legislature" shall be deemed to be a reference to Parliament.
>
> (3) (a) Subject to the provisions of this Constitution, the Legislative Assembly shall have power to make laws for the whole or any part of the National Capital Territory with respect to any of the matters enumerated in the State List or in the Concurrent List in so far as any such matter is applicable to Union territories except matters with respect to Entries 1, 2 and 18 of the State List and Entries 64, 65 and 66 of that List in so far as they relate to the said Entries 1, 2 and 18.
>
> (b) Nothing in sub-clause (a) shall derogate from the powers of Parliament under this Constitution to make laws with

respect to any matter for a Union territory or any part thereof.

(c) If any provision of a law made by the Legislative Assembly with respect to any matter is repugnant to any provision of a law made by Parliament with respect to that matter, whether passed before or after the law made by the Legislative Assembly, or of an earlier law, other than a law made by the Legislative Assembly, then, in either case, the law made by Parliament, or, as the case may be, such earlier law, shall prevail and the law made by the Legislative Assembly shall, to the extent of the repugnancy, be void : Provided that if any such law made by the Legislative Assembly has been reserved for the consideration of the President and has received his assent, such law shall prevail in the National Capital Territory :

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

(4) There shall be a Council of Ministers consisting of not more than ten per cent. of the total number of members in the Legislative Assembly, with the Chief Minister at the head to aid and advise the Lieutenant Governor in the exercise of his functions in relation to matters with respect to which the Legislative Assembly has power to make laws, except in so far as he is, by or under any law, required to act in his discretion : Provided that in the case of difference of opinion between the Lieutenant Governor and his Ministers on any matter, the Lieutenant Governor shall refer it to the President for decision and act according to the decision given thereon by the President and pending such decision it shall be competent for the Lieutenant Governor in any case where the matter, in his opinion, is so urgent that it is necessary for him to take immediate action, to take such action or to give such direction in the matter as he deems necessary.

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

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

(7) (a) Parliament may, by law, make provisions for giving effect to, or supplementing the provisions contained in the

> foregoing clauses and for all matters incidental or consequential thereto.
>
> (b) Any such law as is referred to in sub-clause (a) shall not be deemed to be an amendment of this Constitution for the purposes of article 368 notwithstanding that it contains any provision which amends or has the effect of amending, this Constitution.
>
> (8) The provisions of article 239B shall, so far as may be, apply in relation to the National Capital Territory, the Lieutenant Governor and the Legislative Assembly, as they apply in relation to the Union territory of Puducherry, the administrator and its Legislature, respectively; and any reference in that article to "clause (1) of article 239A" shall be deemed to be a reference to this article or article 239AB, as the case may be."

Article 239AA is a product of the exercise of the constituent power, tracing its origins to the sixty ninth amendment which was brought into force on 1 February 1992. Under clause 1, with the commencement of the Constitution (Sixty Ninth Amendment) Act 1991, the Union Territory of Delhi is called the National Capital Territory of Delhi. Its Administrator, who is appointed under Article 239, is designated as the Lieutenant Governor. The administrator appointed by the President under Article 239(1) is designated as the Lieutenant Governor for the National Capital Territory. The source of the power to appoint the Lieutenant Governor is traceable to Article 239(1).

28 Clause 2 of Article 239AA contains a constitutional mandate that there shall be a legislative assembly for the NCT. This is unlike Article 239A which left it to the discretion of Parliament to create a legislature by enacting a law for the Union territories governed by that provision. Article 239AA imprints the

legislative assembly for the NCT with a constitutional status. Its representative character is reflected in the mandate that the members of the legislative assembly shall be "chosen by direct election from territorial constituencies" in the NCT. The necessity of direct election underlines the rule of participatory democracy and of the members of the legislative assembly being representatives of the people residing in the territorial constituencies comprised in the NCT. Parliament has been assigned the role of regulating through a law, the number of seats in the legislative assembly, reservation for the scheduled castes, defining the division of the NCT into territorial constituencies and of elucidating the functioning of the assembly in all matters. The importance which the Constitution ascribes to the status of the legislative assembly is evinced by the adoption of the provisions of Articles 324 to 327 and 329 in relation to the NCT as they apply in the case of the legislative assembly of a state. These articles (which are contained in Part XV of the Constitution) ascribe constitutional status to the Election Commission of India and assign to it the task of superintending, directing and controlling the conduct of all elections. Article 325 is a guarantee against discrimination based on religion, race, caste or sex. Article 326 embodies the principle of adult suffrage. Article 327 empowers Parliament to enact a law in regard to the elections to the legislatures. Article 329 imposes a restraint on interference by courts in electoral matters. The Constitution has considered the institutional existence of a legislative assembly for Delhi to be a matter of such importance as to be elevated to a constitutional requirement in clause 2 of Article 239AA and to

warrant the guarantee of free and fair elections which is enforced through the constitutionally entrenched position of the Election Commission of India.

29 Clause 3 of Article 239 AA defines the legislative powers of the legislative assembly for the NCT. Sub clause (a) empowers the legislative assembly for the NCT to enact law with respect to any of the matters contained in the State or Concurrent lists to the Seventh Schedule of the Constitution. The ability of the legislative assembly is circumscribed "insofar as any such matter is applicable to Union territories". The legislative assembly can hence enact legislation in regard to the entries in the State and Concurrent lists to the extent to which they apply to a Union territory. Of equal significance is the exception which has been carved out : Entries 1, 2 and 18 of the State List (and Entries 64, 65 and 66 insofar as they relate to Entries 1,2 and 18) lie outside the legislative powers of the legislative assembly of NCT. Entries 1, 2, and 18 of the State List are thus:

> "1. Public order (but not including the use of any naval, military or air force or any other armed force of the Union or of any other force subject to the control of the Union or of any contingent or unit thereof in aid of the civil power).
> 2. Police (including railway and village police) subject to the provisions of entry 2A of List I.
> 18. Land, this is to say, rights in o over land, land tenures including the relation of landlord and tenant, and the collection of rents; transfer and alienation of agricultural land; and improvement and agricultural loans; colonization."

The subjects of public order, police and land do not lie within the domain of the legislative assembly. Entries 64, 65 and 66 provide thus :

"64. Offences against laws with respect to any of the matters in this List.
65. Jurisdiction and powers of all courts, except the Supreme Court, with respect to any of the matters in this List.
66. Fees in respect of any of the matters in this List, but not including fees taken in any court."

The legislative assembly is disabled from enacting laws governing the above entries (which deal with offences against laws referable to the State List, jurisdiction of courts and fees) insofar as they relate to public order, the police and land. This is a constitutional indication of the fact that the NCT has been considered to be of specific importance from the perspective of the nation to exclude three important areas which have a vital bearing on its status as a national Capital. Apart from the exclusions, the over-arching importance of the regulatory power of Parliament is underlined by the conferment upon Parliament of legislative power over State as well as Concurrent List subjects in the Seventh Schedule. Unlike state legislative assemblies which wield legislative power exclusively over the State List, under the provisions of Article 246(3), the legislative assembly for NCT does not possess exclusive legislative competence over State List subjects. By a constitutional fiction, as if it were, Parliament has legislative power over Concurrent as well as State List subjects in the Seventh Schedule. Sub clause (c) of clause 3 of Article 239AA contains a provision for repugnancy, similar to Article 254. A law enacted by the legislative assembly would be void to the extent of a repugnancy with a law enacted by Parliament unless it has received the assent of the President. Moreover, the assent of the President would not preclude Parliament from enacting legislation in future to override or modify the law enacted by the

legislative assembly. Hence, the provisions of clause 2 and clause 3 of Article 239AA indicate that while conferring a constitutional status upon the legislative assembly of NCT, the Constitution has circumscribed the ambit of its legislative Powers firstly, by carving out certain subjects from its competence (vesting them in Parliament) and secondly, by enabling Parliament to enact law on matters falling both in the State and Concurrent lists. Moreover, in the subjects which have been assigned to it, the legislative authority of the Assembly is not exclusive and is subject to laws which are enacted by Parliament.

E Cabinet Form of Government

30 Before deliberating upon the nature and extent of the executive power of the NCT, it is necessary to discuss the essential features of the cabinet form of government, which are of paramount importance in the current context.

Collective Responsibility

31 Collective responsibility is a cornerstone of the Westminster model. Initially developed[35] as a constitutional convention in Britain between 1780 and 1832, it began to appear[36] in text-books in the 1860s and 1870s. In 1867, Walter Bagehot, in his classic work titled “The English Constitution”, called the “House of Commons” as “a real choosing body”, which decides the path that the nation

[35] AH Birch, Representative and Responsible Government, George Allen & Unwin Ltd (1964), at page 131
[36] Ibid, at page 136

would follow.[37] The consequence of such a systemic expectation in the British Parliamentary system, Bagehot declared, was that the public can, "through Parliament, turn out an administration which is not doing as it likes, and can put in an administration which will do as it likes"[38]. The responsibility of Ministers was set as their liability "to have all their public acts discussed in Parliament"[39]. The Cabinet was defined as "a collective body bound together by a common responsibility".[40] Later, Lord Salisbury formulated this common responsibility thus:

> "**[F]or all that passes in a Cabinet, each Member of it who does not resign is absolutely and irretrievably responsible,** and that he has no right afterwards to say that he agreed in one case to a compromise, while in another he was persuaded by one of his Colleagues... It is only on the principle that absolute responsibility is undertaken by every Member of a Cabinet who, after a decision is arrived at, remains a Member of it, that the joint responsibility of Ministers to Parliament can be upheld, and one of the most essential conditions of Parliamentary responsibility established."[41] (Emphasis supplied)

Ministers were liable to lose their offices, if they failed to retain the confidence of the House of Commons or the Parliament.

In the 1880s, Dicey, "Law of the Constitution", propounded that:

> "[It] is now well-established law that the Crown can act only through Ministers and according to certain prescribed forms which absolutely require the co-operation of some Minister, such as a Secretary of State or the Lord Chancellor, who thereby becomes not only morally but legally responsible for

[37] Walter Bagehot, The English Constitution, 2nd Edition (1873), at page 118, available at https://socialsciences.mcmaster.ca/econ/ugcm/3ll3/bagehot/constitution.pdf
[38] Ibid, at page 34
[39] Edward A. Freeman, The Growth of the English Constitution (1872)
[40] Ibid
[41] HL Deb vol 239 cc 833-4, 8 April 1878

> the legality of the act in which he takes part. Hence, indirectly but surely, the action of every servant of the Crown, and therefore, in effect of the Crown itself, is brought under the supremacy of the land. Behind parliamentary responsibility lies legal liability, and the acts of Ministers no less than the acts of subordinate officials are made subject to the rule of law."[42]

This fixed the responsibility of the Cabinet for the "general conduct of affairs"[43] of the government.

32 In the twentieth century, Sir Ivor Jennings conceptualized collective responsibility of a Cabinet Government, thus:

> "A Government that cannot make up its mind on a fundamental issue ought not to be the Government and will be so regarded in the constituencies. Its fall may be regarded as imminent."[44]

The conduct of the cabinet determines the fate of the government.

33 Collective responsibility of Ministers to the Parliament is comprehended in two aspects: (i) collective responsibility of Ministers for the policies of the government; and (ii) individual responsibility of Ministers for the work of their governments.[45] The idea behind this bifurcation, as explained by Birch, is to hold a government "continuously accountable for its actions, so that it always faces the possibility that a major mistake may result in a withdrawal of Parliamentary support."[46] In the British system, collective responsibility work on

[42] Ibid, at page 327
[43] Ibid, at page 420
[44] Ivor Jennings, Cabinet Government, Cambridge University Press (1959), 3rd Edition, at page 279
[45] AH Birch (Supra note 35), at page 131
[46] Ibid, at page 137

basis of certain precepts which define and regulate the existence of government. Geoffrey Marshall (1989) identifies three strands within the principle[47]:

i) *The confidence principle*: a government can only remain in office for so long as it retains the confidence of the House of Commons, a confidence which can be assumed unless and until proven otherwise by a confidence vote;

ii) *The unanimity principle*: all members of the government speak and vote together in Parliament, save in situations where the Prime Minister and the Cabinet themselves make an exception such as a free vote or an 'agreement to differ'; and

iii) *The confidentiality principle*: unanimity, as a universally applicable situation, is a constitutional fiction, but one which must be maintained, and is said to allow frank ministerial discussion within the Cabinet and the Government.

34 A study conducted by the London School of Economics and Political Science in 2007 examined the individual and collective performance of Ministers between 1945-1997. The findings of the study revealed that though the principle acted "as a form of protection for an individual Minister when policies pursued in his department are deemed to have failed", it also induced a cost for being a member of the government. All the Ministers of the

[47] G Marshall, Ministerial responsibility, Oxford University Press (1989), at pages 2-4

government, as a consequence of the principle of solidarity, were perceived as jointly sharing the responsibility of policy failure.[48]

The doctrine of collective responsibility has evolved as one of the indispensable features of the parliamentary system of government and reflects the political engagement between government and Parliament. In a parliamentary democracy, the nuances of the doctrine are political.[49] To maintain the notion of "collegiality and coherence", the ministers work as a team. In the Australian context, **Wanna** (2012) postulates that collective responsibility thereby acts as an under-flowing current necessary for the survival of a government:

> "To survive as a government, ministries must show they can maintain the confidence of the house, put up a credible front to their political opponents and the media, and as a working ministry find ways to deal with the business of state, much of which will involve making collective decisions and imposing collegial executive authority."[50]

35 Granville Austin observes that the framers of India's Constitution conceived that the democratic values of the Constitution would be achieved in "the institutions of direct, responsible government"[51]. The members of the Constituent Assembly borrowed the Parliamentary–Cabinet form of government

[48] Samuel Berlinski, Torun Dewan and Keith Dowding, "Individual and Collective Performance and the Tenure of British Ministers 1945-1997", London School of Economics & Political Science (February 2007), available at http://eprints.lse.ac.uk/19281/1/Individual_and_Collective_Performance_and_the_Tenure_of_British_Ministers_1945-1997.pdf

[49] V Sudheesh Pai, "Is The River Rising Higher Than The Source? Nature Of Rules Business – Directory Or Mandatory?" Journal of Indian Law Institute (2011), at page 513

[50] John Wanna, "Ministers as Ministries and the Logic of their Collective Action", in Keith Dowding & Chris Lewis (eds.), Ministerial Careers and Accountability in the Australian Commonwealth Government, ANU Press (2012), available at http://press-files.anu.edu.au/downloads/press/p191121/pdf/ch023.pdf

[51] Granville Austin (Supra note 3), at page 145

from British constitutional theory and adopted it into our Constitution.[52] Though the Constituent Assembly did not adopt British constitutional conventions in the written form, collective responsibility of the Cabinet was specifically incorporated into India's constitutional framework.[53]

There is a direct relationship between the principle of collective responsibility and government accountability. This relationship is conceptualized in "The Oxford Companion to Politics in India":

> "[A]ccountability can be defined in terms of outcomes rather than processes of government… It also includes the criterion of responsiveness to changes in circumstances that alter citizen needs and abilities… In other words, accountability refers to the extent to which actual policies and their implementation coincide with a normative ideal in terms of what they ought to be… In this broad sense, accountability amounts to evaluating the nature of governance itself, in outcome-oriented terms."[54]

The Oxford Handbook of the Indian Constitution[55] (2016) adverts to several facets of collective responsibility:

> "Collective responsibility has several facets. First, ministers act as a common unit; cabinet decisions are binding on all ministers. Disagreements, if any, may be aired in private. Ministers, however, speak in one voice and stand by one another in Parliament and in public. Those that cannot reconcile themselves with particular government policies, or are unwilling to defend them in public, must resign. Conversely, decisions of particular ministers, unless overruled, are decisions of the government."

[52] Ibid, at page 166
[53] Ibid, at page 172
[54] Dilip Mookherjee, "Government Accountability" in Niraja Gopal Jayal and Pratap Bhanu Mehta (eds.), The Oxford Companion to Politics in India, Oxford University Press (2010), at page 477
[55] Shubhankar Dam, "Executive" in Sujit Choudhry, Madhav Khosla and Pratap Bhanu Mehta (eds.), The Oxford Handbook of the Indian Constitution, Oxford University Press (2016), at page 319

The principle has also been considered as a political component which political parties in power invoke to maintain party discipline.[56]

Collective responsibility also exists in practice in situations where ministers have no knowledge of the actions taken by the subordinate officers of their respective departments:

> "Governing is a complex affair; hundreds of officials in dozens of departments make many decisions on a daily basis… These officials are also part of the executive, and ministers are responsible for those that serve in their departments… Ordinarily, ministers busy themselves with policy issues; matters of implementation are usually left to officials over whom ministers command little or no oversight. Yet, when they act, subordinates notionally do so on behalf of ministers. Ministers, therefore, cannot seek refuge in ignorance. Nor can they absolve themselves by pointing to their officers. Both inside and outside Parliament, they are accountable for their departmental shortcomings."[57]

36 Collective responsibility, as a principle and practice, has been given effect authoritatively in several judgments of this Court. The Constitution Bench of this Court, in **Rai Sahib Ram Jawaya Kapur** v **The State of Punjab**[58], examined the functions of the executive. The Court held that the President is "a formal or constitutional head of the executive" and that the "real executive powers" are vested in the Ministers or the Cabinet:

> "Our Constitution, though federal in its structure, is modelled on the British Parliamentary system where the executive is deemed to have the primary responsibility for the formulation of governmental policy and its transmission into law though the condition precedent to the exercise of this responsibility is its retaining the confidence of the legislative branch of the State…

[56] Ibid
[57] Ibid, at page 320
[58] (1955) 2 SCR 225

> In the Indian Constitution, therefore, we have the same system of parliamentary executive as in England and the council of Ministers consisting, as it does, of the members of the legislature is, like the British Cabinet, "a hyphen which joins, a buckle which fastens the legislative part of the State to the executive part". **The Cabinet enjoying, as it does, a majority in the legislature concentrates in itself the virtual control of both legislative and executive functions; and as the Ministers constituting the Cabinet are presumably agreed on fundamentals and act on the principle of collective responsibility, the most important questions of policy are all formulated by them."** (Emphasis supplied)

The relationship between the responsibility of the Cabinet and individual Ministers was dealt with in a Constitution Bench decision in **A Sanjeevi Naidu** v **State of Madras**[59]:

> "The cabinet is responsible, to the legislature for every action taken in any of the ministries. That is the essence of joint responsibility. That does not mean that each and every decision must be taken by the cabinet. The political responsibility of the Council of Ministers does not and cannot predicate the personal responsibility of the Ministers to discharge all or any of the governmental functions. Similarly an individual Minister is responsible to the legislature for every action taken or omitted to be taken in his ministry. This again is a political responsibility and not personal responsibility."

In **Samsher Singh** v **State of Punjab**[60], Chief Justice AN Ray (speaking for the majority) opined that Ministers must accept responsibility for every executive act:

> "In England, the sovereign never acts on his own responsibility. The power of the sovereign is conditioned by the practical rule that the Crown must find advisers to bear responsibility for his action. Those advisers must have the confidence of the House of Commons. This rule of English Constitutional law is

[59] (1970) 1 SCC 443
[60] (1974) 2 SCC 831

> incorporated in our Constitution. The Indian Constitution envisages a parliamentary and responsible form of Government at the Centre and in the States and not a Presidential form of Government. The powers of the Governor as the Constitutional head are not different."

A seven-judge Bench decision of this Court in **State of Karnataka** v **Union of India**[61] explained the substance of a government's collective responsibility. All the Ministers are treated as one entity. A government could stay in office only so long as it commands the support and confidence of a majority of the Members of the Legislature. The government is politically responsible for the decisions and policies of each of the Ministers and of his department. The sanction against any government action was held to be embodied in the principle of collective responsibility, which is enforced by the "pressure of public opinion" and expressed specifically in terms of withdrawal of political support:

> "The object of collective responsibility is to make the whole body of persons holding Ministerial office collectively, or, if one may so put it, "vicariously" responsible for such acts of the others is are referable to their collective volition so that, even if an individual may not be personally responsible for it, yet, he will be deemed to share the responsibility with those who may have actually committed some wrong."

The decision in **Common Cause, A Registered Society** v **Union of India**[62] delivered by a three-judge Bench held that the concept of collective responsibility is essentially a "political concept" and that the country is governed

[61] (1977) 4 SCC 608
[62] (1999) 6 SCC 667

by the party in power on the basis of the policies endorsed by its Cabinet. The Court held that the concept of collective responsibility has two meanings:

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

The decision in **Subramanian Swamy** v **Manmohan Singh**[63] theorises that collective responsibility may be enforced only politically, thereby making its legal implications unclear. In this case, a Minister was charged with committing grave irregularities in the grant of telecom licenses. The appellant had provided documents to the Prime Minister's Office (PMO) for the grant of sanction to prosecute under the Prevention of Corruption Act, 1988. This Court held:

> "In our view, the officers in the PMO and the Ministry of Law and Justice, were duty bound to apprise Respondent No. 1 [Prime Minister] about seriousness of allegations made by the Appellant… By the very nature of the office held by him, Respondent No. 1 is not expected to personally look into the minute details of each and every case placed before him and has to depend on his advisers and other officers. Unfortunately, those who were expected to give proper advice to Respondent No. 1 and place full facts and legal position before him failed to do so. We have no doubt that if Respondent No. 1 had been apprised of the true factual and legal position regarding the representation made by the Appellant, he would have surely taken appropriate decision and would not have allowed the matter to linger for a period of more than one year."

[63] (2012) 3 SCC 64

The decision implied that "individual ministerial decisions… do not always generate collective legal responsibilities"[64].

37 Collective responsibility represents a seminal principle for modern parliamentary democracies.[65] Collective responsibility of the Council of Ministers ensures accountability to the legislature and to the electorate. Collective responsibility governs the democratic process, as it makes a government liable for every act it does. It envisages that a government works effectively to ensure and fulfil the interests of the public. It purports to ensure transparency in government decisions. Collective responsibility rests on the foundations of constitutional morality, which reflects constitutional ethics.

Aid and Advice

38 Collective responsibility under our Constitution is based on a "slightly modified version"[66] of the British cabinet system. There is a direct relationship between collective responsibility and the form of government envisaged by the Constitution. The President was designated as the titular head of government. The founding fathers and mothers of the Constitution adopted the convention which made the President generally bound by the advice of the Council of

[64] The Oxford Handbook of the Indian Constitution (Supra note 52), at page 320
[65] See also Amarinder Singh v Special Committee, Punjab Vidhan Sabha, (2010) 6 SCC 113; Krishna Kumar Singh v State of Bihar, (2017) 3 SCC 1; State of Himachal Pradesh v. Satpal Saini, 2017(2) SCALE 292
[66] Granville Austin (Supra note 3), at page 145

Ministers. This was explained by Dr B R Ambedkar, while introducing the Draft Constitution on 4th November 1948.

> "Under the Draft Constitution the President occupies the same position as the King under the English Constitution. He is the head of the State but not of the Executive. He represents the Nation but does not rule the Nation. He is the symbol of the nation. His place in the administration is that of a ceremonial device on a seal by which the nation's decisions are made known… **The President of the Indian Union will be generally bound by the advice of his Ministers. He can do nothing contrary to their advice nor can he do anything without their advice. The President of the United States can dismiss any Secretary at any time. The President of the Indian Union has no power to do so long as his Ministers command a majority in Parliament…**
>
> A democratic executive must satisfy two conditions - (1) It must be a stable executive and (2) it must be a responsible executive. Unfortunately it has not been possible so far to devise a system which can ensure both in equal degree…
>
> In England, where the Parliamentary system prevails, the assessment of responsibility of the Executive is both daily and periodic. The daily assessment is done by members of Parliament, through questions, Resolutions, No-confidence motions, Adjournment motions and Debates on Addresses… The daily assessment of responsibility which is not available under the American system is it is felt far more effective than the periodic assessment and far more necessary in a country like India. **The Draft Constitution in recommending the Parliamentary system of Executive has preferred more responsibility to more stability.**"[67] (Emphasis supplied)

Shri Alladi Krishnaswami Ayyar agreed with Dr Ambedkar:

> "…that the Council of Ministers shall be collectively responsible to the House of the People. If a President stands in the way of the Council of Ministers discharging that responsibility to the House he will be guilty of violation of the Constitution and he will be even liable to impeachment. Therefore **it is merely a euphemistic way of saying that the President shall be guided by the advice of his Ministers in the exercise of his functions. This Council of Ministers will be collectively**

[67] Constituent Assembly Debates, Vol. 7 (4th November 1948)

> **responsible to the House of the People, and the House of the People must meet all situations in regard to the budget, in regard to legislation, in regard to every matter connected with the administration of the country. Therefore, if the Council of Ministers is to discharge their responsibility, it will be the duty of the President to see that the Constitution is obeyed**…"[68](Emphasis supplied)

As the Chairman of the Constituent Assembly, Dr Rajendra Prasad expected the convention to be developed into a healthy practice in independent India:

> "We have had to reconcile the position of an elected President with an elected Legislature and, in doing so, we have adopted more or less the position of the British Monarch for the President… [H]is position is that of a Constitutional President.
>
> Then we come to the Ministers. They are of course responsible to the Legislature and tender advice to the President who is bound to act according to that advice. Although there are no specific provisions, so far as I know, in the Constitution itself making it binding on the President to accept the advice of his Ministers, **it is hoped that the convention under which in England the King acts always on the advice of his Ministers will be established in this country also and, the President, not so much on account of the written word in the Constitution, but as the result of this very healthy convention, will become a Constitutional President in all matters.**"[69] (Emphasis supplied)

The Constitution makers envisaged and adopted a limited role for the President as the nominal head of the Indian State and imposed sanctions on his or her constitutional authority by making them bound by the decisions of the Council of Ministers generally. A similar role was adopted for the Governor in the States.

[68] Ibid
[69] Constituent Assembly Debates, Vol. 11 (26th November, 1949)

39 After the Constitution had come into force, this Court gave judicial sanction to the convention. In **U.N.R. Rao** v **Smt. Indira Gandhi**[70], the Constitution Bench held:

> "It will be noticed that Article 74(1) is mandatory in form. We are unable to agree with the appellant that in the context the word "shall" should be read as "may". Article 52 is mandatory. In other words there shall be a President of India.... The Constituent Assembly did not choose the Presidential system of Government. If we were to give effect to this contention of the appellant we would be changing the whole concept of the Executive. It would mean that the President need not have a Prime Minister and Ministers to aid and advise in the exercise of his functions. As there would be no 'Council of Ministers' nobody would be responsible to the House of the People. With the aid of advisers he would be able to rule the country at least till he is impeached under Article 61… Article 74(1) is mandatory and, therefore, the President cannot exercise the executive power without the aid and advice of the Council of Ministers. We must then harmonise the provisions of Article 75(3) with Article 74(1) and Article 75(2). Article 75(3) brings into existence what is usually called "Responsible Government"."

In **Samsher Singh** v **State of Punjab**[71], while dealing with the question whether the Governor as the Constitutional or the formal head of the State can exercise powers and functions of appointment and removal of members of the subordinate judicial service personally, Chief Justice AN Ray delivered the majority judgment, holding that:

> "The President as well as the Governor is the constitutional or formal head. The President as well as the Governor exercises his powers and functions conferred on him by or under the Constitution on the aid and advice of his Council of Ministers, save in spheres where the Governor is required by or under the Constitution to exercise his functions in his discretion. Wherever the Constitution requires the satisfaction of the

[70] (1971) 2 SCC 63
[71] (1974) 2 SCC 831

> President or the Governor for the exercise by the President or the Governor of any power or function, the satisfaction required by the Constitution is not the personal satisfaction of the President or Governor but the satisfaction of the President or Governor in the Constitutional sense in the Cabinet system of Government, that is, satisfaction of his Council of Ministers on whose aid and advice the President or the Governor generally exercise all his powers and functions. The decision of any Minister or officer under rules of business made under any of these two Articles 77(3) and 166(3) is the decision of the President or the Governor respectively. These articles did not provide for any delegation. Therefore, the decision of Minister or officer under the rules of business is the decision of the President or the Governor."

The Court summed up the position of law as follows:

> "[W]e hold that the President or the Governor acts on the aid and advice of the Council of Ministers with the Prime Minister at the head in the case of the Union and the Chief Minister at the head in the case of State in all matters which vests in the executive whether those functions are executive or legislative in character. Neither the President nor the Governor is to exercise the executive functions personally… Where the Governor has any discretion the Governor acts on his own judgment. The Governor exercises his discretion in harmony with his Council of Ministers."

Justice Krishna Iyer, on behalf of himself and Justice PN Bhagwati, delivered a concurring opinion.

40 The convention that the President shall be bound by the aid and advice tendered by the Council of Ministers was explicitly made a part of the Constitution by the forty-second constitutional amendment. By the amendment, Article 74(1) was amended to ensure that the President shall, in the exercise of

his functions, act in accordance with the advice tendered by the Council of Ministers. Article 74(1) reads thus:

> "There shall be a Council of Ministers with the Prime Minister at the head to aid and advise the President who shall, in the exercise of his functions, act in accordance with such advice."

The Forty-fourth Constitution Amendment added another proviso to Article 74 (1) so that the "President may require the Council of Ministers to reconsider such advice, either generally or otherwise, and the President shall act in accordance with the advice tendered after such reconsideration". Therefore, the position which emerges is that where it has not been expressly provided, the executive head shall be bound by the advice tendered by the Council of Ministers. This constitutional scheme, after the forty-second and forty-fourth amendments, has been judicially reaffirmed. Authoring the judgment of the Constitution Bench in **PU Myllai Hlychho** v **State of Mizoram**[72], Justice KG Balakrishnan (as he then was) held that the "satisfaction" of the Governor required by the Constitution for the exercise of any power or function is not the personal satisfaction of the Governor but a satisfaction in the constitutional sense under the Cabinet system of Government, i.e. on the aid and advice of the Council of Ministers.

Justice Madan B Lokur, while delivering the concurring opinion in the five-judge Constitution Bench decision in **Nabam Rebia and Bamang Felix** v **Deputy Speaker, Arunachal Pradesh Legislative Assembly**[73], opined that the

[72] (2005) 2 SCC 92
[73] (2016) 8 SCC 1

absence of the expression "his individual judgment" makes it apparent that the Governor would always be bound by the aid and advice of the Council of Ministers, except in matters where he/she is permitted under the Constitution to act "in his discretion".

41 Collective responsibility and aid and advice are mutually reinforcing principles. Each of them and both in conjunction affirm and enhance the democratic values on which the Cabinet form of government is founded. Collective responsibility ensures that government speaks as one political entity which owes allegiance to the elected representatives of the people. By ensuring that government is responsible in its decision making to the legislature, the principle of collective responsibility fosters a responsive and accountable government. Modern government, with its attendant complexities, comprises of several components and constituent elements. They include Ministers who are also elected as members of the legislature and unelected public officials who work on issues of daily governance. Discussion and dialogue are accepting of dissent. In a system of constitutional governance, collective decision making must allow room for differences. A synthesis can emerge in government, when political maturity and administrative wisdom combine in arriving at acceptable solutions to the problems of governance. Collective responsibility allows for and acknowledges differences in perception and ideology. Yet, what the doctrine does is to place a decision taken by a constituent part of the government as a decision of the government. All Ministers are bound by a decision taken by one

of them or their departments. In terms of its accountability to the legislature, government is treated as one decision making unit so that the politics of decision making and administrative divergences do not dilute from the responsibility which government owes as a political unit to the legislature. This is crucial to ensuring that government is responsive to the aspirations of the people in whom political sovereignty resides.

42 In **Kihoto Hollohan** v **Zachillhu**[74], Chief Justice Venkatachaliah speaking for this Court had held thus:

> "Parliamentary democracy envisages that matters involving implementation of policies of the Government should be discussed by the elected representatives of the people. Debate, discussion and persuasion are, therefore, the means and essence of the democratic process. During the debates the Members put forward different points of view. Members belonging to the same political party may also have, and may give expression to, differences of opinion on a matter. Not often the view expressed by the Members in the House have resulted in substantial modification, and even the withdrawal, of the proposals under consideration. Debate and expression of different points of view, thus, serve an essential and healthy purpose in the functioning of Parliamentary democracy."

43 The doctrine of aid and advice enhances the commitment to the same democratic values which form the basis of collective responsibility. The mandate that a titular head of government must act on the aid and advice of the Council of Ministers ensures that the form of democratic governance (decision making in the name of a titular head) is subservient to its substance, which

[74] 1992 SCC Supp. (2) 651

mandates that the real authority to take decisions must reside in the elected arm of the government. The doctrine of aid and advice enhances accountability and responsive government – besides representative government – by ensuring that the real authority to take decisions resides in the Council of Ministers, which owes ultimate responsibility to the people, through a legislature to whom the Council is responsible. Collective responsibility and the aid and advice doctrine must not be construed as disjunctive but together constitute integral parts of the discourse in ensuring the strength of and commitment to democracy.

F The Nature of Executive Power

44 While the legislative power in relation to the NCT is defined in clauses 2 and 3, its executive power forms the subject matter of clause 4 of Article 239AA. Clause 4 institutionalises the position of the Council of Ministers with a Chief Minister as its head. The constitutional role which is ascribed to the Council of Ministers is to aid and advise the Lieutenant Governor "in the exercise of his functions in relation to matters with respect to which the legislative assembly has power to make laws". There are three salient features of the executive power which is vested in the Council of Ministers. Firstly, the executive power is co-extensive with the legislative power of the legislative assembly. The executive power extends to all subjects upon which the assembly can legislate. The executive power of the Council of Ministers does not extend to matters on which the legislative assembly cannot legislate. What is beyond the legislative

competence of the Assembly is *ultra vires* the executive powers of the Council of Ministers. Secondly, the delineation of the executive power in clause 4 defines, at the same time, the relationship between the Council of Ministers (headed by the Chief Minister) and the Lieutenant Governor. The Council of Ministers aids and advises the Lieutenant Governor; the corollary being that the Lieutenant Governor has to act on the basis of the aid and advise tendered by the Council. Thirdly, the exception to the aid and advice principle in the substantive part of clause 4 is in respect of those matters in which the Lieutenant Governor is required to act in its discretion "by or under any law". In other words, save and except in regard to areas which are reserved for the exercise of his discretion, the Lieutenant Governor must act on the aid and advice tendered to him by the Council of Ministers.

45 The proviso to clause 4 forms the bone of contention. The proviso envisages a situation where the Lieutenant Governor has a difference of opinion with the Council of Ministers "on any matter". In such a case, the proviso entails the course of action which the Lieutenant Governor must follow. The Lieutenant Governor is under a constitutional mandate to refer the difference of opinion to the President for decision. As a consequence, the Lieutenant Governor must necessarily act according to the decision "given thereon" by the President. Pending a decision by the President, the Lieutenant Governor is empowered to take action or to issue directions where the matter is of such an emergent nature as to require immediate action. The heart of the matter turns upon interpreting

the expression “difference of opinion” and the words “on any matter”. Clause 4 does not specify what kind of a difference of opinion would warrant a reference to the President. Nor for that matter, does it explain the nature of the matter on which a difference of opinion is contemplated. Before we interpret the ambit of the proviso to clause 4, one facet is clear. Where a difference of opinion has arisen, warranting a reference to the President, the proviso leaves the course of action to be followed by the Lieutenant Governor beyond doubt. In a situation where the conditions under the proviso exist, the Lieutenant Governor has to refer the matter to the President and must abide by the decision of the President. Reading the substantive part of clause 4 and the proviso, it is thus evident that the Lieutenant Governor has two courses of action to follow. Primarily, under the substantive part of clause 4, the Lieutenant Governor is bound by the aid and advice of the Council of Ministers (the only exception being where under a provision of law, he has to act according to his own discretion). However, the embargo upon the Lieutenant Governor acting otherwise than on the aid and advice of the Council of Ministers is lifted only to enable him to refer a difference of opinion on any matter for a decision by the President. In other words, the Lieutenant Governor must either abide by the aid and advice tendered by the Council of Ministers or, in the event of a difference of opinion, reserve it for a decision by the President and thereupon be bound to act in accordance with the decision which has been rendered by the President. Pending the decision by the President, the proviso enables the Lieutenant Governor to attend to a situation requiring immediate action.

46 Before elucidating the nature and ambit of the relationship between the (i) Council of Ministers and the Lieutenant Governor; and (ii) the Lieutenant Governor and the President, it would be necessary to advert to some of the other provisions of Article 239AA which have a bearing on those relationships. The Lieutenant Governor, as we have noted earlier, is appointed by the President under Article 239(1) read with Article 239AA(1). The Chief Minister is appointed by the President, while the other ministers are appointed by the President on the advice of the Chief Minister. They hold office during the pleasure of the President (clause 5). The concept of collective responsibility of the Council of Ministers to the legislative assembly is expressly embodied in clause 6. A comparative analysis of the provisions of the Constitution relating to the Council of Ministers in the Union and the States indicates that in the case of the NCT, Article 239AA has engrafted the fundamental precept of the collective responsibility of an elected government in a cabinet form of government to the elected legislature. Creating an executive power in government which is co-extensive with the legislative power of the elected legislature and the collective responsibility of the Council of Ministers to the legislature are intrinsic to the cabinet form of government.

47 Parliament has, by clause 7 of Article 239AA, been empowered to make provisions to implement and to supplement the other provisions of that Article. Any law enacted by Parliament to do so would not amount to a constitutional

amendment within the meaning of Article 368 even if it amends or has the effect of amending any provision of the Constitution.

48 Article 239AB enunciates the course of action which the President is empowered to follow where there has been a failure of constitutional machinery in the NCT. Article 239AB provides as follows:

> "239AB. Provision in case of failure of constitutional machinery.—If the President, on receipt of a report from the Lieutenant Governor or otherwise, is satisfied—
>
> (a) that a situation has arisen in which the administration of the National Capital Territory cannot be carried on in accordance with the provisions of article 239AA or of any law made in pursuance of that article; or
>
> (b) that for the proper administration of the National Capital Territory it is necessary or expedient so to do, the President may by order suspend the operation of any provision of article 239AA or of all or any of the provisions of any law made in pursuance of that article for such period and subject to such conditions as may be specified in such law and make such incidental and consequential provisions as may appear to him to be necessary or expedient for administering the National Capital Territory in accordance with the provisions of article 239 and article 239AA."

Under Article 239AB, the President is empowered to suspend the operation of (i) any provision of Article 239AA; and of (ii) any provisions of law made in pursuance of that Article and to make provisions to administer the NCT, in accordance with Articles 239 and 239AA where, upon a report from the Lieutenant Governor, the President is satisfied that: (a) A situation has arisen where the administration of the NCT cannot be carried on in accordance with

Article 239AA or a law made in pursuance of it; or (b) For the proper administration of the NCT.

Article 239B as already noted confers power upon the administrator of Puducherry to promulgate ordinances during the recess of the legislature. This power is also conferred upon the Lieutenant Governor of the NCT by clause 8 of Article 239AA. Under Article 241, Parliament is empowered to constitute a High Court for a Union territory.

49 In understanding the nature of the executive power in relation to the NCT of Delhi and the relationship between the Council of Ministers and the Lieutenant Governor on one hand, and the Lieutenant Governor and the President on the other, it is necessary to draw a comparison with the provisions of the Constitution governing the Union and the States. Part V of the Constitution (consisting of Articles 52 to 151) deals with the Union; Part VI (comprising of Articles 152 to 237) deals with the States and Part VIII (comprising of Articles 239 to 241) deals with the Union territories. Parts V and VI contain similar elucidations with some important variations. Both Part V and Part VI deal with the executive, the legislative power of the President, and the judiciary. Part V covers the Union judiciary, while Part VI over the High Courts and the subordinate courts in the States.

50 Article 52 provides for the President. Article 53 stipulates that the executive power of the Union shall be vested in the President and shall be exercised by him directly or through subordinate officers in accordance with the Constitution. Under Article 73, the executive power of the Union extends (a) to matters with respect to which Parliament has power to make laws; and (b) to the exercise of rights, authority and jurisdiction exercisable by the Union government under a treaty or agreement. Article 73 provides thus:

> "73. Extent of executive power of the Union.—
>
> (1) Subject to the provisions of this Constitution, the executive power of the Union shall extend—
>
> (a) to the matters with respect to which Parliament has power to make laws; and
>
> (b) to the exercise of such rights, authority and jurisdiction as are exercisable by the Government of India by virtue of any treaty or agreement:
>
> Provided that the executive power referred to in sub-clause (a) shall not, save as expressly provided in this Constitution or in any law made by Parliament, extend in any State to matters with respect to which the Legislature of the State has also power to make laws.
>
> (2) Until otherwise provided by Parliament, a State and any officer or authority of a State may, notwithstanding anything in this article, continue to exercise in matters with respect to which Parliament has power to make laws for that State such executive power or functions as the State or officer or authority thereof could exercise immediately before the commencement of this Constitution."

The proviso to Article 73(1) stipulates that except as may be expressly provided by Constitution or in any law which has been enacted by Parliament, the executive power of the Union under sub clause (a) of clause 1 does not extend in a State to matters with respect to which the legislature of the State has *also*

power to make laws. The effect of the proviso is that the executive power of the Union does not extend to matters in the Concurrent List, since these are matters on which State legislatures *also* have the power to make laws. Article 74(1) provides for a Council of Ministers with the Prime Minister as the head. The function of the Council of Ministers is "to aid and advice the President". The President is, in the exercise of his functions, under a mandate to "act in accordance with such advice". Article 74 provides as follows:

> "74. Council of Ministers to aid and advise President.—
>
> (1) There shall be a Council of Ministers with the Prime Minister at the head to aid and advise the President who shall, in the exercise of his functions, act in accordance with such advice: Provided that the President may require the Council of Ministers to reconsider such advice, either generally or otherwise, and the President shall act in accordance with the advice tendered after such reconsideration.
>
> (2) The question whether any, and if so what, advice was tendered by Ministers to the President shall not be inquired into in any court."

Article 77 provides for the conduct of the business of the Union government:

> "77. Conduct of business of the Government of India.—
>
> (1) All executive action of the Government of India shall be expressed to be taken in the name of the President.
>
> (2) Orders and other instruments made and executed in the name of the President shall be authenticated in such manner as may be specified in rules to be made by the President, and the validity of an order or instrument which is so authenticated shall not be called in question on the ground that it is not an order or instrument made or executed by the President.
>
> (3) The President shall make rules for the more convenient transaction of the business of the Government of India, and for the allocation among Ministers of the said business."

By and under Article 77(1) the executive action of the Union government is expressed to be taken in the name of the President. Under clause 2, orders and instruments made and executed in the name of the President are to be authenticated in such a manner as may be specified in the rules made by the President. Clause 3 enables the President to make rules for the transaction of the business of the government and for the allocation of governmental business among ministers. Article 78 embodies the basic duty of the head of the elected government in a Cabinet form of government to communicate with and to furnish information to the President. Article 78 provides as follows :

> "78. Duties of Prime Minister as respects the furnishing of information to the President, etc.—
>
> It shall be the duty of the Prime Minister—
>
> (a) to communicate to the President all decisions of the Council of Ministers relating to the administration of the affairs of the Union and proposals for legislation;
>
> (b) to furnish such information relating to the administration of the affairs of the Union and proposals for legislation as the President may call for; and
>
> (c) if the President so requires, to submit for the consideration of the Council of Ministers any matter on which a decision has been taken by a Minister but which has not been considered by the Council."

These provisions of the Constitution institutionalise the relationship between the President and the Union Cabinet and re-affirm the position of the President as the titular head of state. The President must act on the aid and advise tendered by the Union Cabinet. The executive power of the Union is co-extensive with the legislative power of Parliament. In a cabinet form of government, it is the Council of Ministers which owes collective responsibility to the House of the

People. Collective responsibility, as a constitutional doctrine, ensures accountability to the sovereign will of the people who elect the members of the legislature. Though all executive action is expressed to be taken in the name of the President and orders and instruments made and executed in the name of the President are authenticated in the manner prescribed by rules, the constitutional position of the President is of a titular head. The use of the expression “in the exercise of his functions” in Article 74(1) is formalistic in nature since the substance of executive power is vested in and conferred upon the government constituted through the Council of Ministers which owes collective responsibility to Parliament. The proviso to Article 74(1) stipulates that while the President may require the Council of Ministers to reconsider his advice, once that has been done, the President is bound to act on the advice tendered after reconsideration.

51 The position of the President as a titular head of State is evidenced in the constitutional provisions which define the relationship between the President and Parliament. Under Article 111, a Bill is presented to the President for assent upon being passed by the Houses of Parliament. Under the proviso to Article 111, the President is empowered to return a Bill for reconsideration (if it is not a Money Bill). Upon being reconsidered, if the Bill is passed again by the Houses of Parliament (with or without amendment) the President shall, thereafter, not withhold assent.

52 In Part VI of the Constitution, the provisions which define the role of the Governor in relation to the states indicate that the Governor is also a titular head of government in each state. The executive power of the State is vested in the Governor under Article 154. The Governor is appointed by the President under Article 155 and holds office during the pleasure of the President under Article 156. The executive power of the state is co-extensive with the legislative power, by virtue of Article 162. However, in relation to matters on which both the legislature of a State and Parliament can enact law, the executive power of the state is subject to and limited by the conferment of executive power upon the Union by the Constitution or by a law enacted by Parliament. In the States, Article 163 postulates a Council of Ministers with the Chief Ministers as its head to aid and advice the Governor in the exercise of his functions, except where the Governor is under the Constitution required to exercise any of the functions in his own discretion. Where a question arises as to whether the Governor is required to act in his discretion, Article 163(2) makes the decision of the Governor final. While the Chief Minister is appointed by the Governor under Article 164, other ministers are appointed by the Governor on the advice of the Chief Minister and hold office during the pleasure of the Governor. Article 164(2) incorporates the principle of collective responsibility of the Council of Ministers to the legislative assembly of the State. Article 166 contains a provision dealing with the conduct of the business of the government of the State which is *pari materia* with Article 77. Similarly, Article 167 incorporates the duty of the Chief

Minister to communicate with and to furnish information on the affairs of the state to the Governor, in terms similar to Article 78.

53 While assessing the status of the National Capital Territory under Article 239AA, certain significant aspects need to be borne in mind:

(i) Article 239AA is a result of the exercise of the constituent power under Article 368 of the Constitution. By and as a result of Article 239AA, special provisions have been made for the National Capital Territory of Delhi. These provisions are not an emanation of an act of ordinary legislation;

(ii) For the NCT of Delhi, the exercise of the constituent power has resulted in a constitutionally entrenched status both for the legislature and for the Council of Ministers. The legislative assembly is elected by the process of direct election. The legislative assembly has the power to enact law in respect of matters in the State List of the Seventh Schedule (save for the excepted matters in Entries 1, 2 and 18 and Entries 64, 65 and 66 insofar as they relate to entries 1, 2 and 18). Yet, while the legislative powers which have been conferred on the legislative assembly extend to the State List (save for the excepted entries) and the Concurrent List, Parliament has been empowered to legislate both on matters falling within the State and the Concurrent lists. Parliament possesses overriding legislative powers over matters falling in both the State and Concurrent lists for the NCT; and

(iii) Article 239AA(4) provides constitutional status to the Council of Ministers and embodies the entrenched principle in a cabinet form of government that a titular head of state acts on the aid and advice tendered by his ministers, who owe collective responsibility to the legislature. In setting up a structure of governance in which there is a legislature elected through the process of direct election and an executive arm which is collectively responsible to the legislature and which, in the discharge of its functions, tenders aid and advise to Lieutenant Governor on matters which are co-extensive with legislative power, the Constitution has incorporated the basic principles of the cabinet form of government. The adoption of these special features of the cabinet form of government in relation to the NCT must weigh while interpreting Article 239AA.

54 At the same time, the constitutional scheme indicates several features in relation to the NCT which have resulted in the conferment of a constitutional status which falls short of the trappings of full statehood. They include the following :

(a) The position of the National Capital Territory is subsumed under Part VIII which applies to Union territories. Delhi is and continues to be a Union territory governed by Part VIII;

(b) Every Union territory is, under Article 239(1), administered by the President acting through an Administrator. The Administrator appointed under Article 239(1) is designated as the Lieutenant

Governor for the NCT under Article 239AA(1). Article 239 is the source of the constitutional power to appoint the Lieutenant Governor for the NCT;

(c) The position that the application of Article 239 is not excluded in relation to the NCT is made evident by Article 239AB. In a situation in which the President is empowered to suspend the provisions of Article 239AA, where the administration of the NCT cannot be carried on in accordance with Article 239AA, or of any law made in pursuance of that Article, the President is empowered to make consequential provisions for administering the territory in accordance with Article 239 as well as Article 239AA. Hence, the provisions of Article 239AA cannot be read disjunctive from Article 239(1);

(d) The administration of a Union territory by the President acting through an Administrator is firstly subject to Parliamentary law and secondly, to such extent as he thinks fit. Hence the nature of the administration of a Union territory, including NCT is subject to these two provisions;

(e) The position of the NCT as distinguished with the constitutional position of a State finds expression in the contrast between Article 239AB and Article 356 on the other. Upon the exercise of the power

under Article 356, the President "can assume to himself" the functions of the government of the State and declare that the powers of the legislature of the State shall be exercisable by or under the authority of Parliament. In contrast, Section 239AB empowers the President to suspend the operation of Article 239AA or of any provision of law made under it and to thereupon make consequential provisions for the administration of the NCT in accordance with Articles 239 and 239AA; and

(f) While emphasising the binding character of the aid and advise tendered to the President, or as the case may be, the Governor, the constitutional position in relation to the Lieutenant Governor contains a distinct variation. Article 74(1) embodies, in relation to the President of India, the binding character of the aid and advice tendered by the Council of Ministers by specifying that the President shall, in the exercise of his functions, act in accordance with such advice. Upon the President requiring the Council of Ministers to reconsider their advice, the President is bound to act upon the advice which is tendered after reconsideration. Similarly, in the case of Governors in the states, Article 163(1) provides for a Council of Ministers "to aid and advise the Governor in the exercise of his functions", except where the Governor is required by the Constitution to exercise his functions in his discretion. Article 239AA(4) incorporates in its substantive segment the constitutional

> principle of aid and advice which the Council of Ministers tenders to the Lieutenant Governor in the exercise of his functions. But, in relation to the advice tendered by the Council of Ministers, the proviso to Article 239AA(4) has engrafted a special provision which does not have a corollary in Article 163. While under Article 163(1), the Governor is required to act upon the aid and advice tendered (save in matters which the Constitution entrusts to the discretion of the Governor), the proviso to Article 239AA(4) contemplates an area where the binding character of the aid and advice tendered to the Lieutenant Governor is lifted in the event of a "difference of opinion.. on any matter".

55 In resolving the area within which the Lieutenant Governor can refer the difference of opinion with the Council of Ministers of the NCT to the President, it would be necessary to balance on the one hand the constitutional principles of the cabinet form of government adopted in Article 239AA, while on the other hand leaving open the latitude, which has been created by the proviso to clause 4 considering the special status of the NCT. The former consideration would need the court to pursue a line of interpretation which does not detract from the fundamental principles of representative government. An elected government reflects in a democracy, the aspirations of the people who vote to elect their representatives. The elected representatives carry the responsibility of giving expression to the political will of the electorate. In a democratic form of government, real power must subsist in the elected arms of the State. Ministers

of government are elected representatives of the people. They are accountable to the people through their collective responsibility to the legislature. As a collective entity, the Council of Ministers owes responsibility to the legislature. The relationship between the Council of Ministers and the titular head of State is governed by the over-arching consideration that real power and substantive accountability is vested in the elected representatives of the people. The principle of aid and advice is in a constitutional sense intended to strengthen the constitutional value of representative government and of governance which is accountable and responsive to the electorate. While bearing these fundamental constitutional principles of a democracy in mind, a balance has to be struck with the second of the above elements which recognises the special status of the NCT. The NCT represents the aspirations of the residents of its territory. But it embodies, in its character as a capital city the political symbolism underlying national governance. The circumstances pertaining to the governance of the NCT may have a direct and immediate impact upon the collective welfare of the nation. This is the rationale for the exclusion of the subjects of public order, police and land from the legislative power and necessarily from the executive power of the NCT. These considerations would necessarily require a careful balance between the two principles. Each of the two principles must be given adequate weight in producing a result which promotes the basic constitutional values of participatory democracy, while at the same time preserving fundamental concerns in the secure governance of the nation.

G Constitutional History of the NCT

56 Mr Gopal Subramanium, learned Senior Counsel, appearing on behalf of the NCT, has submitted that the NCT occupies a unique position in our constitutional jurisprudence. It has been contended by Mr Subramanium that the NCT, though it remains a Union Territory, has come to acquire various characteristics that were, prior to the 69th constitutional amendment, considered under the Constitution to be characteristics solely of States. As a consequence, the learned Senior Counsel has further contended, NCT has become a constitutional hybrid with powers that were formerly only found in full-fledged States of the Union and therefore enjoys far more powers than the government of any other Union Territory. On the contrary, Mr Maninder Singh, the learned Additional Solicitor General has submitted that the NCT finds its place as a Union Territory in Part II of Schedule I of the Constitution. It has been contended on his behalf that the NCT has historically remained a centrally administered territory with the status of a Union Territory in the Constitution and that it continues to remain a Union Territory even after the 69th constitutional amendment.

57 In order to interpret the constitutional scheme envisaged for the NCT, this Court must analyze the constitutional history and the evolution of the structure of governance for the NCT as brought into existence, by various enactments, from time to time.

The Government of Part C States Act, 1951

58 The first Schedule to the Constitution originally contained Part A, Part B and Part C States. After the adoption of the Constitution, The Government of Part C States Act, 1951 was enacted. Section 2(c) defined the expression Delhi thus:

> "Section 2(c) "Delhi", except where it occurs in the expression "State of Delhi", means such area in the State of Delhi as the Central Government may by notification in the Official Gazette specify."

Section 3 provided for the constitution of a legislative assembly for each state governed by the law. It provided for the establishment of legislative assemblies for the states of Ajmer, Bhopal, Coorg, Delhi, Himachal Pradesh and Vindhya Pradesh. The Chief Commissioner was entrusted with the power, under Section 8(2), to prorogue and dissolve the assembly. Section 12 conferred upon the Chief Commissioner the right to address and send messages to the assembly. Section 21 of the Act defined the extent of legislative power:

> "Section 21- Extent of legislative power
>
> "(1) Subject to the provisions of this Act, the Legislative Assembly of a State may make laws for the whole or any part of the State with respect to any of the matters enumerated in the State List or in the Concurrent List:
>
> **Provided** that the Legislative Assembly of the State of Delhi shall not have power to make laws with respect to any of the following matters, namely:-
>
> (a) Public order;
>
> (b) Police including railway police;

> (c) The constitution and powers of municipal corporations and other local authorities, of improvement trusts and of water supply, drainage, electricity, transport and other public utility authorities in Delhi or in New Delhi;
>
> (d) Lands and buildings vested in or in the possession of the Union which are situated in Delhi or in New Delhi including all rights in or over such lands and buildings, the collection of rents therefrom and the transfer and alienation thereof;
>
> (e) Offences against laws with respect to any of the matters mentioned in the foregoing clauses;
>
> (f) Jurisdiction and powers of all courts, with respect to any of the said matters; and
>
> (g) Fees in respect of any of the said matters other than fees taken in any court."

However, sub Section 2 of Section 21 provided that sub section 1 will not derogate from the power conferred upon Parliament by the Constitution to make laws with respect to any matter for a state. The sanction of the Chief Commissioner was required under Section 23 for certain legislative proposals, these being:

> "(a) Constitution and organisation of the court of the Judicial Commissioner;
>
> (b)Jurisdiction and powers of the court of the Judicial Commissioner with respect to any of the matters in the State List or in the Concurrent List;
>
> (c) State Public Service Commission."

59 A Bill passed by the legislative assembly was, under Section 26, required to be presented to the Chief Commissioner. The Chief Commissioner in turn was obligated to reserve the Bill for consideration of the President. If the President directed the Chief Commissioner to submit the Bill to the Assembly

for reconsideration, the Assembly was required to consider the suggestions and, if the Bill was passed, it had to be presented again to the President for reconsideration.

60 Section 36 provided for a Council of Ministers:

> "Council of Ministers
>
> (1) There shall be a Council of Ministers in each State with the Chief Minister at the head to aid and advise the Chief Commissioner in the exercise of his functions in relation to matters, with respect to which the Legislative Assembly of the State has power to make law except in so far as he is required by any law to exercise any judicial or quasi-judicial functions:
>
> **Provided** that, in case of difference of opinion between the Chief Commissioner and his Ministers on any matter, the Chief Commissioner shall refer it to the President for decision and act according to the decision given thereon by the President, and pending such decision it shall be competent for the Chief Commissioner in any case where the matter is in his opinion so urgent that it is necessary for him to take immediate action, to take such action or to give such direction in the matter as he deems necessary:
> **Provided further** that in the State of Delhi every decision taken by a Minister or by the Council in relation to any matter concerning New Delhi shall be subject to the concurrence of the Chief Commissioner, and nothing in this sub-section shall be construed as preventing the Chief Commissioner in case of any difference of opinion between him and his Ministers from taking such action in respect of the administration of New Delhi as he in his discretion considers necessary.
>
> (2) The Chief Commissioner shall, when he is present, preside at meetings of the Council of Ministers, and, when the Chief Commissioner is not present, the Chief Minister or, if he is also not present, such other Minister as may be determined by the rules made under sub-section (1) of section 38 shall preside over meetings of the Council.
>
> (3) If any question arises as to whether any matter is or is not a matter as respects which the Chief Commissioner is

> required by any law to exercise-any judicial or quasi-judicial functions, the decision of the Chief Commissioner thereon shall be final.
>
> (4) If in the State of Delhi any question arises as to whether any matter is or is not a matter concerning New Delhi, the decision of the Chief Commissioner thereon shall be final:
>
> **Provided** that in case of any difference of opinion between the Chief Commissioner and his Ministers on such question, it shall be referred for the decision of the President and his decision shall be final.
>
> (5) The question whether any, and if so what, advice was tendered by Ministers to the Chief Commissioner shall not be inquired into in any court."

Section 36(1) incorporated the aid and advice principle. But where there was a difference of opinion between the Chief Commissioner and his ministers "on any matter", the Chief Commissioner was required to refer it to the President and to act in accordance with the decision of the President. Insofar as the State of Delhi was concerned, under the second proviso every decision of a Minister or the Council of Ministers in relation to New Delhi was subject to the concurrence of the Chief Commissioner. In the event there was a difference of opinion, the Chief Commissioner had the authority to take such action for the administration of New Delhi "as he in his discretion considers necessary". The Chief Commissioner would also preside over the meetings of the Council of Ministers. If a question arose as to whether any matter concerned New Delhi, the decision of the Chief Commissioner was to be final and if there was a difference of opinion, it was to be referred to the President for his decision.

61 Section 36 assumes significance in the context of the present controversy, because its provisions must be distinguished from the position which was adopted when the sixty ninth amendment was introduced in Article 239AA into the Constitution. Four features of Section 36 stand out : first, the requirement of the concurrence of the Chief Commissioner to every decision concerning New Delhi; second, empowerment of the Chief Commissioner, in the event of a difference of opinion to act in his discretion for the administration of New Delhi; third, the mandate of the Chief Commissioner being required to preside over meetings of the Council of Ministers; and fourth, the requirement of referring any difference of opinion on whether a matter concerned New Delhi to the President whose decision would be final. Article 239AA has made a departure in critical matters from the position as it obtained under Section 36. First, (unlike the second proviso to Section 36(1)), Article 239AA(4) does not mandate that every decision of the Council of Ministers should be subject to the concurrence of the Lieutenant Governor; second, the provision (in the second proviso to Section 36(1)) empowering the Chief Commissioner to act in his discretion on the administration of New Delhi is absent in Article 239AA(4) except where the Lieutenant Governor on a reference of a difference of opinion to the President has to deal with an emergent situation; and third, neither in Article 239AA nor in the GNCTD Act (and for that matter in the Transaction of Business Rules) has it been provided that the Lieutenant Governor would preside over meetings of the Council of Ministers. Section 36 of the erstwhile Act of 1951 created a hierarchical structure which placed the Chief

Commissioner as an authority superior to the Council of Ministers in the exercise of its executive power. Every decision of the Council of Ministers concerning New Delhi was subject to the concurrence of the Chief Commissioner. The absence of such a provision in Article 239AA cannot be regarded as a matter of no constitutional significance. Historically the constituent body had before it a model which was created by the parliamentary enactment of 1951 but advisedly did not choose to engraft it into the provisions of Article 239AA when the sixty ninth amendment was adopted.

62 The provisions of the Constitution relating to Part A, Part B and Part C States were abrogated with the adoption of the seventh amendment[75] in 1956. Section 130 of the States Reorganization Act 1956 repealed the 1951 Act. The result has been explained in the Statement of Objects and Reasons for the 1956 Act.

> "… The main features of the reorganization proposed are the abolition of the existing constitutional distinction between Part A, Part B and Part C States, the establishment of two categories for the component units of the Union to be called the States and the abolition of the institution of the Raj Pramukh consequent on the disappearance of the Part B States…".

Consequent upon the seventh amendment to the Constitution, the expression "the Union territories specified in the First Schedule" was inserted into the

[75] The Constitution (Seventh Amendment) Act 1956

Constitution. Delhi came to be described as a Union territory upon being included as an entry in the First Schedule. By virtue of Section 12 of the 1956 Act, as from the appointed day, in the First Schedule to the Constitution for Part A, Part B and Part C States, the parts which followed were substituted. Delhi was described in serial number 1 of Part C as "the territory which immediately before commencement of the Constitution was comprised in the Chief Commissioner's Province of Delhi". Delhi became a Union Territory governed by the Union government through an Administrator who was appointed by the President.

63 Article 239A was introduced by the fourteenth amendment[76] in 1962, as a result of which Parliament was authorized to create, for certain Union territories, local legislatures and/ or a Council of Ministers.

The Government of Union Territories Act, 1963

64 On 10 May 1963, the Government of Union Territories Act 1963 was enacted. The Act of 1963 defined the expression Administrator in Section 2(a) as :

> "(a) "Administrator" means the administrator of the Union territory appointed by the President under article 239;"

[76] The Constitution (Fourteenth Amendment) Act 1962

Section 3 provided for a legislative assembly. Section 18 provided for the extent of legislative power in the following terms:

> "18. Extent of legislative power. (1) Subject to the provisions of this Act, the Legislative Assembly of the Union territory may make laws for the whole or any part of the Union territory with respect to any of the matters enumerated in the State List or the Concurrent List in the Seventh Schedule to the Constitution in so far as any such matter is applicable in relation to Union territories.
>
> (2) Nothing in sub-section (1) shall derogate from the powers conferred on Parliament by the Constitution to make laws with respect to any matter for the Union territory or any part thereof."

Sub Section 1 of Section 18 was similar in language to Article 239AA(3)(a), without the exclusion of matters relating to Entries 1, 2 and 18 and Entries 64, 65 and 66. Sub Section 2 was similar in language to Article 239AA(3)(b). Section 21 provided that if there was any inconsistency between a law made by Parliament and a law made by the legislative assembly, the law made by Parliament would prevail to the extent of repugnancy (this provision is similar in nature to Article 239AA(3)(c). Section 44 contained the following provision for the Council of Ministers:

> "44. Council of Ministers.
>
> (1) There shall be a Council of Ministers in each Union territory with the Chief Minister at the head to aid and advise the Administrator in the exercise of his functions in relation to matters with respect to which the Legislative Assembly of the Union territory has power to make laws except in so far as he is required by or under this Act to act in his discretion or by or under any law to exercise any judicial or quasi-judicial functions:
>
> Provided that, in case of difference of opinion between the Administrator and his Ministers on any matter, the Administrator shall refer it to the President for decision and act

> according to the decision given thereon by the President, and pending such decision it shall be competent for the Administrator in any case where the matter is in his opinion so urgent that it is necessary for him to take immediate action, to take such action or to give such direction in the matter as he deems necessary:
>
> …
>
> (3) If and in so far as any special responsibility of the Administrator is involved under this Act, he shall, in the exercise of his functions, act in his discretion."

Section 44 (1) and Article 239AA are *pari materia* (with the difference that clause 4 of Article 239AA pegs the strength of the Council of Ministers to not more than ten per cent of the total number of members of the legislative assembly). At the same time, it must also be noted that sub section 3 of Section 44 recognised the power of the Administrator, to act in his discretion where "any special responsibility" of the Administrator was involved under the Act. This provision in sub section 3 of Section 44 was in addition to the reservation made in Section 44(1) in respect of those matters where the administrator was under the Act, required to act in his discretion or was to exercise judicial or quasi-judicial functions under any law. The "special responsibility" provision of sub-section 3 of Section 44 does not find a parallel in Article 239AA.

The Delhi Administration Act, 1966

65 On 2 June 1966, Parliament enacted the Delhi Administration Act 1966, "to provide for the administration of the Union territory of Delhi". The Act, in Section 3, constituted a Metropolitan Council, consisting of 56 persons to be

directly elected. However, the Central government was empowered to nominate five persons to the Metropolitan Council. The tenure of the Metropolitan Council, unless it was sooner dissolved, was to be five years. Under Section 22 the Metropolitan Council could make recommendations, on certain matters, insofar as they related to Delhi. Section 22 provided as follows:

> "(1) Subject to the provisions of this Act, the Metropolitan Council shall have the right to discuss, and make recommendations with respect to, the following matters in so far as they relate to Delhi, namely: -
>
> (a) proposals for undertaking legislation with respect to any of the matters enumerated in the State List or the Concurrent List in the Seventh Schedule to the Constitution in so far as any such matter is applicable in relation to Union territories (hereafter referred to as the State List and the Concurrent List);
>
> (b) proposals for extension to Delhi of any enactment in force in a State relatable to any matter enumerated in the State List or the Concurrent List;
>
> (c) proposals for legislation referred to it by the Administrator with respect to any of the matters enumerated in the State List or the Concurrent List;
>
> (d) the estimated receipts and expenditure pertaining to Delhi to be credited to and to be made from, the Consolidated Fund of India; and notwithstanding anything contained in the Delhi Development Act, 1957, the estimated receipts and expenditure of the Delhi Development Authority;
>
> (e) matters of administration involving general policy and schemes of development in so far as they relate to matters enumerated in the State List or the Concurrent List;
>
> (f) any other matter referred to it by the Administrator.
>
> (2) The recommendations of the Metropolitan Council, after having been duly considered by the Executive Council, shall, wherever necessary, be forwarded by the Administrator to the Central Government with the views, if any, expressed thereon by the Executive Council."

The recommendations of the Metropolitan Council after they were considered by the Executive Council were to be forwarded to the Central government. The function of the Executive Council was to "assist and advise" the Administrator in the exercise of his functions in relation to matters in the State List or Concurrent List. Conscious as Parliament was of the use of the expression "aid and advise" in Articles 74 and 163 of the Constitution; and in Section 36(1) of the Government of Part C States Act 1951; Section 44 of the Government of Union Territories Act 1963, carefully adopted the expression "assist and advise" in Section 27. Section 27 was in the following terms:

> "(1) There shall be an Executive Council, consisting of not more than four members one of whom shall be designated as the Chief Executive Councilor and others as the Executive Councilors, to assist and advise the Administrator in the exercise of his functions in relation to matters enumerated in the State List or the Concurrent List, except in so far as he is required by or under this Act to exercise his functions or any of them in his discretion or by or under any law to exercise any judicial or quasi-judicial functions:
>
> Provided that, in case of difference of opinion between the Administrator and the members of the Executive Council on any matter, other than a matter in respect of which he is required by or under this Act to act in his discretion, the Administrator shall refer it to the President for decision and act according to the decision given thereon by the President, and pending such decision, it shall be competent for the Administrator in any case where the matter is in his opinion so urgent that it is necessary for him to take immediate action, to take such action or to give such direction in the matter as he deems necessary:
>
> Provided further that every decision taken by a member of the Executive Council or by the Executive Council in relation to any matter concerning New Delhi shall be subject to the concurrence of the Administrator, and nothing in this sub-section shall be construed as preventing the Administrator in case of any difference of opinion between him and the members of the Executive Council

from taking any action in respect of the administration of New Delhi as he, in his discretion, considers necessary.

(2) The Administrator shall preside at every meeting of the Executive Council, but if he is obliged to absent himself from any meeting of the Council owing to illness or any other cause, the Chief Executive Councilor shall preside at the meeting of the Council.

(3) The functions of the Administrator with respect to law and order in Delhi including the organization and discipline of police force, and with respect to such other matters as the President may it from time to time specify in this behalf, shall be exercised by him in his discretion.

(4) If any question arises as to whether any matter is or is not a matter as respects which the Administrator is by or under this Act required to act in his discretion, the decision of the Administrator thereon shall be final.

(5) If any question arises as, to whether any matter is or is not a matter as respects which the Administrator is required by or under any law to exercise any judicial or quasi-judicial functions, the decision of the Administrator thereon shall be final.

(6) If any question arises as to whether any matter is or is not a matter concerning New Delhi, the decision of the Administrator thereon shall be final.

(7) The question whether any, and if so, what advice was tendered by any member of the Executive Council to the Administrator shall not be enquired into in any court."

Every decision of the Executive Council in relation to any matter concerning New Delhi was subject to the concurrence of the Administrator. A provision similar to the second proviso to Section 27(1) does not find a reference in Article 239AA. Moreover, under sub section 2 of Section 27, the Administrator was to preside at every meeting of the Executive Council. The members of the Executive Council were, under Section 28, appointed by the President and held office during the pleasure of the President. A member of the Executive Council

could not hold office beyond a period of six months if he was not a member of Metropolitan Council.

66 The Act of 1966 continued to apply to the Union Territory of Delhi until the adoption of the sixty ninth amendment to the Constitution and the GNCTD Act 1991.

The Balakrishnan Committee

67 On 14 December 1989 the Committee constituted by the Ministry of Home Affairs for making recommendations on the reorganization of the structure for the governance of Delhi submitted its report. The report of the Committee, which was chaired by Mr S Balakrishnan (Adviser, Ministry of Home Affairs) observed that there is a conflict of interest between the need to develop the national capital for the nation as a whole and the desires of the local population for a greater autonomy in the conduct of their own affairs. This conflict was described in the report thus:

> "..The main difficulty lies in reconciling the two conflicting requirements, namely, the requirement of satisfying the democratic aspirations over the citizens of the capital to govern themselves in consonance with the spirit of their national Constitution and the requirement that the national Government should have sufficient control over the capital city and its administration for discharging its national and international responsibilities and commitments."

The Committee considered the following five options:

> "(1) The existing structure under the Delhi Administration Act, 1966 may be retained with such modifications as may be found necessary.
>
> (2) The administration of Delhi may be the direct responsibility of the Central Government except for municipal functions to be left with the Municipal Corporation or other municipal bodies; there is no need for any Legislative Assembly or Council of Ministers.
>
> (3) Delhi may be made a full-fledged State of the Union.
>
> (4) Delhi may be made a Union territory with a Legislative Assembly and Council of Ministers.
>
> (5) Delhi may be given a special status and dispensation under the Constitution itself."

The Committee indicated the reasons which had weighed with it in rejecting the claim for full statehood to Delhi. Firstly, the Committee noted that the conferment of full statehood would result in a constitutional division of legislative power between the Union and the State and to that extent, the Union Executive would be denuded of executive powers in relation to matters governed by the State list. In the view of the Committee:

> "..This constitutional prohibition on the exercise of powers and functions will make it virtually impossible for the Union to discharge its special responsibilities in relation to the national capital as well as to the nation itself. We have already indicated in an earlier chapter the special features of the national capital and the need for keeping it under the control of the Union Government. Such control is vital in the national interests irrespective of whether the subject matter is in the State field or Union field. If the administration of the national capital is divided into rigid compartments of State field and Union field, conflicts are likely to arise in several vital matters, particularly if the two Governments are run by different political parties. Such conflicts may, at times, prejudice the national interest. We have given careful thought to the matter and we are of the considered opinion that any arrangement for Delhi

> that involves constitutional division of powers, functions and responsibilities between the Union and the government of the national capital will be against the national interest and should not be made."

The Committee opined that "**the national capital belongs to the nation as a whole**" and hence a demand for full statehood could not be entertained. Consistent with its view, the Committee opined that Delhi should have a Legislative Assembly and a Council of Ministers, while continuing to be a Union territory for the purposes of the Constitution. The legislative powers conferred upon the Legislative Assembly were to exclude certain specific subjects, having due regard to the special responsibility of the Union in respect of Delhi. The Committee recommended that the subjects of public order and police should be excluded from the purview of the Legislative Assembly. The report of the Committee recommended that the Administrator for the Union Territory should be expressly required to perform his functions on the aid and advice of the Council of Ministers. The expression "aid and advice", the Committee noted, is a term of art based on the cabinet form of government adopted by the Constitution. However, the principle of aid and advice would be subject to three modifications: (i) it would not apply in respect of those matters where the Administrator exercises judicial or quasi-judicial functions; (ii) the Administrator would act on aid and advice in respect of matters where the legislative Assembly has the power to make laws; and (iii) a special provision would be made to resolve differences between the Administrator and his Council of Ministers on any matter concerning the administration of Delhi.

The Committee was of the following view:

> "..by virtue of article 239 of the Constitution, the ultimate responsibility for good administration of Delhi is vested in the President acting through the Administrator. Because of this, the Administrator has to take a somewhat more active part in the administration than the Governor of a State. It is, therefore, necessary to reconcile between the need to retain the responsibility of the Administrator to the Centre in this regard and the need for enforce the collective responsibility of the Council of Ministers to the Legislature. The best way of doing this is to provide that in case of difference of opinion which cannot be resolved between the Administrator and his Council of Ministers, he should refer the question to the President and the decision of the President thereon will be final.."

The Committee considered whether the administration of Delhi should be provided for under a law enacted by Parliament, as was the case earlier. The Committee recommended a constitutional amendment in preference to a statute governing the administration of the national capital as a measure of **stability and permanence**:

> "..any arrangement providing for the structure of government for the national capital is of great importance and significance to the nation and, as such, it is desirable that any such arrangement should ensure a measure of stability and permanence: The fluid situation which existed at the time when the Constitution came into force and which was the ground relied upon at that time for making a flexible arrangement no longer exists. We, therefore, consider that the time has come for making specific constitutional provisions for the structure of government for the national capital at least in regard to the core features thereof. If the provisions are incorporated in the Constitution an amendment can be made only by a two-thirds majority in parliament which may not always be available. To that extent a scheme incorporated in the Constitution would be more permanent than one in a law of parliament. We have no doubt that this will go a long way in assuring the people of Delhi that the governmental structure will be stable and will not suffer by the play of political forces."

The Committee thus recommended a constitutional amendment, with the above core features, with parliamentary legislation supplementing them in details.

68 The Statement of Objects and Reasons for the sixty ninth amendment to the Constitution explains its rationale in the following terms :

> "After such detailed inquiry and examination, it recommended that Delhi should continue to be a Union Territory and provided with a Legislative Assembly and a Council of Ministers responsible to such Assembly **with appropriate powers to deal with matters of concern to the common man.** The Committee also recommended that with a view to ensure stability and permanence, the arrangements should be incorporated in the Constitution to give the National Capital a **special status among the Union Territories**." (Emphasis supplied)

The avowed object of the sixty ninth amendment was to ensure that while Delhi would continue to be a Union territory, it would have a legislative assembly and a Council of Ministers responsible to it. This was to vest "appropriate powers" to deal with the matters of concern to the common man. The object of the constitutional amendment was to attribute "stability and permanence" to the arrangements to govern the Union territory and to confer "a special status among the Union territories" to the national Capital. In other words, while the status of the NCT would be of a Union territory, it nonetheless had a special status within the class of Union Territories.

69 Having regard to this history and background, it would be fundamentally inappropriate to assign to the NCT a status similar to other Union territories.

Article 239AA(4) is a special provision which was adopted to establish a special constitutional arrangement for the governance of the NCT, albeit within the rubric of Union territories. In interpreting the provisions of Article 239AA, this Court cannot adopt a blinkered view, which ignores legislative and constitutional history. While adopting some of the provisions of the Acts of 1963 and 1966, Parliament in its constituent capacity omitted some of the other provisions of the legislative enactments which preceded the sixty ninth amendment. The relationship between the Council of Ministers and the Administrator of the Union territory evolved as Delhi progressed from a Part C State (before the Seventh Amendment) to a Union Territory governed by legislation. As a Union territory, the position of Delhi has evolved from being administered by an Administrator under Article 239A following the fourteenth amendment and from governance under the earlier enactments of Parliament to its present-day status as a national capital territory governed by a specific constitutional provision: Article 239AA. We have noticed how, when Delhi was within the purview of the Part C States Act, every decision of the Council of Ministers on any matter concerning New Delhi was subject to the concurrence of the Chief Commissioner and any difference of opinion was to be resolved by the Chief Commissioner himself acting in his discretion to administer New Delhi. Under the Act of 1963, besides matters which the Administrator was required to act in his discretion or where he was to exercise judicial or quasi-judicial functions under law there were matters vested in the Administrator in his “special responsibility” where he could act in his discretion. Under the Act of 1966, the Executive Council was to “assist

and advice" the Administrator and each one of its decisions in relation to any matter concerning New Delhi was subject to the concurrence of the Administrator. The absence of similar provisions in Article 239AA cannot be ignored while defining the nature of the relationship between the Council of Ministers and the Lieutenant Governor and the authority of the Lieutenant Governor.

H NCT : A Special Class among Union Territories?

70 All Union territories are grouped together in Part VIII of the Constitution. While bringing them under the rubric of one constitutional pairing, there is an unmistakable distinction created between them by the Constitution. Such a distinction originates in Article 239(1) itself. While setting out the basic premise that "every Union territory shall be administered by the President", Article 239(1) conditions it upon two important qualifications. The first is provided by the language with which Article 239(1) opens, which is: "save as otherwise provided by Parliament by law". The second qualification is that the President may exercise the power of administering each Union territory "to such extent as he thinks fit" through an Administrator. The opening words essentially leave it to Parliament to determine the nature and extent to which the administration of a Union territory would be exercised through the President. The President may exercise that power through the office of an Administrator to such extent as he thinks fit. The expression "to such extent as he thinks fit" enunciates a constitutional discretion by which the limits of the exercise by the President of

the power of administration through an Administrator are to be set. Both these qualifications have significant constitutional implications because they leave open the nature and extent of the administration of the Union territory by the President, through the auspices of an Administrator, to the determination by Parliamentary legislation.

71 The provisions of Article 239 result in significant consequences for the position of Union territories. Article 239 does not elucidate the nature or extent of administrative or regulatory control over the Union territory. Article 239A (which presently applies to Puducherry), Article 239AA (which has special provisions for Delhi) and Article 240 leave no manner of doubt that the relationship of the Union government with every Union and the extent of Presidential control over the administration is not intended to be uniform. These three Articles indicate that a distinction has been made between the status of Union territories at least in terms of the exercise of legislative powers in relation to executive functions.

72 This distinction would emerge from a close reading of the provisions of Article 240 which governs :

(i) The Andaman and Nicobar Islands;
(ii) Lakshadweep;
(iii) Daman and Diu;
(iv) Dadar and Nagar Haveli; and
(v) Puducherry.

Clause 1 of Article 240 enables the President to make regulations for "the peace, progress and good government" of the Union territories mentioned above. Article 239A as we have noticed earlier, empowers Parliament to create a local legislature or a Council of Ministers (or both) for Puducherry. Once Parliament enacts legislation under clause 1 of Article 239A, it would be incongruous to have a duality of governance with the President making regulations for peace, progress and good government as well. Hence, the proviso to Article 240(1) states that the President shall not make any such regulation after the legislature for the Union territory of Puducherry has first convened, when a Parliamentary legislation under Article 239A creates a body to function as a legislature. However, when the legislature is dissolved or its functioning is eclipsed pursuant to a Parliamentary legislation, the Presidential power to make regulations for peace, progress and good government is revived. Puducherry was therefore grouped together with the other Union territories under Article 240(1) but in contemplation of a law made by Parliament under Article 239A, a specific constitutional mandate allows for the entrustment of legislative and executive functions to the extent that they are transferred under the law to the local legislature or, as the case may be, to the Council of Ministers. If Parliament were to enact no law at all, the President would continue to retain the power to frame regulations. Moreover, even upon the enactment of Parliamentary legislation, the Presidential power to frame regulations for Puducherry is revived where the legislature stands dissolved or its functioning is suspended.

73 Delhi presents a special constitutional status under Article 239AA. This is fortified when those provisions are read in contrast with Articles 239A and 240. Article 239AA does not incorporate the language or scheme of Article 240(1), which enables the President to frame regulations for peace, progress and good government of the Union territories referred to in Article 240(1). This proviso to Article 240(1) indicates that once a Parliamentary law has been framed, the President shall not frame regulations for Puducherry. In the case of Delhi, Article 239AA does not leave the constitution of a legislature or the Council of Ministers to a law to be framed by Parliament in future. Article 239AA mandates that there shall be a legislative assembly for the NCT and there shall be a Council of Ministers, with the function of tendering aid and advice to the Lieutenant Governor. The "there shall be" formulation is indicative of a constitutional mandate. Bringing into being a legislative assembly and a Council of Ministers for the NCT was not relegated by Parliament (in its constituent power) to its legislative wisdom at a future date upon the enactment of enabling legislation. Clause 7(a) of Article 239AA enables Parliament by law to make provisions to give effect to or to supplement the provisions contained in that Article. Parliament's power is to enforce, implement and fortify Article 239AA and its defining norms.

74 The above analysis would indicate that while Part VIII brings together a common grouping of all Union territories, the Constitution evidently did not intend to use the same brush to paint the details of their position, the institutions

of governance (legislative or executive), the nature of democratic participation or the extent of accountability of those entrusted with governance to their elected representatives. Hence, in defining the ambit of the constitutional powers entrusted to the Council of Ministers for the NCT and their relationship with Lieutenant Governor as a delegate of the President, the Court cannot be unmindful of the constitutional importance which has to be assigned to representative government. Representative government is a hallmark of a Constitution which is wedded to democracy for it is through a democratic form of governance that the aspirations of those who elect their representatives are met. Undoubtedly, governance of the NCT involves national imperatives. They must also weigh in the balance. The proviso to clause 4 of Article 239AA is constitutional indicator of the national concerns which were borne in mind when the constituent power was exercised to establish the NCT as a political arm of governance by a special constitutional provision. Those national imperatives have led to the carving out of the areas of police, public order and land from the sphere of legislative authority of the legislative assembly and their entrustment to Parliament. Again, it is the sense of a national imperative which led to the constituent power being so modulated in relation to the NCT as to allow Parliamentary legislative authority over all entries in the State list, in addition to the Concurrent list. Parliament does not exercise legislative authority in relation to State list entries as regards the states in India unless a matter falls within the ambit of Articles 252 or 253. Parliamentary legislative control over Union territories has been broadened precisely as a manifestation of national

imperatives or concerns. The executive power of the Council of Ministers being co-extensive with legislative power, this aspect has to be borne in mind. The true challenge is to maintain that delicate balance in a federating Union, such as ours, which ensures that national concerns are preserved in the interest of the unity and integrity of the nation, while at the same time local aspirations exercised through the democratic functioning of elected governments find expression in our polity.

75 The constitutional principle which emerges is that while Delhi presents a special case, quite unlike the other Union territories, the constitutional provisions governing it are an amalgam between national concerns (reflected in control by the Union) and representative democracy (expressed through the mandate of a Council of Ministers which owes collective responsibility to a directly elected legislature). There is no gainsaying the fact that the control by the Union, is also control of the President acting on the aid and advice of the Union Council of Ministers which in turn owes collective responsibility to Parliament. Constitutional statesmanship between the two levels of governance, the Centre and the Union territory, ought to ensure that practical issues are resolved with a sense of political maturity and administrative experience. This Court has to step in only because skirmishes between the two have raised constitutional issues of the proper distribution of executive control over the National Capital Territory.

I The Government of National Capital Territory of Delhi Act, 1991

76 Parliament enacted the Government of National Capital Territory of Delhi Act 1991[77] "to supplement the provisions of the Constitution relating to the legislative assembly and a Council of Ministers for the National Capital Territory of Delhi". The legislation has been enacted in pursuance of the provisions of clause 7(a) of Article 239AA.

77 Some of the salient features of the law merit reference. The law mandates direct election from territorial constituencies to the legislative assembly[78]. The duration of the assembly is fixed at five years[79]. The Lieutenant Governor has the right to address and to communicate messages to the assembly[80]. The law provides special provisions for financial bills[81]. A recommendation of the Lieutenant Governor, prior to the introduction of a Bill or amendment in the legislative assembly is mandatory, where it incorporates a provision for any of the following :

> "(a) the imposition, abolition, remission, alteration or regulation of any tax ;
>
> (b) the amendment of the law with respect to any financial obligations undertaken or to be undertaken by the Government of the Capital;
>
> (c) the appropriation of moneys out of the Consolidated Fund of the Capital;

[77] Act 1 of 1992 (Referred hereinafter as the "GNCTD Act")
[78] Section 3, GNCTD Act
[79] Section 5, GNCTD Act
[80] Section 9, GNCTD Act
[81] Section 22, GNCTD Act

> (d) the declaring of any expenditure to be expenditure charged on the Consolidated fund of the Capital or the increasing of the amount of any such expenditure;"[82]

Similarly, if a Bill, when enacted into law, would involve an expenditure from the consolidated fund of the Capital, it requires the prior recommendation of the Lieutenant Governor before being passed by the legislative assembly. Assent of the Lieutenant Governor to Bills passed by the legislative assembly is mandated in the following terms:

> "Section 24. Assent to Bills : - When a Bill has been passed by the Legislative Assembly, it shall be presented to the Lieutenant Governor and the Lieutenant Governor shall declare either that he assents to the Bill or that he withholds assent therefrom or that he reserves the Bill for the consideration of the President :
>
> Provided that the Lieutenant Governor may, as soon as possible after the presentation of the Bill to him for assent, return the Bill if it is not a Money Bill together with a message requesting that the Assembly will consider the Bill or any specified provisions thereof, and, in particular, will consider the desirability of introducing any such amendments as he may recommend in his message and, when a Bill is so returned, the Assembly will reconsider the Bill accordingly, and if the Bill is passed again with or without amendment and presented to the Lieutenant Governor for assent, the Lieutenant Governor shall declare either that he assents to the Bill or that he reserves the Bill for the consideration of the President:
>
> Provided further that the Lieutenant Governor shall not assent to, but shall reserve for the consideration of the President, any Bill which, -
>
> (a) in the opinion of the Lieutenant Governor would, if it became law, so derogate from the powers of the High Court as to endanger the position which that court is, by the Constitution, designed to fill; or
>
> (b) the President may, by order, direct to be reserved for his consideration; or

[82] Section 22(1), GNCTD Act

> (c) relates to matters referred to in sub-section (5) of section 7 or section 19 or section 34 or sub-section (3) of section 43.
>
> Explanation :- For the purposes of this section and section 25, a Bill shall be deemed to be a Money Bill if it contains only provisions dealing with all or any of the matters specified in sub-section (1) of section 22 or any matter incidental to any of those matters and, in either case, there is endorsed thereon the certificate of the Speaker of the Legislative Assembly signed by him that it is a Money Bill."

As the above provisions indicate, the Lieutenant Governor can assent to a Bill, withhold assent or reserve the Bill for consideration of the President. Where the Bill is not a Money Bill, the Lieutenant Governor is permitted to return it for reconsideration to the Assembly. Thereafter, if the Bill is passed again by the Assembly, the Lieutenant Governor can either assent to the Bill or reserve it for consideration of the President. The second proviso sets out three categories of Bills which the Lieutenant Governor must reserve for the consideration of the President. Where the Bill has been reserved for the consideration of the President, Section 25 stipulates that the President may either assent or withhold assent to the Bill. The President may, if it is not a Money Bill, direct the Lieutenant Governor to return the Bill to the assembly for reconsideration and if it is again passed, the Bill has to be presented again to the President for consideration.

78 The power of the Lieutenant Governor is wider than the power of the Governor of a State under Article 200 of the Constitution. Article 200 provides as follows:

> "Article 200. When a Bill has been passed by the Legislative Assembly of a State or, in the case of a State having a Legislative Council, has been passed by both Houses of the Legislature of the State, it shall be presented to the Governor and the Governor shall declare either that he assents to the Bill or that he withholds assent therefrom or that he reserves the Bill for the consideration of the President:
>
> Provided that the Governor may, as soon as possible after the presentation to him of the Bill for assent, return the Bill if it is not a Money Bill together with a message requesting that the House or Houses will reconsider the Bill or any specified provisions thereof and, in particular, will consider the desirability of introducing any such amendments as he may recommend in his message and, Assent to Bills. When a Bill is so returned, the House or Houses shall reconsider the Bill accordingly, and if the Bill is passed again by the House or Houses with or without amendment and presented to the Governor for assent, the Governor shall not withhold assent therefrom: Provided further that the Governor shall not assent to, but shall reserve for the consideration of the President, any Bill which in the opinion of the Governor would, if it became law, so derogate from the powers of the High Court as to endanger the position which that Court is by this Constitution designed to fill."

Under Article 200, where the Governor has returned a Bill (not being a Money Bill) to the legislative assembly of the State for reconsideration and the Bill is passed by the legislature, the Governor is precluded from withholding assent. In contrast, Section 24 confers authority upon the Lieutenant Governor, even if a Bill has been reconsidered and passed by the legislative assembly of the NCT, to either assent to it or reserve it for consideration of the President. Moreover, the second proviso to Section 24 widens the categories of Bills which the Lieutenant Governor must necessarily reserve for the consideration of the President. Clause (a) of the second proviso corresponds to the second proviso to Article 200. In addition, clause (b) of the second proviso to Section 24 empowers the President to direct the Lieutenant Governor to reserve a Bill for

his consideration. Similarly, under clause (c), Bills relating to salaries payable to the Speaker, Deputy Speaker and the members of the legislative assembly of NCT, the official language of the Capital and of the legislative assembly and the salaries and the allowances of the Ministers, are matters upon which the Lieutenant Governor has to reserve a Bill for the consideration of the President. These provisions indicate a greater degree of interface between the President and the Lieutenant Governor.

79 Section 27 provides for the laying of an annual financial statement by the Lieutenant Governor before the legislative assembly with the previous sanction of the President, containing the estimated receipts and expenditure of the Capital for that year. Section 29 makes a provision for appropriation Bills. Section 30 provides for supplementary, additional or excess grants. Here again, a provision has been made for the previous sanction of the President. Section 33 empowers the legislative assembly to make rules for regulating, subject to the Act, its procedure and conduct of business. The Lieutenant Governor upon consulting the Speaker of legislative assembly and with the approval of the President may make rules for the timely completion of financial business; for regulating the procedure of and the conduct of business in the legislative assembly in relation to financial matters of Bills; for the appropriation of moneys within the consolidated fund of the Capital; and for prohibiting any discussion on matters where the Lieutenant Governor is to act in his discretion. Under Section 34, the President has been empowered to direct that the official

language of the Union shall be adopted for such of the official purposes of the Capital as may be specified, and that any other language shall also be adopted.

80 Part IV of the GNCTD Act has *inter alia* made provisions for matters which lie in the discretion of the Lieutenant Governor, the conduct of business, and the duty of the Chief Minister to communicate with and share information with the Lieutenant Governor. Section 41 provides thus:

> "Section 41. Matters in which Lieutenant Governor to act in his discretion:-
> (1) The Lieutenant Governor shall act in his discretion in a matter –
>
> (i) which falls outside the purview of the powers conferred on the Legislative Assembly but in respect of which powers or functions are entrusted or delegated to him by the President ; or
> (ii) in which he is required by or under any law to act in his discretion or to exercise any judicial functions.
>
> (2) If any question arises as to whether any matter is or is not a matter as respects with the Lieutenant Governor is by or under any law required to act in his discretion, the decision of the Lieutenant Governor thereon shall be final.
>
> (3) If any question arises as to whether any matter is or is not a matter as respects which the Lieutenant Governor is by or under any law required by any law to exercise any judicial or *quasi-judicial* functions, the decision of the Lieutenant Governor thereon shall be final."

81 The Lieutenant Governor acts in his discretion in two classes of matters. The first consists of those which are outside the powers conferred upon the legislative assembly but in respect of which the President has delegated powers and functions to the Lieutenant Governor. The second category consists of

those matters where the Lieutenant Governor is required to act in his discretion by or under any law or under which he exercises judicial or *quasi-judicial* functions. Matters falling within the ambit of Section 41 lie outside the realm of the aid and advice mandate. Where a subject or matter lies outside the purview of the legislative assembly, it necessarily lies outside the executive powers of the government of the NCT. Such matters stand excepted from the ambit of the aid and advice which is tendered by the Council of Ministers to the Lieutenant Governor.

82 Section 44 stipulates that the President may make rules for the conduct of business:

> "Section 44. Conduct of business:
>
> (1) The President shall make rules -
>
> (a) for the allocation of business to the Ministers in so far as it is business with respect to which the Lieutenant Governor is required to act on the aid and advice of his Council of Ministers; and
>
> (b) for the more convenient transaction of business with the Ministers, including the procedure to be adopted in the case of a difference of opinion between the Lieutenant Governor and the Council of Ministers or a Minister.
>
> (2) Save as otherwise provided in this Act, all executive action of the Lieutenant Governor whether taken on the advice of his Ministers or otherwise shall be expressed to be taken in the name of the Lieutenant Governor.
>
> (3) Orders and other instruments made and executed in the name of the Lieutenant Governor shall be authenticated in such manner as may be specified in rules to be made by the Lieutenant Governor and the validity of an order or instrument which is so authenticated shall not be called in question on the ground that it is not an order or instrument made or executed by the Lieutenant Governor."

Under Section 44, the allocation of business amongst ministers in the government on matters where the Lieutenant Governor is to act on the aid and advice of the Council of Ministers has to be prescribed by the rules framed by the President. Similarly, rules for the convenient transaction of business with Ministers and for the modalities to be followed where there is a difference between the Lieutenant Governor and the Council of Ministers or a Minister are framed by the President. All executive action is under sub-section 2 expressed in the name of the Lieutenant Governor. Sub-Section 3 provides for the authentication of orders and instruments made and executed in the name of the Lieutenant Governor.

83 Section 44 may be distinguished from the provisions of the Constitution in relation to the conduct of business of the Union government (under Article 77) and the conduct of business of the States (under Article 166). Article 77 *inter alia* stipulates that all executive action of the Union government shall be expressed in the name of the President and that orders or instruments in the name of the President shall be authenticated in accordance with the rules framed by the President. The President is empowered to make rules for the convenient transaction of business and for allocation of that business among ministers. Article 166 is *pari materia* (with the substitution of the Governor, for the President in relation to a State). Unlike in the case of a State, where rules of business are prescribed by the Governor, Section 44 requires that the rules in relation to the conduct of business in the NCT be framed by the President.

Moreover, there is no provision analogous to the proviso to Article 239AA(4) in relation to the affairs of a State under the Constitution. Article 167 does not contain a provision for the procedure to be adopted where there is a difference of opinion between the Governor and the Council of Ministers.

84 Section 45 provides for the duty of the Chief Minister to communicate with and share information with the Lieutenant Governor:

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

Section 45 is similar in terms to Article 78 (in relation to the Prime Minister) and Article 167 (in relation to a Chief Minister of a State). Articles 78 and 167 embody the fundamental duty of the elected head of government in a cabinet form of government to communicate with the titular head of state and to furnish information in regard to the affairs of the state. The duty to keep the head of State informed in relation to the affairs of State arises because real decision making vests in the elected executive. Since decisions are taken by the executive, the head of State is kept apprised in reference to his constitutional position as titular head.

85 Section 46 provides for the Consolidated Fund of the Capital. Section 47 provides for contingency funds. Section 47(A) provides that the executive power of the Union extends to borrowing upon the security of the Consolidated Fund of the Capital within the limits determined by Parliamentary legislation.

86 Section 49 establishes the principle of the "general control" of the President over the Lieutenant Governor and the Council of Ministers.

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

As an incident of control, the Lieutenant Governor and Council of Ministers must comply with the particular directions issued by the President. Such directions are obviously issued on the aid and advise of the Union Council of Ministers.

Section 52 stipulates that all contracts relating to the administration of the Capital are made in exercise of the executive power of the Union and suits and proceedings in connection with the administration can be instituted by or against the Union government.

87 This survey of the provisions of the GNCTD Act 1991 indicates that there is a significant interface between the President and the Lieutenant Governor in

matters relating to the administration of the Capital. The Lieutenant Governor has been conferred with certain specific powers by the provisions of the Act including, among them, requirements of seeking the prior recommendation of the President to the introduction of financial Bills. As we have seen, the Lieutenant Governor has been subjected to a wider obligation to reserve Bills for the consideration of the President and in regard to withholding of his assent to a Bill which has been passed by the legislative assembly in comparison with the duties of a Governor of a State. Matters such as the presentation of the annual financial statement or supplementary, additional or excess grants require previous sanction of the President. The President has been conferred with the power to issue directions in regard to the official language of the National Capital Territory. The Lieutenant Governor has been vested with the power to act in his own discretion in matters which fall outside the ambit and power of the legislative assembly and which have been delegated to him by the President as well as in regard to those matters where he is required under law to exercise his own discretion or to act in exercise of judicial or quasi judicial functions. Rules for the conduct of business are framed by the President in relation to the National Capital Territory, including for the allocation of business. They would include the procedure to be followed where there is a difference of opinion between the Lieutenant Governor and the Council of Ministers. Section 49, which has a non-obstante provision, subjects the Lieutenant Governor and the Council of Ministers to the general control of the President and to such directions as may be issued from time to time.

J The Transaction of Business Rules, 1993

88 The Transaction of Business of the Government of National Capital Territory of Delhi Rules, 1993 ("Transaction of Business Rules") have been formulated by the President in exercise of powers conferred by Section 44 of the GNCTD Act 1991. Rule 4(1) embodies the principle of collective responsibility. According to the Rule 4(1):

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

89 Rule 7 stipulates that all proposals which are referred to in the Schedule must be placed before the Council of Ministers in accordance with the provisions contained in Chapter 3. All such proposals after consideration by the Minister-in-charge have to be submitted to the Chief Minister. Rule 8 envisages orders of the Chief Minister either for circulation of a proposal under Rule 9 or for placing it for consideration of the Ministers. Rule 9 empowers the Chief Minister to circulate proposals to the Ministers for opinion instead of placing them before the Council of Ministers. A proposal can be passed by circulation only if there is unanimity of opinion among the Ministers.

90 The Transaction of Business Rules contain elaborate provisions for the Lieutenant Governor to be kept informed right from the stage of a proposal. Rule 9(2), stipulates that where a proposal is circulated, a memorandum explaining the proposal has to be prepared for circulation among the Ministers and simultaneously a copy has to be forwarded to the Lieutenant Governor. According to the Rule 9(2):

> "If it is decided to circulate any proposal, the Department to which it belongs, shall prepare a memorandum setting out in brief the facts of the proposal, the points for decision and the recommendations of the Minister in charge and forward copies thereof to the Secretary to the Council who shall arrange to circulate the same among the Ministers and simultaneously send a copy thereof to the Lieutenant Governor."

Under Rule 10(4), if the Chief Minister accepts the recommendations, he is to return the proposal with his orders to the Secretary to the Council of Ministers. Thereupon, Rule 10(5) stipulates that :

> "On receipt of the proposal, the Secretary to the Council shall communicate the decision to the Lieutenant Governor and pass on the proposal to the Secretary concerned who shall thereafter take necessary steps to issue the orders unless a reference to the Central Government is required in pursuance of the provisions of Chapter V."

Rule 10(5) requires that on receipt of a proposal, the Secretary to the Council is to communicate the decision to the Lieutenant Governor and to share the proposal with the Secretary of the concerned department. The Secretary of the department concerned would proceed to issue orders, unless a reference to the Central government is required under Chapter V. Chapter V, as we shall note

hereafter, deals with a situation where there has been a difference of opinion between the Lieutenant Governor and the Council of Ministers.

91 Proposals which are required to be placed before the Council of Ministers are dealt with in Rule 11, which provides thus :

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

A memorandum explaining the proposal is placed by the department to which the proposal belongs before the Secretary to the Council. The latter circulates the memorandum to the Ministers and simultaneously sends a copy to the Lieutenant Governor. Rule 13(3) requires that the agenda, upon being approved by the Chief Minister, must be forwarded by the Secretary to the Council to the Lieutenant Governor, the Chief Minister and other Ministers. A record of the decisions taken in the meetings of the Council is prepared and, under Rule 13(7), the Secretary to the Council is required to forward a copy to the Ministers and to the Lieutenant Governor. Rule 14 provides thus:

> "(1) The decision of the Council relating to each proposal shall be separately recorded and after approval by the Chief Minister, or the Minister presiding , shall be placed with the records of the proposal. After approval by the Chief Minister or the Minister presiding , the decision of

> the Council as approved, shall be forwarded by the Secretary to the Council to the Lieutenant Governor.
>
> (2) Where a proposal has been approved by the Council and the approved record of the decision has been communicated to the Lieutenant Governor, the Minister concerned shall take necessary action to give effect to the decision."

After a decision has been taken by the Council on a proposal and upon the approval by the Chief Minister, the decision is forwarded to the Lieutenant Governor. After the decision has been communicated to the Lieutenant Governor, the Minister concerned is empowered to give effect to the decision.

92 Rule 15 empowers the Minister in charge of a department to dispose of proposals or matters in the department in accordance with the Standing Orders. Copies of the Standing Orders have to be forwarded to the Lieutenant Governor and to the Chief Minister. Under Rule 16, the Minister can provide, by means of Standing Orders, for matters to be brought to his personal notice. Copies of the Standing Orders have to be forwarded to the Lieutenant Governor and the Chief Minister. Rule 17 requires a weekly submission of statements containing particulars of important proposals or matters disposed of in the department both to the Lieutenant Governor and the Chief Minister.

93 Rule 19(5) confers authority upon the Lieutenant Governor to call for papers of a proposal or matter from any department. Rule 19(5) is in the following terms:

> "The Lieutenant Governor may call for papers relating to any proposal or matter in any Department and such requisition shall be complied with by the Secretary to the Department concerned, he shall simultaneously inform the Minister-in-charge of the department of the action taken by him."

Rule 22 provides for a class of matters which shall be brought to the attention of the Lieutenant Governor and the Chief Minister:

> "Any matter which is likely to bring the Government of the Capital into controversy with the Central Government or with any State Government, shall, as soon as possible, be brought to the notice of the Lieutenant Governor and the Chief Minister."

Rule 23 provides for classes of proposals or matters which must be submitted to the Lieutenant Governor before orders are issued. Rule 23 is in the following terms:

> "The following classes of proposals or matters shall essentially be submitted to the Lieutenant Governor through the Chief Secretary and the Chief Minister before issuing any orders thereon, namely:
>
> (i) matters which affect or are likely to affect the peace and tranquillity of the capital;
> (ii) matters which affect or are likely to affect the interest of any minority community, Scheduled Castes and backward classes;
> (iii) matters which affect the relations of the Government with any State Government , the Supreme Court of India or the High Court of Delhi;
> (iv) proposals or matters required to be referred to the Central Government under the Act or under Chapter V;

(v) matters pertaining to the Lieutenant Governor's Secretariat and personnel establishment and other matters relating to his office;
(vi) matters on which Lieutenant Governor is required to make order under any law or instrument in force;
(vii) petitions for mercy from persons under sentence for death and other important cases in which it is proposed to recommend any revision of a judicial sentence;
(viii) matters relating to summoning, prorogation and dissolution of the Legislative Assembly, removal of disqualification of voters at elections to the Legislative Assembly, Local Self Government Institutions and other matters connected with those; and
(ix) any other proposals or matters of administrative importance which the Chief Minister may consider necessary."

Rule 24 provides thus:

"Where the Lieutenant Governor is of the opinion that any further action should be taken or that action should be taken otherwise than in accordance with the orders passed by the Minister in-charge, he may require the proposal or matter to be placed before the Council for consideration: Provided that the notes, minutes or comments of the Lieutenant Governor in any such case shall not be brought on the Secretariat record unless the Lieutenant Governor so directs."

Rule 25 casts a duty on the Chief Minister to furnish to the Lieutenant Governor information on certain matters pertaining to the administration of the Capital. According to Rule 25:

"The Chief Minister shall:

(a) cause to be furnished to the Lieutenant Governor such information relating to the administration of the Capital and proposals for legislation as the Lieutenant Governor may call for; and

(b) if the Lieutenant Governor so requires, submit for the consideration of the Council any matter on which a decision has been taken by a Minister but which has not been considered by the Council."

Rule 45 of the Transaction of Business Rules deals with the disposal of business relating to the executive functions of the Lieutenant Governor. Under Rule 45:

> "The Lieutenant Governor, may by standing orders in writing, regulate the transaction and disposal of the business relating to his executive functions:
>
> Provided that the standing orders shall be consistent with the provisions of this Chapter, Chapter V and the instructions issued by the Central Government for time to time.
>
> Provided further that the Lieutenant Governor shall in respect of matters connected with 'public order', 'police' and 'land' exercise his executive functions to the extent delegated to him by the President in consultation with the Chief Minister, if it is so provided under any order issued by the President under article 239 of the Constitution. Provided further that 'standing orders' shall not be inconsistent with the rules concerning transaction of business."

The second proviso deals with the class of subjects (public order, police and law) which stand carved out of the legislative powers of the Assembly and hence lie outside the executive powers of the NCT government. On such matters, to the extent to which functions are delegated to the Lieutenant Governor by the President, the Lieutenant Governor will consult the Chief Minister if the President has so provided in an order under Article 239.

Rule 46 makes provisions in regard to persons serving in connection with the administration of the National Capital Territory:

> "(1) With respect to persons serving in connection with the administration of the National Capital Territory, the Lieutenant Governor shall, exercise such powers and perform such functions as may be entrusted to him under the provisions of the rules and orders regulating the conditions of service of such persons or by any other order

> of the President in consultation with the Chief Minister, if it is so provided under any order issued by the President under article 239 of the Constitution.
>
> (2) Notwithstanding anything contained in sub-rule (1) the Lieutenant Governor shall consult the Union Public Service Commission on all matters on which the Commission is required to be consulted under clause(3) of article 320 of the Constitution; and in every such case he shall not make any order otherwise than in accordance with the advice of the Union Public Services Commission unless authorised to do so by the Central Government.
>
> (3) All correspondence with Union Public Service Commission and the Central Government regarding recruitment and conditions of service of persons serving in connection with the administration of National Capital Territory shall be conducted by the Chief Secretary or Secretary of the Department concerned under the direction of the Lieutenant Governor."

Under Rule 47, the Lieutenant Governor has to consult the Union government before exercising his powers or discharging his functions in respect of any matter for which no specific provision is contained in the Rules.

94 Chapter V of the Transaction of Business Rules sets out the procedure to be followed by the Lieutenant Governor in making a reference to the Central government in the event of a difference of opinion with the Council of Ministers. Rules 49, 50 and 51 provide as follows:

> "49. In case of difference of opinion between the Lieutenant Governor and a Minister in regard to any matter, the Lieutenant Governor shall endeavour by discussion on the matter to settle any point on which such difference of opinion has arisen. Should the difference of opinion persist, the Lieutenant Governor may direct that the matter be referred to the Council."
>
> "50. In case of difference of opinion between the Lieutenant Governor and the Council with regard to any matter, the

> Lieutenant Governor shall refer it to the Central Government for the decision of the President and shall act according to the decision of the President."
>
> "51. Where a case is referred to the Central Government in pursuance of rule 50, it shall be competent for the Lieutenant Governor to direct that action shall be suspended pending the decision of the President on such case or in any case where the matter, in his opinion, is such that it is necessary that immediate action should be taken to give such direction or take such action in the matter as he deems necessary."

Where a direction has been issued by the Lieutenant Governor under Rule 51, the Minister concerned must take action to give effect to the direction.

95 Under Rule 53, an annual plan for each financial year is to be prepared under the directions of the Lieutenant Governor which has to be referred to the Central government for approval. The form of the annual financial statement and the procedure for obtaining the approval of the President have to be prescribed by the Central government under Rule 54.

96 Rule 55(1) provides for certain categories of legislative proposals which must be referred to the Central government by the Lieutenant Governor. Rule 55(2) enunciates those matters upon which the Lieutenant Governor shall make a prior reference to the Union government in the Ministry of Home Affairs or through the appropriate ministry. According to Rule 55:

> "(1) The Lieutenant Governor shall refer to the Central Government every legislative proposal, which

(a) if introduced in a Bill form and enacted by the Legislative Assembly, is required to be reserved for the consideration of the President under the proviso to subclause (c) of clause (3) of article 239 AA or, as the case may be, under the second proviso to section 24 of the Act;

(b) attracts provisions of articles 286, 287, 288 and 304 of the Constitution as applicable to the Capital;

(c) relates to any matter which may ultimately necessitate additional financial assistance from the Central Government through substantive expenditure from the Consolidated Fund of the Capital or abandonment of revenue or lowering of rate of any tax.

(2) Subject to any instructions which may from time to time be issued by the Central Government, the Lieutenant Governor shall make a prior reference to the Central Government in the Ministry of Home Affairs or to the appropriate Ministry with a copy to the Ministry of Home Affairs in respect of the following matters:-

(a) proposals affecting the relations of the Central Government with any State Government, the Supreme Court of India or any other High Court;

(b) proposals for the appointment of Chief Secretary and Commissioner of Police, Secretary (Home) and Secretary (Lands);

(c) important cases which affect or are likely to affect the peace and tranquillity of the National Capital Territory; and

(d) cases which affect or are likely to affect the interests of any minority community, Scheduled Castes or the backward classes."

Rule 56 stipulates that where a matter has been referred by the Lieutenant Governor to the Central government under the Rules, further action shall not be taken except in accordance with the decision of the Central government.

97 Analysing the Transaction of Business Rules, it becomes evident that the Lieutenant Governor is required to be kept informed of governmental business.

The duty of the Council of Ministers, with the Chief Minister at its head, to do so begins at the stage of a proposal. When a proposal is circulated under the directions of the Chief Minister to the Council of Ministers, a copy of the explanatory memorandum has to be forwarded to the Lieutenant Governor. After the proposal has been approved, the decision is communicated to the Lieutenant Governor. The decision is forwarded to the Secretary of the department concerned for issuing orders unless a reference to the Central government is warranted under Chapter V. Where a proposal is placed before the Council of Ministers, an explanatory memorandum has to be forwarded to the Lieutenant Governor. Copies of the agenda, upon approval of the Chief Minister, are required to be submitted to the Lieutenant Governor. A record of the decisions of the Council of Ministers is forwarded to the Lieutenant Governor. After the decisions of the Council have been approved by the Chief Minister, they are forwarded by the Secretary to the Council to the Lieutenant Governor. Rule 14(2) stipulates that after a proposal has been approved by the Council of Ministers and the approved record of the decision has been communicated to the Lieutenant Governor, the minister concerned "shall take necessary action to give effect to the decision". Communication of the approved record of the decision to the Lieutenant Governor is mandatory and it is only thereafter that the decision can be implemented. The Lieutenant Governor is empowered to call for papers relating to any proposal or matter in any department under Rule 19(5). The power conferred upon the Lieutenant Governor to do so is independent of and does not detract from the duty of the

Council of Ministers to keep him informed at every stage. Matters which are likely to bring the government of the NCT into controversy with the Central government or with any state government must be bought to the notice of the Lieutenant Governor. As distinguished from Rule 14, Rule 23 sets out those classes of proposals or matters which have to be submitted to the Lieutenant Governor before orders are issued thereon. Rule 14(2), as noted earlier, stipulates that upon being approved by the Council, the record of the decision is communicated to the Lieutenant Governor upon which the minister will take necessary action to give effect to the decision. However, Rule 23 elucidates specified situations where proposals or matters must be essentially submitted to the Lieutenant Governor before issuing orders thereon. These matters are considered to be important enough to warrant a mandatory prior submission to the Chief Minister as well as to the Lieutenant Governor before orders are issued. These provisions in the Transaction of Business Rules ensure that the Lieutenant Governor is kept informed of the affairs and administration of the National Capital Territory at every stage. The rules leave no element of discretion in the Council of Ministers to not comply with the obligation. The obligation to keep the Lieutenant Governor informed at every stage brooks no exceptions.

98 The Transaction of Business Rules set out a careful defined procedure to enable the Lieutenant Governor to counsel the Ministers. This is to facilitate a further reflection or reconsideration in certain situations. Rule 24 deals with

one such situation where the Lieutenant Governor is of the opinion "that any further action should be taken or that action should be taken otherwise than in accordance with the orders passed by the minister in charge". The Lieutenant Governor may in either case require that the proposal or matter be placed before the Council of Ministers for consideration. The duty of keeping the Lieutenant Governor abreast of the administration of the affairs of the National Capital Territory is amplified by Rule 25. Under the Rule, a duty has been cast on the Chief Minister to furnish to the Lieutenant Governor information on the administration of the Capital and proposals for legislation as the latter may summon. The Lieutenant Governor may also require the submission to the Council of a matter on which the Minister has taken a decision but it has not been placed before the Council.

99 Chapter IV enables the Lieutenant Governor to formulate standing orders regulating the transaction and disposal of business relating to his executive functions. The second proviso to Rule 45 specifically deals with matters connected with public order, police and land. These are subjects which lie outside the ambit of legislative powers of the legislative assembly, since they fall under Entries 1, 2 and 18 of the State List. Since there is an absence of legislative power in relation to these subjects, they lie outside the realm of matters covered by the aid and advice of the Council of Ministers. On these excepted subjects, the Lieutenant Governor has to exercise his executive function to the extent to which there is a delegation by the President. The

Lieutenant Governor has to consult the Chief Minister if it is so provided in an order of the President under Article 239. Clearly, therefore, in regard to the excepted matters, the exercise of the executive functions by the Lieutenant Governor must be in accord with the delegation, if any, by the President. The Lieutenant Governor can exercise only such executive functions, to the extent to which a delegation has been made. The requirement of consulting the Chief Minister would be subject to the contents of an order issued by the President under Article 239.

100 As regards persons who are in the service connected to the administration of the NCT, the Lieutenant Governor has been assigned under Rule 46 such powers and functions as are entrusted to him by the Rules and orders regulating the conditions of service of such persons or an order of the President made under Article 239. The Lieutenant Governor is mandated to consult the Union Public Service Commission on matters on which it is required to be consulted under Article 320(3). The Lieutenant Governor has to act in accordance with the advice of the Commission unless authorized by the Central government.

101 The Transaction of Business Rules elaborately define the modalities which the Lieutenant Governor must follow in the event of a difference of opinion with the Council of Ministers. The proviso to Article 239AA(4), Section 44(1)(b)

of the GNCTD Act and Chapter V of the Transaction of Business Rules provide a composite and holistic perspective. They elucidate the modalities which must be followed when there is a difference of opinion. Chapter V supplements and gives effect to the proviso to Article 239AA(4). If a difference of opinion arises between the Lieutenant Governor and a Minister on any matter, the first and primary endeavour must be to resolve it by discussion. Before the matter escalates to the next stage all efforts have to be devoted to a mutual resolution with the Minister. If the difference of opinion continues to persist, the Lieutenant Governor is empowered to direct that the matter in difference be referred to the Council of Ministers. It is when a difference persists between the Lieutenant Governor and the Council of Ministers that a reference is contemplated by Rule 50 to the Central government for a decision of the President. These provisions provide a road map for the exercise of constitutional statesmanship. The differences between the Lieutenant Governor and a Minister or the Council of Ministers must in good faith be attempted to be resolved. Differences constitute the heart of democracy. Reason and dialogue are the essence of a democratic government. The affairs of government do admit of variations in perspective and opinion. The problems of governance are complex. The institutional process of decision making must be mature and tolerant. The theatrics which accompany the rough and tumble of politics ought not to disrupt the necessity for institutional governance which is marked by constitutional sobriety and administrative wisdom.

102 Settlement of a difference between a Minister and the Lieutenant Governor by discussion obviates a reference to the President and provides a flexible and expeditious solution where there is a difference of opinion. The first stage at which a resolution is attempted is between the Lieutenant Governor and the Minister in question. If that does not result in a satisfactory solution, the second stage involves the Council of Ministers as a collective entity. It is when the dispute has failed to meet a satisfactory resolution with the Council of Ministers that the Lieutenant Governor is empowered to make a reference to the Central government. The power of the Lieutenant Governor under Rule 55(2) stands independent of the area of difference of opinion covered by Rules 49, 50 and 51. Rule 55(2) brings into focus certain specified areas where certain matters have to be referred to the Union government either in the Union Ministry of the Home Affairs or in the appropriate ministry. The matters covered by Rule 55(2) are considered to be important enough to warrant a prior reference to the Central government.

103 The feature which stands out from the Transaction of Business Rules is that an obligation and duty has been cast upon the elected government and its officers to duly keep the Lieutenant Governor informed of proposals relating to governmental business. The duty to keep the Lieutenant Governor informed is a necessary element of the process and essential for the exercise of the constitutional authority which has been vested in the Lieutenant Governor. It is only when the Lieutenant Governor is kept duly apprised of matters relating to

the administration of the National Capital Territory that a decision can be taken on whether a reference should be made to the Union government under Chapter V. If the Lieutenant Governor were to be kept in the dark, it would not be possible for him as a constitutional authority to determine as to whether the matter is of such a nature as would warrant a reference to the Central government. Sharing of information and the process of communication ensures a dialogue which promotes harmony in administration. The Rules are founded upon the need to maintain constitutional comity rather than strife.

104 A significant aspect of the Rules is that on matters which fall within the ambit of the executive functions of the government of NCT, decision making is by the government comprised of the Council of Ministers with the Chief Minister at its head. The role of the Lieutenant Governor is evinced by the duty which is cast upon the government to keep him duly apprised on matters relating to the administration of the Union territory. On matters of executive business which lie within the constitutional functions assigned to the executive government of the NCT, such a role is elaborated in the functions assigned to the Lieutenant Governor under Rule 24. Rule 24 deals with an eventuality when the Lieutenant Governor may be of the opinion that any further action should be taken or that action should be taken otherwise than in accordance with an order which has been passed by a Minister. In such a case, the Lieutenant Governor does not take his own decision. He has to refer the proposal or matter to the Council of Minister for consideration. Under Rule 25, Lieutenant Governor may require the

Council to consider a matter on which a decision has been taken by a Minister but which has not been considered by the Council. Rule 23 enunciates matters which have to be submitted to the Lieutenant Governor before issuing any orders thereon. If the Lieutenant Governor disagrees with a decision or proposal, recourse has to be taken to the procedure which has been enunciated in Rules 49, 50 and 51. If there is a difference of opinion, the Lieutenant Governor must refer it to the Union government after following the procedure which has been laid down. After the decision of the President has been communicated, the Lieutenant Governor must follow that decision and implement it. In other words, the Lieutenant Governor has not been conferred with the authority to take a decision independent of and at variance with the aid and advice which is tendered to him by the Council of Ministers. If he differs with the aid and advice, the Lieutenant Governor must refer the matter to the Union government (after attempts at resolution with the Minister or Council of Ministers have not yielded a solution). After a decision of the President on a matter in difference is communicated, the Lieutenant Governor must abide by that decision. This principle governs those areas which properly lie within the ambit and purview of the executive functions assigned to the government of the National Capital Territory. Matters under Section 41 which fall under the discretion of the Lieutenant Governor stand at a different footing. The Lieutenant Governor may be required to act in his discretion where a matter falls outside the powers conferred on the legislative assembly but in respect of which powers or functions have been delegated to him by the President. The

Lieutenant Governor may also be required to act in his discretion under a specific provision of law or where he exercises judicial or *quasi judicial* functions. Matters pertaining to public order, police and land lie outside the ambit of the legislative powers of the Assembly and hence are outside the executive functions of the government of NCT. These are matters where the Lieutenant Governor would act in the exercise of his functions at his discretion if and to the extent to which there has been a delegation or entrustment by the President to him under Article 239 of the Constitution. Hence, a distinction exists between matters which lie within the domain of the legislative powers of the Assembly and of the executive powers of the NCT government, and those which lie outside. On the former, the Lieutenant Governor must abide by the aid and advice tendered by the Council of Ministers and, in the event of a difference of opinion, refer the matter to the President for decision. In matters which lie outside the legislative powers of the legislative assembly, the Lieutenant Governor has to act in accordance with the entrustment or delegation that has been made to him by the President under Article 239.

105 Section 49 of the GNCTD Act confers an overriding power of control upon the President and the power to issue directions. Upon the exercise of Presidential powers under Section 49, the Lieutenant Governor would have to abide by the directions of the President.

K Precedents

Literal Interpretation

106 The Learned Additional Solicitor General has relied on certain decisions of this Court to support his submission that while interpreting the Constitution, the Court must read its words in a strictly textual manner. It is his contention that the provisions of Article 239AA, the GNCTD Act and Transaction of Business Rules must be given plain and literal interpretation.

107 The first case relied by the Learned ASG is the decision in **Keshavan Madhava Menon** v **State of Bombay**[83] **("Keshavan Madhava Menon")**. A Full Bench of the Bombay High Court had held that assuming that the provisions of the Indian Press (Emergency Powers) Act, 1931 were inconsistent with Article 19(1)(a) of the Constitution, proceedings which had been commenced and were pending at the date of the commencement of the Constitution were not affected even if the Act was inconsistent with the fundamental rights and had become void under Article 13(1). The appeal against the judgment of the High Court was adjudicated by a seven-Judge Constitution Bench of this Court. Justice S R Das, speaking for a majority of this Court held that:

> "An argument founded on what is claimed to be the spirit of the Constitution is always attractive, for it has a powerful appeal to sentiment and emotion; but a court of law has to gather the spirit of the Constitution from the language of the Constitution. What one may believe or think to be spirit of the Constitution cannot prevail if the language of the Constitution does not

[83] (1951) 2 SCR 228

> support that view. Article 372(2) gives power to the President to adapt and modify existing laws by way of repeal or amendment. There is nothing to prevent the President, in exercise of the powers conferred on him by that article, from repealing, say the whole or any part of the Indian Press (Emergency Powers) Act, 1931. If the President does so, then such repeal will at once attract Section 6 of the General Clauses Act. In such a situation all prosecutions under the Indian Press (Emergency Powers) Act, 1931, which were pending at the date of its repeal by the President would be saved and must be proceeded with notwithstanding the repeal of that Act unless an express provision was otherwise made in the repealing Act. It is therefore clear that the idea of the preservation of past inchoate rights or liabilities and pending proceedings to enforce the same is not foreign or abhorrent to the Constitution of India. We are, therefore, unable to accept the contention about the spirit of the Constitution as invoked by the learned counsel in aid of his plea that pending proceedings under a law which has become void cannot be proceeded with. Further, if it is against the spirit of the Constitution to continue the pending prosecutions under such a void law, surely it should be equally repugnant to that spirit that men who have already been convicted under such repressive law before the Constitution of India came into force should continue to rot in jail. It is, therefore, quite clear that the court should construe the language of Article 13(1) according to the established rules of interpretation and arrive at its true meaning uninfluenced by any assumed spirit of the Constitution."

Applying the standard, the majority held that Article 13 of the Constitution "is entirely prospective in operation and rendered inconsistent existing laws ineffectual on and after the date of the commencement of the Constitution". The view of the majority was that there is no fundamental right that a person shall not be prosecuted and punished for an offence committed before the Constitution came into force. Justice Fazal Ali in his dissenting judgment, however, held that:

> "..Evidently, the framers of the Constitution did not approve of the laws which are in conflict with the fundamental rights, and, in my judgment, it would not be giving full effect to their intention to hold that even after the Constitution has come into

> force, the laws which are inconsistent with the fundamental rights will continue to be treated as good and effectual laws in regard to certain matters, as if the Constitution had never been passed. How such a meaning can be read into the words used in Article 13(1), it is difficult for me to understand. There can be no doubt that Article 13(1) will have no retrospective operation, and transactions which are past and closed, and rights which have already vested, will remain untouched. But with regard to inchoate matters which were still not determined when the Constitution came into force, and as regards proceedings whether not yet begun, or pending at the time of enforcement of the Constitution and not yet prosecuted to a final judgment, the very serious question arises as to whether a law which has been declared by the Constitution to be completely ineffectual can yet be applied. On principle and on good authority, the answer to this question would appear to me to be that the law having ceased to be effectual can no longer be applied."

108 The next judgment on which reliance has been placed by the ASG is in **Tej Kiran Jain** v **N Sanjiva Reddy**[84]. A Bench of six judges of this Court was considering an appeal from the judgment of a Full Bench of the Delhi High Court rejecting a plaint claiming a decree for damages for statements made on the floor of the Lok Sabha during a Calling Attention Motion. Such an action was clearly barred under Article 105(2) of the Constitution. This Court rejected the contention that the immunity granted by Article 105(2) in respect of anything said or any vote given in Parliament would apply only to words relevant to the business of Parliament and not to something which was irrelevant. In that context, the Court held that:

> "In our judgment it is not possible to read the provisions of the article in the way suggested. The article means what it says in language which could not be plainer. The article confers immunity inter alia in respect of "anything said …. In Parliament". The word 'anything' is of the widest import and is equivalent to 'everything'. The only limitation arises from the

[84] (1970) 2 SCC 272

> words 'in Parliament' which means during the sitting of Parliament and in the course of the business of Parliament. We are concerned only with speeches in Lok Sabha. Once it was proved that Parliament was sitting and its business was transacted, anything said during the course of that business was immune from proceedings in any Court. This immunity is not only complete but is as it should be…"

109 The third decision is of a Constitution Bench in **G Narayanaswami** v **G Pannerselvam**[85] **("Narayanaswami")**. In that case, Article 171 of the Constitution came up for interpretation and the submission which was urged was that in order to be qualified to stand for election to a graduate constituency of the Legislative Council of a State, a person must also possess the qualification of being a graduate. Repelling the contention, this Court held that it was not open to the Court to add to the qualifications prescribed by the Constitution:

> "..The concept of such representation does not carry with it, as a necessary consequence, the further notion that the representative must also possess the very qualifications of those he represents… the view contained in the Judgment under appeal, necessarily results in writing some words into or adding them to the relevant statutory provisions to the effect that the candidates from graduates' constituencies of Legislative Councils must also possess the qualification of having graduated. This contravenes the rule of "plain meaning" or "literal" construction which must ordinarily prevail."

110 In support of the above contention, reliance has also been placed on two other Constitution Bench decisions of this Court in **Kuldip Nayar** v **Union of India**[86] **("Kuldip Nayar")** and **Manoj Narula** v **Union of India**[87] **("Manoj**

[85] (1972) 3 SCC 717
[86] (2006) 7 SCC 1
[87] (2014) 9 SCC 1

Narula"). In **Kuldip Nayar**, an amendment made in the Representation of People Act, 1951 was challenged. By the said amendment, the requirement of "domicile" in the State concerned for getting elected to the Council of States was deleted. It was contended by the petitioner that removing the said requirement violated the principle of federalism, a basic feature of the Constitution. The Court rejected the contention of the petitioner. While endorsing and reiterating the view taken in the judgment in **Narayanaswami**, the Court held:

> "It may be desirable to give a broad and generous construction to the Constitutional provisions, but while doing so the rule of "plain meaning" or "literal" interpretation, which remains "the primary rule", has also to be kept in mind. In fact the rule of "literal construction" is the safe rule unless the language used is contradictory, ambiguous, or leads really to absurd results… The "representative" of the State is the person chosen by the electors who can be any person who, in the opinion of the electors, is fit to represent them. There is absolutely no basis for the contention that a person who is an elector in the State concerned is more "representative" in character than one who is not. We do not find any contradiction, ambiguity, or absurdity in the provisions of the law as a result of the impugned amendment. Even while construing the provisions of the Constitution and the RP Acts in the broadest or most generous manner, the rule of "plain meaning" or "literal" interpretation compels us not to accept the contentions of the petitioners."

In **Manoj Narula**, a writ petition under Article 32 of the Constitution assailed the appointment of some of the original Respondents as Ministers to the Council of Ministers of Union of India despite their involvement in serious and heinous crimes. The question before the Court was whether a categorical prohibition can be read to the words contained in Article 75(1) of the Constitution so that the Prime Minister is constitutionally prohibited to give advice to the President

in respect of a person for becoming a Minister who is facing a criminal trial for a heinous and serious offence and charges have been framed against him by the trial Judge. The Constitution Bench held that it cannot re-write a constitutional provision:

> "Reading such an implied limitation as a prohibition would tantamount to adding a disqualification at a particular stage of the trial in relation of a person. This is neither expressly stated nor is impliedly discernible from the provision."

111 These judgments do not advance the proposition which is sought to be urged on behalf of the Union of India that anything but the literal meaning of the words used is irrelevant to the interpretation of the Constitution. The judgment in **Keshavan Madhava Menon** held that the Court has to gather the spirit of the Constitution from its language and that the language of Article 13 had to be interpreted in accordance with the established rules of interpretation "uninfluenced by any assumed spirit of the Constitution". These observations of the seven-judge Bench are not intended to adopt a principle of interpretation which requires the Court to ignore the basic values which the Constitution seeks to enhance, while interpreting the words used in the text. The words contained in the text of the Constitution have to be attributed a purposive interpretation which advances fundamental constitutional values. In **Keshavan Madhava Menon**, the Court found the 'spirit of the Constitution' to be perhaps too vague or amorphous (though it was not articulated specifically thus). After the evolution of the basic structure doctrine post **Kesavananda**, the interpretation of the Constitution must be guided by those fundamental tenets which constitute the foundation and basic features of the document. Where a provision of the

Constitution is intended to facilitate participatory governance, the interpretation which the Court places must enhance the values of democracy and of republican form of government which are part of the basic features.

112 The judgment in **Tej Kiran Jain** rejects the attempt to dilute the immunity conferred by Article 105 in respect of statements made on the floor of the House. The judgment in **Narayanaswami** rejected the attempt to read a qualification for being elected to the Legislative Council which was not found in the text of Article 171. The Court in **Manoj Narula** refused to read a disqualification into the words of Article 75 for being appointed as a Minister of the Union Cabinet. The Constitution of India is an embodiment of multiple values. The Constitution preserves national unity. Yet it also nurtures regional autonomy and decentralization. As discussed in the beginning of this judgment, the approach of a constitutional court must be to interpret the Constitution so as "to arbitrate between contesting interpretations of the many core values on which our polity is believed to be based."[88] Each provision of the Constitution must therefore be studied "as an expression of values" and has to be interpreted "against the background of an overarching constitutional order".[89] Representative democracy underlines the essence of our Constitution. Collective responsibility of the Council of Ministers is the most essential component of the Cabinet form of government as envisaged under the

[88] Rajiv Bhagava (ed.), Politics and Ethics of the Indian Constitution, Oxford University Press (2008), at page 9
[89] Martin Loughlin, "The Silences of Constitutions", International Journal of Constitutional Law (2019, In Press) https://www.jura.uni-freiburg.de/de/institute/rphil/freiburger_vortraege/silences-of-constitutions-m.-loughlin-manuskript.pdf

Constitution. The trust reposed in the Council of Ministers of the NCT is based on its constitutional status. These moral values of the Constitution must therefore be upheld.

113 In **Kuldip Nayar**'s case, the Court had held that in order to interpret the intention behind the enactment of a provision, "one needs to look into the historical legislative developments". Placing the structure of governance in the NCT to a constitutional pedestal (while making divergences from previous statutory schemes, as discussed earlier in this judgment) provided a special status to the NCT, which this Court cannot ignore.

This Court must interpret the Constitution on the basis of the principles elucidated in the beginning of this judgment.

Relationship between Centre and Union Territories

114 The relationship between the Union government and a Union territory has in varying contexts been the subject matter of decided cases. In **Satya Dev Bushahri** v **Padam Dev**[90] **("Satya Dev Bushahri")**, the election of the first respondent was questioned, among other grounds, for the reason that he was interested in contracts with the government and was disqualified for being chosen to the legislative assembly of Himachal Pradesh. The Election Tribunal rejected the contention holding that Representation of the People Act, 1951 was

[90] (1955) 1 SCR 549

not applicable to elections in Part C States. The appellant contended that the contracts in which the elected candidate had interest were in fact contracts with the Central government, which disqualified him from becoming a member of the legislative assembly. It was urged that since the executive action of the Central government is vested in the President, the President was also the executive head of Part C States and a contract entered into with the then state of Himachal Pradesh was in law a contract with the Central government. Dealing with the submission, Justice T L Venkatarama Ayyar speaking for a Bench of three judges of this Court held thus :

> "9…The fallacy of this reasoning is obvious. The President who is the executive head of the Part C States is not functioning as the executive head of the Central Government, but as the head of the State under powers specifically vested in him under Article 239. The authority conferred under Article 239 to administer Part C States has not the effect of converting those States into the Central Government. Under Article 239, the President occupies in regard to Part C States, a position analogous to that of a Governor in Part A States and of a Rajpramukh in Part B States. Though the Part C States are centrally administered under the provisions of Article 239, they do not cease to be States and become merged with the Central Government."

The Court consequently rejected the contention that a contract with a Part C State should be construed as a contract with the Central government. This decision was subject to a review. In the application for review, reliance was sought to be placed on the provisions of Section 3(8)(b)(2) of the General Clauses Act which define the expression "Central Government" as follows :

> "3…Central Government' shall in relation to anything done or to be done after the commencement of the Constitution, mean the President; and shall include in relation to the administration

> of a Part C State, the Chief Commissioner or Lieutenant-Governor or Government of a neighbouring State or other authority acting within the scope of the authority given to him or it under Article 239 or Article 243 of the Constitution, as the case may be."

On this basis, it was urged that a contract with the Chief Commissioner of Himachal Pradesh must be treated as a contract with the Central government and in consequence the elected candidate was disqualified under the relevant legislation. On the other hand, the elected candidate relied upon the provisions of Section 3(60)(b) which read as follows:

> "State Government" as respects anything done or to be done after the commencement of the Constitution, shall mean, in a Part A State, the Governor, in a Part B State the Rajpramukh, and in a Part C State the Central Government."

This Court, in the course of the judgment in review, held that in view of the provisions of Section 3(8), a contract with the Chief Commissioner in a Part C State is a contract with the Central government, which would be a disqualification for election to the legislative assembly under Section 17 of Government of Part C States Act 1951 read with Section 7(d) of Representation of the People Act, 1951. In the view of the Court:

> "4…We are unable to agree that Section 3(8) has the effect of putting an end to the status of Part C States as independent units, distinct from the Union Government under the Constitution. It merely recognises that those States are centrally administered through the President under Article 239, and enacts that the expression "Central Government "should include the Chief Commissioner administering a Part C State under the authority given to him under Article 239. Section 3(8) does not affect the status of Part C States as distinct entities having their own Legislature and judiciary, as provided in Articles 239 and 240. Its true scope will be clear if, adapting it,

> we substitute for the words "Central Government" in Section 9 of Act 43 of 1951 the words "the Chief Commissioner acting within the scope of the authority given to him under Article 239". A contract with the Chief Commissioner would, therefore, under Section 9 read with Section 3(8) of the General Clauses Act, be a contract with the Central Government, and would operate as a disqualification for election to either House of Parliament under Sections 7(*d*) and 9 of Act 43 of 1951, and it would be a disqualification under Section 17 of Act 49 of 1951, for election to the Legislative Assembly of the State."

115 The subsequent decision in **Devji Vallabhbhai Tandel** v **Administrator of Goa, Daman & Diu**[91] **("Tandel")** involved an order of detention issued under the COFEPOSA[92] by the Administrator of Goa, Daman and Diu. One of the grounds of challenge before the Bench of three Judges of this Court was that an order of detention could be made only by the Chief Minister in the name of the Administrator, and not by the Administrator. Section 2(f) defined the expression "state government", in relation to a Union territory, to mean the Administrator. An order of detention could be issued under Section 3(1) by the Central government or the state government or officers of a certain rank who were duly empowered. Justice Baharul Islam speaking for this Court noted that comparing the provisions of Articles 74 and 163, on the one hand and Section 44 of the Government of Union Territories Act 1963, there was a manifest difference between the position of the President or Governor and the Administrator of a Union territory. In the view of the Court:

> "14…The Administrator even in matters where he is not required to act in his discretion under the Act or where he is not exercising any judicial or quasi-judicial function, is not bound to act according to the advice of the Council of Ministers.

[91] (1982) 2 SCC 222
[92] The Conservation of Foreign Exchange and Prevention of Smuggling Activities Act 1974

> This becomes manifest from the proviso to Section 44(1). It transpires from the proviso that in the event of a difference of opinion between the Administrator and his Ministers on any matter, the Administrator shall refer the matter to the President for decision and act according to the decision given thereon by the President. If the President in a given situation agrees with what the Administrator opines contrary to the advice of the Council of Ministers, the Administrator would be able to override the advice of the Council of Ministers and on a reference to the President under the proviso, obviously the President would act according to the advice of the Council of Ministers given under Article 74. Virtually, therefore, in the event of a difference of opinion between the Council of Ministers of the Union Territory and the Administrator, the right to decide would vest in the Union Government and the Council of Ministers of the Union Territory would be bound by the view taken by the Union Government. Further, the Administrator enjoys still some more power to act in derogation of the advice of the Council of Ministers."

The Court adverted to the fact that when the Administrator makes a reference to the President on a difference of opinion arising with the Council of Ministers, he may "during the interregnum...completely override the advice of the Council of Ministers and act according to his light". This Court observed that neither the Governor nor the President enjoys such a power:

> "15…This basic functional difference in the powers and position enjoyed by the Governor and the President on the one hand and the Administrator on the other is so glaring that it is not possible to hold on the analogy of the decision in *Samsher Singh case* is that the Administrator is purely a constitutional functionary bound to act on the advice of the Council of Ministers and cannot act on his own. Therefore, for this additional reason also the submission... must be rejected."

116 The learned Additional Solicitor General has placed reliance on the above observations to submit that since the proviso to Section 44 was "bodily lifted" (as he describes it) and placed in Article 239AA(4), the construction placed by

the Bench of three Judges in **Tandel** on the ambit of the powers of the Administrator will govern the construction of the proviso to Article 239AA. On the other hand, Mr Gopal Subramanium urged that the above interpretation of the proviso to Section 44(1) of the 1963 Act will not apply *proprio vigore* to Article 239AA. In his submission, the constitutional amendment resulting in the introduction of Article 239AA is a significant expression of people's sovereignty and the intention underlying it must receive a purposive interpretation. While not detracting from the importance of the NCT, Mr Subramanium submitted that the area of control with the Administrator which is "an exceptional residual power" must not set at naught a democratically elected Cabinet form of government in the Union territory. We will return to the proper construction to be placed upon the proviso. However, at this stage we find it difficult to subscribe to the view that the content of the constitutional provision engrafted in Article 239AA must be read on the same pedestal as the content of the statutory provision in Section 44 of the 1963 Act. The fact that the proviso to Article 239AA(4) is similar in terms to the proviso to Section 44(1) of the 1963 Act may be one aspect of relevance to the construction of the former. Yet, to our mind, in construing a constitutional provision, the considerations which weigh with the Court would not be constricted by the principles underlying the interpretation of the provisions of a statute. Ordinarily while construing a statute, the Court would be guided by the plain and grammatical meaning of the words used. The literal or golden rule of interpretation gives way where its consequence would lead to an absurdity or perpetuate an evil which the legislature had intended to avoid. The

Court, even while interpreting a statute, may adopt a purposive interpretation. An interpretation is purposive because it facilitates the object which the legislature intended to achieve by enacting the law. Even a purposive interpretation seeks to fulfil the aim and object of the legislature which enacted the law. While construing the provisions of the Constitution, the Court cannot be oblivious either to the nature of the document which it construes or to its task as an institution created by the Constitution to interpret its provisions. Ordinary law is susceptible to alteration by legislative majorities. Legislative amendments to statutory provisions are often a response to the predicaments of the moment. The object of elevating rights, duties and modes of governance into the protective terrain of a constitutional document is to precisely elevate them to a status of stability and permanence which we attribute to a constitutional provision. Constitutional provisions are also subject to the amendatory process under Article 368 so long as the basic features of the Constitution are not abridged. The restraints on the constituent power in the form of the special majorities required for the passage of an amendment, the requirement in certain cases of ratification by the state legislatures and the substantive limits imposed by the basic structure doctrine make the distinction between ordinary legislation and a constitutional amendment evident. Interpretation of a constitutional text is therefore governed by the precept that the Court is embarking upon the task of construing an organic document which defines the basic compact for society. It is in that sense that the Court will bear in mind that it is the Constitution which the Court is expounding. These considerations must apply with significant force

when an amendment to the Constitution has (as in the present case) strengthened the basic structure by entrenching the principle of democratic governance. Consequently, the line of thought which requires us to read the proviso to Article 239AA(4) in terms of the proviso to Section 44(1), and to follow the line of interpretation of the latter in **Tandel's** case is to place words above the heart and soul of the Constitution. **Tandel's** case did not have to go into the issues which arise before us in relation to the exercise of constitutional powers. **Tandel** does not explain what is the nature of the difference of opinion which will warrant a reference to the President. The COFEPOSA, as we have noticed, defined the expression "state government" in relation to a Union territory to mean 'the Administrator thereof'. The Court did not have to consider the effect of the proviso, in any event not in the context of a constitutional provision. There are more fundamental issues which the Court must resolve while interpreting the text of the Constitution which lie beyond the mere question of whether the Administrator of Goa (as in that case) was authorised to issue an order of detention. While construing the text of Article 239AA, the endeavour of the Court must be to facilitate the strengthening of democratic institutions. Constitutional liberties survive and democracies remain vibrant when the institutions of governance created by the Constitution are capable of withstanding the challenges of the times. As an expounder of constitutional principle, it is the foremost duty of the Court to adopt an interpretation which gives expression to democratic values. Truth, justice and freedom are cardinal values in the democratic quest of achieving the dignity of citizens. The ability of citizens to

participate in the formation of governments and to expect accountable and responsive government constitutes the backbone of a free society. In interpreting constitutional text, history should remind us how fragile liberty and democracy can be, unless citizens fiercely protect their foundations. We can ignore them only at our peril.

117 Another decision of this Court which must be adverted to is in **Goa Sampling Employees' Association** v **General Superintendence Co. of India Pvt. Ltd.**[93] **("Goa Sampling")**. A reference was made by the Central government of an industrial dispute for adjudication under the Industrial Disputes Act 1947. It was sought to be urged that in relation to a Union Territory, the Central government is the appropriate government. The Tribunal held that the workmen were dock workers governed by an Act of Parliament and since they were working in a major port, it was the Central government which was the appropriate government. The Tribunal also held that even if the state government is the appropriate government, since Goa was then a Union territory and its administration was carried on by an Administrator appointed by the President under Article 239, the Central government was the appropriate government. The High Court held that the industrial dispute in which the workmen were involved did not concern a major port and hence the Central government was not the appropriate government. Moreover, the High Court

[93] (1985) 1 SCC 206

also held that the Central government is not the state government for the Union territory of Goa under the Act but it was the Administrator appointed under Article 239 who is the state government. The Administrator being the appropriate government, the High Court held that the Central government had no jurisdiction to make the reference. It was the second limb of the finding of the High Court which was considered by this Court in the course of its judgment. In order to appreciate the controversy, it is necessary to consider the expressions "Central government" as defined in Section 3(8) of the General Clauses Act, 1897 which reads as follows:

> "(8) 'Central Government' shall—
> (a) * * *
> (b) in relation to anything done or to be done after the commencement of the Constitution, mean the President; and shall include,
> (i)-(ii) * * *
> (iii) in relation to the administration of a Union Territory, the Administrator thereof acting within the scope of the authority given to him under Article 239 of the Constitution."

The expression "state government" is defined in Section 3(60), insofar as is material thus:

> " 'State Government',—
> (a)-(b) * * *
> (c) as respects anything done or to be done after the commencement of the Constitution (Seventh Amendment) Act, 1956, shall mean, in a State, the Governor, and in a Union Territory, the Central Government;"

"Union territory" is defined in Section 3(62) to mean the Union territories specified in the First Schedule to the Constitution and to include any other territory comprised within the territory of India but not specified in that Schedule.

Dealing with the provisions of Section 44(1) of the 1963 Act, this Court observed thus:

> "12…According to the proviso in the event of a difference of opinion between the Administrator and the Ministers on any matter, the Administrator shall refer it to the President for decision given therein by the President etc. Thus the executive power of the Administrator extends to all subjects covered by the legislative power. But in the event of a difference of opinion the President decides the point. When President decides the point, it is the Central Government that decides the point."

The Court noticed that the provisions of Part VI of the Constitution which deal with the States clearly indicate that a Union territory administration is not a state government. The Court observed that the Constitution makes a distinction between a State and its government (called the state government) on one hand and the Union territory and its administration on the other hand. This distinction, the Court observed, was carried in the definition contained in the General Clauses Act:

> "14…Now if we recall the definition of three expressions "Central Government" [Section 3(8),] "State Government" [Section 3(60)] and "Union Territory" [Section 3(62-A)] in the General Clauses Act, it would unmistakably show that the framers of the Constitution as also the Parliament in enacting these definitions have clearly retained the distinction between State Government and Administration of Union Territory as provided by the Constitution. It is especially made clear in the definition of expression "Central Government" that in relation to the Administration of a Union Territory, the Administrator thereof acting within the scope of the authority given to him

> under Article 239 of the Constitution, would be comprehended in the expression "Central Government". When this inclusionary part is put in juxtaposition with exclusionary part in the definition of the expression "State Government" which provides that as respects anything done or to be done after the commencement of the Constitution (Seventh Amendment) Act, 1956, it shall mean, in a State, the Governor, and in a Union Territory, the Central Government, the difference conceptually speaking between the expression "State Government" and the "Administration of a Union Territory" clearly emerges. Therefore, there is no room for doubt that the expression "Administration of a Union Territory", Administrator howsoever having been described, would not be comprehended in the expression "State Government" as used in any enactment."

The view of the High Court that the Administrator is the state government insofar as the Union territory is concerned under Section 3(60) was held to be in error. The decisions in **Satya Dev Bushahari** and in **The State of Madhya Pradesh** v **Shri Moula Bux**[94] were distinguished since they were rendered prior to the amendment of Part VIII of the Constitution in 1956 and before the insertion of Articles 239A and 239B. The position in law was set out as follows:

> "17…On a conspectus of the relevant provisions of the Constitution and the 1963 Act, it clearly transpires that the concept of State Government is foreign to the administration of Union Territory and Article 239 provides that every Union Territory is to be administered by the President. The President may act through an Administrator appointed by him. Administrator is thus the delegate of the President. His position is wholly different from that of a Governor of a State. Administrator can differ with his Minister and he must then obtain the orders of the President meaning thereby of the Central Government. Therefore, at any rate the Administrator of Union Territory does not qualify for the description of a State Government. Therefore, the Central Government is the "appropriate Government"."

[94] (1962) 2 SCR 794

The decision of the two judge Bench in **Goa Sampling** explains that under the General Clauses Act 1897, the expression "Central government" will include the Administrator of a Union territory acting within the scope of his authority under Article 239, in relation to the administration of the Union territory. Similarly, the expression "state government" means in relation to the Union territory, the Central government. The Central government was held to be the appropriate government to make a reference under the Industrial Disputes Act, 1947. The judgment in **Goa Sampling** dealt with the limited scope as to which is the appropriate Government under the Industrial Disputes Act.

118 The issue as to whether the Lieutenant Governor of the NCT is competent to accord sanction for prosecution under the Prevention of Terrorism Act and the Code of Criminal Procedure was considered by a two judge Bench of this Court in **State (NCT of Delhi)** v **Navjot Sandhu**[95] **("Navjot Sandhu")**. In that case, sanctions under both the statutes were accorded "by order and in the name of the Lieutenant Governor". The sanction under Section 50 of the POTA was urged to be a nullity on the ground that in relation to the Union Territory only the Central government was competent to accord it. Section 2(1)(h) of POTA defined the expression "State" in relation to a Union territory, to mean the Administrator thereof. Rejecting the challenge, this Court held that under Article 239AA, the Administrator appointed under Article 239 does not lose his status as such and it is only his designation which is merged into the new designation

[95] (2005) 11 SCC 600

of Lieutenant Governor "in keeping with the upgraded status of this particular Union territory". The Lieutenant Governor, who continues to be an Administrator, was held to derive authority to grant sanction under Section 50 by reason of the legislative fiction under Section 2(1)(h), the Administrator being deemed to be the state government for the purpose of Section 50. Hence :

> "..by virtue of specific statutory delegation in favour of the Administrator who is constitutionally designated as the Lieutenant Governor as well, the sanction accorded by the said authority is a valid sanction under Section 50 of POTA.."

The decision in **Navjot Sandhu** turned upon a specific statutory delegation in favour of the Administrator to grant sanction. It is hence of no assistance to the present constitutional context.

Decision in NDMC

119 A nine-judge Bench of this Court in **New Delhi Municipal Council** v **State of Punjab**[96] **("NDMC")** dealt with the issue as to whether properties owned and occupied by various states in the NCT are exempt from the levy of local taxes under Article 289(1) of the Constitution. Allied to this was the question as to whether the states are entitled to exemption from the levy of taxes imposed by Parliamentary legislation under Article 246(4) upon their properties situated within the Union territories. Article 246(4) provides thus:

> "Parliament has power to make laws with respect to any matter for any part of the territory of India not included [in a State]

[96] (1997) 7 SCC 339

> notwithstanding that such matter is a matter enumerated in the State List."

Justice B P Jeevan Reddy spoke for the majority of five judges. The minority view of four judges was rendered by Chief Justice Ahmadi.

120 The judgment of the majority notes that the States, put together, do not exhaust the territory of India. Parliament has the power to make laws with respect to any matter for any part of territory of India not included in a State. Since the Union territories are not included in the territory of any State, Parliament was the only law making body. Dealing with the provisions of Article 239 AA, the Court held :

> "..In the year 1991, the Constitution did provide for a legislature for the Union Territory of Delhi [National Capital Territory of Delhi] by the Sixty-Ninth (Amendment) Act (Article 239-AA) but even here the legislature so created was not a full-fledged legislature nor did it have the effect of – assuming that it could – lift the National Capital Territory of Delhi from Union Territory category to the category of States within the meaning of Chapter I of Part XI of the Constitution. All this necessarily means that so far as the Union Territories are concerned, there is no such thing as List I, List II or List III. The only legislative body is Parliament – or a legislative body created by it. Parliament can make any law in respect of the said territories – subject, of course, to constitutional limitations *other than* those specified in Chapter I of Part XI of the Constitution. Above all, the Union Territories are not "States" as contemplated by Chapter I of Part XI; they are the territories of the Union falling outside the territories of the States. Once the Union Territory is a part of the Union and not part of any State, it follows that any tax levied by its legislative body is Union taxation. Admittedly, it cannot be called "State taxation" – and under the constitutional scheme, there is no third kind of taxation. Either it is Union taxation or State taxation.."

121 The judgment of the majority also holds that all Union territories are not situated alike. The first category consists of Union territories which have no legislature at all. The second category has legislatures created by a law enacted by Parliament under the Government of Union Territories Act, 1963. The third category is Delhi which has "special features" under Article 239 AA. Though the Union territory of Delhi "is **in a class by itself**", it "**is certainly not a State within the meaning of Article 246 or part VI of the Constitution**". Various Union territories- the Court observed - are in different stages of evolution. However, the position remains that these Union territories, including the NCT are yet Union territories and not a State.

General Clauses Act

122 Article 367 (1) of the Constitution provides that:

> "367(1) Unless the context otherwise requires, the General Clauses Act, 1897, shall, subject to any adaptations and modifications that may be made therein under article 372, apply for interpretation of this Constitution as it applies for the interpretation of an Act of the Legislature of the Dominion of India."

123 As we have noticed, the inclusive definition of the expression 'State' in Section 3(58) of the General Clauses Act, 1897 provides that as respects any period after the commencement of the Constitution (Seventh Amendment) Act, 1956, the expression State shall mean the States specified in the First Schedule to the Constitution and shall include a Union territory. If this inclusive definition was made applicable for the purpose of construing Article 246(4), an anomaly would arise because Parliament would have no power to legislate in respect of

the Union territories with respect to matters governed by the State list. Until a legislature which is empowered to legislate on matters in the State list is created under Article 239A for the Union territories, there would be no legislature with competence to legislate on those matters. The consequences which would result from reading the provisions of Section 3(58) of the General Clauses Act while interpreting Article 246(4) were noticed in a judgment of a Constitution Bench in **TM Kanniyan** v **Income Tax Officer, Pondicherry**[97] **("Kanniyan")**. The Constitution Bench held that such a construction would be repugnant to the context of Article 246 and hence, Parliament would have under Article 246(4) plenary powers to make laws for all Union Territories in respect of all matters. The decision in **Kanniyan** was followed in the judgment of the majority in the nine-judge bench decision in **NDMC**. Even the judgment of the minority noted that while certain Union territories have legislative assemblies of their own, "they are very much under the supervision of the Union Government and cannot be said to have an independent status". Notably, the minority view also accepted the principle that the definition of the expression "State" in Section 3(58) of the General Clauses Act is inapplicable to Article 246(4).

124 A Constitution Bench of this Court in **Management of Advance Insurance Co. Ltd.** v **Shri Gurudasmal**[98] **("Advance Insurance")** while construing Entry 80 of the Union list held that the definitions contained in the General Clauses Act may not always apply in relation to the expression "State"

[97] (1968) 2 SCR 103
[98] (1970) 1 SCC 633

in the Constitution and much would depend upon the context. Entry 80 of the Union list provides as follows:

> "80. Extension of the powers and jurisdiction of members of a police force belonging to any State to any area outside that State, but not so as to enable the police of one State to exercise powers and jurisdiction in any area outside that State without the consent of the Government of the State in which such area is situated; extension of the powers and jurisdiction of members of a police force belonging to any State to railway areas outside that State"

In that case, on a complaint by an Income Tax Officer of the commission of offences by the appellant under Sections 409, 477A and 120B of the Penal Code, a case was registered by the Superintendent of Police in the Special Police Establishment, New Delhi. The appellant filed a writ petition challenging the right of the Special Police Establishment to investigate the case in the State of Maharashtra but it was dismissed by the High Court. In appeal before this Court, it was urged that the Delhi Special Police Establishment constituted under the Act XV of 1946 was not constitutional and had no jurisdiction to investigate cases in other states. The submission was that Entry 80 speaks of a police force belonging to any state and not of a police force belonging to a Union territory. Chief Justice Hidayatullah speaking for a Constitution Bench held that Section 3(58) of the General Clauses Act (which defines State in respect of any period after the commencement of the seventh constitution amendment to include a Union territory) "furnishes a complete answer to the difficulty which is raised since Entry 80 must be read so as to include Union territory". Hence, the members of a police force belonging to a Union territory

could have their powers and jurisdiction extended to another state with the consent of that State. The Constitution Bench held that the definitions in the General Clauses Act "cannot always be read" in interpreting the constitutional text and "the definitions apply unless there is anything repugnant in the subject or context".

The Constitution Bench held that:

> "After the Seventh Amendment India is a Union of States (Article 1) and the territories thereof are specified in the First Schedule. Then there are Union Territories which are mentioned separately. There is thus a distinction between "States" and "Union Territories" which cannot be lost sight of. When the definition cannot be made applicable owing to the context or the subject, the word "State" refers to States in the First Schedule only. Such an occasion arose in I.M Kanniyan v Income-Tax Officer, Pondicherry and Another, and Bachawat, J., explained Article 246 by holding that the definition of "State" in two parts in the adapted Section 3(58) of the General Clauses Act was repugnant to the subject and context of Article 246. There is nothing in the subject or context of Entry 80 of the Union List which can be said to exclude the application of the definition in Section 3(58). Indeed the Part C States were expressly mentioned in Entry No. 39 of the Federal List of the Government of India Act, 1935 (after its amendment in 1947) and thus before the Seventh Amendment the definition of State (subject to the subject or context) included Part C States. Therefore, the definition of "State" in Section 3(58) in the General Clauses Act after the adaptation in 1956 applies and includes Union Territories in Entry 80 of the Union List"

The Constitution Bench in **Advance Insurance** did not find anything repugnant in the subject or context of Entry 80 of the Union list. Hence, Entry 80 was held to include Union territories.

125 In **Union of India** v **Prem Kumar Jain**[99], a Bench of four judges of this Court dealt with an appeal from a decision of the Delhi High Court which had quashed a notification of the Union government and a scheme for the formation of a joint cadre of the Indian Administrative Service. The High Court had held the formation of a Delhi – Himachal Cadre of service to be *ultra vires*. The creation of a joint cadre for all Union territories on 1 January 1968 under Rule 3(1) of the IAS (Cadre) Rules 1954 was challenged as being contrary to Article 312 and the All India Services Act 1951, as it was not common to the Union and a State, a Union territory not being a State. The High Court held that Union territories not being States, the action was *ultra vires*. In appeal, this Court observed that it was not necessary for Parliament to make a law providing for the creation of a service common to the Union and the States under Article 312(1), in view of clause 2, which provided as follows :

> "312 (2) The services known at the commencement of this Constitution as the Indian Administrative Service and the Indian Police Service shall be deemed to be services created by Parliament under this article".

Section 3(1) of the All India Services Act had a provision for making rules for the regulation of recruitment and conditions of service of persons appointed to an All India Service "after consultation with the governments of the States concerned". The issue was whether Union territories could be States for the purpose of such consultation. This Court held that the expression "State" having been defined in Section 3(58), from the commencement of the seventh

[99] (1976) 3 SCC 743

amendment to the Constitution in 1956, and the President having substituted a new clause 58 in Section 3, there was nothing repugnant to the subject or context to make that definition inapplicable. The High Court was held to have been in error in holding that Union territories were not States for that purpose.

126 Whether the expression "State" in the Constitution would cover a Union territory is a matter to be deduced from the context. The Constitution in the First Schedule makes a clear distinction between States and Union territories. Hence, the inclusive definition of the expression "State" in Section 3(58) of the General Clauses Act cannot apply to the First Schedule. Similarly, in Article 246(4), which enables Parliament to make laws with respect to any matter for any part of the territory of India not included in a State, the definition in Section 3(58) would have no application, having due regard to the context. This was explained in the decision in **Kanniyan**. When there is something repugnant in the subject or context, the definition in Section 3(58) would have no application.

"Insofar as any such matter is applicable to Union territories"

127 In the State list and the Concurrent list of the Seventh Schedule, there are numerous entries which use the expression "State". These entries are illustratively catalogued below:

> "**List II**
> 12. Libraries, museums and other similar institutions controlled or financed by the **State**.

26. Trade and commerce within the **State** subject to the provisions of entry 33 of List III.
37. Elections to the Legislature of the **State** subject to the provisions of any law made by Parliament.
38. Salaries and allowances of members of the Legislature of the **State**, of the Speaker and Deputy Speaker of the Legislative Assembly and, if there is a Legislative Council, of the Chairman and Deputy Chairman thereof.
39. Powers, privileges and immunities of the Legislative Assembly and of the members and the committees thereof, and, if there is a Legislative Council, of that Council and of the members and the committees thereof; enforcement of attendance of persons for giving evidence or producing documents before committees of the Legislature of the **State**.
40. Salaries and allowances of Ministers for the **State**.
41. **State** public services; **State** Public Service Commission.
42. **State** pensions, that is to say, pensions payable by the **State** or out of the Consolidated Fund of the **State**.
43. Public debt of the **State**.

LIST III
3. Preventive detention for reasons connected with the security of a **State**
4. Removal from one **State** to another **State** of prisoners, accused persons and persons subjected to preventive detention for reasons specified in entry 3 of this List.
43. Recovery in a **State** of claims in respect of taxes and other public demands, including arrears of land-revenue and sums recoverable as such arrears, arising outside that **State**." (Emphasis supplied)

128 Article 239AA(3)(a) permits the legislative assembly of the NCT to legislate on matters in the State list, except for Entries 1, 2 and 18 (and Entries 64, 65 and 66 insofar as they relate to the earlier entries) and on the Concurrent list, "**insofar as any such matter is applicable to Union territories**". In forming an understanding of these words of Article 239AA(3)(a), it has to be noticed that since the decision in **Kanniyan** right through to the nine-judge Bench decision in **NDMC**, it has been held that the expression "**State**" **in Article 246** does not include a Union territory. The expression "insofar as any such

matter is applicable to Union territories" cannot be construed to mean that the legislative assembly of NCT would have no power to legislate on any subject in the State or Concurrent lists, merely by the use of the expression "State" in that particular entry. This is not a correct reading of the above words of Article 239AA(3)(a). As we see below, that is not how Parliament has construed them as well.

129 Section 7(5) of the GNCTD Act provides that salaries of the Speaker and Deputy Speaker of the legislative assembly may be fixed by the legislative assembly by law. Section 19 provides that the members of the legislative assembly shall receive salaries and allowances as determined by the legislative assembly by law. Section 43(3) similarly provides that the salaries and allowances of ministers shall be determined by the legislative assembly. However, Section 24 provides that a Bill for the purpose has to be reserved for the consideration of the President. Parliament would not have enacted the above provisions unless legislative competence resided in the States on the above subject. The subjects pertaining to the salaries and allowances of members of the legislature of the state (including the Speaker and Deputy Speaker) and of the Ministers for the state are governed by Entry 38 and Entry 40 of the State list. The GNCTD Act recognises the legislative competence of the legislative assembly of NCT to enact legislation on these subjects. The use of the expression 'State' in these entries does not divest the jurisdiction of the

legislative assembly. Nor are the words of Article 239AA(3)(a) exclusionary or disabling in nature.

130 The purpose of the above narration is to indicate that the expression 'State' is by itself not conclusive of whether a particular provision of the Constitution would apply to Union territories. Similarly, it can also be stated that the definition of the expression state in Section 3(58) of the General Clauses Act (which includes a Union territory) will not necessarily govern all references to 'State' in the Constitution. If there is something which is repugnant in the subject or context, the inclusive definition in Section 3(58) will not apply. This is made clear in the precedent emanating from this Court. In certain contexts, it has been held that the expression 'State' will not include Union territories while in other contexts the definition in Section 3(58) has been applied. Hence, the expression "insofar as any such matter is applicable to Union territories" is not one of exclusion nor can it be considered to be so irrespective of subject or context.

L Construction of the proviso to Article 239AA(4)

131 The vexed issue of interpretation relates to the proviso to Article 239AA(4). Undoubtedly, the National Capital Territory continues to be a Union territory. The Union government has a special interest in the administration of its affairs. This is exemplified by the provisions of Article 239 and Section 49 of the GNCTD Act. The proviso to Article 239AA(4) must be given an interpretation

which is marked with a sense of fine constitutional balance. The balance which is drawn must preserve the vital interest of the Union government in the governance of the national capital while supporting the legitimacy, and constitutional status of the Council of Ministers which owes collective responsibility to the legislative assembly and which, in its capacity of the executive arm of government tenders aid and advice to the Lieutenant Governor under a cabinet form of governance.

132 Broadly speaking, three lines of reasoning emerge before the Court. The Court need not be constrained by having to choose one among them. It would be possible to draw from each, in arriving at a conclusion. The first line of interpretation would have the Court interpret the expression “difference of opinion between the Lieutenant Governor and his Council of Ministers on any of the matter” without reservation or qualification. This line of interpretation follows a purely literal or textual construction. Any difference of opinion would fulfil the proviso to clause 4. ‘Any matter’ would mean any matter without restriction. The Lieutenant Governor would be free to refer to the President just about any difference of opinion of any matter, where it has arisen with the Council of Ministers. This approach cautions the court against confining the proviso to specified categories or confining the areas where differences can arise.

133 The second line of interpretation is that the expression should be read and confined to specified categories. To test the validity of this approach, four categories may be delineated. The Lieutenant Governor may invoke the power under the proviso where:

(i) Executive decisions or acts of the Government of NCT will impede or prejudice the exercise of the executive power of the Union government;

(ii) The requirement of complying with laws enacted by Parliament or of the provisions of the Constitution arises;

(iii) The executive authority of the government of NCT is sought to be exercised in an area where it has no legislative competence (the *ultra vires* doctrine); and

(iv) A matter is located within Rule 23 of the Transaction of Business Rules.

134 There is a third line of interpretation, which has two facets. The first facet postulates at what stage, a reference to the President may be made in terms of the proviso. According to it, a reference can be made to the President only after the Lieutenant Governor has made an effort to resolve a difference with a Minister or with the Council of Ministers by seeking a resolution through dialogue and discussion. The Lieutenant Governor has to follow the provisions contained in the Transaction of Business Rules, which mandate that an attempt should be made to resolve differences within the institutional level of the NCT government before escalating matters to the President. The second facet

relates to the substantive meaning of the expression 'any matter'. 'Any matter' in this line of interpretation would not mean 'every matter' or every trifling matter but only those rare and exceptional matters where the difference is so fundamental to the governance of the Union territory that it deserves to be escalated to the President. The third approach to interpretation proposes that both a procedural and substantive nuance must be adopted while interpreting the proviso, failing which the salutary constitutional purpose underlying Article 239AA will be defeated.

135 A close analysis of the three lines of interpretation would indicate that there is a kernel of substance in each of them, but there are pitfalls which must be guarded against. The functioning of institutions must establish a constitutional balance which facilitates cooperative governance. Governance in cooperation is both a hallmark and a necessity of our constitutional structure. Our Constitution distributes legislative and executive powers between political entities. Distribution of power between institutions which are the creation of the Constitution is a significant effort to ensure that the values of participation and representation which constitute the foundation of democracy permeate to all levels of governance. The federal structure for governance which is a part of the basic structure recognizes the importance of fulfilling regional aspirations as a means of strengthening unity. The Constitution has adopted some but may be not all elements of a federal polity and the Union government has an important role in the affairs of the nation. For the purpose of the present

discourse, it is necessary to emphasise the value which the Constitution places on cooperative governance, within the federal structure.[100] An illustration is to be found in Chapter II of Part XI which deals with the administrative relations between the Union and the States. Under Article 256, an obligation has been cast upon every state to ensure that its executive power is exercised to secure compliance with laws enacted by Parliament. The executive power of the Union extends to issuing directions to a State as are necessary, for that purpose. Article 257 contains a mandate that in exercising its executive power, a State shall not impede or prejudice the exercise of the executive power of the Union. The constitutional vision of cooperative governance is enhanced by the provision made in Article 258 under which the President may, with the consent of a State, entrust to it or to its officers, functions in relation to any matter to which the power of the Union extends. Similarly, even on matters on which a State legislature has no power to make laws, Parliament may confer powers and impose duties on the officers of the State. Article 261 provides that full faith and credit must be given throughout the territory of India to public acts, records and judicial proceedings of the Union and of every State. Without determining (it being unnecessary for the present discussion) the extent to which these provisions apply to a Union territory, the purpose of emphasising the principles which emerge from the chapter on administrative relations is to highlight the necessity for cooperative governance between different levels of government, in a Constitution, such as ours, which contains an elaborate distribution of

[100] Granville Austin (Supra note 3), at page 232

power between political entities and institutions. The construction which the Court places on the proviso to Article 239AA(4) must facilitate mutual cooperation so that the affairs of state are carried out without dislocations occasioned by differences of perception. Differences between political arms of the state are natural to a democratic way of life. The strength inherent in differences is that the Constitution provides a platform for the robust expression of views, accommodates differences of ideology and acknowledges that the resilience, and not the weakness of the nation lies in the plurality of her cultures and the diversity of her opinions. The working of a democratic Constitution depends as much on the wisdom and statesmanship of those in charge of governing the affairs of the nation as much as it relies on the language of the Constitution defining their powers and duties.

136 The proviso to Article 239AA(4) must be operated and applied in a manner which facilitates and does not obstruct the governance of the NCT. If the expression 'any matter' were to be construed as 'every matter' or every trifling matter that would result in bringing to a standstill the administration of the affairs of the NCT. Every conceivable difference would be referred to the President. The elected representatives would be reduced to a cipher. The Union government would govern the day to day affairs. The forms of the Constitution would remain but the substance would be lost. Article 239AA has been introduced as a result of the exercise of the constituent power. The purpose of the exercise is to confer a special status on the National Capital Territory. The

arrangements for administering the affairs of Delhi are constitutionally entrenched as a result of the Sixty-Ninth amendment. Whether there should be a Council of Ministers or a Legislature (or both) was not left to determination in an Act of Parliament. The Constitution mandates that both must exist in the NCT. The Constitution mandates direct elections to the Legislature. It obligates the existence of a Council of Ministers which owes collective responsibility to the Legislature. It demarcates the area of legislative and executive power. The Lieutenant Governor, as the substantive part of Article 239AA(4) stipulates, is to act on the aid and advice of the Council of Ministers. In adopting these provisions, the Constitution incorporates the essentials of the cabinet form of government. Was this to have no meaning? A constitutional court must be averse to accepting an interpretation which will reduce these aspirations of governance to a mere form, without the accompanying substance. The Court must take into consideration constitutional morality, which is a guiding spirit for all stakeholders in a democracy.

137 In discharging his constitutional role, the Lieutenant Governor has to be conscious of the fact that the Council of Ministers which tenders aid and advice is elected to serve the people and represents both the aspirations and responsibilities of democracy. Neither the Constitution nor the enabling legislation, which we have noticed earlier, contemplate that every decision of the executive government must receive the prior concurrence of the Lieutenant Governor before it can be implemented.

138 The interpretation of the proviso must be cognizant of the constitutional position that though Delhi has a special status, it continues to be a Union territory governed by Part VIII. There are take-aways from the first line of interpretation which have significance. Within the rubric of Union territories, as the nine-judge Bench decision in **NDMC** noticed, different Union territories are in varying stages of evolution. Some of the erstwhile Union territories such as Goa attained full statehood and ceased to be Union territories. Some may not have a legislature. Some may have a Legislature under an enactment of Parliament. Delhi has a special position in that both its Legislature as well as Council of Ministers have a constitutionally recognized status. The conferment of this status by a constitutional amendment enhances the position of its arms of governance within Union territories without conferring statehood. Delhi is administered by the President under Article 239 acting through an Administrator who is designated as a Lieutenant Governor under Article 239AA(1). The language of the opening words of Article 239(1) must be read in harmony with Article 239AA. In terms of the reach of its legislative powers, the legislative assembly for the NCT does not exercise exclusive jurisdiction over State List subjects. Parliament has legislative authority (in addition to the Union List), both in regard to the State and Concurrent Lists for NCT. Hence legislation by the legislative assembly, even on matters which fall within its legislative domain is subject to the overriding power of Parliament. The principle of repugnancy which Article 254 recognises between Union and State legislation on matters in the Concurrent List is extended by Article 239AA [3(b) and 3 (c)], both with

reference to State and Concurrent List subjects for NCT. Moreover, certain subjects have been expressly carved out from the ambit of the legislative authority of the legislative assembly and vested exclusively in Parliament. Executive powers of the Government of NCT being co-extensive with legislative powers, the aid and advice which is tendered to the Lieutenant Governor by the Council of Ministers is confined to those areas which do not lie outside the purview of legislative powers. These provisions demonstrate that while adopting the institutions of a cabinet form of government, the Constitution has, for NCT, curtailed the ambit of the legislative and executive power, consistent with its status as a Union territory.

139 The exercise of the constituent power to introduce Article 239AA was cognizant of the necessity to protect national interests inherent in the governance of a national capital. A sense of permanence and stability was sought to be attributed to the arrangements made for governing Delhi by bringing in a constitutional amendment. Both in terms of the reach of the legislative power, as well as in relation to the exercise of executive power, the special constitutional arrangements for Delhi recognise that the governance of Delhi implicates a sense of national interest. When matters of national interest arise, they wold predicate a predominant role for institutions of national governance.

140 Consistent with the need to preserve national interest, it would not be appropriate to restrict the ambit of the proviso to Article 239AA(4) to situations where the action of the government is *ultra vires* the limits of its executive powers. This becomes evident on a construction of the provisions of Section 41(1)(i) and Section 44(1)(a) of the GNCTD Act. Sub-clause(i) of Section 41(1) enables the Lieutenant Governor to act in his discretion on a matter which falls outside the purview of the powers conferred on the legislative assembly but in respect of which powers or functions are entrusted or delegated to him by the President. Under Section 44(1)(a), Rules of Business are made on matters on which the Lieutenant Governor is required to act on the aid and advice of the Council of Ministers. Section 44(1)(a) covers business which is not a part of Section 41(1)(i). This is because matters which fall within Section 44(1)(i) are not governed by the principle of aid and advice.

141 There is much to be said for not laying down an exhaustive catalogue of situations to which the proviso applies. Governance involves complexities. In the very nature of things, it would not be possible for a Court delivering judgment in the context of the problems of the day to anticipate situations which may arise in future. It would be unsafe to confine a constitutional provision to stated categories which may affect the resilience of the Constitution to deal with unforeseen situations. Some of the illustrations which may warrant the exercise of the power under the proviso may shed light on the purpose of the proviso and the object which it seeks to achieve.

142 There are two constitutional perspectives: first, the operation of the proviso should preserve the national concerns underlying the conferment of such a power, and second, the exercise of the power under the proviso must not destroy the essential democratic values recognised in Article 239AA. Thus, it is necessary to lay down the steps which need to be adopted before recourse is taken to the proviso. The Transaction of Business Rules indicate in sufficiently elaborate terms that when there is a difference of opinion between the Lieutenant Governor and a Minister, primarily, an effort should be made to resolve it by mutual discussion. If this process does not yield a satisfactory result, the matter can be referred to the Council of Ministers with whom an attempt is made to seek a satisfactory solution. It is when these two stages are crossed and a difference still persists that the proviso can be taken recourse to by referring the matter to the President. These stages which are enunciated in the Transaction of Business Rules must be read in conjunction with the authority conferred by Section 44 of the GNCTD Act which was enacted in pursuance of Article 239AA(7). Hence the proviso must be read in conjunction with the law enacted by Parliament and the Transaction of Business Rules made by the President, to give clarity to the operating procedure for invoking the proviso. Moreover, once a reference is made to the President, the Lieutenant Governor is bound by the decision of the President. The Lieutenant Governor has the authority to take action which is warranted by emergent circumstances until the President has taken a decision. But before recourse is taken to the proviso, the Lieutenant Governor must make every effort with the Minister or, as the case

may be, the Council of Ministers to resolve a matter of difference. The nature of the differences which may warrant a reference to the President cannot be exhaustively catalogued. But it would be appropriate to construe the proviso as a protector of national concerns in regard to governance of the NCT. The Lieutenant Governor is a watchdog to protect them. The Lieutenant Governor may, for instance, be justified in seeking recourse to the proviso where the executive act of the government of the NCT is likely to impede or prejudice the exercise of the executive power of the Union government. The Lieutenant Governor may similarly consider it necessary to invoke the proviso to ensure compliance with the provisions of the Constitution or a law enacted by Parliament. There may well be significant issues of policy which have a bearing on the position of the National Capital Territory as a national capital. Financial concerns of the Union government may be implicated in such a manner that it becomes necessary for the Lieutenant Governor to invoke the proviso where a difference of opinion remains unresolved. A situation of the nature indicated in Rule 23 of the Transaction of Business Rules may well justify recourse to the proviso. The touchstone for recourse to the proviso is that the difference of opinion is not a contrived difference. The matter on which a difference has arisen must be substantial and not trifling. In deciding whether to make a reference, the Lieutenant Governor must always bear in mind the latitude which a representative government possesses to take decisions in areas falling within its executive authority. The Lieutenant Governor must bear in mind that it is not he, but the Council of Ministers which takes substantive decisions and even

when he invokes the proviso, the Lieutenant Governor has to abide by the decision of the President. The Lieutenant Governor must also be conscious of the fact that unrestrained recourse to the proviso would virtually transfer the administration of the affairs of the NCT from its government to the Centre. If the expression 'any matter' were to be read so broadly as to comprehend 'every matter', the operation of the proviso would transfer decision making away from the government of the NCT to the Centre. If the proviso were to be so read, it would result in a situation where the President would deal with a reference on every matter, leaving nothing but the husk to the administration of the Union territory. Article 239AB makes a provision where there is a failure of the constitutional machinery in the Union territory. The proviso to Article 239AA(4) does not deal with that situation. Hence, in the application of the proviso it would be necessary to bear in mind that the Council of Ministers for the NCT has a constitutionally recognised function, as does the legislative assembly to whom the Council is collectively responsible. The role of the Lieutenant Governor is not to supplant this constitutional structure but to make it workable in order to ensure that concerns of a national character which have an innate bearing on the status of Delhi as a national capital are not bypassed. If these fundamental precepts are borne in mind, the operation of the proviso should pose no difficulty and the intervention of the President could be invoked in appropriate cases where a matter fundamental to the governance to the Union territory is involved.

M Conclusions

143 After analysing the constitutional and statutory provisions and the precedents on this point, this Court reaches the following conclusions:

(1) The introduction of Article 239AA into the Constitution was the result of the exercise of the constituent power. The 69th amendment to the Constitution has important consequences for the special status of Delhi as the National Capital Territory, albeit under the rubric of a Union territory governed by Part VIII of the Constitution;

(2) The content of such a constitutional amendment cannot be confined or constrained by the content of legislations which governed Delhi in the past. The constitutional amendments sought to bring stability and permanence to the democratic governance of the NCT. An amendment which enhances the basic features of the Constitution must bear an interpretation which will fulfil its true character;

(3) The Administrator appointed by the President under Article 239(1) is designated, with reference to the NCT as its Lieutenant Governor. The substantive source of power to appoint the Lieutenant Governor arises from Article 239 of the Constitution;

(4) While Article 239(1) indicates that the administration of a Union territory is by the President, the opening words of the provision ("Save as otherwise provided by Parliament by law") indicate that the nature and extent of the administration by the President is as indicated in the law framed by Parliament. Moreover, the subsequent words of the provision ("to such extent as he thinks fit") support the same position;

(5) By adopting Article 239AA, Parliament as a constituent body, provided Delhi with a special status by creating constitutionally entrenched institutions of governance. Article 239AA mandates the existence of a legislative assembly and Council of Ministers to govern the affairs of the National Capital;

(6) The provisions of Article 239AA represent a clear mandate of the Constitution to provide institutional governance founded on participatory, representative and responsive government. These features emerge from the provisions of Article 239AA which:

(i) require direct election to the legislative assembly from territorial constituencies;

(ii) engage the constitutional functions of the Election Commission of India under Articles 324, 327 and 329;

(iii) confer law making authority on the legislative assembly in respect of matters governed by the State List (save for excepted matters) and the Concurrent List;

(iv) mandate the collective responsibility of the Council of Ministers to the legislative assembly; and

(v) provide (in the substantive part of Article 239AA(4)) that the Lieutenant Governor shall act on the aid and advise of the Council of Ministers headed by the Chief Minister.

In adopting these provisions through an amendment, the Constitution has recognized the importance of the cabinet form of government to govern the affairs of Delhi;

(7) The distribution of legislative power in Article 239AA is indicative of the predominant role assigned to Parliament as a legislative body. This emerges from:

(i) the position that Parliament is empowered to legislate on subjects falling in the State List as well as the Concurrent List; and

(ii) the carving out of the three subjects of public order, police and land (Entries 1, 2 and 18 of the State List) and of offences, jurisdiction of Courts and fees (Entries 64, 65 and 66 in so far as they relate to the previous entries), all of which are within the exclusive legislative domain of Parliament. Principles of repugnancy govern any inconsistency between laws enacted by the legislative assembly and

those by Parliament and the laws of Parliament are to prevail unless a Presidential assent has been received.

(8) The executive power of the government of NCT is co-extensive with the legislative power. The principle of aid and advice under clause 4 of Article 239AA extends to areas where the Lieutenant Governor exercises functions in relation to matters where the legislative assembly has the power to make laws. In consequence, those matters on which the legislative assembly does not have the power to enact legislation are not governed by the principle of aid and advice. Similarly, the Lieutenant Governor is not subject to aid and advice on matters where he is required to exercise his own discretion by or under any law;

(9) The GNCTD Act, 1991 has been enacted by Parliament in pursuance of the legislative authority conferred upon it by clause 7(a) of Article 239AA. The President has made the Transaction of Business Rules for the NCT as contemplated in the GNCTD Act, 1991;

(10) Section 41 of the GNCTD Act indicates that:

(i) in matters which lie outside the legislative powers entrusted to the legislative assembly and where there has been an entrustment or delegation of functions by the President to the Lieutenant Governor under Article 239; and

(ii) on matters where the Lieutenant Governor exercises his own discretion by or under any law,

he is not subject to the aid and advice of the Council of Ministers;

(11) Section 44 of the GNCTD Act indicates that aid and advice governs areas other than those specified in Section 44(1)(i);

(12) Under the Transaction of Business Rules, the Lieutenant Governor must be kept duly apprised on all matters pertaining to the administration of the affairs of the NCT. The Rules indicate the duty of the Council of Ministers to inform the Lieutenant Governor right from the stage of a proposal before it. The duty to keep the Lieutenant Governor duly informed and apprised of the affairs of the NCT facilitates the discharge of the constitutional responsibilities entrusted to him and the fulfilment of his duties under the GNCTD Act, 1991 and the Transaction of Business Rules;

(13) While the provisions contained in the Transaction of Business Rules require a scrupulous observance of the duty imposed on the Council of Ministers to inform the Lieutenant Governor on all matters relating to the administration of the NCT, neither the provisions of Article 239AA nor the provisions of the Act and Rules require the concurrence of the Lieutenant Governor to a decision which has been taken by the Council of Ministers. Rule 14 of the Transaction of Business Rules in fact indicates that the duty

is to inform and not seek the prior concurrence of the Lieutenant Governor. However, in specified areas which fall under Rule 23; it has been mandated that the Lieutenant Governor has to be apprised even before a decision is implemented;

(14) As a result of the provisions of Article 367, the General Clauses Act, 1897 applies, subject to adaptations and modifications made under Article 372, to the interpretation of the Constitution. The definitions of the expressions 'state' (Section 3(58)) and 'state government' (Section 3(60)) and 'union territory' (Section 3(62A)) apply to the interpretation of the provisions of the Constitution unless there is something repugnant in the subject or context of a particular provision of the Constitution;

(15) Since the decision of this Court in **Kanniyan** (supra) and right through to the nine-judge Bench decision in **NDMC** (supra), it is a settled principle that the expression 'state' in Article 246(4) will not include a Union territory and that the definition contained in the General Clauses Act will not apply having regard to the subject and context of the provision. Decisions of this Court have applied the subject and context test to determine whether the expression 'state' in other provisions of the Constitution and in statutory provisions would include a Union territory;

(16) The use of the expression "State" in a particular provision is not dispositive of whether or not its application would stand excluded in relation to a Union territory. The outcome is essentially based on the subject and context in which the word has been used;

(17) While giving meaning and content to the proviso to Article 239AA (4), it is necessary to harmonise two significant precepts:

(i) The Constitution has adopted a cabinet form of government for the Union territory of Delhi by creating institutions for the exercise of legislative power and an executive arm represented by the Council of Ministers; and

(ii) Vital national interests are implicated in the governance of the National Capital Territory.

The doctrines of aid and advice and of collective responsibility give effect to (i) above while the empowerment of the Lieutenant Governor to refer any matter on which there is a difference of opinion to the President is a reflection of (ii) above.

(18) While it may not be possible to make an exhaustive catalogue of those differences which may be referred to the President by the Lieutenant Governor, it must be emphasised that a difference within the meaning of the proviso cannot be a contrived difference. If the expression 'any matter' were to be read as 'every matter', it would lead to the President

assuming administration of every aspect of the affairs of the Union territory, thereby resulting in the negation of the constitutional structure adopted for the governance of Delhi;

(19) Before the Lieutenant Governor decides to make a reference to the President under the proviso to Article 239AA(4), the course of action mandated in the Transaction of Business Rules must be followed. The Lieutenant Governor must, by a process of dialogue and discussion, seek to resolve any difference of opinion with a Minister and if it is not possible to have it so resolved to attempt it through the Council of Ministers. A reference to the President is contemplated by the Rules only when the above modalities fail to yield a solution, when the matter may be escalated to the President;

(20) In a cabinet form of government, the substantive power of decision making vests in the Council of Ministers with the Chief Minister as its head. The aid and advice provision contained in the substantive part of Article 239AA(4) recognises this principle. When the Lieutenant Governor acts on the basis of the aid and advise of the Council of Ministers, this recognises that real decision-making authority in a democratic form of government vests in the executive. Even when the Lieutenant Governor makes a reference to the President under the terms of the proviso, he has to abide by the decision which is arrived at by the President. The

Lieutenant Governor has, however, been authorised to take immediate action in the meantime where emergent circumstances so require. The provisions of Article 239AA(4) indicate that the Lieutenant Governor must either act on the basis of aid and advice or, where he has reason to refer the matter to the President, abide by the decision communicated by the President. There is no independent authority vested in Lieutenant Governor to take decisions (save and except on matters where he exercises his discretion as a judicial or quasi-judicial authority under any law or has been entrusted with powers by the President under Article 239 on matters which lie outside the competence of the Government of NCT); and

(21) The proviso to Article 239AA is in the nature of a protector to safeguard the interests of the Union on matters of national interest in relation to the affairs of the National Capital Territory. Every trivial difference does not fall under the proviso. The proviso will, among other things, encompass substantial issues of finance and policy which impact upon the status of the national capital or implicate vital interests of the Union. Given the complexities of administration, and the unforeseen situations which may occur in future, it would not be possible for the court in the exercise of judicial review to exhaustively indicate the circumstances warranting recourse to the proviso. In deciding as to whether the proviso should be

invoked the Lieutenant Governor shall abide by the principles which have been indicated in the body of this judgment.

144 After the circulation of my judgment to my learned colleagues, I have had the benefit of receiving the judgments of the learned Chief Justice and brother Justice Ashok Bhushan. I believe that there is a broad coalescence of our views.

145 The reference shall stand answered in the above terms and the proceedings shall now be placed before the learned Chief Justice of India for appropriate directions in regard to the constitution of the Bench to decide the matters.

…….....J
[Dr D Y CHANDRACHUD]

New Delhi;
July 04, 2018.