VOL - 21

IN THE SUPREME COURT OF INDIA

GOVT. OF NATIONAL CAPITAL TERRITORY OF DELHI
V.
UNION OF INDIA AND ORS.
SLP No. 26224 of 2016

PRELIMINARY SUBMISSIONS

by

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On behalf of the Government of NCT of Delhi

I. CONSTITUTIONAL INTERPRETATION

A. PURPOSIVE INTERPRETATION

1.1 Constitutional provisions are to be interpreted in a purpose oriented way:

- S.R. Chaudhuri v. State of Punjab, *(2001) 7 SCC 126*, at pr.33

  "33. Constitutional provisions are required to be understood and interpreted with an object-oriented approach. A Constitution must not be construed in a narrow and pedantic sense. The words used may be general in terms but, their full import and true meaning, has to be appreciated considering the true context in which the same are used and the purpose which they seek to achieve. Debates in the Constituent Assembly referred to in an earlier part of this judgment clearly indicate that a non-member's inclusion in the Cabinet was considered to be a "privilege" that extends only for six months, during which period the member must get elected, otherwise he would cease to be a Minister. It is a settled position that debates in the Constituent Assembly may be relied upon as an aid to interpret a constitutional provision because it is the function of the court to find out the intention of the framers of the Constitution. We must remember that a Constitution is not just a document in solemn form, but a living framework for the Government of the people exhibiting a sufficient degree of cohesion and its successful working depends upon the democratic spirit underlying it being respected in letter and in spirit. The debates clearly indicate the "privilege" to extend "only" for six months."

- Krishna Iyer J. in Samsher Singh v. State of Punjab, *(1974) 2 SCC 831* (at pr.128) states:

  "...(A) Constitution is a declaration of articles of faith, not a compilation of laws."

- In R. C. Poudyal v. Union of India, *1994 Supp (1) SCC 324*, the court observed: (pr. 124)

  "It is aptly said that "the intention of a Constitution is rather to outline principles than to engrave details.""'

- In Rameshwar Prasad (VI) v. Union of India, *(2006) 2 SCC 1*, at pr.88, the Supreme Court adopted Justice Barak's principles on constitutional interpretation:

  "The task of expounding a Constitution is crucially different from that of construing a statute. A statute defines present rights and obligations. It is easily enacted and as easily repealed. A Constitution, by contrast, is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental power and, when joined by a Bill or Charter of Rights, for the unremitting protection of individual rights and liberties. Once enacted, its provisions cannot easily be repealed or amended. It must, therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers. The judiciary is the guardian of the Constitution and must, in interpreting its provisions, bear these considerations in mind."

B. CONSTITUTIONAL SILENCES, PRINCIPLES AND CONVENTIONS

1.2 The doctrine of silence has been recognized to fill gaps and given effect to by Dipak Misra J. speaking for the Constitution Bench in Manoj Narula v Union of India *(2014) 9 SCC 1* (at pr.65)

> *65. The next principle that can be thought of is constitutional silence or silence of the Constitution or constitutional abeyance. The said principle is a progressive one and is applied as a recognised advanced constitutional practice. It has been recognised by the Court to fill up the gaps in respect of certain areas in the interest of justice and larger public interest.*

Admittedly these silences cannot transgress the text of the Constitution. (pr. 67)

1.3 Recognition should be given to the "silences of the Constitution" which along with the Constitution compose principles that the Constitution is based and expected to work upon.

- It was earlier stated in Bhanumati v. State of U.P., *(2010) 12 SCC 1*, (at pr.49-51)

  "49. Apart from the aforesaid reasons, the arguments by the appellants cannot be accepted in view of a very well-known constitutional doctrine, namely, the constitutional doctrine of silence. Michael Foley in his treatise on The Silence of Constitutions (Routledge, London and New York) has argued that in a

Constitution "abeyances are valuable, therefore, not in spite of their obscurity but because of it. They are significant for the attitudes and approaches to the Constitution that they evoke, rather than the content or substance of their strictures". (P. 10)

50. The learned author elaborated this concept further by saying, "Despite the absence of any documentary or material form, these abeyances are real and are an integral part of any Constitution. What remains unwritten and indeterminate can be just as much responsible for the operational character and restraining quality of a Constitution as its more tangible and codified components." (P. 82)

51. Many issues in our constitutional jurisprudence evolved out of this doctrine of silence. The basic structure doctrine vis-à-vis Article 368 of the Constitution emerged out of this concept of silence in the Constitution. A Constitution which professes to be democratic and republican in character and which brings about a revolutionary change by the Seventy-third Constitutional Amendment by making detailed provision for democratic decentralisation and self-government on the principle of grass-root democracy cannot be interpreted to exclude the provision of no-confidence motion in respect of the office of the Chairperson of the panchayat just because of its silence on that aspect."

1.4 Elaborating the need for looking for principles underlying the court, B.R. Ambedkar in the Constitutional debates asked:

> *"A student of Constitutional Law, if a copy of a Constitution is placed in his hands is sure to ask two questions. Firstly what is the form of Government that is envisaged in the Constitution; and secondly what is the form of the Constitution? For these are the two crucial matters which every Constitution has to deal with."*
>
> [VII CAD pg.31-2]

1.5 Manoj Narula (supra) also recognised the principle of constitutional implication (at pr. 68 & 70)

> *"68. The next principle that we intend to discuss is the principle of constitutional implication.*
>
> *70. There is no speck of doubt that the Court has applied the doctrine of implication to expand the constitutional concepts, but the context in which the horizon has been expanded has to be borne in mind....*
>
> *... Any proposition that is arrived at taking this route of interpretation must find some resting pillar or strength on the basis of certain words in the text or the scheme of the text. In the absence of that, it may not be permissible for a court to deduce any proposition as that would defeat the legitimacy of reasoning. A proposition can be established by reading a number of articles cohesively, for that will be in the domain of substantive legitimacy."*

1.6 The judgment also built on the idea that the Constitution is a dynamic document (at pr. 74-75):

> *"74. The Constitution of India is a living instrument with capabilities of enormous dynamism. It is a Constitution made for a progressive society. Working of such a Constitution depends upon the prevalent atmosphere and conditions. Dr Ambedkar had, throughout the debate, felt that the Constitution can live and grow on the bedrock of constitutional morality. Speaking on the same, he said:*
>
> > *"Constitutional morality is not a natural sentiment. It has to be cultivated. We must realise that our people have yet to learn it. Democracy in India is only a top-dressing on an Indian soil, which is essentially undemocratic."*
>
> *75. The principle of constitutional morality basically means to bow down to the norms of the Constitution and not to act in a manner which would become violative of the rule of law or reflectible of action in an arbitrary manner. It actually works at the fulcrum and guides as a laser beam in institution building. The traditions and conventions have to grow to sustain the value of such a morality. 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. Commitment to the Constitution is a facet of constitutional morality."*

Misra J. recalled Laurence H. Tribe's prominent words from The Living Constitution to the effect that a Constitution is "*written in blood, rather than ink*" (at pr.76)

1.7 Misra J. examined the principles of good governance and constitutional trust (at pr.82)

> *"82. In a democracy, the citizens legitimately expect that the Government of the day would treat the public interest as the primary one and any other interest secondary. The maxim salus populi suprema lex, has not only to be kept in view but also has to be revered. The faith of the people is embedded in the root of the idea of good governance which means reverence for citizenry rights, respect for fundamental rights and statutory rights in any governmental action, deference for unwritten constitutional values, veneration for institutional integrity, and inculcation of accountability to the collective at large. It also conveys that the decisions are taken by the decision-making authority with solemn sincerity and policies are framed keeping in view the welfare of the people, and including all in a homogeneous compartment. The concept of good governance is not a Utopian conception or an abstraction. It has been the demand of the polity wherever*

democracy is nourished. The growth of democracy is dependent upon good governance in reality and the aspiration of the people basically is that the administration is carried out by people with responsibility with service orientation."

1.8 He then proceeded with the underpinning idea of "constitutional trust" including the Prime Minister (at pr.88):

> *"88. As the Prime Minister is the effective head of the Government, indubitably, he has enormous constitutional responsibility. The decisions are taken by the Council of Ministers headed by the Prime Minister and that is the Cabinet form of government and our Constitution has adopted it. While discussing about the successful working of the Cabinet form of government, H.M. Seervai, the eminent author of Constitutional Law, observed:*
>
> > *"18.57. The Constitution does not guarantee that power would be wisely exercised by the executive.— … But as long as the political atmosphere remains what it is, the Constitution cannot be worked as it was intended to be worked. It has been said that the Constitution confers power, but it does not guarantee that the power would be wisely exercised. It can be said equally that the Constitution confers power but it gives no guarantee that it will be worked by men of high character, capacity and integrity. If the Constitution is to be successfully worked, an attempt must be made to improve the political atmosphere and to lay down and enforce standards of conduct required for a successful working of our Constitution." (emphasis added)"*

1.9 The doctrine of Constitutional trust is imbricated in the present case, involving two constitutional functionaries (namely the Chief Minister and Speaker) in whom the third constitutional functionary (the Governor) should have reposed trust.

C. CENTRAL PRINCIPLES RELATING TO REPRESENTATIONAL DEMOCRACY

1.10 Thus a central principle on which the democracy of the Indian Constitution rests are that it is based on the English system of parliamentary democracy entailing the twin principles that:

(a) the Executive Head of Government shall be bound by the aid and advice of the Council of Ministers; and

(b) The Council of Ministers in turn shall be collectively responsible to the House of the people.

- This is explicated in S.R. Chaudhuri v. State of Punjab, *(2001) 7 SCC 126*, [on the reappointment of a Minister not a member of the House interpreting Article 164(4) in its overall context (at pr.21)]

"21. Parliamentary democracy generally envisages (i) representation of the people, (ii) responsible government, and (iii) accountability of the Council of Ministers to the Legislature. The essence of this is to draw a direct line of authority from the people through the Legislature to the executive. The character and content of parliamentary democracy in the ultimate analysis depends upon the quality of persons who man the Legislature as representatives of the people. It is said that "elections are the barometer of democracy and the contestants the lifeline of the parliamentary system and its set-up".

1.11 Following the British system was part of historical fact; Munshi elaborated:

"We must not forget a very important fact that during the last one hundred years Indian public life has largely drawn upon the tradition of the British constitutional law. Most of us, and during the last several generations before us, public men in India, have looked up to the British model as the bst. For the last thirty or forty years, some kind of responsibility has been introduced in the governance of this country. Our Constitutional traditions have become parliamentary and we now all our Provinces functioning more or less on the British model. As a matter of fact, today, the Domain Government of India functioning as a full-fledged Parliamentary Government" [VII CAD pg.984-985]

1.12 Introducing the Draft Constitution, Ambedkar justified the reason for the choice of the British in terms of the continuous responsibility generated by it:

"Under the non-Parliamentary system, such as the one that exists in the U.S.A., the assessment of the responsibility of the Executive is periodic. It is done by the Electorate. 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. Periodic assessment is done by the electorate at the time of the election which may take place every five years or earlier. 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." [VII CAD pg.31-32]

D. FEDERAL PRINCIPLES

a) FEDERALISM AND BASIC STRUCTURE

1.13 Federalism is basic structure of the Constitutions Admits differences on justiciability all judges accept federalism as the basic structure

S.R. Bommai vs. Union of India *(1994) 3 SCC 1*

- K. Ramaswamy J (pr.248)

  248. The preamble of the Constitution is an integral part of the Constitution. Democratic form of Government, federal structure, unity and integrity of the nation, secularism, socialism, social justice and judicial review are basic features of the Constitution.

  165. Further federalism implies mutuality and common purpose for the aforesaid process of change with continuity between the Centre and the States which are the structural units operating on balancing wheel of concurrence and promises to resolve problems and promote social, economic and cultural advancement of its people and to create fraternity among the People.

- Jeewan ReddyJ and Agrawal J (pr.276)

  276. The fact that under the scheme of our Constitution, greater power is conferred upon the Centre vis-a-vis the States does not mean that States are mere appendages of the Centre. Within the sphere allotted to them, States are supreme. The Centre cannot tamper with their powers. More particularly, the courts should not adopt an approach, an interpretation, which has the effect of or tends to have the effect of whittling down the powers reserved to the States. It is a matter of common knowledge that over the last several decades, the trend the world over is towards strengthening of Central Governments — be it the result of advances in technological/scientific fields or otherwise, and that even in USA the Centre has become far more powerful notwithstanding the obvious bias in that Constitution in favour of the States. All this must put the Court on guard against any conscious whittling down of the powers of the States. Let it be said that the federalism in the Indian Constitution is not a matter of administrative convenience, but one of principle — the outcome of our own historical process and a recognition of the ground realities.

- Pandian J agreed with Jeevan Reddy (pr.8 on presidential proclamation) but added

  8. Since my learned brothers have elaborately dealt with the constitutional provisions relating to the issue of the Proclamation and as I am in agreement with the reasoning given by B.P. Jeevan Reddy, J., it is not necessary for me to make further discussion on this matter except saying that I am of the firm opinion that the power under Article 356 should be used very sparingly and only when President is fully satisfied that a situation has arisen where the Government of the State cannot be carried on in accordance with the provisions of the Constitution. Otherwise, the frequent use of this power and its exercise are likely to disturb the constitutional balance. Further if the Proclamation is freely made, then the Chief Minister of every State who has to discharge his constitutional functions will be in perpetual fear of the axe of Proclamation falling on him because he will not be sure whether he will remain in power or not and consequently he has to stand up every time from his seat without properly discharging his constitutional obligations and achieving the desired target in the interest of the State.

- Ahmadi J. (pr.19)

  19. The Preamble of our Constitution shows that the people of India had resolved to constitute India into a Sovereign Secular Democratic Republic and promised to secure to all its citizens Justice, Liberty and Equality and to promote among them all Fraternity assuring the dignity of the individual and the unity and integrity of the Nation. In the people of India, therefore, vests the legal sovereignty while the political sovereignty is distributed between the Union and the States.

- Sawant J with Kuldeep Singh J (at pr.99)

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

1.14 Kesavananda Bharti v. State Kerala *(1973) 4 SCC 225*

- Sikri CJ (at pr.292 -294)

  292. The learned Attorney-General said that every provision of the Constitution is essential; otherwise it would not have been put in the Constitution. This is true. But this does not place every provision of the Constitution in the same position. The true position is that every provision of the Constitution can be amended provided in the result the basic foundation and structure of the constitution remains the same. The basic structure may be said to consist of the following features:

  (1) Supremacy of the Constitution;

  (2) Republican and Democratic form of Government;

  (3) Secular character of the Constitution;

  (4) Separation of powers between the legislature, the executive and the judiciary;

  (5) Federal character of the Constitution.

  293. The above structure is built on the basic foundation i.e. the dignity and freedom of the individual. This is of supreme importance. This cannot by any form of amendment be destroyed

  294. The above foundation and the above basic features are easily discernible not only from the preamble but the whole scheme of the Constitution, which I have already discussed. .

- Shelat & Grover JJ (pr.582)

  (1) The supremacy of the Constitution.

(2) Republican and Democratic form of government and sovereignty of the country.
(3) Secular and federal character of the Constitution.
(4) Demarcation of power between the Legislature, the executive and the judiciary.
(5) The dignity of the individual secured by the various freedoms and basic rights in Part III and the mandate to build a welfare State contained in Part IV.
(6) The unity and the integrity of the Nation.

- Hegde & Mukherjea JJ (pr.666)

  666. On a careful consideration of the various aspects of the case, we are convinced that the Parliament has no power to abrogate or emasculate the basic elements or fundamental features of the Constitution such as the sovereignty of India, the democratic character of our polity, the unity of the country, the essential features of the individual freedoms secured to the citizens. Nor has the Parliament the power to revoke the mandate to build a welfare State and egalitarian society. These limitations are only illustrative and not exhaustive.

- Khanna J (pr.1529)

  1529. In a federal system where the spheres of legislative powers are distributed between the Central Legislature and the State Legislatures, there has to be provided a machinery to decide in case of a dispute as to whether the law made by the State Legislatures encroaches upon the field earmarked for the Central Legislature as also a dispute whether a law made by the Central Legislature deals with a subject which can be exclusively dealt with by the State Legislatures. This is true not only of a federal system but also in a constitutional set up like ours wherein the Constitution-makers, though not strictly adopting the federal system, have imbibed the features of a federal system by distributing and setting apart the spheres of legislation between the Central Legislature and the State Legislatures.

  (Also at pr.1426 on democratic character)

1.15 Despite the lack of territorial integrity, there is little double that India's system is federal.

1.16 The asymmetries of Indian federalism bare well know as exemplified by Article 370, 370A to 370 J; Vth Schedule, VIth Schedule. Just as there are asymmetries with the states similar asymmetries exist with Union Territories.

1.17 The Constitution has created a three tier federalism by the Constitution 73rd and 74th Amendments [See Statement of Objects and reasons Preamble to these Amendment]

1.18 Union Territories are also part of the federal structure and do not lose character simply because of Central control. The President as head of a Union Territory is independent as President of India.

As Jeevan Reddy in Bommai puts it:

274. The expression "federation" or "federal form of government" has no fixed meaning. It broadly indicates a division of powers between a central (federal) Government and the units comprised therein.

As Ahmadi J in Bommai puts it:

14. Federalism is, therefore, a concept which unites separate States into a Union without sacrificing their own fundamental political integrity. Separate States, therefore, desire to unite so that all the member-States may share in formulation of the basic policies applicable to all and participate in the execution of decisions made in pursuance of such basic policies. Thus the essence of a federation is the existence of the Union and the States and the distribution of powers between them. Federalism, therefore, essentially implies demarcation of powers in a federal compact.

- Govt. of NCT, Delhi v. All India Central Civil Accounts, JAO's Assn., *(2002) 1 SCC 344*, at pr. 2:

  2. As stated by this Court in New Delhi Municipal Council v. State of Punjab[1] the President, who is the executive head of a Union Territory does not function as the head of the Central Government, but as the head of the Union Territory under powers specially vested in him under Article 239 of the Constitution thereby occupying a position analogous to that of a Governor in a State. Though the Union Territories are centrally administered under the provisions of Article 239 they do not become merged with the Central Government as has been stated by this Court in Satya Dev Bushahri v. Padam Dev. However, the Administrator is competent to exercise all powers vested in him by the Government of National Capital Territory of Delhi Act, 1991 (1 of 1992) (hereinafter referred to as "the Act"). The Administrator functions as a delegate of the President and will have to act under the orders of the President, that is, the Central Government.

(follow NDMC v. State of Punjab *(1997) 7 SCC 339*

- This is reiterated for Chandigarh [See Chandigarh Admn. v. Surinder Kumar, *(2004) 1 SCC 530*, at page 533;
- See also Satya Dev Bushahri v. Padam Dev, *(1955) 1 SCR 549*

1.19 Federal principles are reiterated to Democratic principles

1.20 Thus the NCT Government has both democratic and federal protection.

E. Interpretation of Statutes Must Fulfill Constitutional Objectives

1.21 Statutes have to be interpreted so that they fulfill the Constitutional design and cannot be given any other meaning. In Vipulbhai M. Chaudhary v. Gujarat Coop. Milk Mktg. Federation Ltd. **(2015) 8 SCC 1** the court held:

> *"27...As a corollary, the Constitution enables the competent legislature or authority to suitably amend the existing provisions in their laws in tune with the constitutional mandate.*
> ***46.** In the background of the constitutional mandate, the question is not what the statute does say but what the statute must say. If the Act or the Rules or the bye-laws do not say what they should say in terms of the Constitution, it is the duty of the court to read the constitutional spirit and concept into the Acts."*

1.22 Interpretation of Constitutional objectives:
In Ziyauddin Burhanuddin Bukhari v. Brijmohan Ramdass Mehra ***(1976) 2 SCC 17*** the Court held:

> *"**11.** Our Constitution-makers certainly intended to set up a Secular Democratic Republic the binding spirit of which is summed up by the objectives set forth in the preamble to the Constitution. No democratic political and social order, in which the conditions of freedom and their progressive expansion for all make some regulation of all activities imperative, could endure without an agreement on the basic essentials which could unite and hold citizens together despite all the differences of religion, race, caste, community, culture, creed and language. Our political history made it particularly necessary that these differences, which can generate powerful emotions, depriving people of their powers of rational thought and action, should not be permitted to be exploited lest the imperative conditions for the preservation of democratic freedoms are disturbed.*
> *12. It seems to us that Section 123 sub-sections (2), (3) and (3-A) were enacted so as to eliminate, from the electoral process, appeals to those divisive factors which arouse irrational passions that run counter to the basic tenets of our Constitution, and, indeed, of any civilised political and social order."*

1.23 Purposive Interpretation: Except in obvious cases, purposive interpretation is the way forward. See Lokur J. in Abhiram Singh v. CD Commachen ***(2017) 1 SCALE 1:***

> *"66(37)...The pendulum has swung towards purposive methods of construction. This change was not initiated by the teleological approach of European Community jurisprudence, and the influence of European legal culture generally, but it has been accelerated by European ideas."*

1.24 The interpretation of a proviso in a Constitution or explicating aspects of Constitutional principles must be in consonance with Constitutional objectives. In S. Sundaram Pillai v. VR Pattibirman ***(1985) 1 SCC 591***, left with the multiplicity of possible meanings of a proviso (Pr. 27-43) for statutory interpretation, the court held:

> *"43...To sum up, a proviso may serve four different purposes:*

(1) qualifying or excepting certain provisions from the main enactment:

(2) it may entirely change the very concept of the intendment of the enactment by insisting on certain mandatory conditions to be fulfilled in order to make the enactment workable:

(3) it may be so embedded in the Act itself as to become an integral part of the enactment and thus acquire the tenor and colour of the substantive enactment itself; and

(4) it may be used merely to act as an optional addenda to the enactment with the sole object of explaining the real intendment of the statutory provision."

1.25 Such an approach is too eclectic to be of any value other than to give a judge maximum latitude to pursue any interpretation. It is submitted:

(a) The interpretation rule is the most reliable.

(b) Constitutional interpretation must be tailored to achieve Constitutional objectives.

II. THE CONTEXT PURPOSE INTERPRETATION OF ARTICLE 239AA

2.1 The Statement of Objects and Reasons of the Bill, as introduced as a Constitutional amendment emphasised:

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

2.2 The real background to the 69th Amendment lies in the Report of the Committee on Reorganisation of Delhi Set-Up (Balakrishnan Committee) of December, 1989, which emphasised:

> *"4.3.2 The lack of accountability for acts of commission or omission by those functioning in the Delhi Administration also arises in a different way. The multiplicity of agencies and bodies involved in the affairs of Delhi and the overlapping of their functions inevitably leads to a dilution of their individual accountability to that extent. There is also a feeling that this is in turn encourages a tendency for officials and non-officials to interfere in the working of these agencies without being held responsible for such interference. From the views expressed before us we are convinced that many of the problems faced by the common man in*

Delhi can be attributed to the lack of accountability of the administration and its agencies to the representatives of the people."

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2.3 Clearly, democratic and responsible Govt. was the object of the Legislature:

> *"9.9 There is a good case on merits for providing Delhi with a Legislative Assembly and a Council of Ministers responsible to such assembly with adequate powers to deal with matters of concern to the common man. If Delhi is provided with these institutions many of the problems faced by the public as well as by the administration, which arise from or relatable to structural deficiency dealt with in Chapter IV can be satisfactorily resolved. As is clear from the debates in the Constituent Assembly, the intention of the Constitution is not to exclude Delhi from the system of participative democracy adopted for the whole country."*

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2.4 As far as the relationship of the Lieutenant Governor with the Council of Ministers is concerned, it was clearly stated:

> *"9.20 Provision should be made for a Council of Ministers headed by the Chief Minister, broadly on the pattern of the States. The Chief Minister should be appointed by the President and other Ministers should be appointed by him after consultation with the Chief Minister. The Ministers are to hold office during the pleasure of the President.*
>
> *9.21 The Council of Ministers should be made collectively responsible to the Legislative Assembly.*
>
> *9.22.1 The Lt. Governor should be expressly required to perform his functions on the "aid and advise" of the Council of Ministers as understood in the system of cabinet form of government adopted in our Constitution. However the requirement should not apply to any matter:*
>
> > *(i) which is outside purview of the Legislative Assembly, but in respect of which powers and functions are entrusted or delegated to Lt. Governor by the President, or*
> > *(ii) in which he is required by or under any law to act in his discretion or has to exercise any judicial or quasi judicial functions.*
>
> *9.22.2 In the case of difference of opinion between the Lt. Governor and his Council of Ministers which cannot be resolved, the question should be referred to*

the President whose decision thereon will be final. The Lt. Governor may take interim action in case of urgency. The rules of business governing the exercise of executive power by the Council of Ministers should be made by the President.

9.22.3 There is no need to provide that the Lt. Governor should preside over the meetings of Council of Ministers.

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2.5 Needless to say that provisions were made for the Chief Minister to keep the Lieutenant Governor informed.

2.6 The debates shed little light o the intention except for the introduction of SB Chavan.

III. Status of the GNCTD

3.1 It is significant that there is difference between the governance of different Territory (UTS) which is:

(i) UTS endowed by the Constitution (Art. 239AA)

(ii) UTS devolved by Parliament (Art. 239A)

(iii) UTS under direct Union control (239)

This is consistent with the view laid down in NDMC v. State of Punjab *(1997) 7 SCC 339* at Pr. 155.

> *"155. In this connection, it is necessary to remember that all the Union Territories are not situated alike. There are certain Union Territories (i.e., Andaman and Nicobar Islands and Chandigarh) for which there can be no legislature at all – as on today. There is a second category of Union Territories covered by Article 239-A (which applied to Himachal Pradesh, Manipur, Tripura, Goa, Daman and Diu and Pondicherry – now, of course, only Pondicherry survives in this category, the rest having acquired Statehood) which have legislatures by courtesy of Parliament. Parliament can, by law, provide for constitution of legislatures for these States and confer upon these legislatures such powers, as it may think appropriate. Parliament has created legislatures for these Union Territories under the "the Government of Union Territories Act, 1963", empowering them to make laws with respect to matters in List II and List III, but subject to its overriding power. The third category is Delhi. It had no legislature with effect from 1-11-1956 until one has been created under and by virtue of the Constitution Sixty-Ninth (Amendment) Act, 1991 which introduced Article 239-AA. We have already dealt with the special features of Article 239-AA and need not repeat it. Indeed, a reference to Article 239-B*

read with clause (8) of Article 239-AA shows how the Union Territory of Delhi is in a class by itself but is certainly not a State within the meaning of Article 246 or Part VI of the Constitution. In sum, it is also a territory governed by clause (4) of Article 246."

3.2 It is also important to note the Constitution (70th Amendment) whereby
(a) UT of Delhi and Pondicherry were also accepted as constitution for the election of the President.
(b) It as made clear that Parliament's powers to legislate on the UT were supplemental.

3.3 This may be best illustrated by examining the constitutional texts in this regard. Articles in part VIII:

Art. 239 Under Direct Union Control	Art. 239A Devolved Govt. by Parliament	Art. 239AA Constitutionally Endowed Govt.
239. Administration of Union territories.— (1) Save as otherwise provided by Parliament by law, every Union territory shall be administered by the President acting, to such extent as he thinks fit, through an administrator to be appointed by him with such designation as he may specify. (2) Notwithstanding anything contained in Part VI, the President may appoint the Governor of a State as the administrator of an adjoining Union territory, and where a Governor is so appointed, he shall exercise his functions as such administrator	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	This elaborates the governance of the GNCTD in detail which is to be supplemented by Parliament under Article 239AA(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.

independently of his Council of Ministers.	purposes of article 368 notwithstanding that it contains any provision which amends or has the effect of amending this Constitution.	

3.4 Thus apart from the Presidents rule power & the ordinance making power there is no similarity between Art. 239A as applicable to Pondicherry which is a devolved government by Parliament and a full responsible government enshrined in the Constitution for the GNCTD.

3.5 However the Parliament neither creates the Govt. of NCT of Delhi nor can it alter in except "supplementing the provisions".

Likewise the preamble of the GNCTD Act, 1991 states:

> *"An Act of supplement the provisions of the Constitution relating to the Legislative Assembly and a Council of Ministers for the National Capital Territory of Delhi and for matters connected therewith or incidental thereto."*

3.6 Thus, though Delhi is described as a Union Territory it has a lot of commonalities with Central and State governments created by the Constitution.

Principle	GNCTD	State	Union
Principal of direct elections using the election commission	239AA(2)	168 & 170	79, 80 & 81
Principle of distribution of power	239AA(3) • Including repugnancy • Non derogation of Parliaments • Powers, exceptions, provisions	245, 246	245, 256 including Art. 246 (4).
Principle of Council of Minister & collective responsibility	239AA(4), (5) & (6)	163, 163	74, 75
Status of Parliaments	239(7)		

Power			
Ordinance Power	239(8), 239B		
Emergency Power	239(8), 239AB, 352, 360	352, 356, 360	352, 360, 360
Presidents power to give directions	Section 49 of the GNCTD Act	160	

3.7 Nomenclature: Whether it is to be called a Union Territory must be nuanced so that differentiations between the various Union Territories are established.

IV. The status and interpretation of the Allocation and Transaction Rules

4.1 In so far as they are relevant, the rules are broadly in four categories;

(a) To provide and call for post-decisional information.

(b) To give prior information.

(c) To define and regulate the L-G's functions.

(d) To govern the relationship between the GNCTD, L-G and the Parliament

A. Providing Information

4.2 Providing information is a feature of the Constitution.

Union: Article 78

State: Article 167

GNCTD: Section 45, GNCTD Act, 1991

These are identical.

Note: The giving of information does not empower the Lt. Governor with overriding powers.

4.3 The relevant rules are Rule 9(2), Rule 10(5), Rule 11(1)& (2), Rule 13(3), (7), Rule 15, Rule 16, Rule 17, Rule 19(5), Rule 21, Rule 25.

4.4 Rules in respect of giving prior information: Rule 22, Rule 23, Rule 24 & Rule 42.

4.5 Rules 49 to 56 make reference to the Central Government

4.6 This is consistent with harmonizing the powers of the Union and GNCTD with information passing through the L-G and ensuring that the excepted areas [Entry 1, 2, 18 (List I) & 64, 65, 66 (List II)] are referred to the Union. In some areas, the information can be used to promote a healthy interaction.

5. ROLE OF THE LG AND CENTRAL GOVERNMENT

5.1 While certain powers are not available to the Delhi Legislature or Ministry (Article 239AA(2), Article 239AB)), the relationship between the Lt. Governor and the Council of Ministers is similar (with some exceptions) to

the rules of parliamentary government [Samsher principle (see Samsher Singh v. State of Punjab, *(1974) 2 SCC 831)]*

5.2 Article 239AA (4)-(6) lay down

(i) The Council of Ministers shall "*aid and advise*" the Lt. Governor except when the latter acts his discretion.

(ii) A difference of opinion has to be resolved by the President.

(iii) The Council of Ministers shall be "*collectively responsible*" to the Assembly.

(iv) The Lt. Governor may act in his discretion where the role of the Council of Ministers is obviated.

5.3 Section 41 of the *Government* of National Capital Territory of *Delhi Act, 1991* states.

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

5.4 There is ample authority for the proposition that India's system of governance is modeled after the British (see Ram Jawaya v State of Punjab *(1955) 2 SCR 225*; A Sanjeev Naidu v Madras *(1970) 1 SCC 443*; U.N.R Rao v Indira Gandhi *(1971) 2 SCC 63.*

5.5 It follows that the President is bound by the advice of the Prime Minister or Chief Minister. In R.C. Cooper *(1970) 1 SCC 248* the Court observed:

> *"Under the Constitution, the President being the constitutional head, normally acts in all matters including the promulgation of an ordinance on the advice of his Council of Ministers."*

5.6 A problem arose because in Sardari Lal's case *(1971) 1 SCC 411* Grover J. for a Constitution Bench of 5 judges, followed the earlier case of Jayantilal v F.N. Rana *(1964) 5 SCR 294*, to take the broad view of the areas on which the President (or Governor) could exercise his discretion including service

matters for which business rules existed. Quoting from Jayantilal the Court said:

> *"There is a vast array of other powers exercisable by the President–to mention only a few–appointment of Judges: Articles 124 and 217, appointment of Committees of Official Languages Act: Article 344, appointment of Commissions to investigate conditions of backward classes: Article 340, appointment of Special Officer for Scheduled Castes and Tribes: Article 338, exercise of his pleasure to terminate employment: Article 310, declaration that in the interest of the security of the State it is not expedient to give to a public servant sought to be dismissed an opportunity contemplated by Article 311 (2)–these are executive powers of the President and may not be delegated or entrusted to another body or officer because they do not fall within Article 258."*

Without going into the service law facts, Sardari Lal and Jayantilal greatly expanded the power of the President.

5.7 This resulted in the seven judge bench in Shamsher v State of Punjab ***(1974) 2 SCC 831.*** Ray C.J. (in the main judgment) pointed out (at pr.14).

> *"**14.** In all the articles which speak of powers and function of the President, the expression used in relation thereto are 'is satisfied', 'is of opinion', 'as he thinks fit' and 'if it appears to'. In the case of Governor, the expressions used in respect of his powers and functions are 'is satisfied', 'if of opinion' and 'as he thinks fit'.*

On these have to be imposed the system of Cabinet Government (at pr.28)

> *"28. Under the Cabinet system of Government as embodied in our Constitution the Governor is the constitutional or formal head of the State and he exercises all his powers and functions conferred on him by or under the Constitution on the aid and advice of his Council of Ministers save in spheres where the Governor is required by or under the Constitution to exercise his functions in his discretion."*

Giving the reasons, Ray C.J. said:

> *"**30.** Wherever the Constitution requires the satisfaction of the President or the Governor for the exercise of any power or function by the President or the Governor, as the case may be, as for example in Articles 123, 213, 311(2) proviso (c), 317, 352(1), 356 and 360 the satisfaction required by the Constitution is not the personal satisfaction of the President or of the Governor but is the satisfaction of the President or of the Governor in the constitutional sense under the Cabinet system of Government. The reasons are these. It is the satisfaction of the Council of Ministers on whose aid and advice the President or the Governor generally exercises all his powers and functions. Neither Article 77(3) nor Article 166(3) provides for any delegation of power. Both Articles 77(3) and 166(3) provide that the President under Article 77(3) and the Governor under Article 166(3) shall make rules for the more convenient transaction of the business of the Government and the allocation of business among the Ministers of the said business. The Rules of Business and the allocation among*

the Ministers of the said business all indicate that the decision of any Minister or officer under the Rules of Business made under these two articles viz. Article 77(3) in the case of the President and Article 166(3) in the case of the Governor of the State is the decision of the President or the Governor respectively." (emphasis added)

5.8 Justice Krishna Iyer (for himself and Bhagwati J) concurred with even greater emphasis. Indeed, it is his judgment that is often cited as authoritative. According to him the ratio of Sardari Lal and Jayantilal had to be reduced, not expanded (at pr.142).

> *"142. ...If only we expand the ratio of Sardari Lal and Jayantilal to every function which the various articles of the Constitution confer on the President or the Governor, Parliamentary democracy will become a dope and national elections a numerical exercise in expensive futility."*

The reason (at pr.151)

> *"151. The omnipotence of the President and of the Governor at State level — is euphemistically inscribed in the pages of our Fundamental Law with the obvious intent that even where express conferment of power or functions is written into the articles, such business has to be disposed of decisively by the Ministry answerable to the Legislature and through it vicariously to the people, thus vindicating our democracy instead of surrendering it to a single summit soul whose deification is incompatible with the basics of our political architecture — lest national elections become but Dead Sea fruits, legislative organs become labels full of sound and fury signifying nothing and the Council of Ministers put in a quandary of responsibility to the House of the People and submission to the personal decision of the head of State. A Parliamentary-style Republic like ours could not have conceptualised its self-liquidation by this process. On the contrary, democratic capital-formation to strengthen the people's rights can be achieved only through invigoration of the mechanism of Cabinet-House-Elections."*

There are possible areas of discretion, but here too, they have to be tested on the principle of parliamentary democracy (at pr.154).

> *"154. We declare the law of this branch of our Constitution to be that the President and Governor, custodians of all executive and other powers under various articles shall, by virtue of these provisions, exercise their formal constitutional powers only upon and in accordance with the advice of their Ministers save in a few well-known exceptional situations. Without being dogmatic or exhaustive, these situations relate to (a) the choice of Prime Minister (Chief Minister), restricted though this choice is by the paramount consideration that he should command a majority in the House; (b) the dismissal of a Government which has lost its majority in the House, but refuses to quit office; (c)*

the dissolution of the House where an appeal to the country is necessitous, although in this area the head of State should avoid getting involved in politics and must be advised by his Prime Minister (Chief Minister) who will eventually take the responsibility for the step. We do not examine in detail the constitutional proprieties in these predicaments except to utter the caution that even here the action must be compelled by the peril to democracy and the appeal to the House or to the country must become blatantly obligatory."

5.9 In a spate of decisions it has been stated that there can be no appeals to the President's satisfaction in respect of matters decided by a Minister under the Rules (e.g. Union of India v Sripati Ranjan ***(1975) 4 SCC 699).***

5.10 It is true that the Constitution says (Article 239 AA proviso):

"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 of 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."

But if democracy is to be preserved, then such references and urgency must be genuine. Further, the urgency clause must be exercised under the directions of the Central Government, otherwise the LG would be an autocrat.

5.11 Again the Rules of Business elaborate this:

"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 Governor 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.

52. Where a direction has been given by the Lieutenant Governor in pursuance of rule 51, the Minister concerned shall take action to give effect to such direction."

But these rules cannot override constitutional principles and create emergencies where none exist. These provisions cannot be used by the LG and the Central Government conspiratorially to unsettle the elected government and the very principle of democracy on which the Constitution is based upon. In Bhanumati v State of UP ***(2010) 12 SCC 1*** the Court observed (at pr.51)

> *"51. Many issues in our constitutional jurisprudence evolved out of this doctrine of silence. The basic structure doctrine vis-à-vis Article 368 of the Constitution emerged out of this concept of silence in the Constitution. A Constitution which professes to be democratic and republican in character and which brings about a revolutionary change by the Seventy-third Constitutional Amendment by making detailed provision for democratic decentralisation and self-government on the principle of grass-root democracy cannot be interpreted to exclude the provision of no-confidence motion in respect of the office of the Chairperson of the panchayat just because of its silence on that aspect."*

These silences have now become authoritative principles declared by the Supreme Court.

5.12 I have made a distinction between

(a) Constitutional *principles* recognized as part of the rule of law texts of the constitution by courts are binding and to be followed and interpreted.

(b) In contradistinction *practices* which Indian governance produces in abundance, with often contrary effects, are to be noticed but not recognized as principle.

In many cases, cumulative practices amidst contradictions are wrongly projected to be followed as part of the constitutional mandate. Principles (not practices) recognized by courts are the only safe way to create a body of constitutional principles to guide governance.

5.13 This distinction is fundamental to the constitution and reinforced by the basic structure doctrine so that the constitution does not run adrift on the winds of practice without being recognized as constitutional principles recognized by courts.