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Delving into the Constitutional Issues of GNCTD (Amendment) Acts 2021 and 2023

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The Indian Constitution¹ envisages a polity that is necessarily quasi-federal in nature having unitary bias. The Seventh Schedule² of the Constitution provides for the demarcation of powers between the Union and States and Article 246³ read with the aforesaid Schedule provides for the Symmetric Model (where the powers between the Centre and States are evenly distributed) of federalism in general. However, the insertion of Article 239AA⁴ to the Constitution made a significant departure from the aforementioned established model of federalism and adopted an Asymmetric Model (where the powers between the Centre and States are unevenly distributed). The tussles of powers between the democratic institutions such as legislature and judiciary or even between the Centre and the States are not at all new in the Indian Constitutional history; however, the intricacies in the unique model of governance adopted in Delhi have led to a new set of disputes raising serious question marks on the principles of federalism and subsequent deadlocks in several instances that have been ultimately adversely affecting the efficient governance in the national capital. Two such instances occurred when the Parliament brought two amendments to the Government of National Capital Territory of Delhi Act, 1991⁵ in the years 2021 and 2023 to overturn the landmark Supreme Court rulings in the years 2018 and 2023,

¹ Constitution of India 1950

² Constitution of India 1950, sch 7

³ Constitution of India 1950, art 246

⁴ Constitution of India 1950, art 239AA

⁵ The Government of National Capital Territory of Delhi Act 1991

respectively. In this paper, the author aims to analyze the various major Constitutional issues involved in the said amendments of the 1991 Act that are likely to become impediments to these passing the tests of Constitutional validity.

Keywords: *constitutional validity, constitution, democracy, federalism.*

INTRODUCTION

In a Constitutional democracy, the fundamental principle lies in the fact that none of the organs of the government are supreme, but it is only the Constitution that is supreme. Therefore, while it is desirable that all the organs should function hand in hand remaining within the specific domains demarcated by the Constitution, it is well said that the skirmishes between the different organs of the government symbolize a vibrant democratic set-up as it ensures the de-concentration of powers and efficient working of the Checks and Balances. That is to say that such skirmishes ultimately uphold the ideals of Constitutionalism by preventing any organ from becoming an autocrat and abusing its powers. There is doubt in mentioning that such skirmishes should not take such a turn so as to create deadlocks between the organs and deprive the citizens of efficient governance by undermining Constitutional ideals. In the Indian Constitutional history, there is no dearth of instances witnessing the tussles of powers between the different organs of the government, especially, between the legislature and judiciary.

As per the framework of the Constitution of India⁶, on one hand, the laws made by the legislature are subject to judicial review and therefore, the Constitutional Courts can invalidate any law if the same contravenes the Constitution. On the other hand, the rulings given by the Courts can also be overturned by the legislature by altering its basis or removing its vices, but the only requirement is that the proper procedure must be followed.

In India, some notable instances of skirmishes between the Parliament and the Supreme Court have been witnessed in the last few years with respect to the various issues related to the special status conferred to Delhi and the interpretations of the Constitutional provisions relating to it.

⁶ Constitution of India 1950

Those instances occurred when the Parliament sought to nullify two Supreme Court rulings of 2018 and 2023 by bringing amendments in 2021 and 2023, respectively, in the Government of National Capital Territory of Delhi Act, 1991⁷. The purposes of this paper are to analyze the provisions of those legislations amending the principal Act of 1991 and the major Constitutional issues involved in the said legislations that make them vulnerable to disqualification to the test of Constitutional validity.

REVIEW OF LITERATURE

Many authors and Constitutional experts have authored articles and raised serious concerns on the Constitutional issues involved in the two Government of NCT of Delhi (Amendment) Acts of 2021 and 2023. Amongst those articles, the articles authored by **Manu Sebastian** on “*Why GNCTD (Amendment) Act 2023 May Not Pass Constitutional Test Despite Changes From Services Ordinance?*”⁸ and **Yash Mittal** on “*Addressing the Constitutional vires of the Delhi Services Act, 2023: A critical analysis*”⁹ provided the scope of the current research. In the said articles, the authors threw light on the Constitutional issues involved in the Amendment Act of 2023 in precise manners. However, no such research has been made on the Constitutional validity of the Amendment Act of 2021. The author of this paper therefore aims to address the vacuums in the existing literature on the subject matter of this research by delving into the Constitutional issues of the amendment Acts of 2021 and 2023 and extensively examining why the laws may not pass the tests of Constitutional validity with the help of landmark cases and Constitutional and jurisprudential principles. In the end, the author also tries to give some suggestions to overcome the issues involved in the laws.

⁷ GNCTDA 1991

⁸ Manu Sebastian, ‘WHY GNCTD (AMENDMENT) ACT 2023 MAY NOT PASS CONSTITUTIONAL TEST DESPITE CHANGES FROM SERVICE ORDINANCE’ *Live Law* (17 August 2023)

<<https://www.livelaw.in/articles/why-gnctd-amendment-act-2023-may-not-pass-constitutional-test-despite-changes-from-services-ordinance-235443>> accessed 10 February 2024

⁹ Yash Mittal, ‘ADDRESSING THE CONSTITUTIONAL VIRES OF THE DELHI SERVICES ACT, 2023: A CRITICAL ANALYSIS’ *Bar and Bench* (12 August 2023)

<<https://www.barandbench.com/columns/addressing-the-constitutional-vires-of-the-delhi-services-bill-2023-a-critical-analysis>> accessed 10 February 2024

THE OBJECT OF THE PAPER

The author of this paper intends to analyze the Constitutional validity of –

- The Government of National Capital Territory of Delhi (Amendment) Act, 2021¹⁰; and
- The Government of National Capital Territory of Delhi (Amendment) Act, 2023¹¹.

RESEARCH METHODOLOGY

The Research Methodology of this paper shall be Doctrinal.

Background of the Special Status of Delhi and Controversies: The history of the special status of Delhi goes back to the commencement of the Constitution in 1950 when the States were divided into the categories of Part A, Part B, and Part C States and Delhi was allotted the status of Part C State and accordingly governed by the Government of Part C States Act, 1951¹². Since the enforcement of the 7th Constitutional Amendment Act, 1956¹³, Delhi has been awarded the status of a Union Territory. In order to create a balance between the necessities of having Delhi under the governance of the Union Government on account of legitimate national interests, on one hand, and on the other hand, long-standing demands of the people of Delhi to have an elected government, the Parliament brought the 69th Constitutional Amendment Act, 1991¹⁴ by virtue of which Article 239AA¹⁵ and Article 239AB¹⁶ were inserted in Part VIII¹⁷ of the Constitution with the purpose of conferring Delhi a sui generis status. Adopting an asymmetric federal model, Article 239AA¹⁸ confers Delhi the status of the National Capital Territory (NCT). It provides for the constitution of a Legislative Assembly at NCT of Delhi and a Council of Ministers headed by the Chief Minister collectively responsible to the Assembly and the

¹⁰ The Government of National Capital Territory of Delhi (Amendment) Act 2021 (GNCTDAA 2021)

¹¹ The Government of National Capital Territory of Delhi (Amendment) Act 2023 (GNCTDAA 2023)

¹² Government of Part C States Act 1951

¹³ Constitution (Seventh Amendment) Act 1956

¹⁴ Constitution (Sixty-ninth Amendment) Act 1991

¹⁵ Constitution of India 1950, art 239AA

¹⁶ Constitution of India 1950, art 239AB

¹⁷ Constitution of India 1950, pt VIII

¹⁸ Constitution of India 1950, art 239AA

Lieutenant Governor shall be appointed by the Union Government who shall act as per the aid and advice of the Council of Minister except the cases wherein he is required by the Constitution or any law made by the Parliament to act in his own discretion.

One of the striking features of Article 239AA¹⁹ is that it confers powers to the Legislative Assembly of NCT of Delhi to make laws on all matters contained in the State List and Concurrent List of the Seventh Schedule²⁰ except Entries 1, 2 and 18 along with Entries 64, 65 and 66 so far as they are related to Entries 1, 2, and 18, however, it conferred powers to the Parliament to make laws on all matters of State List in addition to the Union List and Concurrent List. The Parliament enacted the Government of National Capital Territory of Delhi Act, 1991²¹ by virtue of the powers conferred to it under Article 239AA(7)(a)²² to lay down the provisions regulating the functions of the Lieutenant Governor, Government and Legislative Assembly of the NCT of Delhi.

Notably, while this unique asymmetric federal model of governance appears to be the only viable solution in order to fulfil the unique requirements of the Union Territory of Delhi as to its governance, it significantly led to tussles of Legislative and Executive powers between the NCT of Delhi and Union and the Constitutional deadlocks have been created at the most of the times due to such tussles requiring the judicial interventions at different times.

The major judicial rulings and the consequences thereof are as follows –

State (NCT of Delhi) v Union of India (2018)²³: In July 2018, a 5 judges Constitution Bench of the Hon'ble Supreme Court in the case of comprehensively dealt with the Constitutional provisions and interpreted Article 239AA²⁴ broadly to clarify the position and role of the Lieutenant Governor in the governance of the NCT of Delhi. This ruling sought to pacify the

¹⁹ *Ibid*

²⁰ Constitution of India 1950, sch 7

²¹ GNCTDA 1991

²² Constitution of India, art 239AA(7)(a)

²³ *State (NCT of Delhi) v Union of India and Anr* (2018) 8 SCC 501

²⁴ Constitution of India, art 239AA

conflicts between the Lieutenant Governor (LG) and the elected Government of NCT of Delhi by ensuring a healthy set-up of democratic governance. The Court in this case laid emphasis on the necessity of harmonious functioning of the Constitutional functionaries as sine qua non to the efficient functioning of a Constitutional democracy and therefore, ruled that the Lieutenant Governor must discharge his powers and functions not in discordance but in concordance with the elected Government. The Parliament in order to overturn this ruling brought the Government of NCT of Delhi (Amendment) Act 2021²⁵.

Government of NCT of Delhi v Union of India (2023)²⁶: Again, in May 2023, the Supreme Court had to intervene to settle another matter of conflict between the GNCTD and the Union relating to the control over Civil Servants in NCT of Delhi. A 5 judges Constitution Bench of the Supreme Court interpreted the Constitutional and relevant legal provisions in light of the 2018 Constitutional Bench verdict and ruled that the Government of NCT of Delhi must have control over the Civil Servants as per Entry 41 of the State List of Seventh Schedule²⁷ except on matters relating to Public Order, Police and Land which were expressly excluded by virtue of Article 239AA²⁸. This ruling, as well, was overturned first by the Presidential Ordinance that was fructified in the Government of NCT of Delhi (Amendment) Act 2023²⁹.

²⁵ GNCTDAA 2021

²⁶ *Government of NCT of Delhi v Union of India* 2023 SCC OnLine SC 606

²⁷ Constitution of India 1950, sch 7

²⁸ Constitution of India, art 239AA

²⁹ GNCTDAA 2023

Do the provisions of the Government of NCT of Delhi (Amendment) Act 2021³⁰ contravene Article 239AA³¹ of the Constitution of India as well as the fundamental spirits of the Constitutional scheme?

The constitutional validity of Section 2(3):³² Section 2³³ amends Section 21³⁴ and thereby inserts sub-section 3 to said Section which reads as follows – *“The expression ‘Government’ referred to in any law to be made by the Legislative Assembly shall mean the ‘Lieutenant Governor’.”*³⁵

From the reading of the above provision, it is evident that the provision intends to vest all Executive powers of the NCT of Delhi to the Lieutenant Governor (hereinafter, referred to as LG) divesting the same powers from the popularly elected Government of the NCT of Delhi. It thereby dilutes the purpose of Article 239AA³⁶ contained in Part VIII³⁷ of the Constitution of India and the interpretation thereof made by the Constitution Bench of the Supreme Court in its 2018 verdict, making the role of the elected Government of NCT of Delhi in performing the Executive functions almost nugatory. Further, this results in the indirect transfer of the governance of the NCT of Delhi from the Government of NCT of Delhi to the Union of India. This is an explicit violation of the ‘Federal Structure’ of polity ingrained in the Constitution which forms an essential part of the ‘Basic Structure’ of the Constitution as ruled by the Supreme Court in the landmark case of **SR Bommai v Union of India**³⁸ in accordance with the ‘**Basic Structure Doctrine**’ propounded by the Apex Court in its historic decision in the case of **Kesavananda Bharati v State of Kerala**³⁹. Moreover, such indirect transfer of Executive functions of the Government of NCT of Delhi to the Union also leads to sheer erosion of

³⁰ GNCTDAA 2021

³¹ Constitution of India, art 239AA

³² GNCTDAA 2021, s 2(3)

³³ GNCTDAA 2021, s 2

³⁴ GNCTDAA 1991, s 21

³⁵ GNCTDA 1991, s 21(3)

³⁶ Constitution of India, art 239AA

³⁷ Constitution of India 1950, pt VIII

³⁸ *S.R. Bommai v Union of India* AIR 1994 SC 1918

³⁹ *Kesavananda Bharati Sripadagalvaru and Ors v State of Kerala and Anr* AIR 1973 SC 1461

democratic values as it fails an elected government to function as a representative of popular will.

An argument can be presented in favor of the Constitutional validity of this particular subsection that it has been inserted by the Parliament exercising powers conferred by Article 239AA(7)(a)⁴⁰ to give effect to the provisions of Article 239AA⁴¹ and it is fully consistent with Article 239(1)⁴² of the Constitution which contains that – *“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.”*⁴³

In view of the above provision, as per Article 239(1), the President through appointing LG shall administer a Union Territory and accordingly, the LG is empowered to perform the Executive functions by virtue of any enactment made by the Legislative Assembly of NCT of Delhi. Therefore, merely the insertion of Article 239AA⁴⁴ and providing for a representative form of Government in the NCT of Delhi does not convert its fundamental characteristics of a Union Territory to that of a State. However, at the same time, it has already been conclusively held in the Constitution Bench verdict of 2018 by the Apex Court that there is no ‘Uniform Class’ of Union Territories available in Part VIII⁴⁵ of the Constitution. More significantly, Article 239AA⁴⁶ confers NCT of Delhi a sui generis status and for the same reason, the status of Delhi cannot be compared with the other Union Territories. When an elected government has been installed by the Constitution in a Union Territory, divesting of the powers of the same and vesting those to the LG (who is merely nominated by the President as an Administrator thereof) defeats the electoral mandates of the people. Therefore, it shall not be proper to rely upon Article 239(1)⁴⁷

⁴⁰ Constitution of India, art 239AA(7)(a)

⁴¹ Constitution of India, art 239AA

⁴² Constitution of India 1950, art 239(1)

⁴³ *Ibid*

⁴⁴ Constitution of India, art 239AA

⁴⁵ Constitution of India 1950, pt VIII

⁴⁶ *Ibid*

⁴⁷ Constitution of India, art 239(1)

to justify the insertion of sub-section 3 to Section 21⁴⁸ and accordingly, Section 2(3)⁴⁹ is prone to unconstitutionality.

Constitutional validity of Section 4(b)⁵⁰: Section 4(b)⁵¹ of the GNCTD (Amendment) Act, 2021⁵² amends the Proviso to Section 33(1)⁵³ of the principal Act of 1991 (containing the ‘Rules of Procedure’ of the functioning of the Government of NCT of Delhi) and inserts the first Proviso. The said first proviso as it stands post the amendment prohibits the Legislative Assembly of NCT of Delhi *“to make any rule to enable itself or its Committees to consider the matters of day-to-day administration of the Capital or conduct inquiries in relation to the administrative decisions.”*⁵⁴ Further, it voids all the rules made by the Legislative Assembly in relation to the aforesaid matters retrospectively.

A democratically elected government cannot function efficiently unless it is given autonomy as regards the day-to-day affairs of the administration in the territory at least to some extent. Notwithstanding the fact that the NCT of Delhi is not a State and has been conferred with a unique position by the Constitution providing for an elected government with some restricted autonomies, taking away the rule-making powers of the Assembly in the aforementioned matters will not serve the underlying purpose of the representative democracy since it will largely affect the efficient governance in the Union Territory. Moreover, the said embargo on rule-making powers of the Assembly in effect is likely to create avenues for the LG representing the Union Government to interfere in the day-to-day administrative affairs of the Government of NCT of Delhi and thereby, abrogate the restricted autonomy granted by the Constitution to it. As a general consequence of it, the entire process of democratic governance in NCT of Delhi can be crippled and many Constitutional deadlocks may be occurred due to conflicts between the Delhi Government and LG. These in turn will fail the Delhi Government to serve the

⁴⁸ GNCTDA 1991, s 21

⁴⁹ GNCTDAA 2021, s 2(3)

⁵⁰ GNCTDAA 2021, s 4(b)

⁵¹ *Ibid*

⁵² GNCTDAA 2021

⁵³ GNCTDA 1991, s 33(1)

⁵⁴ GNCTDA 1991, s 33(1)

mandates of electorates for which it has been entrusted by the Constitution by ensuring good governance and being accountable to them.

In view of the above discussions, the author opines that the insertion of the embargo on the rule-making powers of the Legislative Assembly of NCT of Delhi as per the first Proviso to Section 33(1)⁵⁵ of the GNCTD Act, 1991⁵⁶ is unwarranted and ultra vires the scheme of governance envisaged by Article 239AA⁵⁷ for it does not sub serve the purpose of the said Article of the Constitution and therefore, it cannot be said to be law made under Article 239AA(7)(a)⁵⁸ which reads as follows – *“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.”*⁵⁹

The restriction on the rule-making powers of the Delhi Legislative Assembly can also be ultra vires the Article 239AA⁶⁰ for another reason that imposition of such restriction is not permitted by the said provisions of the said Article. That is to say that Article 239AA(3)(a)⁶¹ only carves out the law-making powers of the Delhi Legislative Assembly in the matters enumerated in Entries 1, 2, and 18 of List- II of the Seventh Schedule⁶² of the Constitution and Entries 64, 65 and 66 as well in so far as they relate to Entries 1, 2, and 18 of the said List. No excess restrictions can be validly imposed by the Parliament (except the aforementioned explicitly excluded Entries of the State List) on the law-making powers of the Assembly by any ordinary statute as that can only be done by way of Constitutional amendments. The restriction on the rule-making powers of the Assembly by first Proviso to Section 33(1)⁶³ is an additional restriction, the imposition of which is not legally permissible.

⁵⁵ GNCTDA 1991, s 33(1)

⁵⁶ GNCTDA 1991

⁵⁷ Constitution of India, art 239AA

⁵⁸ Constitution of India, art 239AA(7)(a)

⁵⁹ Constitution of India 1950, art 239AA(7)(a)

⁶⁰ Constitution of India, art 239AA

⁶¹ Constitution of India, art 239AA(3)(a)

⁶² Constitution of India 1950, sch 7

⁶³ GNCTDA 1991, s 33(1)

Do Sections 3 and 4⁶⁴ of the Government of NCT of Delhi (Amendment) Act 2023 contravene Article 239AA⁶⁵ of the Constitution of India and are inconsistent with the framework of the Indian Constitution?

Salient features of the Government of National Capital Territory of Delhi (Amendment) Act, 2023⁶⁶:

The highlighting features of the 2023 amendment in the GNCTD Act, 1991⁶⁷ is that it constitutes the 'National Capital Civil Services Authority' and provides for the composition, powers, functions and rules of the conduct of the business of the authority. The key takeaways of the authority are as follows:

The Authority as per Section 45E(2)⁶⁸ of the principal Act of 1991 consists of three members and they are:

- Chief Minister of the Government of NCT of Delhi as the ex officio Chairperson of the authority;
- Chief Secretary of the Government of NCT of Delhi as an ex officio member; and
- Principal Home Secretary of the Government of NCT of Delhi as the ex officio Member Secretary to the Authority.

a. The principal function of the Authority as per Section 45H⁶⁹ of the Principal Act of 1991 is to recommend the transfers and postings of the Group A officers of the 'Delhi, Andaman & Nicobar, Lakshadweep, Daman and Diu and Dadra and Nagar Haveli (Civil) Services' (DANICS) serving in connection with the affairs of NCT of Delhi except in case of the officers serving in connection with the matters contained Entries 1, 2, and 18 of the State List of Seventh

⁶⁴ GNCTDAA 2023, ss 3-4

⁶⁵ Constitution of India, art 239AA

⁶⁶ GNCTDAA 2023

⁶⁷ GNCTDA 1991

⁶⁸ GNCTDA 1991, s 45E(2)

⁶⁹ GNCTDA 1991, s 45H

Schedule⁷⁰ of the Constitution and also Entries 64, 65, and 66 thereof in so far as they relate to the Entries 1, 2, and 18, simpliciter, the Entries of the List II of Seventh Schedule⁷¹ which have been expressly excluded from the legislative competence of the Legislative Assembly of the NCT of Delhi by virtue of Article 239AA(3)(a)⁷² of the Constitution.

b. In addition to the preceding point, the Authority is empowered to recommend to the LG with respect to the matters connected with or falling under the subject of vigilance and non-vigilance matters for the purposes of disciplinary proceedings and prosecution sanctions against all officers including the officer of All India Services serving in connection with affairs of the NCT of Delhi except in case of the officers serving in connection with matters in the List II of Seventh Schedule⁷³ of the Constitution explicitly excluded from the legislative competence of the Delhi Legislative Assembly.

c. As per Section 45E⁷⁴, all matters are to be decided by the Authority by majority votes of the members present and voting and all recommendations are required to be authenticated by the Member Secretary of the Authority.

d. As per Section 45F, the Chairperson of the Authority shall preside over the meetings of the Authority and it shall meet at such time and place, as the Member Secretary of the Authority shall decide with the approval of the Chairperson.

e. As per sub-section 3 of Section 45H⁷⁵ of the Principal Act of 1991, the LG on receipt of the recommendations from the Authority shall pass appropriate orders giving effect to the recommendations made to him. He may before passing any appropriate order, also ask for any relevant materials regarding the Group A officers of DANICS as well as the All India Services serving with the matters in connection with the affairs of the NCT of Delhi. Further, the LG, after

⁷⁰ Constitution of India 1950, sch 7

⁷¹ *Ibid*

⁷² Constitution of India 1950, art 239AA(3)(a)

⁷³ Constitution of India 1950, sch 7

⁷⁴ GNCTDA 1991, s 45E

⁷⁵ GNCTDA 1991, s 45H

recording reasons, is empowered to return any recommendation made to him by the Authority for reconsideration by the same in case he differs with such recommendations whether based on any material so-called or otherwise and in case of any difference of opinion, the decision of LG shall be final.

f. The conjoint readings of Section 41(1)(iii)⁷⁶ and Section 45H(3)⁷⁷ suggest that the LG, for being entrusted to discharge the functions vested in him by virtue of Section 45H(3) must act in his ‘Sole Discretion’. That is to say that the functions of LG under Section 45H(3) are one of such categories of functions vested in him under Section 41(1)⁷⁸ which are reserved to be exercised by him in his ‘Sole Discretion’.

1. Constitutional validity of Section 3⁷⁹ (in its entirety): Section 3(A)⁸⁰ amends Section 41⁸¹. As noted earlier, the notable changes brought about in the said Section are as follows –

a. It substitutes the ‘discretionary powers’ of the Lieutenant Governor (LG) of NCT of Delhi with the ‘Sole Discretionary’ powers.

b. It further inserts clause (iii) into Section 41(1)⁸² extending the ‘Sole Discretionary’ powers of the Lieutenant Governor (LG) to Part IV-A⁸³.

The aforesaid amendment in Section 41⁸⁴ of the GNCTD Act, 1991⁸⁵ converts the ‘Discretionary powers’ of the LG to his ‘Sole Discretionary’ powers. In this context, it is essential to distinguish between the terms ‘Discretion’ and ‘Sole Discretion’. According to Sir Edward Coke, “*Discretion*

⁷⁶ GNCTDA 1991, s 41(1)(iii)

⁷⁷ GNCTDA 1991, s 45H(3)

⁷⁸ GNCTDA 1991, s 41(1)

⁷⁹ GNCTDAA 2023, s 3

⁸⁰ GNCTDAA 2023, s 3(A)

⁸¹ GNCTDA 1991, s 41

⁸² GNCTDA 1991, s 41(1)

⁸³ GNCTDA 1991, pt IV-A

⁸⁴ GNCTDA 1991, s 47

⁸⁵ GNCTDA 1991

is a science or understanding to discern between falsity and truth, between right and wrong, and not to do according to will and private affection”⁸⁶.

‘Discretionary powers’ are those that are vested in any person, especially in the present context, acting in an administrative capacity to empower him to make any decision that appears just and proper to him in a given fact or circumstance. While exercising such ‘Discretionary powers’, he is bound to make every decision rationally and reasonably by keeping all relevant facts, materials, prevailing circumstances, effects of such decisions, public interests, opinions of experts or the public, laws, precedents, settled legal and Constitutional principles and provisions, canons of natural justice, fair play etc. into due consideration. He cannot decide anything that is utterly irrational, discriminatory or based on extraneous considerations. Lord Wrenbury, in the case of **Roberts v Hopwood**⁸⁷ decided by the House of Lords, observed that—
“A discretion does not empower a man to do what he likes merely because he is minded to do so- he must in the exercise of his discretion do not what he likes but what he ought. In other words, he must, by use of his reason, ascertain and follow the course which reason directs. He must act reasonably.”⁸⁸

‘Sole Discretion’ is different from ‘Discretion’ for the reason that the person to whom ‘Sole Discretionary’ powers have been conferred, can make any decision without keeping any specific things, aspects or principles into account, that is to say, that he is absolutely free to do whatever he deems appropriate in whatever manner and his actions cannot be questioned before the Court of Law even if those are irrational, arbitrary, discriminatory, illegal, mala fides or based on entirely extraneous considerations. Such ‘Sole’ or ‘Absolute’ discretions vested in any person make way to arbitrariness and hence, often termed as ‘Constitutional Blasphemy’. Such discretion closes the doors of judicial review that is sine qua non of the rule of law and a part of the Basic Structure of the Constitution of India. Justice William Douglas in the US Supreme Court cases of **United States v Wunderlich**⁸⁹ and **New York v United States**⁹⁰ stated that—

⁸⁶ Dr. I.P. Massey, *Administrative Law* (10th edn, Eastern Book Company 2022) 62

⁸⁷ *Roberts v Hopwood* [1925] AC 578 (HL)

⁸⁸ *Ibid*

⁸⁹ *United States v Wunderlich* [1951] 342 US 98, 101

⁹⁰ *New York v United States* [1951] 342 US 882, 884

“Absolute discretion is a ruthless master. It is more destructive of freedom than any of man’s other inventions.... Absolute discretion, like corruption marks the beginning of the end of liberty.”⁹¹

‘Discretion’ must not be confused with the freedom to do anything any person wants according to his whims and caprices. It can be acknowledged that it is not practically possible to lay down all universally applicable provisions while framing a law by contemplating every possible circumstance that might arise in a given case at a time and moreover, what might be proper in a particular case and factual situation, might not be proper in another case and factual situation. Therefore, some discretionary powers must be conferred to a person holding a responsible position by providing some amount of flexibility in discharging the functions entrusted to him under the law so as to allow him to make proper decisions on a case-to-case basis. However, such discretions must be adequately guided by making some standards to minimize the scope for arbitrariness and must not be absolute or unfettered. It is the settled principle that all discretionary powers must be exercised with utmost care to anathematize arbitrariness and must correspond to the ‘finer canon of Constitutionalism’ set out in the ‘Golden Trinity of the Constitution’ consisting of Articles 14, 19 and 21⁹² as spelled out by the Supreme Court in the case of **RD Shetty v International Airport Authority of India**⁹³. The Apex Court in the case of **Maru Ram v Union of India**⁹⁴ notably observed that— *“All public power, including Constitutional power, shall never be exercisable arbitrarily or mala fide and, ordinarily, guidelines for fair and equal execution are guarantors of the valid play of power.”⁹⁵*

While discussing the discretionary powers vested in the State Government under Article 316⁹⁶ of the Constitution to appoint the Chairperson of the Punjab Public Service Commission, the Supreme Court in the case of **State of Punjab v Salil Sabhlok**⁹⁷ categorically emphasized that any discretion given to a public authority cannot be absolute in the sense that it can be exercised

⁹¹ MP Jain & SN Jain, *Principles of Administrative Law* (7th edn, LexisNexis 2017) 441

⁹² Constitution of India 1950, arts 14, 19 and 21

⁹³ *Ramana Dayaram Shetty v The International Airport Authority of India and Ors* AIR 1979 SC 1628

⁹⁴ *Maru Ram v Union of India* AIR 1980 SC 2147

⁹⁵ MP Jain, *Indian Constitutional Law* (8th edn, LexisNexis 2018) 172

⁹⁶ Constitution of India 1950, art 316

⁹⁷ *State of Punjab v Salil Sabhlok and Ors* (2013) 5 SCC 1

on the whims and sentiments of the authority. There is always an implied limitation that the exercise of discretion must be based on relevant considerations of necessary qualifications, competence, and integrity necessary for holding a public office.⁹⁸

The Apex Court in the notable case of **State of West Bengal v Anwar Ali Sarkar**⁹⁹, examined the Constitutional validity of Section 5(1)¹⁰⁰ of the West Bengal Special Courts Act, 1950¹⁰¹ which conferred wide discretion to the State Government to refer certain offenses for trial by the Special Court established under the said Act with the purpose of speeding up the trial for such offenses. It was also contended that the procedure of such trials in the Special Courts was stringent in comparison with that for ordinary trials and therefore, the law is violative of the right to equality enshrined in Article 14¹⁰² of the Constitution. The Court held Section 5(1)¹⁰³ of the said Act ultra vires the Constitution on the ground that the said provision used vague expressions such as ‘speedier trial’, and thus confers wide and unguided discretionary powers to the State Government that could be the basis of unreasonable classification making way to the arbitrary use of powers and hence, violative of Article 14¹⁰⁴.

Again in the case of **Akhil Bhartiya Upbhokta Congress v State of Madhya Pradesh**¹⁰⁵, the Supreme Court categorically emphasized that – *“In our constitutional structure, no functionary of the State or public authority has an absolute or unfettered discretion. The very idea of unfettered discretion is totally incompatible with the doctrine of equality enshrined in the Constitution and is an antithesis to the concept of the rule of law.”*¹⁰⁶

⁹⁸ Dr I.P. Massey, *Administrative Law* (10th edn, Eastern Book Company 2022) 62

⁹⁹ *State of West Bengal v Anwar Ali Sarkar* AIR 1952 SC 75

¹⁰⁰ West Bengal Special Courts Act 1950, s 5(1)

¹⁰¹ West Bengal Special Courts Act 1950

¹⁰² Constitution of India 1950, art 14

¹⁰³ West Bengal Special Courts Act 1950, s 5(1)

¹⁰⁴ Constitution of India 1950, art 14

¹⁰⁵ *Akhil Bhartiya Upbhokta Congress v State of Madhya Pradesh and Ors* 2011 SCC OnLine SC 581 [50]

¹⁰⁶ *Ibid*

In the historic case of **Maneka Gandhi v Union of India**¹⁰⁷, a Constitution Bench of the Supreme Court examined the Constitutional validity of Section 10(3)(c)¹⁰⁸ which was challenged on the ground that it conferred unfettered or unguided discretionary powers to the Passport Authority to impound the passport of any citizen in the interest of the general public and thus the said provision being inconsistent with core ideals of non-arbitrariness and reasonableness envisaged by Articles 14, 19 and 21 of the Constitution. The Court rejected the contentions of the petitioner and upheld the Constitutional validity of the aforesaid provision, for the reasons that the expression 'in the interest of general public' was held to be not undefined or vague having been borrowed from Article 19(5) and thus the discretionary powers conferred to the authority were not unfettered or unguided and not based on subjective considerations of the authority having been required to record reasons in writing for impounding the passport and supply the same to the person affected.

Nevertheless, in the above case as well, the Court laid emphasis on the axiomatic principle of non-arbitrariness that when a statute vests an unguided and unrestricted power in an authority without framing any policy or principle to guide the authority in the exercise of its powers, it is bound to be affected by the vices of discrimination and arbitrariness. In case, any person or authority acts in mala fides and contrary to the law and Constitution while exercising any 'Discretionary powers' vested in him, his action can be questioned and invalidated by the Constitutional Courts on the grounds of arbitrariness for the same being the sole anti-thesis of the rule of law and violative of the 'Golden Trinity' of Articles 14, 19 and 21 of the Constitution. That is the reason that vesting of 'Absolute Discretion' or 'Sole Discretion' in a person or body is not permissible in a Constitutional democracy. This is also known as the '**Doctrine of Implied Limitation**'.

However, in the present case, in so far as the Constitutional validity of Section 41¹⁰⁹ is concerned as it stands post the amendment of 2023, the precedent of Maneka Gandhi is not entirely

¹⁰⁷ *Maneka Gandhi v Union of India* (1978) 1 SCC 248

¹⁰⁸ Passport Act 1967, s 10(3)(c)

¹⁰⁹ GNCTDA 1991, s 41

applicable for the reason that neither Section 41¹¹⁰ of GNCTD Act, 1991 (post the enactment of the amendment Act of 2023) nor the Transaction of Business Rules of the Government of National Capital Territory of Delhi, 1993¹¹¹ stipulates any standards or guidelines to minimize or guide the exercise of 'Sole Discretionary' powers by the LG.

Moreover, an argument can be presented that Section 41¹¹² post the enactment of the amendment Act of 2023, confers 'Sole Discretionary Powers' to the LG only on 'matters mentioned in the said Section' and hence, it restrains the LG to exercise his 'Sole Discretion' in all or any matter whatsoever as he may deem fit in the given facts and circumstances. But, there is no doubt that the said provision intends to limit the Sole Discretionary powers of the LG to some extent by restricting the same only to the matters mentioned therein, it leaves the scope of arbitrary use of the Discretionary powers on the mentioned matters absolutely open to LG. This is itself sufficient to come to the conclusion that such 'Discretionary Powers' conferred to the LG under Section 41 does not curb the arbitrary use of those powers and hence, such an exercise of conferring of absolute discretion to LG is impermissible under the Constitutional scheme for being conspicuously in contravention of Articles 14, 19 and 21 of the Constitution.

It is noteworthy that Article 239AA(4) makes it binding for the LG to act in accordance with the aid and advice of the Council of Ministers of the NCT of Delhi as it is interpreted by the verdict of the Constitution Bench of the Supreme Court in 2018. This general rule is not applicable in cases where by or under any law, he is required to act in his 'Discretion'. Therefore, the aforesaid provision does not encompass the conferment of 'Sole' or 'Absolute' Discretionary powers on the LG in any manner.

In view of the above analysis of the Constitutional validity of the contents of Section 3¹¹³ of the GNCTD (Amendment) Act, 2023, the said provision is grossly vulnerable to be declared ultra vires the Constitution and struck down.

¹¹⁰ GNCTDA 1991, s 41

¹¹¹ The Transaction of Business Rules of the Government of National Capital Territory of Delhi 1993

¹¹² GNCTDA 1991, s 41

¹¹³ GNCTDAA 2023, s 3

2. Determining the true nature of Section 41(1)(iii)¹¹⁴ and Part IV-A¹¹⁵ of the GNCTD Act, 1991 and the Constitutional validity of Section 4¹¹⁶ r/w Sections 3(B)(c)¹¹⁷ of the amendment Act of 2023: Section 4¹¹⁸ of the GNCTD (Amendment) Act, 2023¹¹⁹ inserts Part IV-A¹²⁰ in the principal Act of 1991 containing Sections 45A to 45M¹²¹ and thereby makes the Provisions relating to the “Maintenance of the Democratic and Administrative Balance in the Governance of National Capital Territory of Delhi”¹²². Most significantly, it constitutes the National Capital Civil Services Authority and provides for the composition, powers, functions and rules of the conduct of business of the Authority. It vests the Authority to make recommendations on the postings and transfers of the DANICs officers serving in connection with the affairs of NCT of Delhi. The Authority as per Section 45E(2)¹²³ of the principal Act of 1991 shall consist of three members and they are- (i) Chief Minister of the Government of NCT of Delhi as the ex officio Chairperson of the authority; (ii) Chief Secretary of the Government of NCT of Delhi as an ex officio member; and (iii) Principal Home Secretary of the Government of NCT of Delhi as the ex officio Member Secretary to the Authority. Apart from Section 4¹²⁴, Section 3(B)(c)¹²⁵ of the GNCTD (Amendment) Act, 2023¹²⁶ inserts clause (iii) to Section 41(1)¹²⁷ of the principal Act of 1991 empowering the LG to exercise his ‘Sole Discretionary Powers’ in discharging his functions in matters relating to Part IV-A¹²⁸.

¹¹⁴ GNCTDA 1991, s 41(1)(iii)

¹¹⁵ GNCTDA 1991, pt IV-A

¹¹⁶ GNCTDAA 2023, s 4

¹¹⁷ GNCTDAA 2023, s 3(B)(c)

¹¹⁸ GNCTDAA 2023, s 4

¹¹⁹ GNCTDAA 2023

¹²⁰ GNCTDA 1991, pt IV-A

¹²¹ GNCTDA 1991, ss 45A-45M

¹²² GNCTDA 1991, pt IV-A

¹²³ GNCTDA 1991, s 45E(2)

¹²⁴ GNCTDAA 2023, s 4

¹²⁵ GNCTDAA 2023, s 3(B)(c)

¹²⁶ GNCTDAA 2023

¹²⁷ GNCTDA 1991, s 41(1)

¹²⁸ GNCTDA 1991, pt IV-A

As a general principle of the Westminster System of Government and Parliamentary Democracy, the Executive powers of a government are co-extensive with the Legislative powers and this same principle is also applied in deciding the extent of Executive powers of the Union and State Governments. The same principle is applicable to the Executive powers of the Government of NCT of Delhi too under Article 239AA(3)(a)¹²⁹ of the Constitution. Therefore, it can be established that the Legislative Assembly of NCT of Delhi has full competence to make laws on the 'Services' contained in Entry 41 of the State List of Seventh Schedule¹³⁰ of the Constitution, and thus, the Delhi Government, as per Article 239AA(4)¹³¹, subject to any provision of the Constitution or any law made by the Parliament (under which the Union Government is authorized to exercise its Executive powers) also has the full competence to exercise Executive powers over the 'Services' contained in the said Entry and so over the Civil Servants serving in connection with any affair of the NCT of Delhi. Such control over Civil Servants includes control over their postings and transfers.

In addition to the above discussions, according to the scheme laid down in Article 239AA(3)(b)¹³² read with Article 239AA(3)(a)¹³³ of the Constitution and the interpretation given in the Constitution Bench decision of the Supreme Court in the case of **Government of National Capital Territory of Delhi v Union of India**¹³⁴ in 2023, the Parliament is competent to make laws on matters of all the Lists of the Seventh Schedule¹³⁵ including the State List (List II) in respect of NCT of Delhi and therefore, only for Union Territory of Delhi, both the State List (List II) and Concurrent List (List III) shall be treated as Concurrent List. For this reason, both the Delhi Legislative Assembly and Parliament can make laws on the matters enumerated in both the State List as well as the Concurrent List, except the expressly excluded Entries of the State List for which the Delhi Assembly cannot legislate.

¹²⁹ Constitution of India 1950, art 239AA(3)(a)

¹³⁰ Constitution of India 1950, sch 7

¹³¹ Constitution of India 1950, art 239AA(4)

¹³² Constitution of India 1950, art 239AA(3)(b)

¹³³ Constitution of India 1950, art 239AA(3)(a)

¹³⁴ *Government of NCT of Delhi* (n 23) [91]-[92]

¹³⁵ Constitution of India 1950, sch 7

Now, in the present context, while looking into the extent and limitations of the Executive powers of the Government of NCT of Delhi, a careful reading of the Constitution Bench decision of the Supreme Court in the 2023 judgment clearly suggests that an analogy should be drawn with the proviso to Article 162¹³⁶ of the Constitution for that purpose, which reads – *“Provided that in any matter with respect to which the Legislature of a State and Parliament have power to make laws, the executive power of the State shall be subject to, and limited by, the executive power expressly conferred by this Constitution or by any law made by Parliament upon the Union or authorities thereof.”* By applying the analogy, it can be concluded that except for the excluded Entries of the State List, the Delhi Government is competent to exercise the Executive powers over the matters enumerated in both the State as well as the Concurrent List; however, such Executive powers can only be limited by the Constitutional provisions or any law made by the Parliament expressly vesting Executive powers of over any matter upon the Union Government.

If the above discussions are duly considered, the argument that keeping the excluded Entries aside, the Delhi Legislative Assembly is not vested with the exclusive Legislative powers over all remaining Entries of the State List (in view of Article 239AA(3)(b)¹³⁷) and hence, the Delhi Government cannot claim control over those remaining Entries and so Entry 41 of the said List, cannot be accepted. The simple reason is that the proviso to Article 162¹³⁸ provides that the Executive powers of the State Governments can only be made ‘subject to or limited by any Constitutional provision or law made by the Parliament’ expressly vesting such powers with the Union Government and therefore, the Executive powers of a State government over any Entry of Concurrent List cannot be completely taken vide the said proviso. Similarly, applying the same reasoning, the Executive powers of the Government of NCT of Delhi can only be made ‘subject to or limited by any Constitutional provision or Parliamentary law’ vesting the Executive powers over Entry 41 of the State List with the Union Government; however, the

¹³⁶ Constitution of India 1950, art 162

¹³⁷ Constitution of India 1950, art 239AA(3)(b)

¹³⁸ Constitution of India 1950, art 162

Executive powers of Delhi Government over the said Entry in no way can be completely taken away on the garb of limiting it.

Now, if the provisions contained in Part IV-A¹³⁹ and Section 41(1)(iii)¹⁴⁰ are carefully construed in view of the following core features thereof, the scheme behind them can be perceived easily by noting all the following points together –

(a) The establishment of the National Capital Civil Services Authority; (b) the recommendatory decisions shall be taken by the majority of the members present and voting; (c) the decisions are required to be authenticated by the Member Secretary; (d) only the Chief Minister shall represent the Government of NCT of Delhi and other two members practically shall be the representatives of Union Government; (e) merely vesting the Authority with 'Recommendatory' functions; and (f) Ultimately vesting LG with 'Sole Discretionary' powers to decide anything whatever he deems fit on receipt of the recommendations of the Authority.

Therefore, it is conspicuously observable that the Chief Minister of NCT of Delhi shall be the sole representative of the Government of NCT of Delhi in the Authority and as a general consequence thereof, he shall mostly be in the minority in the decisions to be taken by the Authority by voting of the majority of the members present. Moreover, the decisions shall be recommendatory in nature and accordingly shall not be binding upon the LG. Since the LG has unfettered discretions to do whatever he deems proper either to accept or reject the recommendations made to him by the authority and he being the representative of the Union Government and acting as an administrator on behalf of the President, his decisions shall be mostly in favor of the Union Government and the Union Government will always have upper hand on these matters. All these features will make the role of the Government of NCT of Delhi in matters of control over the Civil Servants nearly nugatory.

¹³⁹ GNCTDA 1991, pt IV-A

¹⁴⁰ GNCTDA 1991, s 41(1)(iii)

It therefore can be logically concluded that the said provisions of the GNCTD (Amendment) Act, 2023¹⁴¹ have been inserted with the purpose of overturning the Constitution Bench verdict of the Supreme Court delivered on May 2023 that recognized the powers of the Government of NCT of Delhi to have control over the Civil Servants, even though the Act does not explicitly say so. Now, the author seeks to comprehensively analyze Section 4¹⁴² read with Section 3(B)(c)¹⁴³ of the GNCTD (Amendment) Act, 2023¹⁴⁴ so as to come to a proper conclusion as to the Constitutional validity of the newly inserted clause (iii) to Section 41(1)¹⁴⁵ read with Part IV-A¹⁴⁶ of the principal Act of 1991 under the following headings in view of the true nature of the insertions of such provisions already discussed in this point –

i. Break of triple-chain of accountability: In a representative form of government, as envisaged in our Constitutional framework, especially in a Westminster System of Governance and Parliamentary Democracy, there is a triple chain of accountability – (a) Civil Servants or Bureaucrats are accountable to the Elected Government, (b) The elected government and the Council Ministers are collectively accountable to the Parliament or Legislative Assembly, and (c) Ultimately the Legislators are directly elected by the People and they being the elected representatives of People are accountable to them. In the present context, the Government of NCT of Delhi is a government elected by the People of NCT of Delhi and if its controls over the Civil Servants are taken away, the triple-chain of accountability will be broken making the scheme of representative form of governance futile. Further, since the elected politicians of the government cannot function on their own without the constant aid of the bureaucracy, and practically these are the bureaucrats who ultimately run the government behind the scenes and reach the government schemes and policies at the grassroots levels, taking away the control of an elected government over the Bureaucrats has the potential to paralyze the functions of the government.

¹⁴¹ GNCTDAA 2023

¹⁴² GNCTDAA 2023, s 4

¹⁴³ GNCTDAA 2023, s 3(B)(c)

¹⁴⁴ GNCTDAA 2023

¹⁴⁵ GNCTDA 1991, s 41(1)

¹⁴⁶ GNCTDA 1991, pt IV-A

ii. **Overturning of the Supreme Court verdict of 2023 without removing the legal basis:** The 'Doctrine of Abrogation' comes into the picture in deciding whether a proper procedure has been adhered to by a competent legislature in overturning a judicial decision. As a matter of principle, a judicial decision cannot be directly overruled or declared erroneous or invalid by a legislature. However, there is no doubt that 'the Supreme Court is supreme, but not infallible'. Accordingly, keeping the 'Doctrine of Checks and Balances' and principles of 'Separation of Powers' in due consideration, the effects of a ruling of the Supreme Court (or any High Court) can be nullified by a competent legislative body by passing a 'Validating Act' provided that some settled procedures are adopted in that exercise. Notably, such an exercise of overcoming a judicial decision if done in the appropriate manner cannot be said to be a transgression in the domain of judiciary and the Constitutional Courts while examining the Constitutional validity of the 'Validating Act' (that was brought by a legislature to overcome an earlier judicial decision) should apply the 'Doctrine of Abrogation' in order to save the law from unconstitutionality.

In the case of **M/s. Tirath Ram Rajendra Nath, Lucknow v State of Uttar Pradesh**¹⁴⁷, the Supreme Court ruled that a competent legislature can validly overcome the effects of a judicial decision even by amending an invalid law retrospectively so as to fundamentally change its legal basis, provided that the principles governing the law of retrospectivity must be meticulously adhered to by the legislature and the purpose should be to rectify those defects or legal disabilities in the invalid law which were responsible for the invalidation thereof.¹⁴⁸ It is also necessary for the application of the 'Doctrine of Abrogation' that the Validating Law must not be violative of any fundamental rights contained in Part III of the Constitution and any other provision thereof. The proper test of deciding whether the legal basis of a judicial decision is altered or not by a legislature in nullifying the same decision is that the conditions on which

¹⁴⁷ *M/s. Tirath Ram Rajendra Nath, Lucknow v State of U.P. and Anr* AIR 1973 SC 405

¹⁴⁸ Suyash Verma, 'WHAT IS DOCTRINE OF ABROGATION? - VIEWS OF THE SUPREME COURT' *Desi Kanoon* (10 September 2023) <<https://www.desikanoon.co.in/2023/09/what-is-doctrine-of-abrogation-views-of.html>> accessed 10 February 2024

such judicial decision is based are so fundamentally altered by the legislature that the said decision could not have been given in the altered circumstances.¹⁴⁹

In this context, the recent ruling of the Supreme Court in the case of **NHPC Ltd v State of Himachal Pradesh Secretary**¹⁵⁰ deserves special mention. In this case, the Court was examining the Constitutional validity of the Validating Act of 1997 brought about by the Himachal Pradesh Legislative Assembly to overcome a decision of the Himachal Pradesh High Court in 1997 invalidating certain provisions of the Himachal Pradesh Passengers & Goods Taxation Act, 1955¹⁵¹ as regards the levy of tax on Private Service Vehicles. The Court in this case upheld the Validating Act as the same is the valid legislative exercise of making ultra vires law intra vires. The Court based its decision on the following points –

- a. The Bench pointed out that such a legislative device that removes the vice in the previous legislation that has been declared unconstitutional is not considered to be an encroachment on judicial power but an instance of abrogation recognized under the Constitution of India.¹⁵²
- b. The Bench therefore clarified that it is open to the legislature to alter the law retrospectively, provided the alteration is made in such a manner that it would no longer be possible for the Court to arrive at the same verdict.
- c. The power of a legislature to legislate within its field, both prospectively and to a permissible extent, retrospectively, cannot be interfered with by Courts provided it is in accordance with the Constitution.

The Bench further elucidated that the legislative device of abrogation by enacting retrospective amendments to legislation, as a means to remove the basis of a judgment and validate the

¹⁴⁹ *Shri Prithvi Cotton Mills Ltd. and Anr v Broach Borough Municipality and Ors* AIR 1970 SC 192

¹⁵⁰ *NHPC Ltd. v State of Himachal Pradesh Secretary and Ors* 2023 SCC OnLine SC 1137

¹⁵¹ The Himachal Pradesh Passengers & Goods Taxation Act 1955

¹⁵² Sanya Talwar, 'REMOVING BASIS OF JUDGMENT IS VALID LEGISLATIVE EXERCISE: SUPREME COURT' *Law Beat* (11 September 2023) <<https://lawbeat.in/supreme-court-judgments/removing-basis-judgment-valid-legislative-exercise-supreme-court>> accessed 11 February 2024

legislation set aside or declared inoperative by a Court, must be employed only with a view to bringing the law in line with the judicial pronouncement

In light of the above discussions, it is imperative that the Legislative powers of abrogation cannot be used in any manner merely to circumvent the effects of an unfavorable judicial decision¹⁵³. Therefore, the ruling of the Constitution Bench of the Supreme Court in 2023 approving the exercise of powers by the Delhi Government over the Civil Servants could have only been validly overcome by the Parliament if it had amended Article 239AA(4)¹⁵⁴ itself in order to carve out Entry 41 of the State List of Seventh Schedule¹⁵⁵ from the legislative domain of the Delhi Legislative Assembly and thereby altering the legal basis of the said ruling; nonetheless, the Constitutional validity of such Constitutional amendment would have been questionable for being breaking the 'triple chain of accountability' (as discussed earlier) and 'Basic Structure Doctrine'.

ii. Violation of Article 239AA(7)(a): A law can only be said to have been passed 'to give effect or supplement' the provisions of the Constitution when the said law subserves and does not vitiate the underlying purpose of such Constitutional provisions. Since it is already established that it is not within the legislative competence of the Parliament to completely take away the control of the Government of NCT of Delhi over the Civil Servants by any law, and when this is obvious that the Delhi Legislative Assembly has the legislative competence over the matters connecting to Entry 41 of the List II of Seventh Schedule¹⁵⁶, the Sections 4¹⁵⁷ of GNCTD (Amendment) Act, 2023¹⁵⁸ cannot be said to be a law "to give effect or supplement the provisions of

¹⁵³ Aditi Raj, 'LEGISLATIVE OVERRULING OF JUDGMENTS: AN ANALYSIS OF NHPC LTD. VS. STATE OF HIMACHAL PRADESH SECRETARY & ORS.' (*B&B Associates LLP*, 3 November 2023) <<https://bnblegal.com/article/legislative-overruling-of-judgements-an-analysis-of-nhpc-ltd-vs-state-of-himachal-pradesh-secretary-ors>> accessed 11 February 2024

¹⁵⁴ Constitution of India 1950, art 239AA(4)

¹⁵⁵ Constitution of India 1950, sch 7

¹⁵⁶ *Ibid*

¹⁵⁷ GNCTDAA 2023, s 4

¹⁵⁸ GNCTDAA 2023

*Article 239AA*¹⁵⁹ for the said provision very conspicuously does not subserve the purpose of the provisions of Article 239AA.¹⁶⁰

iii. Part IV-A¹⁶¹ r/w Section 41(1)(iii)¹⁶² being a Colorable Legislation: The Doctrine of ‘Colorable Legislation’ is based on the well-known Latin maxim- ‘**Quando aliquid prohibetur ex directo, prohibetur et per obliquum**’ which means ‘what cannot be done directly cannot be done indirectly’. The author opines that Part IV-A¹⁶³ read with Section 41(1)(iii)¹⁶⁴ of the principal Act of 1991 as they stand post the amendment of 2023 in view of the true nature of the provisions as already discussed earlier suffers from the vices of ‘Colorable Legislation’, for the reason that it in effect seeks to take away the Executive control of Government of NCT of Delhi over the matters connected with Entry 41 of the State List of Seventh Schedule¹⁶⁵ indirectly, even though it does not explicitly say so. As per Article 239AA(4)¹⁶⁶ of the Constitution as well as the principles of the Westminster System of Government and Parliamentary Democracy, the Executive Powers of a Government are co-extensive with the Legislative Powers. For this very reason, since the Delhi Legislative Assembly has the legislative competence to make laws on matters relating to Entry 41 of List II of the Seventh Schedule¹⁶⁷, for the said Entry is not explicitly excluded by Article 239AA(3)¹⁶⁸, the Government of NCT of Delhi is competent to exercise its Executive powers on matters relating to the same Entry. In a nutshell, the legal position is that the Parliament being incompetent under the Constitution cannot take away the Executive powers of the Government of NCT of Delhi from Entry 41 of List II by a statutory provision without amending Article 239AA(4)¹⁶⁹ itself.

¹⁵⁹ Constitution of India 1950, art 239AA(7)(a)

¹⁶⁰ Constitution of India 1950, art 239AA

¹⁶¹ GNCTDA 1991, pt IV-A

¹⁶² GNCTDA 1991, s 41(1)(iii)

¹⁶³ GNCTDA 1991, pt IV-A

¹⁶⁴ GNCTDA 1991, s 41(1)(iii)

¹⁶⁵ Constitution of India 1950, sch 7

¹⁶⁶ Constitution of India 1950, art 239AA(4)

¹⁶⁷ Constitution of India 1950, sch 7

¹⁶⁸ Constitution of India 1950, art 239AA(3)

¹⁶⁹ Constitution of India 1950, art 239AA(4)

In this context, it is worthwhile to mention that in the Supreme Court case of **K.C. Gajapati Narayan Deo v State of Orissa**¹⁷⁰, Justice B.K. Mukherjea stated that –

‘It may be made clear at the outset that the doctrine of colorable legislation does not involve any question of bona fides or mala fides on the part of the legislature. The whole doctrine resolves itself into the question of the competency of a particular legislature to enact a particular law. If the legislature is competent to pass a particular law, the motives which impelled it to act are really irrelevant. On the other hand, if the legislature lacks competency, the question of motives does not arise at all.’¹⁷¹

The essence of the above discussion is that the Parliament by enacting Section 4¹⁷² read with Section 3(B)(c)¹⁷³ of the GNCTD (Amendment) Act, 2023¹⁷⁴ seeks to indirectly (in the disguise of the establishment of the National Capital Civil Service Authority) take away the Executive powers of the Government of NCT of Delhi over Entry 41 of the State List of Seventh Schedule¹⁷⁵, even though it cannot do so directly for being ‘incompetent’ under the Constitution. It is therefore not the motive of the Parliament, but the ‘incompetency’ of it to make the aforesaid provisions is the key factor of consideration. Hence, it squarely makes the aforesaid provisions the pieces of ‘Colorable Legislation’.

The author further opines that the Supreme Court in both of its 2018 as well as 2023 verdicts correctly held that the recommendations made in the Balakrishnan Committee Report, 1987¹⁷⁶ were not binding upon it and the Court was at liberty to take those recommendations into account merely as an external aid to interpretation of the Constitutional and statutory provisions. Accordingly, the Court has appropriately rejected the recommendations of the Committee Report with respect to its disinclination for conferring the Delhi Government with

¹⁷⁰ *K.C. Gajapati Narayan Deo and Ors v The State of Orissa* AIR 1953 SC 375

¹⁷¹ *Ibid* 11

¹⁷² GNCTDAA 2023, s 4

¹⁷³ GNCTDAA 2023, s 3(B)(c)

¹⁷⁴ GNCTDAA 2023

¹⁷⁵ Constitution of India 1950, sch 7

¹⁷⁶ Balakrishnan Committee, *Committee on Reorganization of Delhi Set-up* (1987)

control over the Civil Servants, for the justified reason that those were grossly undermining the role of representative governance in the NCT of Delhi and hence, could not be relied upon by the Court in interpreting the provisions of Article 239AA¹⁷⁷ and the GNCTD Act, 1991¹⁷⁸.

In light of the above-mentioned reasons and Constitutional and legal issues involved in Section 4¹⁷⁹ read with Sections 3(B)(c)¹⁸⁰ of the GNCTD (Amendment) Act, 2023¹⁸¹, it definitively appears that said Sections suffer from manifest arbitrariness and therefore, may not pass the tests of the Constitutional validity.

CONCLUSION AND THE WAY FORWARD

In this paper, the author comprehensively analyzed the major Constitutional issues involved in the Government of NCT of Delhi (Amendment) Acts of 2021¹⁸² and 2023¹⁸³ and those issues are most likely to create troubles in the judicial scrutiny of the Constitutional validity thereof. These issues can be resolved if the Parliament amends the troublesome provisions of the Government of NCT of Delhi Act, 1991¹⁸⁴ (as they stand post the 2021 and 2023 amendments) in such wholesome manners so as to foster the role of the elected government in its Legislative and Executive functions. If necessary, the Parliament should repeal all provisions that are grossly diminishing the democratic character of the scheme of governance in the Union Territory. The ultimate purpose of such amendments or repeals should be to eliminate the likelihood of the subjugation of the Delhi Legislative Assembly and Delhi Government by the Lieutenant Governor (LG) or the Union Government in any manner not recognized by the Constitutional scheme of governance at NCT of Delhi. Therefore, while making the restorative measures, the Parliament should minutely consider the following aspects, namely –

¹⁷⁷ Constitution of India 1950, art 239AA

¹⁷⁸ GNCTDA 1991

¹⁷⁹ GNCTDAA 2023, s 4

¹⁸⁰ GNCTDAA 2023, s 3(B)(c)

¹⁸¹ GNCTDAA 2023

¹⁸² GNCTDAA 2021

¹⁸³ GNCTDAA 2023

¹⁸⁴ GNCTDA 1991

- a. The control over the Civil Servants should be vested in the Delhi Government subject to the control of the Union Government.
- b. The discretionary powers of the LG should be made subject to some standardized norms and minimized as far as practicable and 'Sole Discretionary' powers should be abolished.
- c. The restricted autonomies of the Delhi Legislative Assembly and the Delhi Government in the functioning thereof as granted by the Constitution should not be unjustly hampered and the principles of federalism should be respected, and
- d. The interference of the Union Government or LG in the day-to-day administrative affairs of the Delhi Government should be minimal to fulfill the legitimate national interests.

In a Constitutional democracy, the concept of accountable government is one of the major foundational elements of democratic governance. It is the core democratic values that must not be impaired or subverted by any organ of the government in any manner whatsoever as the ultimate result of it would be the subversion of the democratic form of government envisioned by the Indian Constitutional framework, for the republican and democratic form of government is held to form part of the 'Basic Structure of the Constitution'.¹⁸⁵ As a general connotation, when the Constitution provides for a government elected by the people through a democratic method, the role of any such elected government cannot be undermined as the direct result of it would be to make the will of the people futile and the catastrophic consequences thereof would be the death of democracy as well as the Constitutional morality. It is the right of every citizen of the country to question and hold the government accountable and that is where the glory of democracy lies. If democratic ideals continue to lose their relevance, the author is unhesitant to say that the survival of democracy and the rule of law will be at stake in the country. It is desirable that all organs should act hand in hand, that is to say, that they should work in mutual cooperation and not in animosity to achieve the Constitutional visions and in this way, only, the Constitutional and democratic values as envisioned in the Constitution as well as the all-pervading splendor of idea of Constitutionalism shall be preserved and continue to flourish.

¹⁸⁵ *Kesavananda Bharati Sripadagalvaru and Ors v State of Kerala and Anr* AIR 1973 SC 1461