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OPINION

In Re: Government of National Capital Territory of Delhi

... Querist / *Ex parte*

1. The Querist has sought my opinion on the following questions which also involves an interpretation of Article 239AA of the Constitution.

Question 1: Whether the executive powers of criminal investigations within the National Capital Territory of Delhi ("**NCT**") are vested in the Government of NCT of Delhi?

Question 2: If the answer to the above question is in the affirmative, how is the said answer consistent with the subject 'Police', appearing in Entry 2 of the State List, being within the domain of the Union Government?

Question 3: Does Section 22 of Government of National Capital Territory Act, 1999 ("**NCT Act**") impose unreasonable restrictions on the powers of the Delhi Legislature and, if so, whether they are unconstitutional?

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Question 4: Does Parliament enjoy the power to restrict the powers of a Legislative Assembly through legislation?

Question 5: Is Section 22 of the NCT Act unconstitutional?

Question 6: Is Section 44 of NCT Act unconstitutional?

2. In view of the importance of the above matter, it is necessary to set out a few historical facts. As per ancient history, Delhi was founded by Tomaras and the Tunwar Rajputs. In 1220 AD, Delhi became the capital of the Empire of Illtutmish. Thereafter, the rule of Khiljis followed by Tughlaqs and upon coming under the control of Babar in 1526 AD, Delhi became his Provincial City. During Akbar's reign, Delhi formed a part of 'Suba'.

3. Delhi was constituted as a Territory in 1803 when General Lake defeated the Marathas in a battle at Patparganj, captured Delhi and brought the Mughal Emperor Shah Alam under his control. The city along with the neighbouring territories in the districts of Hisar, Rohtak, Gurgaon and Karnal were placed under the charge of an

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officer designated as Resident and Chief Commissioner of Delhi[1].

4. In 1819, Delhi's territory was divided into two parganas, namely, the northern and the southern parganas.

5. The Indian Legislature can trace back its history to 1861. Consequent to the Revolt of 1857, the Government of India Act, 1858 (21 & 22 Vict. c. 106) was enacted by which the British Parliament ended the rule of the East India Company and directly took responsibility to rule the country. After the Revolt of 1857, the Delhi Territory was annexed to the newly formed Lt. Governorship of the Punjab. On 12th December 1911, when the capital of India changed from Calcutta to Delhi, Delhi Tehsil and Mehrauli Thana were separated from Punjab and were taken into a 'separate province of Delhi' headed by a Commissioner and came to be referred to as a Chief Commissioner's Province.

6. It may be noted that the Delhi Laws Act, 1912 came into force on 1st October 1912 and made applicable to Delhi,

[1] Delhi Gazetteer (1883-1884), page 2.

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certain laws which were applicable to the State of Punjab. Similarly, the Delhi Laws Act, 1915 added the areas comprised of Agra and Awadh in the United Provinces to the Province of Delhi w.e.f. 1st April 1915. By virtue of the powers conferred under the Delhi Laws Act, 1915 the Chief Commissioner of Delhi could determine the application of laws by issuing notification in the gazette of India. By and large, the laws which applied to the State of Punjab were maconstituentde applicable to Delhi.

7. Under the provisions of the Government of India Acts, 1919 and 1935, Delhi continued to be a centrally administered territory. It may be noted that the Government of India Act, 1919 contained specific provisions for the governments of Centrally Administered Territories called Chief Commissioners' Provinces. Under the Government of India Act, 1935, a Federal Government was constituted and thus, the Federation of India came into existence. The Federation of India comprised of:-

   a. The Provinces called the Governors' Provinces;

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b. The Indian States which had acceded to or were expected to accede to the Federation; and

c. The Chief Commissioners' Provinces.

8. It is relevant to note that 'States' were known as Provinces under the Government of India Act, 1935. Provinces which were relatively smaller in size were controlled by Chief Commissioners instead of Governors.

9. Section 94 of the Government of India Act, 1935 listed the various Chief Commissioners' Provinces as:-

a. British Baluchistan

b. Delhi

c. Ajmer-Merwara

d. Coorg

e. Andaman & Nicobar Islands

f. Panth-Piploda

These areas were to be administered by the Governor General acting through a Chief Commissioner.

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10. It may be noted that the objectives of a Federal Government necessarily involved an understanding of a shared vision, common purposes and effective administration.

11. On 31st July 1947, Dr. B. Pattabhi Sitaramayya chaired a Committee to consider and report on the constitutional changes required in the administrative structure existing in the Chief Commissioners' Provinces. This became necessary on account of the lack of coordination between the various Departments in the Government of India so far as Delhi was concerned. By virtue of the provisions of the 1935 Act, Delhi Province had one seat in the Central Legislature. Upon the attainment of Independence on 15th August 1947, the Central Assembly ceased to exist and the representative of Delhi in the Central Legislature became a member of the Constituent Assembly of India.

12. Upon independence from British rule, questions arose in relation to the Chief Commissioner's Provinces under the new Constitution. One of the issues which arose before the Committee was whether the Delhi seat, both old and new, should or should not be separated from the rest of the area

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and placed directly under the Federal Government. The Committee also noticed that the Government of India would very much like to have a separate area for the seat of the capital of the Federation. The Committee ultimately decided to keep the Province of Delhi intact and to confer upon the Central Government certain special powers. It was decided that there shall be a High Court established in Delhi having original as well as appellate jurisdiction over the Province.

13. The Sitaramayya Committee observed that before any constitutional changes were adopted for the Province of Delhi, the following considerations should be taken into account:-

a. That the Centre must have a special responsibility for the good governance and the financial solvency of the Province;

b. That on account of the smallness of these areas and the scarceness of their resources, the need for central assistance will continue in order to maintain the

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standard of their administration at the level existing in major Provinces.

14. The Committee decided that: -

(i) Each of the three Provinces, being Delhi, Ajmer-Merwara and Coorg, would function under a Lt. Governor to be appointed by the President of the Indian Federation;

(ii) Each of the three Provinces would normally be administered by a Council of Ministers responsible to the Legislature, as in other Provinces, but any difference on an important matter arising between the Lt. Governor and the Ministry should be referred to the President of the Federation for final decision;

(iii) Each of these Provinces should have an elected Legislature which should function like other Provincial Legislatures, except that –

a. The Federal Legislature will, in the case of these Provinces, have concurrent powers of legislation

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even in respect of the subjects included in the Provincial legislative list;

b. All laws passed by the Provincial Legislature shall require the assent of the President of the Federation;

c. The budget of the Provinces, having been afforded by the Provincial Legislature, will require the approval of the President of the Federation before it becomes operative.

15. The Committee recognised the special importance of Delhi as the capital of the Federation. Yet the Committee noted that:-

> *".....We are, however of the opinion that the people of the Province which contains the metropolis of India* ***should not be deprived of the right of self-government enjoyed by the rest of their countrymen*** *living in the smallest of the villages....."* (Emphasis Supplied)

16. However, the Drafting Committee differed. The Drafting Committee pointed out that in the United States of America and Australia, the respective Federal Legislatures exercised

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exclusive powers in respect of the seat of the Government. It was of the opinion that Delhi, as the Capital of India, could not be placed under local administration.

17. The Drafting Committee divided the said areas into two categories – First, Andaman & Nicobar Islands, which, according to the recommendations of the Committee, were to be governed through a Chief Commissioner without any representative institutions. Second, the Drafting Committee placed rest of the areas in Part II of the First Schedule and made flexible provisions about their governance. It may also be added that the President was to act on the advice of responsible Ministers and could have a Lt. Governor in Delhi.

18. The Committee was also conscious that a measure of autonomy and democratic set up must also be made available. The draft Constitution was introduced in the Constituent Assembly in November 1948. It must be fairly mentioned that the representatives of Delhi and Ajmer-Merwara were critical of the Drafting Committee. Mr. Deshbandhu Gupta from Delhi made an impassioned appeal

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for the acceptance of the unanimous recommendations of the Pattabhi Sitaramayya Committee and the introduction of responsible Government of Delhi, Ajmer-Merwara and Coorg.

19. At this juncture, it is somewhat necessary to set out the following excerpt from the speech of Shri Deshbandhu Gupta:

> *"Shri Deshbandhu Gupta (Delhi): Sir, there is an amendment in my name to articles 212 and 213 which is based on the unanimous recommendations of the ad hoc Committee which was appointed by this House. Although I do not propose to move it, I must frankly say that I do not feel happy about the amendment that has been moved, by my Friend Dr. Ambedkar to article 213. In fact, the whole population of Delhi is very much disappointed and is bound to feel that the decisions that were taken earlier are being given a go-by.*
>
> *There is a strong feeling amongst the people of Delhi and other centrally governed areas that they have been given step-motherly treatment. From the very beginning this has been evident that they are being ignored. Firstly, when the House appointed committees to settle the principles of the constitutions for the provinces and*

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the Centre, no such committee was appointed to consider the question of the Centrally Administered Areas.

The Draft Constitution first published, although it left it to the President to effect changes in the constitution of Delhi and of the centrally administered areas, a provision for a local legislature was also made therein. But the new amendment has done away with that provision. It was only after a good deal of effort was made by the representatives of the Centrally administered areas and it was pointed out by them that when we are deciding the Constitution of the whole country, there was no reason why the Centrally administered areas which had been denied autonomy so far should continue to be ignored, that a Committee was appointed to go into the question of the future Constitution. That Committee was presided over by Dr. Pattabhi Sitaramayya and besides others, no less an eminent person than Shri Gopalaswami Ayyangar served on that Committee. The Committee recommended unanimously a definite plan for the future Constitution of Delhi and other centrally governed areas."

20. Shri Jawaharlal Nehru remarked as follows:-

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"The Honourable Shri Jawaharlal Nehru (United Provinces: General): Sir, may I indicate in a few sentences the attitude of Government in regard to this important matter? Obviously the question of Delhi is an important point for this House to consider. It was for this reason that over two years ago this House appointed a Committee for the purpose and, normally speaking, the recommendations of the Committee appointed by this House would naturally carry great weight and would possibly be given effect to. But ever since that Committee was appointed the world has changed; India has changed and Delhi has changed vitally. Therefore to take up the recommendations of that Committee regardless of these mighty changes that have taken place in Delhi would be to consider this question completely divorced from reality. But the fact remains that this question has got to be considered and all of us or nearly all of us here sympathise very greatly with those citizens of Delhi and representatives of Delhi who feel that this great and ancient city of Delhi should not be left out of the picture when this Constitution comes into effect. Therefore we have to give thought to it. Now giving thought to it, the first thing that comes up for consideration is this that the situation in Delhi is not a static situation; it is a changing situation and if we put down any clauses in the Constitution, we rather petrify that situation. It is far better to deal with it in a

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way which is capable of future change, i.e, by Act of Parliament rather than by fixed provisions in the Constitution."

21. In its final form, the Constitution of India 1950, (as originally enacted) contained four categories of States, in the First Schedule namely, Part A, Part B, Part C and Part D. Part D comprised only of Andaman & Nicobar Islands. The Constitution of India transformed all the Provinces of the Chief Commissioners into Part 'C' States. The Chief Commissioner's Province of Delhi was one of the Part C States. On 26th January, 1950, Delhi became a Part 'C' State under the new Constitution. By virtue of Part C States, (Delhi Laws Act, 1950), the laws in the erstwhile Chief Commissioner's Province of Delhi were continued in the Part C State of Delhi. The said Act came into force on 16th April, 1950.

22. At this juncture, it is relevant to bear in mind that the Preamble to the Constitution of India is somewhat similar to the Preamble of the American Constitution. The Preamble to the American Constitution runs thus:-

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> *"We, the people of the United States, in order to form a more perfect union, establish justice, ensure domestic tranquillity, provide for the common defence, promote the general welfare and secure the blessings of liberty to ourselves and our posterity do ordain and establish this Constitution for the United States of America."*

23. Mr. James Mussatti in his learned work *"The Constitution of the United States-Our Charter of Liberties"*, has noticed that:-

> *".....The Preamble to the Constitution sets forth the objectives of the Federal Government. These are declared to be the formation of a more perfect union. The purpose of the Preamble may not be the source of any of the powers of the Federal Government yet it does take the scope and purpose of the Constitution....."*

24. It may be pointed out that the American Constitution itself was preceded by an intense debate on whether a strong national government could be erected or should there be an expansion of the powers of the Congress under the Articles of Confederation. As is well-known, the debate took place between two distinct groups in the Convention – one wanting the creation of a national government and opposing equal representation of each State in the Congress, while the other group stood for the Articles of Confederation being retained, while equal representation for each State in the

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Congress. In fact, the Congress of two Houses was the idea of Ellsworth of Connecticut who suggested that there could be a representation of the States in one and representation on the basis of population in the other. This is how a bicameral National Legislature referred to as the House of Representatives and the Senate came to be constituted. Thus, under the American Constitution, the national government is one of delegated powers, while Congress cannot delegate its legislative powers since the Constitution prescribes that *"....all legislative powers shall be vested in the Congress of the United States....."*.

25. The purpose of the House of Representatives was to ensure that States were represented in the House on the basis of their population. The framers of the American Constitution were also of the opinion that frequent elections were essential to the preservation of liberty.

26. The Indian Constitution in its Preamble declares thus:

> *"We, the people of India, having solemnly resolved to constitute India into a Sovereign Socialist Secular Democratic Republic, [...] do hereby adopt, enact and give to ourselves to this Constitution."*

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27. It may be noted that Article 1 of the Constitution clearly stated that India i.e. Bharat shall be a Union of States. It may be noted that the States and its Territories were to be specified in the First Schedule. The territory of India was meant to comprise of – (a) the territories of the States; (b) the Union Territories specified in the First Schedule; and (c) such other territories as may be acquired. Thus, it is important to note that the expression "States" contained in Article 1(3)(a) may be somewhat different from the expression used in Article 1(1) of the Constitution. Article 2 enabled Parliament to admit into the Union or establish new States on such terms and conditions as it thought fit, while Article 3 enabled Parliament to form a new State by the alteration of boundaries.

28. In fact, it may be noted that Explanation 1 clearly mentions that 'State' includes a Union Territory. This lends support to the construction that the expression 'States' occurring in Article 1(1) bears the same interpretation.

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29. It may also be relevant to notice that the Union Constitution was meant to be a collective effort of the chosen representatives, who were members of the Constituent Assembly, including the representative from Delhi. This is clear from the draft Constitution prepared by B.N. Rau which contained the following sentence in the Preamble:-

> *"We, the people of India, seeking to promote the common good, do hereby, wholly chosen representatives, enact, adopt and give to ourselves to this Constitution."*

30. Indeed, in an extremely perceptive comment on the American Constitution called *"Rise and Fall of the Confederate Government"* by Jefferson Davis, it was observed that:-

> *".....In the progressive growth of the Government of the United States in power, splendour, patronage, and consideration abroad, men have been led to exalt the place of the Government above that of the States which created it. Those who would understand the true principles of the Constitution cannot afford to lose sight of the essential plurality of idea invariably implied in*

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the term "United States," wherever it is used in that instrument....."

31. At this juncture, it must be borne in mind that the Assembly members drew upon the experience of great Federations like the United States, Canada, Switzerland and Australia and tried to pick and choose what would suit the genius of the nation best. There is considerable perceptiveness in the comments of Granville Austin, in "*The Indian Constitution: Cornerstone of a Nation*" where he notices that in India, even though there was a relative absence of conflict between the 'centralisers' and the 'provincialists', unlike in the United States, yet there was considerable argument on the integration of federal principles. The classical definition of federalism contained in the Locus Classicus *'Federal Government'* by K.C. Wheare is that *"the general and regional governments of a country shall be independent each of the other within its sphere"*. The principle of cooperative federalism described by A.H. Birch was adopted by the Indian Constitution which contemplated that,

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> *".....the practice of administrative cooperation between general and regional governments, the partial dependence on the regional governments upon payments from the general governments, and the fact that the general governments, by the use of conditional grants, frequently promoted developments and matters which are constitutionally assigned to the regions....".*

Thus, the Indian Constitution was indeed, as described by Dr. Ambedkar, a Federal Constitution which consisted of a dual polity, namely, the Union at the Centre and the States, each endowed with sovereign powers to be exercised in the field assigned to them respectively by the Constitution. Dr. Ambedkar also added that the Indian Constitution could be federal as well as unitary according to the requirements of time and circumstances.

32. It must not, however, be over emphasised that the devolution of authority to the Provinces under the Government of India Act, 1919 was the first step towards freedom. It must also not be underscored that the distribution of powers in favour of the Provinces under the 1935 Act was equally relevant. However, the 'State's rights'

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issues did not assume the same importance as they did in the United States and Australia. Instead, there was an attempt to ensure that community rights were respected. Indeed, the idea of a single citizenship under the Indian Constitution was also to encourage a process of integration into a national identity.

33. It may also be pointed out that the basic provisions laying down the distribution of powers between the Union and the Provincial Governments are found in Part XI of the Constitution titled "Relation between the Union and the States".

34. Consequent to Delhi becoming a Part 'C' States, the Government of Part 'C' States Act, 1951 was enacted. The said enactment clearly provided that there would be a Legislative Assembly for each such State. While describing the extent of legislative power, it was provided in Section 21 that,

> *".....subject to the provisions of this Act, the Legislative Assembly of a State may make laws for the whole or any part of the State with respect to any of the matters*

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enumerated in the State List or in the Concurrent List, provided that the Legislative Assembly of the State shall not have power to make laws with respect to any of the following matters, namely, (a) public order; (b) police including railway police; (c) the constitution and powers of municipal corporations and other local authorities, of improvement trusts and of water supply, drainage, electricity, transport and other public utility authorities in Delhi or in New Delhi; (d) lands and buildings vested in or in possession of the Union which are situated in Delhi or New Delhi including all rights in area over such lands and buildings, the collection of rents therefrom and the transfer and alienation thereof; (e) offences against laws with respect to any of the matters mentioned in the foregoing clauses; (f) jurisdiction and powers of all courts with respect to any of the said matters and fees in respect of the said matters other than fees taken in any court."

35. Sub-section (2) of Section 21 expressly clarified that nothing contained in sub-section (1) would derogate from the power conferred on Parliament by the Constitution to make laws with respect to any matter for a State or any part thereof. The principle contained in Article 254(2) of the Constitution was incorporated in Section 22 of the Act. Similarly, Section

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24 of the Act provided that a Bill or an Amendment shall not be introduced relating to imposition, abolition of any tax or any other financial matters, except upon a recommendation of the Chief Commissioner. Section 24 provided that when a Bill had been passed by the Legislative Assembly of a State, it had to be presented to the Chief Commissioner and the Chief Commissioner had to reserve the Bill for the consideration of the President.

36. The rationale for the exclusion contained in Section 21 may be clear from the following passages of the debates in Parliament;

> *"The main reason for exclusion of certain subjects in respect of Delhi was that Delhi occupies a very peculiar position. It is the capital city of a large federation and it is, as in almost all federal countries, necessary that in the area over which the federal government has to function daily, practically in all details, that government should have unfettered power, power which is not contested by another and subordinate legislature. It is possible that honourable members may say, that so long as the Federal Centre has the power also to make laws in respect of the state subjects, these new*

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provisions in the bill are unnecessary and this exclusion need not have been contemplated. The answer to that is, that it is important that this competition between the state legislature and the federal legislature should be avoided in order to avoid friction in exercise of legislative power in regard to subjects which from an all India point of view, have to be considered as the most important. It is possible that we can control the state legislature even without such exclusion but once the state legislature has the power to legislate in regard to these matters, it would be a source of perpetual friction as to how much of the field of the State Legislature should occupy and how much should be entered upon by the Central Legislature. Also I think the state will stand to gain by handing over these important subjects to Parliament exclusively because Delhi cannot live at all, and much less can it live in accordance with the standards which we should maintain with respect to a metropolis of a large country like ours, if it is to depend upon the small mercies and the smaller resources of a state legislature. It is advisable therefore, that if we are to maintain the capital as it should be the responsibility for maintaining it according to proper standards must be in the hands of centre. That is the reason which has persuaded government to take the step: not merely is it a question of constitutional powers and functions of municipal corporations being excluded in this way in

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regard to this city but the all important question of the maintenance of law and order has to be in the hands of the Central Government. After this the friction between the Centre and the state has not happened, because Delhi has been under the direct charge of the Centre all these years as a centrally administered area."

37. During the debates, the need for retaining control of the National Capital in the hands of the National Government was further emphasised:

"Delhi, including New Delhi forms the capital of a big Federation. The division of sovereign power between the federal government and the federal unit has to be regulated in such a way that the Federal Centre must have a dominant and exclusive jurisdiction in respect of matters which are vital to the proper development of this particular area as the capital of a big federation. In the case of Delhi, it is absolutely necessary that the sovereign powers of the Centre should cover a larger area than in the case of other states. Hence, the Delhi Legislature has been excluded from the jurisdiction to make laws in respect of matters which are considered vital to the federal capital. The state may execute the policy to the extent that is permitted to be done but the policy, the organisation and other things must be left to the Central Executive and Parliament to determine.

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So far as the exclusion of constitution and powers of municipal Corporation in Delhi and New Delhi and constitution and powers of other public utility authorities including water supply, drainage, improvement trusts, electricity and transport is concerned, it may be stated that in regard to the municipal administration of the Federal Capital every other country has reserved the exclusive power in the Centre. Canberra has it; Washington has it. We should not break this principle at all, it is important from the all– India standpoint, apart from the Delhi standpoint, that the administration of Delhi should be of an order which is very much above the average in regard to municipal administration in the country."

38. A unicameral, directly elected legislature, with reservation of seats for Scheduled Castes, came into existence in Delhi on 17.3.1952. The law making power was subject to limitations provided in Section 21 of the Government of Part 'C' States Act, 1951. The experience of a legislature in Delhi lasted for about 4 year's up to the 1st of November 1956. By operation of Section 130 of the States Reorganisation Act, 1956, the Government of Part 'C' States Act, 1951 was

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repealed. In the absence of a saving provision, the Legislature constituted for Delhi came to an end.

39. By virtue of the Constitution (Seventh Amendment) Act, 1956, some of the Part 'C' States which had ceased to exist had either merged into one of the other States or continued as Union Territories. The categorisation of the States in the First Schedule as Parts 'A', 'B', 'C', 'D' and 'E' was also done away with. In its place, the First Schedule now provided for only two categories, namely, the 'States' and the 'Union Territories'. The Seventh Amendment Act specified six Union Territories, namely, Delhi, Himachal Pradesh, Manipur, Tripura, Andaman & Nicobar Islands and Laccadive (Amindivi) Islands. Delhi thus became a Union Territory.

40. It is relevant to bear in mind that Delhi was indeed a State at the time of the framing of the Constitution, and was represented by a member in the Constituent Assembly, Mr. Deshbandhu Gupta, who spoke for the citizens of Delhi, and continued to be a State until it became a Union Territory

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subsequent to the enactment of the Constitution (Seventh Amendment) Act, 1956.

41. It may be pointed out that the States Reorganisation Commission's Report in 1955 dealt with the subject of the Delhi State. According to the Commission, there was a peculiar diarchical structure, which represented an attempt to reconcile the central control over the federal capital with autonomy at the State level.

42. It may, however, be mentioned that the Union Government appears to have contended that the development of the capital was hampered by the division of responsibilities and, as a consequence of the dual control, there was a significant deterioration of administrative standards. On the other hand, the Delhi Government complained that it vested with inadequate powers. The Delhi Government had clearly opposed the establishment of a Corporation in Delhi and submitted a memorandum to the commission stating:

> *"Formation of a corporation of elected members will not and cannot satisfy the political aspirations of people of Delhi as the Corporation will be concerned only with*

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civic affairs. Over the vast field of state administration, Delhi people will have no effective voice. There can be no more retrograde step, politically speaking, than to replace democratic government by bureaucratic administration in Delhi State."

On the other hand, the Jan Sangh fervidly opposed full-fledged statehood on the grounds that a *"full-fledged state for Delhi would be irrational, wasteful and inefficient, it will be detrimental to the country's interest as a whole as it would be to the people of Delhi itself."* It may be pointed out that the States Reorganisation Commission took into account two important factors – (a) Delhi was the seat of the Union Government; and (b) it was basically a city unit, 82% of the total population of which was residing in urban areas.

43. At this juncture it may be pointed out that if Delhi was to continue as the Union Capital, it could not be a further constituent State of the Indian Union. The Commission referred to various national capitals which were provided a special dispensation such as in France and England. The Commission noted:-

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".....Capital cities possess, or come to possess, some degree of political and social predominance. They are cities of national governments with considerable property belonging to these governments. Foreign diplomatic machines and international agencies are located in these capitals. They also become centres of national culture and asset....."

44. In paragraph 587 of the report, the Commission observed thus:-

"587. That the capital of the Union Government should be directly administered by it has not been disputed either in the memorandum submitted on behalf of the Delhi Government or by the official representatives of the State during the course of their discussions with us. It has, however, been suggested that New Delhi should be regarded as the national capital over which the Union Government might have full control. The real issue, therefore, so far as the future of Delhi is concerned is whether a line of demarcation should be drawn between New Delhi and Old Delhi and the two units be placed under two separate administrations."

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45. Hence, on the recommendation of the Commission, statehood of Delhi was done away with. By virtue of the Constitution (Seventh Amendment) Act, 1956 Delhi became a Union Territory. A Municipal Corporation covering almost the entire area of Delhi (excluding NDMC, Delhi Cantonment Board and some areas of the Red Fort) was constituted in April, 1958 under the provisions of Delhi Municipal Corporation Act, 1957. With passage of time, by 1962, there came to be eight Union Territories under the Constitution. In 1962, Pondicherry was also added as a Union Territory. A Constitutional Amendment was introduced which provided that the *"....Parliament may by law create for any of the Union Territories of Himachal Pradesh, Manipur, Tripura, Goa, Daman & Diu and Pondicherry, a body, whether elected or partly nominated or partly elected to function as a legislature for the Union Territories or a Council of Ministers or both with such constitutional powers and functions in each case as may be specified in the law....."*. As noticed by Jeevan Reddy, J. in

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NDMC v. The State of Punjab, (1997) 7 SCC 339 ("**NDMC Judgment**") at page 402:-

> *".....It is significant to note that the said Article did not provide for creation of a Legislature or a Council of Ministers, as the case may be, for the Union Territory of Delhi.....".*

46. However, it is indeed an interesting question; whether Parliament by law could create legislatures and even specify constitutional powers and functions and whether it could devise a body, whether elected or partly nominated or partly elected, to function as a Legislature? It may be noted that the Government of Union Territories Act, 1963 applied only to such territories as were referred to in Article 239A (excluding Delhi). Section 3(1) declared that there shall be a Legislative Assembly for each Union Territory, whereas Section 18(1) provided that subject to the provisions of the Act, the Legislative Assembly of a Union Territory may make laws for the whole or part of any Union Territory with respect to any of the matters enumerated in the State List or the Concurrent List in the Seventh Schedule to the Constitution, insofar as any such matter is applicable in

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relation to Union Territories. Thus, it may be pointed out that the expression 'Union Territory' was not finally determinative of whether there shall be a representative democracy, and if so, what would be the powers which should be exercised by such Legislature. The creation of a Legislature by a law made by Parliament is indeed to confer dual sovereignty to the State i.e., sovereignty to the Legislature, as well as, sovereignty upon the people to undertake the democratic process of free and fair elections to choose such representatives. It is noticed that Section 18(1) did not contain any reservation in respect of any of the items contained in the State List. However, sub-section (2) of Section 18 provided that Parliament could make any law with respect to any matter for a Union Territory or any part thereof. [Indeed, it is somewhat intriguing that while such Union Territories were 'States', yet they were Union Territories for the purpose of parliamentary supremacy.]

47. It is also relevant to note that this anomaly bears considerable reflection because the proviso to Article 3 expressly stipulated that no Bill for the purpose of alteration

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of Territories can be introduced in either House of Parliament except on the recommendation of the President and unless, where the proposal contained in the Bill affected the area, boundaries or name of any of the States, Bill has been referred by the President to the Legislature of that State. Here, obviously, the expression 'State' would not include a Union Territory because there could be no pre-existing Legislature which was a condition precedent to the application of the proviso to Article 3.

48. It is also relevant to note that Part VI, which dealt with these States in Article 152, expressly provided that:-

> *"In this part, unless the context otherwise requires the expression 'State' does not include the State of Jammu and Kashmir."*

49. The Delhi Administration Act, 1966 provided for a Metropolitan Council consisting of 56 elected and 5 nominated members with an Executive Council of 4 members to aid, assist and advise the Administrator in the discharge of his functions. The Council had a right to discuss and make recommendations regarding proposals for

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legislation for Delhi with respect to matters in the State List and the Concurrent List. Final action on these recommendations was to be taken by Parliament and the Central Government. In case of a difference of opinion between the Administrator and the Executive Council, it was to be referred to the President for decision. The Administrator had virtually unfettered discretion as regards the administration of New Delhi. The Metropolitan Council was not equivalent to a legislature, and yet it provided an opportunity to associate the will of the people with the administration.

50. In 1975, a Task Force was set-up, commonly known as the Prabhu Committee, to go into the question of improving the administration in Delhi. The Committee, after thorough study, made a series of recommendations which were generally in the direction of delegation of enhanced financial and administrative powers to the Delhi Administration, avoiding delays in securing sanctions and approvals from the Central ministries, rationalising the functioning and jurisdiction of the corporation and various other authorities

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and effective coordination at various levels among the various authorities and organisations. The said Committee also recommended the setting up of a statutory authority to be called the Delhi Metropolitan Development Authority for ensuring coordinated attention to the complex problems of metropolitan Delhi. The said Committee did not recommend any changes to the 1966 Act.

51. It appears that no action was taken on those recommendations as there was a proposal for providing Delhi with a Legislative Assembly and Council of Ministers. Two Bills, namely, the Constitution (47th Amendment), Bill 1978 and the Government of Union Territories (Amendment) Bill, 1978 were framed in this behalf. But, with the dissolution of the Lok Sabha in 1979, the said two Bills lapsed. Subsequently, in 1980, a decision was taken that there should be no change in the administrative setup of Delhi. The matter was allowed to rest there for some time until 1987, when the Government of India decided to constitute a Committee to undertake a study and make

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recommendation for reorganising the administrative setup in the Union Territory of Delhi.

52. The Government of India felt that there had been a phenomenal increase in the population of the Union Territory of Delhi. It was also felt that there were multiple authorities in Delhi, which in the course of time, assumed overlapping functions, resulting in the common man finding it increasingly difficult to avail their services. Therefore, by an order dated 24th of December 1987, the Government of India appointed a Committee to go into various issues connected with the administration of the Union Territory of Delhi. The Statement of Objects and Reasons appended to the Constitution (74th Amendment) Bill, 1991 stated that the said amendment was to give effect to the proposals of the Committee. Therefore, in order to understand the true conspectus of the issues at hand, an analysis of the report of the said Committee on Reorganisation of Delhi Set-Up rendered on 14th December 1989, is imperative.

53. The Committee on Reorganisation of Delhi Set-up, in Chapter IV of Part 1 of its Report, considered various

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drawbacks and deficiencies in the existing set-up under the Delhi Administration Act, 1966. The same are summarised as under:

(i) Metropolitan Council did not have the power to Legislate;

(ii) The Council could be described as nothing more than a debating society;

(iii) There was a legitimate grievance that the citizens of Delhi did not have the elementary democratic right of deciding what laws should be made for them to meet their particular social and economic aspirations through their elected representatives;

(iv) The Metropolitan Council had no deciding voice on the budget of Delhi;

(v) Practically no decision making power vested in the Metropolitan Council;

(vi) Any decision concerning New Delhi taken by the Executive Council or Metropolitan Council was subject to the concurrence of the Administrator. In this respect, the residents of New Delhi were at a greater disadvantage than those in the rest of Delhi;

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(vii) Even with regard to subjects within the purview of the Executive Council, the Administrator could differ from the decision of the Executive Council and, therefore, the matter would be referred to the Central Government. There was a view that this provision devalued the functioning of the Executive Council even in the field allotted to it;

(viii) At variance with the principles of democratic Government, a sizable segment of the functions of the Delhi Administration had been kept outside the purview of the elected representatives in the Executive Council. Apart from the subjects of law and order, lands and the organisation and discipline of the police force, for which there could be justification, there were certain other subjects which were assigned to the field of discretionary powers of the Administrator. There was a view that some of these matters were of a nature in which participation of public representatives would be useful and necessary. In this connection a reference had been made to subjects like civil defence–acquisition, development and disposal of land; and so on. Moreover, the maintenance of law and order was, in the opinion of many, difficult without the

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active cooperation of the people. The existing arrangement did not provide for such cooperation or for a mechanism of feedback from the public;

(ix) Under the existing arrangement the Administrator presided over the meeting of the Executive Council, which was at variance with the normal arrangements in respect of a Council of Ministers. It had been presented that this was tantamount to a lack of confidence in the popular representatives, and inhibited free and frank discussion;

(x) All matters pertaining to the recruitment, conditions of service and disciplinary control over the person sitting in Delhi Administration were outside the purview of the Executive Council. With virtually no control over the services, the Executive Councillors found themselves unable to exercise effective control on the departments of which they were in-charge. On the other hand, the general public associated the elected representatives with the defaults of the official machinery. This placed them in an embarrassing situation;

(xi) The Delhi Administration Act, 1966 which was intended for the administration of the Union

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Territory of Delhi, had failed to achieve its objectives as the administration of daily functions was done through the Administrator in some matters and through various Union Ministries in the others;

(xii) The various authorities, officers and agencies discharging executive or administrative functions relating to Delhi were controlled either by the Administrator or directly by the Union Ministries;

(xiii) The Administrator acted in his discretion in some matters and with the assistance and advice of the Executive Council in the others. As a consequence, the authority of the Government in Delhi was dispersed and there was no single nodal authority to deal with all affairs relating to the administration of Delhi. The Administrator was presumably intended to serve as a nodal authority for the purpose of coordination between the various departments, but in reality, working of such system was not visible;

(xiv) The absence of an identifiable nodal authority, which would be empowered to get political and administrative leadership to the administration in Delhi and would serve as a focal point for command control and coordination of the

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agencies of administration, contributed substantially to the difficulties of common man in Delhi;

(xv) The multiplicity of agencies and bodies involved in the affairs of Delhi and the overlapping of their functions, inevitably lead to a dilution of their individual accountability to that extent. There was also a feeling that this, in turn, encouraged a tendency for officials and non-officials to interfere in the working of these agencies without being held responsible for such interference;

(xvi) The committee was convinced that many of the problems faced by the common man in Delhi could be attributed to the lack of accountability of administration and its agencies to the representatives of the people;

(xvii) The organisation and functioning of various agencies and bodies for the provision of services in Delhi lead to confusion in the minds of the public as regards the agency or body they should approach for their needs and grievances;

(xviii) The financial powers of the Delhi Administration were restricted only to those delegated to it by the Centre. It had no powers of its own. As a consequence the administration was inhibited

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from taking any initiative, particularly in regard to developmental programmes. Their powers of re-appropriation of funds from one head to another were also limited, and thus there was no flexibility to meet contingent and urgent requirements;

(xix) Even the Delhi Development Authority, due to many additional functions, was not able to devote attention and energy to its core function of monitoring and evaluating the implementation of the Master Plan of Delhi.

54. The Committee was of the view, that any scheme for restructuring the Delhi Administration should not only meet the needs of a large and densely populated metropolis, but should also be appropriate for the Capital of the Union of India. Accordingly, the Committee considered it useful to make a study of arrangements made in other countries in relation to their national capitals. The said arrangements, as considered by the Committee, are to be found in Chapter V of the First Part of the Report of the Committee. The Committee considered the capitals of the United States of America, Australia, Canada, Japan and the United

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Kingdom. The Committee observed that it had been recognised in many countries of the world that the national government should have the ultimate control and authority over the affairs of the national capital. At the same time, there was a noticeable trend in those countries to accept the principle of associating the people in the capital with sectors of administration affecting them, by means of a representative body. Due to the difficulty in securing a balance between these two considerations, the problem of evolving an appropriate governmental structure for the national capital had proved difficult in many countries, particularly, in those with a federal type of government.

55. The consideration and determination of appropriate structure is to be found in Chapter VI of the First Part of the Report of the said Committee. The Committee was of the view that it was not possible to remedy the situation by a mere change in the 1966 Act. According to the Committee, a replacement of the existing system by a new one, to secure for Delhi a democratic government, was called for.

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56. The Committee also rejected the suggestion for direct administration of Delhi by the Centre. It was observed that the administration run only by officials would militate against the principle of accountability of the administration to the people, which is a cardinal feature of democracy. If the structure was composed of government officials only, accountability to the people would undoubtedly suffer because there would be no appropriate forum where the actions of such officials could be questioned. It was observed that one of the root causes of the problems faced in Delhi was the absence of such accountability. The Committee observed:

> *"it cannot be denied that the democratically elected government provides the most effective and broad-based feedback mechanism from the people on a day-to-day basis. It also provides an effective forum for ventilation of people's grievances and demands."*

57. The Committee was convinced that there was no ground to support the view that the administration of Delhi can be run directly by the Centre without participation of

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people through the instrumentality of a Legislative Assembly and a Council of Ministers. The Committee recommended rejection of such a view.

58. The Committee then proceeded to consider the suggestion that Delhi should be a State of the Union. The argument for statehood was summarised as follows:-

(i) Delhi has a vast population of over 8 million at present and it is growing rapidly. If the people of Delhi in such vast numbers are not given an effective voice in the running of their own administration, democracy, which is the bedrock of the system of government adopted by the people of India after the attainment of our hard-won freedom, will have no meaning and content.

(ii) The debates in the Constituent Assembly make it clear that it was never the intention of the Constitution to exclude Delhi from the purview of responsible Government. One of the grounds mentioned by some members for justifying the grant of responsible Government was that the population of Delhi at that time was about two million. The population today is more than 4 times that figure, which further strengthens this argument.

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(iii) Experience in the working of the present system over the years has amply demonstrated that most of the problems faced by the common man in Delhi are due to the lack of accountability of the administration to the people which, in turn, is due to the fact that the representatives of the people of Delhi are not entrusted with the responsibility of government and do not have the necessary powers to attend to the needs of the people or to redress their grievances.

(iv) The difficulties arising from multiplicity of authorities with overlapping functions are mainly due to the absence of a focal point of coordination, control and command at the local level. Such absence has resulted in the present system of diversity of control by different Ministries of the Central Government, instead of unified control at the local level.

(v) If there is a State Government in Delhi as in other metropolitan cities, the Municipal Corporation will function under its close control and supervision at the local level in matters of policy and services. At present, the control by the Central Government is distant and spasmodic, with the result that the quality and scale of civic services do not measure up to the normal

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expectations of the people. The same is the position in regard to the other service agencies dealing with water supply, electricity, housing etc.

(vi) In the absence of a fully empowered Legislative Assembly, the citizens of Delhi are deprived of their basic right of enacting, through their elected representatives, necessary legislation to meet their social and economic needs. They are also deprived of an effective voice in vital matters like planning, development, control over services, finance etc. The present system does not envisage any decision making on any of the important matters affecting the common man at the local level. To that extent, the people of Delhi are deprived of an effective forum for attending to their needs or redressal of their grievances.

(vii) Nothing less than the status of a full-fledged constituent State of the Union will fully satisfy the democratic and political aspirations of the people of Delhi. There is no justification for denying this to them merely on the ground that they happen to reside in the national capital. There are in our country, States, with much smaller area, population and financial resources than those of Delhi. There were some Union

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Territories with population much less than that of Delhi which have become States in the recent past. When people in most parts of India enjoy the fruits of our hard won freedom, it is an irony that the people in Delhi who are in no way inferior to others and who also made sacrifices for the attainment of freedom should be deprived of such fruits.

(viii) In the perception of the common man, statehood represents the highest and most desirable form of political organisation available under the Constitution, by which he can effectively participate in the government through his elected representatives in an empowered legislature and executive, and realise his aspirations. The denial of such a form of political organisation leaves a sense of gnawing dissatisfaction of unfulfilled aspirations in the minds of the citizens of Delhi.

(ix) There is no substance in the argument usually advanced against making Delhi a State of the Union, i.e. that such a step will be detrimental to the functioning of the national capital because there could be conflicts and embarrassments between the Union Government and the Delhi State Government, particularly when the ruling

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political parties in the 2 governments are different. This argument ignores the fact that our Constitution is designed to work smoothly even when different political parties are voted to power in different states of the Union, with the Union itself being governed by a different political party. The Constitution vests in the Union adequate powers to deal with States acting contrary to the requirement of national interests. The political maturity gained by the people of India, including those in Delhi, during the last 40 years of independence is sufficient to guard against irresponsible behaviour on the part of any State Government set up in the national capital. No State Government can afford to act arbitrarily or unreasonably in relation to the Union government without regard to national interest or to the impact of its action and stance on the nation. There is also no basis for assuming that the democratic government in Delhi will function less responsibly than that of any other constituent unit of the Union or that the interests of the cosmopolitan population of Delhi cannot be taken care of otherwise than by the Union.

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(x) There is also no substance in the contention that the financial strength and viability of Delhi may not justify the grant of statehood. Delhi is a thriving commercial and business centre with a high per capita income and vast potential for collecting taxes and revenues. If Delhi becomes a state with a legislature, it can evolve a taxation structure, so as to considerably augment the revenues of the Delhi exchequer. Delhi, of course, has to depend on assistance from the Centre, but every other State of the Union also does. In any case, the Government of Delhi would be justified in asking for special dispensation and financial assistance in view of its special responsibilities for the administration of the national capital.

59. From the consideration of the above said arguments in favour of statehood of Delhi, it is clear that there was a very strong case for statehood to be conferred upon Delhi in 1989. Perhaps, if the studies were to be conducted today there would be an even stronger case for complete statehood of Delhi. It has been more than 25 years since the Committee made its recommendations, and therefore, it is necessary to say the least, that the present working and the

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problems associated with Delhi must be thoroughly studied. Since the Committee was convinced that most of the arguments against making Delhi a State were substantial, sound, valid and deserving acceptance, it would be desirable to peruse a summary of these arguments hereinunder:

(i) If Delhi becomes a State of the Union, there will be a constitutional division of powers and functions between the Union and the State, and as a consequence, the Centre will have no jurisdiction or power to deal with or intervene in matters which are in the State List of the Constitution. This may create serious problems because the Centre has a special responsibility in regard to the national capital, particularly in matters like maintenance of public order, the administration and development of the capital city. In national interest, the Centre must have unfettered powers in respect of the national capital in all matters irrespective of whether the matter is in the Union field or State field. Occasions may arise when even in the day to day exercise, the functions and powers relatable to matters in the State List like maintenance of public order, land use etc., may become necessary for the Centre to take certain actions

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in national interest, and this will be impossible if Delhi becomes a State.

(ii) The Constitution, no doubt, confers certain powers on the centre when a proclamation of emergency is in force or when the state is under President's rule to take any action or intervene in a matter relating to the administration of a State or to give directions to a State in respect of a matter outside the Union executive power, but this power is available only in times of emergency and cannot be exercised in normal circumstances. The need to exercise such power in the national capital is likely to arise often and it will be unthinkable to resort to the emergency powers as a matter of routine.

(iii) The administration of a national capital often has to deal with sudden developments involving security or peace and several special problems peculiar to the capital which are of far greater magnitude and complexity than those normally faced in any metropolitan city of a State. As such, it would be extremely difficult for a State Government with its limited resources to effectively handle situations of such nature, magnitude and complexity.

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(iv) Delhi, as the national capital, is vulnerable to attempts to subvert or overthrow the lawful government and also has the potential to become the centre of anti–national or fissiparous tendencies or activities including those incited by foreign powers or organisations. All covert and overt action to contain such tendencies or activities and to ensure the safety and security of the country as a whole can best be handled only by the expertise and resources available to the Union Government.

(v) The situation of Delhi is such that it has necessarily to depend on other States in regard to several matters, such as electricity, water supply and other essential supplies including food. It will be unrealistic to expect a State Government in Delhi to manage such essential services and supplies on its own. The difficulties may be accentuated in Delhi as the different states on which it depends are ruled by different political parties. The centre will be in the best position to meet the special requirements of Delhi.

(vi) The national capital, particularly in a federal setup, has a unique status and certain distinguishing features and in view of its

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importance for the country as a whole, it should belong to all the states rather than be located in the territory of or be controlled primarily by a single state. Any such arrangement, besides putting such a state in a predominant and advantageous position, may also give a cause for dissatisfaction to other states. The control over the National Capital by one state may not be conducive to ensuring the preservation of the overall interests of the remaining states and the Central Government in the governance of the national capital. The arrangements made in regard to national capitals in other countries of the world, particularly those with a federal setup, justify the view that the national capital should be under the control of the national government.

(vii) Normally, the concern of a State Government or its legislature is with local issues. At any rate, in its functioning, the emphasis is generally on local issues, and elections to the Legislative Assembly are fought on the issues primarily concerning local interests. Such institution cannot be expected to deal adequately with national issues.

(viii) The national capital is regarded as a symbol of the nation not only for the people of the country

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but also for the international community. The standard of administration in matters like maintenance of law and order, security, maintenance of essential supplies and services, transport etc. has to be sufficiently high to befit its status and importance. This could best be achieved by the national government which has the requisite resources.

(ix) As Delhi is the national capital, all the prestigious national institutions like the Rashtrapati Bhawan, the Parliament, the Supreme Court etc. are located in Delhi. It also houses all foreign diplomatic missions, international agencies and other such institutions. Numerous buildings and properties belonging to the Union are also located in Delhi. In view of the need for proper attention and maintenance of these institutions and buildings and the preservation of a proper environment, it would be necessary to keep Delhi under the control of the Central Government.

(x) The national capital is regarded by many as the centre of a composite culture distinct from the diverse cultures in the country. This is an asset which can best be preserved and developed by the national government.

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(xi) At present, Delhi being a Union Territory, its expenditure is met by the Union Government. But for the substantial financial support from the Union government, Delhi as a national capital may not be able to maintain an adequate status or standard of services and amenities so essential for a capital city. If Delhi becomes a State, the norms and restrictions regarding financial assistance from the Centre applicable to other states will automatically apply, resulting in depletion of resources at its disposal, thereby making it difficult to meet the needs of Delhi adequately.

(xii) If the national capital is under a State Government, occasions may arise when frictions and conflicts develop between the Union and the State, particularly when they are ruled by different political parties. These conflicts may get accentuated if they relate to matters in the State's own field under the Constitution. If there is such a confrontation between the centre and the State in the capital, it will not be in the interest of the country as a whole.

60. The Committee was of the view that if Delhi becomes a full-fledged state, there will be a constitutional division of

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sovereign, legislative and executive powers between the Union and the State of Delhi. One of the consequences will be that in respect of matters in the State List, Parliament will have no power or jurisdiction to make any law except in the special and emergency situations provided for under the Constitution and to that extent the Union Executive cannot exercise executive powers or functions. This constitutional prohibition on the exercise of powers and functions will make it virtually impossible for the Union to discharge its special responsibilities in relation to the national capital, as well as to the nation itself. The control of the Union Government over the national capital is vital in national interest, irrespective of whether the subject matter is in the State field or Union field. If the administration of the national capital is divided into rigid compartments of State field and Union field, conflicts are likely to arise in several vital matters, particularly if the two governments are run by different political parties. Such conflicts may, at times, prejudice the national interest. The Committee was of the view that the emergency powers conferred on the Union

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under Articles 356 and 365 or other provisions are not meant to be used as a matter of routine. They are meant to be used only in emergency situations arising from the breakdown of constitutional mechanism. The Committee was of the opinion that any arrangement for Delhi that involves constitutional division of powers, functions and responsibilities between the Union and the Government of the national capital will be against national interest and should not be made. (Paragraph 6.5.6)

61. The Committee then proceeded to consider whether it was financially viable to make Delhi a full-fledged State? The Committee observed that there was no doubt that substantial resources were raised by the Union Territory; however, the expenditure substantially exceeded the revenue. All the deficits were being financed by the Union Government in one way or the other. The precise extent of subsidising the expenditure may not have been easily discernible. Norms and restrictions which applied to the constituent States of the Union in respect of financial flows from the Centre to the States, such as those under the

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Gadgil formula for plan resources and Finance Commission formula for non-plan resources, do not at present strictly apply to the Union Territory of Delhi. It is due to this that Delhi as the national capital is able to maintain a reasonably good standard of services and amenities. Such norms and restrictions will have to be applied if Delhi is to be made a constituent State of the Union. The direct and unavoidable result will be a substantial financial crunch which the State Government will be hard pressed to face and overcome. The Committee conceded that some special financial dispensation may have been necessary in respect of the national capital and the Union Government would be justified in giving special assistance to Delhi. The Committee also considered that not all the constituent States of the Union were financially viable. The Committee believed that the annual deficit between the revenue and expenditure in Delhi would be incomparably large after it becomes a full-fledged State and major renovations would need to be adopted by the Union Government in the mode and volume of financing the Delhi budget, involving deviations from the

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accepted norms and financial treatment meted out to other constituent States of the Union. It would indeed appear incongruous and untenable for the people of Delhi to demand the privileges of a constituent State of the Union and also to expect extraordinary financial dispensation from the Union Government. The Committee was of the view that it would not be in the national interests and in the interest of Delhi itself, to restructure the setup in Delhi as a full-fledged constituent State of the Union and that the same will have to be ruled out. (Paragraph 6.5.10).

62. The Committee noted that the first problem was in regard to making laws for Delhi. The general purpose of law is to provide for social and economic needs of the people and obviously it is the people of Delhi who are the best judges of what is good for them. The Committee was of the view that if a Legislative Assembly was created for Delhi with legislative powers in respect of matters of relevance to Delhi in the State List, and, in the Concurrent List, the people of Delhi will have the benefit of deciding, through their own representatives on the laws to be made for them. The

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Committee was of the view that, the common man, in vital matters of day-to-day concern, must have what almost all other citizens in India have, namely, a proximate government which he can look to for attending to and addressing his grievances. Therefore, the Committee found that if the elected Legislative Assembly and a Council of Ministers answerable to the citizens of Delhi are set up for Delhi, it would go a long way in providing a responsive and representative government at the local level with adequate powers to deal with matters of day-to-day concern to the people of Delhi which is accountable to them. (Paragraph 6.6.3) If there was a Council of Ministers answerable to people's representatives in the local legislature, planning and development for Delhi would not be hampered and would have meaning and content, with the involvement of the people's representatives in the process (paragraph 6.6.4).

63. The Committee considered that in regard to financial powers, the Delhi Administration was exercising only such powers as were delegated to it by the Central Government.

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The devolution of financial powers was not adequate. Exercising merely delegated powers under the control of the Central Government deprived the administration of any initiative. Even the budget proposal virtually finalised by various ministries of the Central Government, left no final say in the matter to the representatives of the people of Delhi. The Committee was of the view that all these problems will be automatically solved if there was a representative and responsible Government for the administration of Delhi. (Paragraph 6.6.5)

64. The Committee was of the view that if Delhi was provided with a Legislative Assembly and a Council of Ministers with appropriate powers, it is likely to bring about substantial improvement by reason of the institutional supervision of the Delhi Administration over the municipal authorities. The Legislative Assembly will provide a forum for venting grievances and for discussion of the working of such authorities. (Paragraph 6.6.6)

65. The Committee observed that the problem of lack of coordination between the various authorities dealing with

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matters of concern to the public of Delhi was due to the absence of a nodal authority and if the Delhi Administration was run by elected representatives through a Legislative Assembly and a Council of Ministers, a suitable coordinating mechanism would be available. (Paragraph 6.6.7)

66. The Committee observed that even the intention of the Constitution as disclosed in the details of the Constituent Assembly was to consider Delhi as a separate area with a responsible government, subject to certain powers to be given to the Centre, and it was not to deprive the people of Delhi of the right of self-government enjoyed by the rest of their countrymen living in the smallest of villages. (Paragraph 6.6.8)

67. The Committee finally recommended that there was a strong case for establishing a Legislative Assembly and a Council of Ministers for Delhi to satisfy the need for a democratic and responsible Government. In my view, chapter subheading 6.6 may provide a possible aid in interpreting some of the provisions of the Constitution (69th Amendment) Act, 1991,

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the Government of National Capital Territory of Delhi Act, 1991 and the Rules of Procedure and Conduct of Business framed by virtue of the provisions of the Government of National Capital Territory of Delhi Act.

68. The Committee then proceeds to provide the salient features of the proposed structure. It first decides to discuss the extent of powers and responsibilities to be conferred on, or entrusted to the proposed bodies, special safeguards to ensure that the Union was not hampered in discharging its duties and responsibilities, and the other salient features of the structure. The Committee was of the view that the only way of ensuring the arrangement was to keep Delhi as a Union Territory for the purpose of the Constitution. Thereby the provision in Article 246 (4) of the Constitution would automatically ensure that the Parliament has concurrent and overriding powers to make laws for Delhi on all matters, including those related to the State List. Correspondingly, the Union Executive could exercise executive powers in respect of all such matters subject to the provisions of any central law governing the matter. The Committee

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recommended that even after the creation of a Legislative Assembly and Council of Ministers for Delhi, it should continue to be a Union Territory for the purpose of the Constitution.

69. At this stage, it appears that the Committee failed to consider how the democratically elected representatives of the people could be made subservient to the bureaucrats representing the Union Executive, consequently subverting the very firmament of democracy enshrined in the Constitution. The question is, can the bureaucrats who are representing the Union Executive be permitted to have an upper-hand over the elected representatives of the people? From a reading of chapter subheading 6.6 it appears that the Committee intended much higher responsibility for the elected representatives of the people and could not have intended for bureaucrats of the Union Executive to be given an upper-hand. In my view, the Committee intended an upper-hand for the Union Executive only to the extent that the Union could discharge its own special responsibilities in relation to the administration of the national capital and

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could not have intended an upper-hand in the day-to-day matters of governance by the Chief Minister and Council of Ministers democratically elected by the people of Delhi. If such an upper-hand was to be sustained, the same would render the democratically elected government completely meaningless and devoid of any significant power of governance.

70. The Committee recommended that the name of the Union Territory of Delhi may be specified as the National Capital Territory and its administrator was constitutionally recognised as the Lieutenant Governor. As regards the Legislative Assembly to be created for Delhi, the Committee recommended that the said Assembly should have a legislative power in relation to matters assigned to it, subject to the specific exclusions. In view of the special responsibility of the Union in respect of Delhi certain specific exceptions should be carved out in the power of the Legislative Assembly to make laws.

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71. The Committee observed that in the 1951 Act certain subjects were excluded from the purview of the Legislative Assembly for Delhi. The subjects were:

(i) public order;

(ii) police, including railway police;

(iii) the constitution and powers of municipal corporations and other local authorities, of improvement trusts and of water supply, drainage, electricity, transport and other public utility authorities in Delhi or New Delhi;

(iv) lands and buildings vested in or in the possession of the Union which are situated in Delhi or New Delhi including all rights in or over such lands and buildings, the collection of rents therefrom and the transfer and alienation thereof

72. The Committee was of the opinion that the reasons which weighed with Parliament for excluding certain subjects from the purview of the Legislative Assembly for Delhi in 1951 were valid even then (that is 1989) and accordingly the Committee considered certain subjects should be retained by the Centre.

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73. As to Public-Order and Police, the Committee observed that the maintenance of law and order in the capital city was of utmost importance not only to the city itself, but also to the nation as a whole. The national capital is generally vulnerable to attempts to subvert or overthrow the lawful government. In recent years the danger has escalated because of terrorist activities. Even in the normal field of maintenance of law and order, any breach of public peace in the capital assumes special magnitude and importance by reason of its political or other overtones. The agitations or unrest taking place anywhere in the country would have repercussions in the capital because the seat of the Central Government and the Parliament are situated in Delhi. The ever-increasing population, the visible disparity in the economic levels among the public and the social tensions created therein have their impact on public peace. The problem is further complicated by the presence of a sizeable number of foreign nationals by the frequent visits of foreign dignitaries, by the holding of international conferences etc. Experience has shown that Delhi is a place which should be

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prepared to meet sudden developments and upheavals. The Committee was of the opinion that to meet every situation that arises, the police in the national capital must necessarily be organised and should function in such a manner that it is ever alert and is in a position to meet eventualities arising from sudden developments. As such, in Delhi, the organisation and functioning of the police force, as well as, the maintenance of public order should be the responsibility of the Union which, as stated in Parliament in 1951, should have, in this respect, unfettered power and, power which is not contested by another subordinate legislature.

74. The Committee further observed that in Delhi there were a number of specialised police forces to deal with security of the country, dignitaries like the President and the Prime Minister, and to combat terrorism. The functioning of these specialised forces would necessarily interfere with the functioning of the normal police, as these forces would have to continuously interact and coordinate with the regular police force in the city. These specialised forces are under

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the control of the Centre. If the local police is placed under the control of a separate agency like the Delhi Administration, serious conflicts are likely to arise which may even have repercussions on the security of the country. This may also result in attempts to shift the blame or avoid responsibility between the two agencies. The Committee recommended that the subjects of 'Public Order' and 'Police' should be excluded from the purview of the Legislative Assembly for Delhi and should be retained by the Centre.

75. The Committee was also of the view that the maintenance of public order cannot be achieved without the cooperation of the people or without a feedback mechanism. Both these needs could be achieved if the elected representatives in the Legislative Assembly are in some way associated with at least some aspects of the matter. Accordingly, the Committee also recommended that the Centre should delegate adequate powers to the Lieutenant Governor in this regard, who, in discharging functions thereunder, should adopt a convention of consultation with the Chief Minister whenever possible.

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76. The Committee further recommended that the Administrator should be expressly made responsible for the maintenance of public order in the capital and for the effective functioning of Police in Delhi. For this purpose, the Administrator should be conferred or invested with adequate powers and jurisdiction under the relevant law, wherever necessary. He should be answerable to the Central Government and thereby, to Parliament. (Paragraph 8.2.2).

77. The Committee further recommended that the Superintendence of Delhi Police throughout Delhi shall vest, in and be exercised by, the Administrator and that any control, direction or supervision exercisable by any police officer over any other member of the police force shall be exercised subject to such superintendence by the Administrator. It was further emphasised that the Administrator should be specifically empowered to exercise all the necessary powers with regard to the maintenance of public order (with the provision for delegation of such powers under the law wherever necessary).

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78. The Committee observed that it was no longer necessary to exclude adequate powers of supervision over local authorities from the proposed democratic administration. As regards control by the Centre, the Committee considered that it would be sufficient to rely on the powers of pervasive control over the Delhi Administration, which would be available in the proposed setup and which would include the power of the Centre to give directions to the Government of Delhi even on matters in the State List.

79. As regards public utilities, it recommended the setting up of statutory corporations functioning under parliamentary laws with appropriate provisions for control over them. The Central Government should have an overall control in national interest, while the Government of Delhi would also be given an appropriate role. (Paragraph 6.7.11)

80. As regards land, land use and land development, the Committee observed that the arrangement of keeping the subject matter directly under the Central Government has more or less continued without an interval since 1912. The Committee was of the view that Entry No.18 of the State

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List, being land, that is to say, rights in or over land, land tenures including the relation of landlord and tenant and the collection of rents; transfer and alienation of agricultural land; improvement and agricultural loans; colonisation, should be kept outside the purview of the powers of the proposed Legislative Assembly. The Committee was also of the view that *ipso facto* Entry 35 would fall outside the purview of the proposed assembly for Delhi. The Committee felt that the appropriate course to secure a balance between the interest of the Centre and those of the representative administration at the local level, would be to provide that executive powers of the Centre in relation to the subject of land may be delegated, to the extent considered appropriate, to the Administrator, who, while exercising such powers in his discretion, in this respect, may act in consultation with the Council of Ministers. It was recommended that the same may be provided for in the Rules of Business.

81. The Committee also recommended that provisions should be made for certain incidental and consequential matters. These include provisions for elections, the limitation of

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constituencies, qualifications and disqualifications of members, duration of and procedure in the assembly, its prorogation or dissolution, Speaker, Deputy Speaker and other officers, manner of voting, privileges etc. In all these matters the Committee considered that the provisions made in respect of the legislature for the States or for Union Territories could be adopted with suitable modifications. Similar provisions should be made for other matters like procedure, budget, Consolidated Fund, Contingency Fund, Appropriation Act, etc. (Paragraph 6.7.16)

82. The Committee then proceeded to consider the relationship between the Lieutenant Governor and the Council of Ministers of Delhi. The Committee recommended that the provisions for the Council of Ministers and the Chief Minister should be broadly on the pattern of the States. The Chief Minister should be appointed by the President and the other ministers should be appointed by the President after consultation with the Chief Minister. This was because of the special responsibility of the President for the good governance of the national capital. The ministers should

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hold office during the pleasure of the President. The Council of Ministers should be made collectively responsible to the Legislative Assembly, which was the basic requirement of a responsible government.

83. The Committee further recommended that the Administrator should be expressly required to perform his functions on the aid and advice of the Council of Ministers. The Committee was conscious that the expression "to aid and advice" is a well understood term of the cabinet system of government adopted by the Indian Constitution. However, the Committee provided for certain modifications in the said convention of "aid and advice" by the Council of Ministers as follows: –

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

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(ii) Secondly, the requirement is only in relation to matters in respect of which the Legislative Assembly has power to make laws. This power will be subject to the restrictions already dealt with. Accordingly, the Council of Ministers will not have jurisdiction to deal with matters excluded from the purview of the Legislative Assembly.

(iii) Thirdly, there is need for a special provision to resolve differences between the Administrator and his Council of Ministers on any matter concerning the administration of Delhi. Normally, the principle applicable to the system of responsible Government under the Constitution is that the head of the administration should act as a mere constitutional figurehead and will have to accept the advice of the Council of Ministers except when the matter is left to his discretion. However, by virtue of Article 239 of the Constitution, the ultimate responsibility over Delhi is vested in the President acting through the Administrator. Because of this, the Administrator has to take a somewhat more active part in the administration than the Governor of a State. It is, therefore, necessary to

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reconcile between the need to retain the responsibility of the Administrator to the centre in this regard, and the need to enforce the collective responsibility of the Council of Ministers to the Legislature. The best way of doing this is to provide that in case there is a difference of opinion which cannot be resolved between the Administrator and his Council of Ministers, he should refer the question to the President and the decision of the President thereon will be final. In case of urgency, if immediate action is necessary, the Administrator may direct action to be taken pending such decision of the President.

(iv) Fourthly, the Rules of Business governing the exercise of executive powers by the Council of Ministers will be made not by the Administrator on the aid and advice of his Council of Ministers, but by the President.

(v) Fifthly, the Administrator has also to perform certain functions as a representative of the Union, in relation to matters within the executive powers of the Union and in respect of which powers have been delegated or entrusted to him. In respect of these, there is no question of his acting on the aid and advice of any ministry and

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the Administrator has to act in his own discretion, but subject to the directions of the Central Government

(vi) Apart from the foregoing, the Administrator may be required by or under any law to act in his own discretion and in such cases he has to do so.

84. The Committee recommended that the Council of Ministers should be restricted to 10% of the number of members comprising the Legislative Assembly. (Paragraph 6.7.25) The Committee also recommended that there should be overall control of the Union over the exercise of executive powers in view of the special responsibility of the Union for the proper administration of the national capital. (Paragraph 6.7.26)

85. The Committee also recommended that the new law should have provisions to deal with failure of constitutional machinery in Delhi; to enable the President to suspend the operation of all or any of the provisions of the law, if the President is satisfied that a situation has arisen in which the administration of the national capital cannot be carried on in accordance with the provisions of the Constitution, or the relevant parliamentary law, or that for the proper

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administration of national capital it is necessary or expedient so to do.

86. In view of the above discussion, the Committee provided for implementation of its Report by way of a Constitutional Amendment and Parliamentary enactment. (Chapter VI of Part 1 of the report). The Report also provides a draft provision to be introduced in the Constitution and also provides a draft law to be enacted by the Parliament.

87. Accordingly, the Constitution (74th Amendment) Bill, 1991 was introduced in the Parliament on 16th December, 1991 citing the above said report of the Committee as its basis in the statement of objects and reasons. The said Bill came to be passed on 20th December, 1991, in both the houses of Parliament as the Constitution (69th Amendment) Act, 1991, inserted after Article 239 A (came into effect on 1.2.1992). Two articles, namely Article 239AA and Article 239AB were added in Part VIII of the Constitution which deals with 'the Union Territories'.

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88. Before considering Article 239AA, the two clauses of Article 239 AB may first need to be considered. Article 239 AB (a) provides is akin to Article 356 in respect of States. It states that if the President, on receipt of a report from the Lieutenant Governor or otherwise was satisfied that a situation has arisen in which the administration of National Capital Territory cannot be carried on in accordance with the provisions of Article 239AA or of any law made in pursuance of that Article, the President may, by order, suspend the operation of any provisions of Article 239 AA or of all or any of the provisions of any law made in pursuance of the Article, for such period and subject to such conditions as may be specified in such law, and make such incidental and consequential provisions, as may appear to him to be necessary or expedient for administering the National Capital Territory in accordance with the provisions of Article 239 and Article 239AA.

89. On the other hand, Article 239 AB (b) provides that if the President, on receipt of a report from the Lieutenant Governor or otherwise, is satisfied that for proper

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administration of the National Capital Territory, it is necessary or expedient so to do, the President may by order suspend the operation of any provision of Article 239AA or of all or any of the provisions of any law made in pursuance of that Article, for such period and subject to such conditions as may be specified in such law, and make such incidental and consequential provisions as may appear to him to be necessary or expedient for administering the National Capital Territory in accordance with the provisions of Article 239 and Article 239AA. However, the President, would be entitled to exercise powers under Article 356.

90. Now, the provisions of Article 239 AA may be considered. The first clause provides that as from the date of commencement of the Constitution (Sixty-Ninth Amendment) Act, 1991, the Union territory of Delhi shall be called the National Capital Territory of Delhi. The said clause also provides that the Administrator thereof, appointed under Article 239, shall be designated as the Lieutenant Governor. Article 239 provides for Administration of Union Territories, which states that save

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as otherwise provided by the 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.

91. Sub-clause (a) of Clause (2) of Article 239 AA provides for a Legislative Assembly for the National Capital Territory. The said Sub-Clause also provides that the seats in such Assembly shall be filled by members chosen by direct election from territorial constituencies in the National Capital Territory. Sub-clause (b) of clause (2) of Article 239 AA provides that the total number of seats in the Legislative Assembly, the number of seats reserved for scheduled castes, the division of the National Capital Territory into territorial constituencies (including the basis for such division) and all other matters relating to the functioning of the Legislative Assembly, shall be regulated by law made by Parliament. Sub–clause (c) of clause (2) of Article 239 AA provides that the provisions of Article 324 to 327 and 329 shall apply in relation to National Capital Territory, the Legislative Assembly of the National Capital Territory and

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the members thereof as they apply in relation to a State, the Legislature of a State and the members thereof respectively; and any reference in Articles the 326 and 329 to "appropriate legislature" shall be deemed to be a reference to Parliament. That is, for the purposes of election provisions contained in Part XV of the Constitution, the status of the National Capital Territory of Delhi has been treated as a State and the Legislative Assembly of National Capital Territory has been treated akin to any Legislative Assembly of a State of the Union.

92. Sub-clause (a) of clause 3 of Article 239 AA provides that subject to the provisions of this Constitution, the Legislative Assembly shall have power to make laws for the whole or any part of the National Capital Territory with respect to any of the matters enumerated in the State List or in the Concurrent List, insofar as any such matter is applicable to Union Territories, except matters with respect to Entries 1, 2 and 18 of the State List and Entries 64, 65 and 66 of that list (insofar as they relate to the said Entries 1, 2 and 18). Thus, the said sub-clause clearly demarcated the legislative

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competence of the assembly of National Capital Territory of Delhi, which is no different from any State, except for the exclusion which has been provided in the said sub-clause.

93. Sub–clause (b) of clause 3 of Article 239 AA provides that nothing in sub-clause (a) shall derogate from the powers of the Parliament under this Constitution to make laws with respect to any matter for a Union Territory or any part thereof. Thus, the said sub-clause in a way reiterates clause (4) of Article 246, which provides that Parliament has power to make laws with respect to any matter for any part of the territory of India not included in a State, notwithstanding that such matter is a matter enumerated in the State List. A conjoint reading of the above mentioned two sub-clauses of clause (3) makes it clear that the Parliament reserves a concurrent power to make laws in respect of areas which had been assigned to the Legislative Assembly of the National Capital Territory. Thus, the Parliament may also have competence to make laws in respect of any matter enumerated in State List of the VIIth schedule of the Constitution. Sub-clause (c) of clause (3) of Article 239 AA

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contains provisions similar to Article 254. The only difference is that in respect of a State, the power of the Parliament to make laws has been limited by the Constitution, whereas, such limitation is not present in respect of the National Capital Territory of Delhi.

94. Clause (4) of Article 239 AA provides for a Council of Ministers and also provides for a limitation that the said Council should not consist of more than 10% of the total number of members in the Legislative Assembly. The said clause also provides that the Council of Ministers, with the Chief Minister at the head, would aid and advise the Lieutenant Governor in the exercise of his functions in relation to matters with respect to which the Legislative Assembly has power to make laws, except insofar as the Lieutenant Governor is, by or under any law, required to act in his discretion. The said clause contains the cardinal principle of Cabinet form of Government - that the Lieutenant Governor was to be the constitutional figurehead and he had to act on the 'aid and advice' of his Council of Ministers. However, the said provision has been subjected to

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an exception carved out by way of a proviso to the said clause. The proviso states that in case of difference of opinion between the Lieutenant Governor and his Ministers on any matter, the Lieutenant Governor shall refer it to the President for decision and act according to the decision given thereon by the President, and, pending such decision it shall be competent for the Lieutenant Governor, in any case, where the matter in his opinion, is so urgent that it is necessary for him to take immediate action, to take such action or to give such direction in the matter as he deems necessary. So, according to the said proviso, in case of a conflict/difference of opinion between the Lieutenant Governor and the Council of Ministers, the Lieutenant Governor has been empowered, pending decision by the President, to issue directions as he deems necessary, provided the matter is urgent and requires immediate action.

95. At this stage itself, it needs to be noted that the said proviso to Clause (4) is unsustainable in view of the well-settled understanding of the relationship between the Governor and

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the Chief Minister and his Council of Ministers. A holistic reading of the entire 69th and 70th Amendment Act would clearly rule out any necessity of such a provision. Such a provision would not only lead to anomaly and confusion, but would be inconsistent with the Cabinet System of governance interwoven in our constitutional democracy.

96. Clause (5) of Article 239 AA provides that the Chief Minister shall be appointed by the President and the other ministers shall be appointed by the President on the advice of the Chief Minister. It further provides that the Ministers shall hold office during the pleasure of the President. On the other hand, in respect of constituent States of the Union, Article 164 provides that the Chief Minister shall be appointed by the Governor and the other ministers shall be appointed by the Governor on the advice of the Chief Minister, and the Ministers shall hold office during the pleasure of the Governor. Although the President is empowered to make regulations for peace, progress and good governance of the Union Territory under Article 240 of the Constitution, the said provision is not applicable to the

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National Capital Territory. However, there is a noticeable departure in clause (5) of Article 239 AA from the provisions in Article 164. Thus, the absence of the National Capital Territory in Article 240 strengthens the argument that the 'peace, progress and good government' have been passed onto the Government of the National Capital Territory.

97. Clause (6) of Article 239 AA contains a provision similar to clause (2) of Article 164 which provides that the Council of Ministers shall be collectively responsible to the Legislative Assembly.

98. Clause (7) of Article 239 AA is the law-making power of the Parliament and provides that 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. Sub-clause (b) provides that any such law, as is referred to in sub-clause (a), shall not be deemed to be an amendment of this Constitution for the purposes of Article 368, notwithstanding, that it contains any provision which amends or has the effect of amending this Constitution. It is

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under this provision that the Government of National Capital Territory of Delhi Act, 1991 has been enacted. The Statement of Objects and Reasons of the said Bill makes a reference to sub-clause (a) of clause 7 of Article 239 AA.

99. It would be pertinent to consider herein that when the Constitution (Seventy Fourth Amendment) Bill, 1991 was being tabled, the question of granting full statehood to Delhi was brought up. However, it was considered more appropriate by the Lok Sabha to debate on the said issue while the Government of National Capital Territory Bill, 1991 was tabled, in the evening session the very same day.

100. On a perusal of the debates, it becomes evident that while the BJP was whole heartedly supporting a claim for full statehood of Delhi, the Congress Party was in favour of granting partial autonomy, while retaining superseding powers with the Centre. It becomes necessary to refer to the views of some of the members of the Lok Sabha therein to understand the debates which took place on the said issue

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101. Shri Madan Lal Khurana was the first person to raise objections regarding the Bill. He supported the Bill half-heartedly. His view was that under the proposed structure, limited rights are being provided and he had many apprehensions regarding it. Certain arguments forwarded by him were as follows:-

> *"Today there is rule of Bureaucracy in Delhi. The situation of Delhi is becoming bad to worse. The reason is that the bureaucrats who rule Delhi, are not responsible to Delhi. They do not have any attachment to Delhi. Those who don't know the Geographical conditions of Delhi, are ruling Delhi. Today, Delhi is an [O]rphan and without protector. Whom should the people of Delhi approach for redressal of their grievances and problems as there is no political structure. I want to cite some examples. You will be surprised to know that Rs. 9034.36 crores have been allocated to Delhi for Five Year Plan. Out of it, only Rs. 2596.03 crores, i.e. 28% would be spent on new schemes and the remaining 72% would be utilized on pending schemes of Delhi. During the next years proposed budget, i.e. 1992-1993, only 11% of the amount would be spent on new schemes, whereas the remaining amount would be spent on pending schemes.*

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There is no proper forum where we could raise the problems of Delhi. Sir, I do not want to present more examples but I would like to say in one sentence that Delhi should have been provided a unified authority, a full fledged body to solve these problems effectively. People of Delhi were dreaming about a unified, power and an effective system. But I want to say that this proposed bill has shattered the dreams of the people of Delhi. As I have said earlier that there is a multiplicity of authorities in Delhi i.e. D.D.A., D.T.C., D.M.S, and many other departments. They do not owe responsibility to anybody. The problem may be related to D.T.C. but it will be solved by the Central Government and Shri Tytler will not talk to the people. People of Delhi have suffered due to the loss in D.M.S. with no fault of theirs. The Government will not talk to anyone from Delhi about it."

102. Referring to recommendations regarding Delhi proposed by the Sarkaria Committee, Mr. Khurana contended that the elected members of Delhi should be consulted in regard to the solution of problems of Water Supply and Sewage Disposal, Electricity Board and

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Transport Corporation by constituting autonomous Boards for these, whereas the Bill was silent on these issues.

103. Mr. Khurana also pointed out certain loopholes in the proposed Bill. His first objection was that the Bill did not clarify the Law and Order situation, Police and Land Rights. He stated that:

> *"At least you should provide full authority in the hands of Chief Minister who will be an elected head of Delhi. Law and order situation is a main problem of Delhi. If he will have no power, then he cannot take any effective steps. How will he solve these problems if he does not have this department under his control."*

104. Mr. Khurana also observed that if there was any difference of opinion between the Lieutenant Governor of Delhi and the Delhi State Government regarding any issue, the issue would be referred to the Central Government for its final decision. However, it was not clear whether the decision of the Lieutenant Governor of Delhi would be valid till the decision of the Central Government was not received.

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105. Mr. Khurana then went on to suggest certain changes that should be incorporated in the Bill. His first request was that the Cabinet of State Government should be given the right to decide on all those matters which fell under its jurisdiction.

106. Mr. Khurana objected to the provision in the Bill that the proposed Delhi Legislative Assembly would have the right to make laws on certain issues such as N.G.O.'s, but these issues would nevertheless fall in the jurisdiction of the Central Government also and thus, it can also make laws regarding them. It implied that the Central Government would have the upper hand in the formulation of laws. The people of Delhi would not be able to take decisions. This, he believed, was undemocratic. According to him, it meant that the Central Government did not have faith in the people of Delhi.

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107. Mr. Khurana further pointed out that in the Vidhan Sabha, no bill having financial provisions could be passed without the recommendation of the Lieutenant-Governor. Every Bill is supposed to have certain shortcomings. Therefore, prior to passing the Bill, the sanction of the Lieutenant Governor will be obligatory for almost every Bill of Delhi State Assembly. This, according to him was not proper, because it was the President who would give the final clearance.

108. In his concluding remarks, Mr. Khurana stated that since there was no setup of elective representatives in Delhi, and the bureaucrats were ruling Delhi, therefore, elections in Delhi was their priority. It was for this reason that they were allowing the bill to be passed. His concluding statements were as under:-

> *"The elections in Delhi should be held immediately so that the elected representatives of Delhi can solve the problems of the Delhiites. For the purpose only they were supporting this Bill regarding powerless assembly. Our ultimate goal is to have a full statehood under whose umbrella all of our Department should be*

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covered and the Delhi should take their own decisions. Unless, our goal is achieved, our struggle will continue and till then we support the Bill which reinstates the democratic rights of Delhi."

109. Shri Sajjan Kumar then sought to reply to the concerns raised by Shri Madan Lal Khurana. He was in complete support of the Bill as it stood and was not in favour of the suggestions made by Mr. Khurana. He pointed out certain reasons why Delhi was not being given complete statehood. He observed that heavy losses were being borne by the Central Government for many years for providing services to the citizens of Delhi at a cheaper rate. He cited the example that Delhi people were getting bus services at cheaper rates, which were lower in comparison to the prevailing rates in Uttar Pradesh and Bihar. If Delhi had been granted statehood, they would have had to bear a heavy financial burden.

110. However, Mr. Kumar did seek to draw the attention of the Home Minister to certain other issues. He pointed out

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that previously three elected members of Delhi Metropolitan Council were nominated in the Delhi Development Authority. He asserted that the said system should be restored. Similarly, the members of the Legislative Assembly who would be the representatives of the people, should also be kept in the autonomous bodies, like DDA, DTC, DMS and DESU. He wanted this assurance from the Home Minister so that the problems of the people of Delhi could be resolved. He did not agree with the report submitted by Shri Balakrishnan which proposed to constitute nine corporations in place of Delhi Municipal Corporation. He was of the opinion that the Zonal Committees should be given more powers on the lines of statutory bodies but the Municipal Corporation should not be disturbed.

111. Shri Tara Chand Khandelwal spoke on the same lines as Shri Madan Lal Khurana. He commented that the Bill had been introduced as a result of strong demand made by the people of Delhi. The people expected that Delhi would be granted full statehood and it would have its Legislative

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Assembly with full powers in consonance with people's expectations with full powers. In this regard, he stated that the Bill was incomplete. His assertions were as under:-

> *"It is just like a toy. The Delhiites have been cheated. It is just like the case when a father puts Rs. 12 lakh in a coffer and informs his son that he has put the coffer in the latter's room but he would continue to keep the key with him. Though Delhi has been given an Assembly, all powers have been retained by the Centre."*

112. Mr. Khandelwal was apprehensive about whether this Bill would be able to achieve its objective since there was a serious lacuna in it, according to him. So far as development of Delhi is concerned, D.D.A was the backbone of Delhi. He believed that such an important body should be put under the control of the Delhi Administration.

113. Mr. Khandelwal further commented that the Law and Order situation in Delhi was deteriorating day by day. According to List I and II of the VIIth schedule of the

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Constitution, law and order is a State subject. The Lt. Governor of Arunachal Pradesh had been given this power by an amendment in Article 371 of the Constitution and on these lines, he believed that the said powers should be given to the Lt. Governor of Delhi also. Since he was a representative of the Central Government, by authorising the Lt. Governor to exercise these powers, the Central Government would have retained its respectful position and rights. As per him, this scheme should have been adopted for Delhi too, and the Chief Minister and Home Minister of Delhi would have been answerable to the people of Delhi.

114. Mr. Khandelwal raised an important point that a common man today does not know whether law and order is the subject of the Union or its Home Minister. Whenever the situation would deteriorate, though it is the Central Government's responsibility, the Chief Minister and the Home Minister of Delhi would be blamed. Thus, he requested the Home Minister to put DDA, Law and Order and utility services under the Delhi Administration.

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115. Shri Jagdish Tytler stood in complete support of the bill. He stated that prior to the introduction of the said bill, there were a number of problems facing Delhi. These included law and order, supply of water, electricity, organization of civil amenities, development of the city, rampant industrialization and consequent pollution etc. The primary requirement for ensuring peaceful co-existence and whole hearted attention to development was the maintenance of law and order and to design administrative systems which can deliver goods to the people of Delhi. He therefore urged that there should be complete review of the law and order machinery in the capital and, if so required, review of the Police Commissioner System itself.

116. He also put forth that all decisions taken, as envisaged in Section 41 Clause 3 [*quasi-judicial decisions taken by the Lt. Governor*], should take into consideration the views of the Chief Minister, and therefore, it must be stipulated that before taking any decision, L.G. should discuss the matter with the Chief Minister.

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117. Mr. Tytler furthered the contention of Shri Sajjan Kumar that three representatives of the Legislative Assembly of Delhi, who are so elected by the Members of the Assembly from among themselves by the method of proportional representation, should be allowed to be Members of the Delhi Development Authority, in order to ensure that land utilisation of this City State is done in a well-coordinated, manner reflective of the requirements of the people.

118. Mr. Tytler thus proposed that a new Section be added to the Act, which would provide that if the local bodies would not go to the jurisdiction of Government of NCT, then there should be a coordinating board under the Chairmanship of the Chief Minister, which shall include Chief Executive of all local authorities, autonomous bodies and various Ministries, as may be considered necessary on the Board.

119. Mr. Tytler also proposed that financial powers should be given to the Assembly, especially in those cases which

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did not require PIB (Public Investment Board) approval. The Assembly should also be given power to create Plan and Non-Plan posts upto the level of Additional Secretary. This would help in giving adequate promotional avenues to the technical personnel. Therefore, Delhi should have its own Public Works Department, just as Arunachal Pradesh had when it was a Union Territory. This, according to him, would also help in the expeditious completion of projects.

120. Shri L.K. Advani, Leader of the Opposition at that time, was in favour of granting statehood to Delhi. At the very outset, he sought to identify the unique situation of Delhi as the capital. He stated as follows:-

> *"Whichever Government comes to power, it will have to keep in mind that Delhi is India in its miniature. Delhi is mini India. In [S]pite of that if the Government ruling the entire country rules over Delhi it will neglect in its duties as a national Government and will do injustice to the people. Delhi has mostly been under the direct control of the Central Government. If the Central Government again puts it under its control it is the bureaucracy which will govern Delhi instead of people's representatives. This is the position of Delhi as on date.*

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We have been making demands for holding the elections for changing the situation. But I do not think that there will be any major change in the situation after passing this Bill. Of course, there will be some change. Therefore, my friend said that he is supporting the Bill under protest."

121. Mr. Advani then went on to raise certain objections, as to why the subjects of Police, Public Order and Land have been excluded from the jurisdiction of the Legislative Assembly. He stated that here in India, since the British Rule, an impression had been developed that the elected representatives were not capable of controlling the police force and the said set-up would definitely lead to a confused state of affairs. Anyone who is in control of the Centre, thinks in the same terms. He considered it the inherent shortcomings of the whole system as no one was prepared to believe in the public. He pointed out that this was not just the question of Delhi, but over-centralisation had created disturbances even in the Centre-State relations. He then went on to cite the Balakrishnan Committee report and cited the problems that had not been addressed by the said

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bill, namely the absence of nodal authorities, confusion as to the jurisdiction, and lack of adequate financial powers.

122. Shri B.L. Sharma Prem also supported the Bill, but criticised the unlimited rights being given to the Lt. Governor. It was not appropriate to provide limited rights to the elected Legislative Assembly. Provision of extraordinary rights to Lt. Governor is an insult to the basic concept of Democracy. He emphasised that the rights given to the Lt. Governor should be limited. The Lt. Governor should generally act on the advice of the Council of Ministers. He should exercise his discretionary powers only under specific circumstances.

123. Mr. Prem further proposed that all the subjects relating to electricity, water, sewerage and transport improvement should come under the purview of Legislative Assembly and the excessive number of authorities existing should be abolished. If the public facilities do not fall under the jurisdiction of Legislative Assembly, then how could an elected representative be made accountable to the subjects relating to the common man?

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124. Shri Frank Anthony was in support of the bill as it existed. He believed that an appropriate balance had been struck between the control of the Centre and the autonomy to the Delhi Assembly. He stated as under:-

> *"Delhi is not an ordinary city. It does not denote only the capital of India. It denotes the capital of the Sub-Continent. That is why the Home Minister was bound to strike a balance and I feel that he has struck a good balance indeed. We cannot have splintering as suggested by Mr. Advani. If you have a full democracy, as suggested by him, where everybody will vote and all of them will be in the Council of Ministers, each minister in charge of a separate ministry, then you will not have a capital and you will have further splintering and further destruction of India as a nation... What I am also afraid of is, if the Centre does not have the power that has been there then you may have the Legislative Council and you may have the Chief Ministers questioning the President of India."*

125. Shri S.B. Chavan, who was the then Home Minister concluded the debate and sought to answer all the questions that had been raised. He provided reasons for

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granting partial autonomy to the Government of Delhi and stated that:-

> *"Ultimately, we cannot possibly forget that this is a national capital and that is why, irrespective of the resources, why is it that the Government of India is spending huge amount of money on different aspects of the development of Delhi? That is because of the fact that after all, this is a national capital and all the amenities which have been provided for the Delhi city will have to be of a standard, then people are bound to feel happy by comparing the, development that is obtained in different capitals in different countries. So, from that point of view, while all the arrangements have to be made for a democratic set-up, there should be no inhibition because of the resources..... The Central Government will have to intervene in the matter to see that all the amenities are provided in such a manner that not only the people of Delhi city, but all those who come from different parts of India and also from abroad, should be able to feel happy by comparing the city of Delhi with any other city having comparable population in their areas. That is why, it has become absolutely necessary that we have to reconcile the two aspects. As a result, powers which are in fact, necessary to be given, have been given to the Assembly."*

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126. Mr. Chavan referred to Mr. Khurana's concern that in case of conflict between the Council of Ministers and the Lt. Governor, the matter should be left to the Chief Minister of Delhi. He countered this by pointing out that if there is a conflict between the Council of Ministers and the Lt. Governor, the matter would be referred to the President. Ultimately, it is the President who would have the responsibility so far as the Union Territories are concerned. But, it may take some time for the President to take a final decision in the matter. In the interim period, which would be the authority entrusted with this kind of responsibility is the question to be considered. This issue, he believed, would be taken care of in the Rules of Business which every Ministry has and the same would be provided for.

127. Mr. Chavan further suggested that there would be some kind of an instruction wherein the Lt. Governor, while exercising this authority, would have to consult the

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Government of India, so that all aspects of the question are available to the Central Government before he takes a very quick interim decision in the matter, since the President would ultimately be taking a final decision. But, only if it is inevitable, would the matter go to the Lt. Governor, or for that matter, to the Government of India.

128. Responding to the concerns regarding Law and Order and all other matters, Mr. Chavan stated that, in fact, almost all the Departments were with the President. Post the 69th Constitutional Amendment, only three subjects had been left with the President. Rest of the subjects had been given to the Govt. of Delhi. He believed that a convention would have to be built up in this regard on the basis of what was there in the Constitution and what was there in the Bill. His comments were as under:-

> *"So far as I am concerned, I feel that most of the things can be done if a healthy convention is built up and, l am sure, that the Delhi Assembly should be able to set an example for all other Assemblies to follow, and claim that we have been able to build a very healthy convention in Delhi, though it is not a very big*

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Assembly, having all the powers with the conventions you may be building, it would be much better than other Assemblies which have all the powers. But I do not want to say anything about what is going on there."

129. Mr. Chavan also pointed out that the power of giving directions is also not limited to the Union Territory alone. In the Constitution, there also exists power of giving direction to the State Government, which the Government of India has never invoked. According to him, the power existed, but if they would be violated, then, in the Home Ministry, they would have hardly had any other option but to invoke Article 356.

130. As regards the Corporations, Mr. Chavan stated that they had proposed to take up this issue on an expeditious basis and, if possible, they would come before the Parliament with a legislation so that the set up of the different kinds of Corporations that would be created in Delhi, the NDMC and Delhi Municipal Corporations, Power

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corporations, Water Corporation, all other Corporations that we have, would be decided. As far as the relationship between the Assembly and the different corporations was concerned, he stated that the corporations would definitely be autonomous, but at the same time, whether it was proper or improper to give representation to Assembly members was a point which would have to be considered by the Government, and thereafter, the entire matter was going to come up before the House, so there should be nothing to worry on that score.

131. With this, the debate on the Government of National Capital Territory Bill, 1991 was concluded. Only two amendments were incorporated into the bill. These were:-

a. Every reference in the act to the 'National Capital Territory' was amended to 'National Capital Territory of Delhi'.

b. Clause 49A was inserted in the bill (*Section 50 of the present Act*) which stated as follows:-

"49A.(1) Every order made by the President under Article 239AB shall expire at the end of one year from

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the date of issue of the order and the provisions of clauses (2) and (3) of article 356 shall, so far as may be, apply to such order as they apply to a Proclamation issued under clause (1) of article 356.

(2) Notwithstanding anything contained in sub-section (1) the President may extend the duration of the aforesaid order for a further period not exceeding two years from the date of expiry of the order under sub-section (1) subject to the condition that every extension at the said order for any period beyond the expiration of one year shall be approved by resolutions by both Houses of Parliament"

132. Although several concerns were raised regarding the Bill, there was, in truth, no opposition to the bill. The Bill was passed on the Home Minister's assurance that all the issues raised would be dealt with by the Central Government in the future. As regards the law and order situation, it was put forth that the issue could be dealt with by bringing about a convention in this regard between the Central Government and the Delhi Government through their mutual co-operation.

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133. The Government of National Capital Territory of Delhi Bill was passed by both Houses of Parliament and received the assent of the President on 2nd January, 1992. The said Act 1 of 1992 was published in the Official Gazette on 31st January, 1992 appointing 1st, February 1992 as the date under sub-section (2) of Section 1 of the Act on which the Act was to come into force.

134. It is pertinent to refer to a few provisions of the Government of National Capital Territory of Delhi Act, 1992. The said act has been divided into 5 parts. Part I provides the Short Title and Commencement, and definitions. Part II provides provisions with respect to the Legislative Assembly and contains provisions starting from Section 3 to Section 37 and is pertaining to Legislative Assembly and its composition; qualifications for membership of Legislative Assembly; duration of Legislative Assembly; sessions of Legislative Assembly prorogation and dissolution; Speaker and Deputy Speaker of Legislative Assembly; speaker or Deputy Speaker are not to preside while a resolution for his removal from office is under consideration; Right of

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Lieutenant Governor to address and send message to Legislative Assembly; Special address by the Lieutenant Governor; Rights of Ministers as respects Legislative Assembly; oath and affirmation by members; Voting in assembly, Power of assembly to act notwithstanding vacancies and quorum; vacation of seats; Disqualifications for membership; Disqualification on ground of defection; penalty for sitting and voting before making oath of affirmation or when not qualified or when Disqualified; Powers, Privileges, etc. of members; salaries and allowances of members; exemption of property of the Union from taxation; restrictions on the laws passed by Legislative Assembly with respect to certain matters; special provisions as to Financial Bills; procedure as to lapsing of Bills; assent to Bills; Bills reserved for consideration; Requirement as to sanction etc.; annual financial statement; procedure in Legislative Assembly with respect to estimates; Appropriation Bills; Supplementary, additional or excess grants; votes on account; authorisation of expenditure pending its sanction by Legislative Assembly; rules of

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procedure; official language or languages of the Capital and language or languages to be used in the Legislative Assembly; language to be used for Bills, Act etc.; restriction on discussion in the Legislative Assembly; and, Courts not to enquire into proceedings of the Legislative Assembly; Part III deals with the delimitation of constituencies (section 38 to section 40). Part IV deals with certain provisions relating to Lieutenant Governor and ministers and provides for matters in which Lieutenant Governor is to act in his discretion; advice by Ministers; other provisions as to Ministers; conduct of business; and duties of Chief Minister as regards the furnishing of information to the Lieutenant Governor, etc. (Sections 41 to 45). The last part of the Act provides certain Miscellaneous and Transitional provisions relating to the Consolidated Fund of the Capital; public account of the Capital and money that is credited to it; Contingency Fund for the Capital; borrowing upon the security of the Consolidated Fund of the Capital; form of accounts of the Capital; audit reports; relation of Lieutenant Governor and his Ministers to the President; Period of order

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made under article 239 AB and approval thereof by the Parliament; authorisation of expenditure by the President; Contracts and suits; power of the President to remove difficulties; and, laying of rules before Legislative Assembly etc. (Sections 46 to 56) The schedule appended to the Act provides the forms of oaths and affirmations pertaining to sections 4, 12 and 43.

135. Certain provisions of the said Act are to be considered at this stage. Section 22 provides that a Bill or Amendment shall not be introduced into, or moved in, the Legislative Assembly except on the recommendation of the Lieutenant Governor, if such Bill or amendment makes provision for any of the matters specified from (a) to (e) . This sub-section (2) is similar to clause 2 of Article 199. Sub-section (3) provides that a Bill which, if enacted and brought into operation, would involve expenditure from the Consolidated Fund of India shall not be passed by the Legislative Assembly unless the Lieutenant Governor has recommended to that Assembly the consideration of the Bill. This provision

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will be considered fully a little later, when one of the question relating to this provision is dealt with.

136. Section 24 of the Act provides that when a Bill has been passed by the Legislative Assembly it shall be presented to the Lieutenant Governor and the Lieutenant Governor shall either declare that he assents to the Bill or that he withholds assent or that he reserves the Bill for the consideration of the President. Sub-section (1) of section 24 is verbatim similar to the 1st clause of Article 200 of the Constitution. The difference lies in the proviso which states that in case the Bill is returned to the house by the Lieutenant Governor with certain suggestions, the Assembly will reconsider the Bill and if the Bill is passed with or without amendment and presented to the Lieutenant Governor for assent, the Lieutenant Governor shall declare either that he assents to the bill or that he reserves the Bill for the consideration of the President. Whereas, in the proviso to Article 200, if the bill is passed again by the house or houses with or without the amendment and presented to the Governor for assent, the Governor shall not

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withhold assent therefrom. Even the 2nd proviso is different from the 2nd proviso of Article 200. The 2nd proviso of section 24 provides that the Lieutenant Governor shall not assent to, but shall reserve for the consideration of the President, any Bill which, –

a. in the opinion of the Lieutenant Governor would, if it became law, so derogate from the powers of the High Court as to endanger the position which the court is, by the Constitution, designed to fill; or

b. the President may, by order, direct to be reserved for his consideration; or

c. relates to matters referred to in sub – section (5) of section 7 or section 19 or section 34 or sub – section (3) of Section 43.

137. Section 25 provides that when a Bill is reserved by the Lieutenant Governor for the consideration of the President, the President shall declare either that he assents to the Bill or that he withholds assent therefrom. The provisions contained in Section 25 are similar to Article 201 of the

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Constitution. Section 27 contains provisions for an annual financial statement and is similar to Article 202. It is to be noted that sub-clause (f) of clause 3 of Article 202, deals with any other expenditure declared by the Constitution, or by the Legislature of the State by law to be charged, whereas, sub-section 3 (f) of Section 27 provides that any other expenditure declared by the Constitution or by a law made by Parliament is or by the Legislative Assembly to be so charged. Thus, it is to be seen, that in a similar provision with reference to a State the reference has been made only to the Legislative Assembly of the State, whereas in respect of the National Capital Territory the reference has been made to both the Parliament as well as the Legislative Assembly. Section 28, 29, 30 and 31 contain similar provisions to those contained in Article 203, 204, 205 and 206 of the Constitution in respect of the States.

138. Section 32 provides for authorisation of expenditure pending its sanction by the Legislative Assembly from the Consolidated Fund of the Capital by the Lieutenant Governor.

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139. Section 33 provides that the Legislative Assembly may make rules for regulating, subject to the provisions of this Act, its procedure and the conduct of its business:

Provided that the Lieutenant Governor shall, after consultation with the Speaker of the Legislative Assembly and with the approval of the President, make rules –

(a) for securing the timely completion of financial business;

(b) for regulating the procedure of, and the conduct of business in, the Legislative Assembly in relation to any financial matter or to any Bill for the appropriation of moneys out of the Consolidated Fund of the Capital;

(c) For prohibiting the discussion of, or the asking of questions on, any matter which affects the discharge of the functions of the Lieutenant Governor insofar as he is required by or under this Act or any law to act in his discretion.

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140. Section 41 provides that 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 to exercise any judicial or quasi-judicial functions.

141. Section 42 provides that the question of whether any, and if so, what advice was tendered by the ministers to the Lieutenant Governor shall not be enquired into before any court. This provision is similar to clause 3 of Article 163 of the Constitution.

142. Section 44 deals with the conduct of business. The said section provides that the President shall make rules:

(a) for the allocation of business to the Ministers insofar as it is business with respect to which the

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Lieutenant Governor is required to act on the aid and advice of his Council of Ministers; and

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

143. It is to be noticed here that sub-section (1) of Section 44 is different from clause (3) of Article 166, insofar as section 44 refers to the President, whereas, clause (3) refers to the Governor. Sub-section (2) of Section 44 is also different from clause (1) of Article 166. Sub-section (2) provides that, save as otherwise provided in this Act, all executive actions of the Lieutenant Governor, whether taken on the advice of his Ministers or otherwise, shall be expressed to be taken in the name of the Lieutenant Governor. Sub-section (3) of section 44 is similar to clause (2) of Article 166.

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144. Section 45 of the Act provides it shall be the duty of the Chief Minister to furnish certain information to the Lieutenant Governor. The section provides that it shall be the duty of the Chief Minister:

(a) to communicate to the Lieutenant Governor all decisions of the Council of Ministers relating to the administration of the affairs of the Capital and proposals for legislation;

(b) to furnish such information relating to the administration of the affairs of the Capital and proposals for legislation as Lieutenant Governor may call for; and

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

145. Section 47A provides that the executive power of the Union extends to borrowing upon the security of the

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Consolidated Fund of the Capital, within such limits, if any, as may from time to time be fixed by the Parliament by law and to the giving of guarantee within such limits, if any, as may be so fixed. It further provides that the powers exercisable by the Government of India under this sub-section shall also be exercisable by the Lieutenant Governor subject to such conditions, if any, as the Government of India thinks fit to impose. Section 47B provides that the accounts of the Capital shall be kept in such form as the Lieutenant Governor may, after obtaining advice of the Comptoller and Auditor General of India and with the approval of the President, prescribe by rules.

146. Section 49 provides for the relationship between the Lieutenant Governor and his Ministers and the President. The said section provides, that notwithstanding anything in the Act, the Lieutenant Governor and his Council of Ministers shall be under the general control of, and comply with such particular directions, if any, as may from time to time be given by the President. Section 49 leaves no

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semblance of doubt as to the powers of the President in respect of the National Capital Territory.

147. Section 52 provides that:

(a) all contracts in connection with the administration of the Capital are contracts made in the exercise of the executive power of the Union; and

(b) all suits and proceedings in connection with the administration of the Capital shall be instituted by or against the Government of India.

148. In exercise of the powers conferred by Section 44 of the Government of National Capital Territory of Delhi Act, 1991, the President framed the Conduct of Business Rules. Rule 3 provides that all contracts in connection with the administration of the Capital shall be expressed to be made by the President and shall be executed on behalf of the President by such person and in such manner as he may direct or authorise under Article 299 of the Constitution. Article 299 provides that all contracts made in the exercise of the executive power of the Union or of a State shall be

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expressed to be made by the President or by the Governor of the State, as the case may be, and all such contracts and all assurances of property made in the exercise of that power shall be executed on behalf of the President or the Governor by such persons and in such manner as he may direct or authorise.

149. Chapter III of the Business Rules deals with disposal of business allocated amongst Ministers. Chapter IV of the Conduct of Business Rules deals with disposal of business relating to Lieutenant Governor's executive functions. The said Rules provide that the Lieutenant Governor shall in respect of matters connected with public order, police and land exercises his executive functions to the extent delegated to him by the President in consultation with the Chief Minister, if it is so provided under any order issued by the President under Article 239 of the Constitution, provided further that standing orders shall not be inconsistent with the Rules. Rule 46 provides that with respect to persons serving in connection with the administration of National Capital Territory of Delhi, the Lieutenant Governor shall

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exercise such powers and perform such functions as may be entrusted to him under the provisions of the Rules and orders regulating the condition of service of such persons or by any other order of the President in consultation with the Chief Minister, if it is so provided under any order issued by the President under Article 239 of the Constitution. Rule 47 provides that for matters in respect of which no specific provision has been made in the Rules, the Lieutenant Governor shall consult the Central Government before exercising his powers or discharging his functions in respect of such matter.

150. Chapter V of the Conduct of Business Rules deals with the reference of the matter to the Central Government. Rule 49 provides that in case of difference of opinion between the Lieutenant Governor and a Minister in regard to any matter, the Lieutenant Governor shall endeavour to settle by discussion any point on which such difference of opinion has arisen. Should the difference of opinion persist, the Lieutenant Governor may direct that the matter be referred to the Council. Rule 50 provides that in case of a difference

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of opinion between the Lieutenant Governor and the Council with regard to any matter, the Lieutenant Governor shall refer it to the Central Government for the decision of the President and shall act according to the decision of the President. Rule 51 provides that where a case is referred to the Central Government under Rule 50, the Lieutenant Governor shall be competent to direct that action to 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. Rule 52 provides that where a direction has been given by the Lieutenant Governor pursuant to Rule 51, the Minister concerned shall take action to give effect to such direction.

151. Rule 55 of the conduct of business rules provides that the Lieutenant Governor shall refer to the Central Government every legislative proposal, which:

(a) if introduced in a Bill form and enacted by the Legislative Assembly, is required to be reserved for

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the consideration of the President under the proviso to sub-clause (c) of clause (3) of Article 239 AA or, as the case may be, under the 2nd proviso to section 24 of the Act;

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

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

152. The said Rules further provide that subject to any instructions which may from time to time be issued by the Central Government, the Lieutenant Governor shall make a prior reference to the Central Government in the Ministry of Home Affairs or to the appropriate Ministry with a copy to the Ministry of Home Affairs in respect of the following matters:

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

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

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

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

153. Rule 56 of the Conduct of Business Rules provides that when a matter has been referred by the Lieutenant Governor to the Central Government under these rules, further action thereon shall not be taken except in accordance with the decision of the Central Government.

154. At this juncture, it would also be pertinent to consider the manual of the Ministry of Parliamentary Affairs, Chapter 9

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of which deals with legislation. Para 9.26.1 deals with legislation even in respect of Union Territories. It provides that Article 246 (4) of the Constitution vests the Parliament with powers to legislate on any matter in relation to the Union Territories listed in the First Schedule of the Constitution. Para 9.26.2 provides that of the various Union Territories:

(a) ...

(b) ...

(c) The National Capital Territory of Delhi has a Legislative Assembly under Article 239 AA of the Constitution of India read with the Government of National Capital Territory of Delhi Act, 1991 with powers to legislate on matters as specified in List II(State List) or in List III (Concurrent List) insofar as any such matter is applicable to Union Territories except matters with respect to entries 1, 2 and 18 of the State List and entries 64, 65 and 66

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of that list insofar as they relate to the said entries 1, 2 and 18.

155. Para 9.29.1 of the abovesaid manual reiterates the provisions contained in Rule 55 of Conduct of Business Rule referred to hereinabove.

Meaning and Concept of "Federalism"

156. To appreciate the issue under consideration, it is necessary to examine the concept of 'Federalism', so as to understand the spheres within which the Union and States are envisaged as operating in the Indian Federation under the Scheme of the Constituition.

157. An examination of how a federal government must function has to begin with first understanding the term "*federalism.*" Generally, the term signifies that there exists an association of states which has been formed for certain common purposes in which the member states retain a considerable measure of their independence. Therefore, the existence of

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more than one center of power is the basic assumption of any 'federal' system.

158. There are several definitions of federalism which can be referred to for an understanding of the meaning of the term 'federal' itself; some of which have been extracted as below:

> *"Of or relating to a system of associated governments with a vertical division of governments into national and regional components having different responsibilities; esp., of or relating to the national government of the United States"*—**Bryan A Garner, Black's Law Dictionary, 20th Edition.**

> *"Federalism is 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 if 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.*

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Federalism, therefore, essentially implies demarcation of powers in a federal compact." - **Wharton's Law Lexicon, 15th Edn., 2009.**

"A general theory of government that recognizes power at both the central level and the state and local level."- **P. Ramanathan Aiyar, The Major Law Lexicon, 4th Edn.,2010.**

159. The intellectual debate about modern federalism – its meaning and significance – can be traced back to the late eighteenth century. The peculiar circumstances that surrounded the shift from confederation to federation in the United States of America in the years between 1781 and 1789 shaped and moulded the nature of the subsequent intellectual debate in a way that had far-reaching consequences for understanding one of the most important historical innovations in modern government and politics. The American federal model established in 1789 was based upon a set of core principles that were consciously imitated by others, and as a consequence, it helped to spark an enduring analytical debate about what it meant to be

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'federal'. In this sense the American federal precedent corresponded simultaneously to both theory and practice.

160. John Stuart Mill, one of the first thinkers to undertake a study on governance, had propounded that for a federation to work successfully, there should not be *any one state* so much more powerful than the rest as to be capable of vying in strength with many of them combined. If there be such a one, and only one, it will insist on being master of the joint deliberations: if there be two, they will be irresistible when they agree; and whenever they differ, everything will be decided by a struggle for ascendancy between the rivals.[2]

161. According to Dicey, the two basic preconditions for the formation of federations were: *first*, 'a body of countries ... so closely connected by locality, by history, by race, or the like, as to be capable of bearing, in the eyes of their inhabitants, an impress of common nationality'; and, *second*, the existence of 'a very peculiar state of sentiment among the inhabitants of the countries which it is proposed to unite'.

[2] J.S. Mill, *Utilitarianism, On Liberty and Considerations on Representative Government*, ed. H.B. Acton (London: J.M. Dent & Sons, 1972)

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'They must', he declared, 'desire union and must not desire unity'.[3] A federal state was 'a political contrivance intended to reconcile national unity and power with the maintenance of 'state rights'.

162. Henry Sidgwick similarly identified three criteria which formed the concept of federalism:

1. The autonomy of the constituent units in a federation must be considerable in extent.
2. When the federality is well marked, the compositeness of the state will find expression somehow in the structure of the common government.
3. If the federal character of the polity is stable, the constitutional process of changing the constitutional division of powers between central and local governments must be determined in harmony with the principle of federalism.[4]

163. It was the publication of Kenneth Wheare's classic, *Federal Government*, in 1946 that launched the contemporary

[3] A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (London: Macmillan & Co. 1950), 9th edn.
[4] H. Sidgwick, *The Elements of Politics* (London: Macmillan & Co. 1891)

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intellectual debate. Following in the familiar English liberal intellectual tradition of Mill, Freeman, Bryce and Dicey, the thrust of Wheare's contribution was couched very much in legal and institutional terms. His 'federal principle' was defined as 'the method of dividing powers so that the general and regional governments are each within a sphere, coordinate and independent'.[5] Accordingly the criterion of the federal principle – its hallmark – was not so much that federal and constituent State Governments operated directly upon the citizens, but whether or not the powers of government were divided between coordinate, independent authorities. He wrote,

> *"The test which I apply is then simply this. Does a system of Government embody predominantly a division of powers between the general and regional authorities, each of which, in its own sphere, is coordinate with the others and independent of them? If so the government is federal."*

164. Wheare acknowledged that this definition was rigid and it is true that this rigidity extended to the point where he could

[5] K.C. Wheare, *Federal Government* (Oxford: Oxford University Press, 1963), 4th edn, 10

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confidently claim that *'any definition of federal government which failed to include the United States would be ... condemned as unreal'*.

165. Federal models can be distinguished along several lines. Some systems are classic state federations like Argentina, others *sui generis* entities like the European Union. Federations range from highly centralized systems like Italy to marginally integrated ones like The Kingdom of the Netherlands. Some countries have "integrative" federal systems that resulted from the coming together of previously more or less sovereign states, like Switzerland, others constitute "devolutionary" systems that result from the decentralization of previously unified nations, like Belgium. There are "vertical" models like Germany in which executive, legislative, or judicial powers are vertically integrated, as well as "horizontal" models like the United States in which each level of government makes, executes, and adjudicates its own laws separately. There are federations in which all component states are constitutionally equal, like Mexico, and asymmetric systems in which some components receive

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greater powers than others, like Malaysia. And some countries formally acknowledge their federal nature, like Brazil, while others view themselves as by and large unitary, like the United Kingdom.[6]

166. Thus, Federalism essentially entails a distribution of powers between the central authority and the provincial/regional authorities. It is a means of governing polity that grants partial autonomy to geographically defined subdivisions of the polity.[7] These sub-units must exercise exclusive jurisdiction over some set of issues; that is, there must be some types of decisions that are reserved to the subsidiary governmental units and that the Central Government may not displace or countermand.[8] However, in actual practice, every federal country has moulded the structure of federalism, as per its need. It is this distribution of powers that forms the core distinction between different models of federal governments worldwide. Nations have deviated significantly from the 'pure federalism' as advocated by the

[6] Daniel Halberstam Mathias Reimann *Ed.*, Federalism and Legal Unification, 2014.
[7] William Livingston, Federalism and Constitutional Change (Oxford: Clarendon, 1956)
[8] Malcolm Feeley, Edward Rubin, Federalism: Political Identity and Tragic Compromise, 2011

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United States. What has largely emerged today is a concept of "cooperative governance".

'Asymmetries' in federal governments

167. *'Asymmetrical federalism'* or *'asymmetric federalism'* is a system of federal governance when there is uneven distribution of powers, where some states/provinces have more autonomy than others, although they have the same constitutional status. The division of powers between center and state is not symmetric. As a result, it is frequently proposed as a solution to the dissatisfaction that arises when one or two constituent units feel significantly different needs from the others, as the result of an ethnic, linguistic or cultural difference. Indian federalism is a prominent illustration of a system that follows asymmetric federalism.[9] This is evident from the various constitutional provisions, such as the special provisions for Jammu and Kashmir; representation in the Lok Sabha based on the size and population of states etc.

[9] Vikram Singh, Public Administration Dictionary 2012

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168. In the search for institutional designs aimed at transforming ethnic conflicts, federalist structures are regarded as the best institutional option. The ideal of federalism is for all regions to have equal power and authority, with their relationships with the central political apparatus following identical rules. However, asymmetric federalist systems are frequently designed to overcome ethnic conflicts. Territorial autonomy is an asymmetrical form of federalism and represents a special case in which one region is favoured vis-à-vis others. The aim of territorial autonomy is to allow ethnic and other groups to themselves resolve those matters that are of particular interest to them, while the interests of society as a whole are managed at a higher level. A special variant of asymmetric structures are the reservations for indigenous groups in the USA, Canada, Australia, and Scandinavia.

Indian Federalism

169. The Indian Constitution possesses many of the essential characteristics, if not all, of a Federal Constitution. As rightly explained by Seervai in his chapter on 'Federalism',

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in order to be called 'Federal' it is not necessary that the Constitution should adopt the federal principle *completely*. It is sufficient that the federal principle is predominant in the Constitution.

170. Prof. Wheare, however, pointed out that the Indian Constitutional framework is such that the very existence of states depends on the Parliament of the Union. Further, he pointed out, that in addition to emergency powers left in the hands of the Union, there exists other similar powers of distribution and intervention and direction in the Constitution which reduce the independence of States. Therefore, he was of the opinion that,

> *"It seems clear that after allowing for Federal features of the India Union, it can only be concluded that the constitution is only "quasi-federal."*

171. The framers of the Indian Constitution were fully aware that India had unique and peculiar problems that had not confronted other federations in history. Therefore, they pursued the policy of pick and choose to see what would suit (India) best. There were two options open before the

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constituent assembly. *First*, to adopt a unitary system like that of the British model, which India had been experiencing for a considerable part of history; or, *second*, was to choose a federal polity in which there was a division of powers between the Center and the States. The assembly was, however, nearly unanimous in favour of the choice of a federal structure.

172. Shri T.T. Krishnamachari, during debates in the Constituent Assembly on the Draft Constitution, had stated as follows:

> *"I would ask my honourable friend to apply a very simple test so far as this Constitution is concerned to find out whether it is federal or not. The simple question I have got from the German school of political philosophy is that the first criterion is that the State must exercise compulsive power in the enforcement of a given political order, the second is that these powers must be regularly exercised over all the inhabitants of a given territory; and the third is the most important and that is that the activity of the State must not be completely circumscribed by orders handed down for execution by the superior unit. The important words are 'must not be completely circumscribed', which envisages*

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some powers of the State are bound to be circumscribed by the exercise of federal authority. Having all these factors in view, I will urge that our Constitution is a federal Constitution. I urge that our Constitution is one in which we have given power to the Units which are both substantial and significant in the legislative sphere and in the executive sphere."

173. In this context Dr. B R Ambedkar, speaking in the constituent assembly, had explained the position in the following words:

"There is only one point of Constitutional import to which I propose to make a reference. A serious complaint is made on the ground that there is too much of centralization and that the States have been reduced to Municipalities. It is clear that this view is not only an exaggeration, but is also founded on a misunderstanding of what exactly the Constitution contrives to do. As to the relation between the center and the States, it is necessary to bear in mind the fundamental principle on which it rests. The basic principle of Federalism is that the legislative and executive authority is partitioned between the center and the States not by any law to be made by the center

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but the Constitution itself. This is what the Constitution does. The States, under our Constitution, are in no way dependent upon the center for their legislative or executive authority. The center and the States are co-equal in this matter. It is difficult to see how such a Constitution can be called centralism. It may be that the Constitution assigns to the center too large a field for the operation of its legislative and executive authority than is to be found in any other Federal Constitution. It may be that the residuary powers are given to the center and not to the States. But these features do not form the essence of federalism. The chief mark of federalism, as I said lies in the partition of the legislative and executive authority between the center and the Units by the Constitution. This is the principle embodied in our Constitution."

174. The decisions of the Supreme Court of India contain many references to the term "*quasi-federal.*" But, two premises have been definitively laid down by the Supreme Court with regard to the nature of the Indian Constitution, i.e. *first*, that the nature of federalism in the Indian Constitution is no longer *res integra* and that there can be no quarrel with the proposition that the Indian model is broadly based on

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the federal form of government.[10] *Second*, is that the federal principle forms a part of the basic structure of our constitution. [11]

175. The real test for a federation was laid down by Mr. Justice Subba Rao in his minority opinion in *State of West Bengal v. Union of India,*[12] where it was held by him that the real test is whether the said constitution provides for division of powers in such a way that the general and regional governments are each within their own spheres substantially independent of each other. This test was reasserted by the Supreme Court in the *Kesavananda Bharti case*, and it was held that the Constitution of India has all essential elements of a federation (in the sense of federalism being the distribution of powers between the federation or the Union and States or the provinces).

176. Beg C.J. dealing with the Indian Constitution in *State of Rajasthan v. Union of India*[13] observed:

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[10] *Kuldip Nayyar v. Union of India*, 2006 (7) SCC 1.
[11] *S R Bommai v. Union of India*, 1994 (3) SCC 1; *Kesavananda Bharti v. Union of India*, 1973 (4) SCC 225.
[12] *State of West Bengal v. Union of India*, AIR 1963 SC 1241.
[13] *Rajasthan v. Union of India*, AIR 1977 SC 1361.

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> *"In a sense therefore, the Indian Union is federal. But, the extent of federalism is largely watered down by the needs of progress and development of a country which has to be nationally integrated; politically and economically co-ordinated, and socially, intellectually and spiritually uplifted. In such a system, the States cannot stand in the way of legitimate and comprehensively planned development of the country in the manner directed by the Central Government."*

Asymmetry in India's Federal structure (Union Territories)

177. Ronald Watts makes a theoretically fruitful distinction between political asymmetry, which exists in every federation as to the geographical and demographic sizes of the units, and constitutional asymmetry, which refers specifically to differences in the status or legislative and executive powers assigned by the Constitution to different units.[14] India is characterized by both these asymmetries. One glaring example of political asymmetry in India is that States are represented in the Rajya Sabha on the basis of

[14] Ronald Watts, Models of Federal Power Sharing, (2008:127)

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their population. Further, literature on Indian federalism has recently been applying the concept of constitutional asymmetry under which states of Jammu and Kashmir, Nagaland and Mizoram for instance, enjoy certain special position and power in the Constitution that is not enjoyed by others.

178. Besides these asymmetries, there are some sub-state asymmetries at the state level in the Indian Constitution that may be synoptically noted here. Indian Federalism includes within its ambit special kinds of federating units that are called Union Territories. These areas were either too small to be states or too difficult to merge with neighboring states on account of cultural disputes, inter state disputes, specific needs of National Capital or far-flung isolated location.

179. In this connection, it is necessary to remember that all the Union Territories are not situated alike.[15] The categories of Union Territories are as follows:

[15] NDMC v. State of Punjab, AIR 1997 SC 2847

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a) There are certain Union Territories (i.e., Andaman and Nicobar Islands and Chandigarh) for which have no legislature at all-as of today;

b) There is a second category of Union Territories covered by Article 239-A (which was initially applied to Himachal Pradesh, Manipur, Tripura, Goa, Daman and Diu and Pondicherry; now, only Pondicherry survives in this category, the rest having acquired Statehood), which have legislatures. The Parliament can, by law, provide for Legislatures for these States and confer upon the Legislature such powers, as it may think appropriate. The Parliament had created legislatures for these Union Territories under the "The Government of India Territories Act, 1963", empowering them to make laws with respect to matters in List-II and List-III, but subject to its over-riding power;

c) The third and a unique category is Delhi. It had no legislature from November 1, 1956, until one

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was created under and by virtue of the Constitution 69th (Amendment) Act, 1991 which introduced Article 239-AA. It is pertinent to note that Delhi is the only Union Territory for which the Constitution, while providing for creation of Legislature, has delineated the sphere of legislative powers to be exercised by the Union and the Legislature.

180. Therefore, in the case of Union Territories we can see that three asymmetrical units exist. This asymmetry raises an important question of how the relationship between the Union and the National Capital Territory of Delhi is to be assessed within the constitutional framework, given its unique status. A critical determination that must be made in this context would be whether the traditional constitutional principles governing the Union and State relationship can equally apply to the National Capital Territory of Delhi?

CLASSIC CONCEPT OF "STATE"

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181. The following is the concept of "State" as envisaged by Aristotle, Ancient Hindu Law, Dharmasastras and International Law.

Aristotle

182. In simple terms, Aristotle stated that a state is constituted of citizens who come together as a community in order to lead a virtuous life. In his view, a state emerges from a family. When several families come closer they form a village and several villages constitute together to form a city State. The underlying basis of a city state is a mutual political partnership to govern oneself in order to lead a virtuous life. He defines a city state in his seminal work, *'Politics'* as follows:

> *"A city state is a partnership of citizens in a system of government. Every city state is a kind of partnership, and every partnership is created for the sake of something good. Political partnership, which is called the city state, aims at the most authoritative good of all. A city state comes into being for the sake of living, but it exists for the sake of living well."*

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183. Clearly, Aristotle envisaged that, like communities, the state must exist for an end, and the end of the state is the highest good for man, which, for Aristotle, meant the life of virtue and contemplation. It may be noted that the above concept of city state was with respect to Athens. It may also be noted that the Athenian State cannot be equated with a representative democracy of modern times. However, the idea of a participative citizenry residing within the Athenian state was very much present therein. The Stanford Encyclopedia of Philosophy describes the same in the following words:

> *"In Athens, for example, citizens had the right to attend the assembly, the council, and other bodies, or to sit on juries. The Athenian system differed from a modern representative democracy in that the citizens were more directly involved in governing."*[16]

184. Although, Aristotle does not define the State in so many words, he defines a 'citizen' of his city state, which in itself carries the idea of an individual who participates in the

[16] See < http://plato.stanford.edu/entries/aristotle-politics/#ConCit> last accessed on 13th March, 2015 at 18:27 Hrs.

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functioning of the State 'politically'. The following passage from 'Politics III' throws valuable light on the same:

> *"A citizen defined in simple terms is someone who can participate in judging [that is serve as a juror in the court system] and in governing that is, serve in public office, which here means not just magistracies but also serving in the assembly and on the council in systems of governance that have these institutions.*[17]

185. The citizen in common parlance is the person who has a share in ruling and being ruled; in the best system of government a citizen is both able and willing to rule and be ruled in accordance with a life lived with excellence as its aim.[18]

186. The task of citizens is the preservation of the partnership, that is, their system of government."[19]

187. Thus, an Aristotelian city-state, although being different from a representative democracy, envisaged a city-state wherein the citizenry participated in the governance. Thus, the public decisions taken in an Aristotelian city-state

[17] *Politics III* 1275a 22-23
[18] *Politics III* 1283b: 42-1284a4
[19] *Politics III* 1276b: 28-29:

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reflected the will of the people who constituted the city-state. Modern times have seen the emergence of representative democracies wherein, although the people do not directly participate in the public decisions, yet they do participate through their elected representatives and have chosen to be governed by the laws made by those elected representatives.

Ancient Hindu Law: Dharmasastras

188. Noted scholar PV Kane in his magnum opus, *'Dharmasastras'*, after referring to the Manu Smriti and other ancients texts of Hindu Law defined 'state' in the following words:

> *The analysis of the elements and nature of the State led ancient Indian writers to hold that a mere conglomeration of people did not by itself constitute State, but that for a State there must be people who live within certain definite geographical limits (rastra), they must be bound by the bond to render allegiance to a ruler (svami), have a certain system of government (amatya), must have a regulated economic system, a force for defence and international relationships. That is the most essential elements are: (1) a sovereign*

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(2) a system of government (3) a definite territory and (4) the population of some size.[20]

189. The concept of state or 'rastra' as envisaged by the Ancient Hindu law scholars was with respect to monarchal kingdoms which were a sovereign power in themselves. Therefore, *inter alia,* there was considerable emphasis on a 'ruler', a definite 'economic system' and a 'force to defend' in cases of invasion. The same is absent in present day India which is a 'sovereign, socialist, secular, democratic republic'. However, it is interesting to note that the same concept of 'State' as seen in ancient Dharmasatras has been echoed in the modern Public International Law jurisprudence.

International Law

190. The Montevideo Convention on Rights and Duties of State, 1933, define State in the following words, *viz.*:

"Article 1 The State as a person of international law should possess the following qualifications: (a) a permanent population (b) a defined territory

[20] Kane PV, *History of Dharmasastras (Ancient and Medieval Religious and Civil Law)*, Vol. III, Government Oriental Series Class-B No. 6, 2nd ed., 1973, pg. 19-20

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(c) government; and (d) capacity to enter into relations with other States."[21]

191. A bare perusal of the above definition shows that recognition as a state in Public International Law requires, in addition to a permanent population, a defined territory and a government; a 'capacity to enter into relations with other states'. It is this last feature that emphasizes on 'sovereignty' as a necessary feature to get recognition of a 'State' in Public International Law. At this juncture, it may be apposite to refer to the definition and concept of State provided by Oppenheim.

192. Oppenheim defines the concept of 'State' and 'Sovereignty' as recognized and widely accepted in Public International Law in the following terms, *viz.*:

> *"A State proper - in contradistinction to colonies and Dominions - is in existence when a people is settled in a country under its own sovereign Government. The conditions which must obtain for the existence of a State are therefore four:*

[21] (1934) 165 League of Nations Treaty Series, at 19

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> *There must, first, be a people. A people is an aggregate of individuals of both sexes who live together as a community in spite of the fact that they may belong to different races or creeds, or be of different colour.*
>
> *There must, secondly be a country in which the people has settled down. A wandering people, such as the Jews were whilst in the desert for forty years before their conquest of the Holy Land, is not a State. But it matters not whether the country is small or large; it may consist, as in the case of city States, of one town only.*
>
> *There must, thirdly, be a Government - that is, one or more persons who are the representatives of the people, and rule according to the law of the land. An anarchistic community is not a State.*
>
> *There must, fourthly and lastly, be a sovereign Government. Sovereignty is supreme authority, an authority which is independent of any other earthly authority. Sovereignty in the strict and narrowest sense of the term implies, therefore, independence all round, within and without the borders of the country."*[22]

193. The above definition of Oppenheim gives a clear view of the requisites of a State, as recognized in Public International Law. It emphasizes that for being recognized as a State, it is mandatory that a certain sizable amount of population is

[22] Oppenheim L, *International Law: A Treatise*, Vol. 1, 3rd ed., The Law Book Exchange Ltd., New Jersey, 2005; pg. 125

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permanently residing in a clearly demarcated geographical area wherein, it has a Government which is sovereign, i.e. it governs itself, free from any external control of any other State/Power.

194. Malcom Shaw notes the definition of the Arbitration Commission of the European Conference on Yugoslavia in Opinion No. 1, which defined 'State' in the following words:

> *"the state is commonly defined as a community which consists of a territory and a population subject to an organised political authority' and that 'such a state is characterised by sovereignty'. It was also noted that the form of internal political organization and constitutional provisions constituted 'mere facts', although it was necessary to take them into account in order to determine the government's sway over the population and the territory."*[23]

195. Malcom Shaw further adds that self-determination is an additional determinative factor in respect of Statehood in Public International Law. While citing the example of Rhodesia, Malcom Shaw notes that although Rhodesia

[23] Shaw Malcom N., *International Law*, 5th ed., Cambridge, pg. 177; also see 92 ILR, **pp.** 162, 165.

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fulfilled the criteria as noted above (see Oppenheimer and Montevideo convention), yet its internal disturbances led the U.N. to ask member states not to recognize it as a State.[24] The reason behind the same were noted to be the strenuous denunciations of its purported independence by the international community and the developing civil war. However, once the civil war concluded leading to foundation of Zimbabwe, the same was recognized and accepted as a State. Malcom Shaw emphasizes on self-determination being an additional factor in determination of statehood in the following words, *viz.*:

> *"The best approach is to accept the development of self-determination as an additional criterion of statehood, denial of which would obviate statehood. This can only be acknowledged in relation to self-determination situations and would not operate in cases, for example, of secessions from existing states. In other words, in the case of an entity seeking to become a state and accepted by the international community as being entitled to exercise the right of self-determination, it may well be necessary to demonstrate that the internal requirements of the principle have not been offended. One cannot define this condition too rigorously in view of state practice to date, but it would appear to be a sound proposition that systematic and institutionalized*

[24] Id., pg. 184

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discrimination might invalidate a claim for statehood."[25]

196. Thus, to summarize, in order to attain statehood as per the principles of Public International Law the requirements are (a) a definite geographical area, (b) a sizeable population (c) a government which is sovereign and free from any external power or internal conflict and, as an additional criteria, (d) self-determination. Although Public International Law deals with Nation-State, these definitions are still relevant for provincial states in a federation of union of states.

WHAT DOES A DIRECTLY ELECTED LEGISLATIVE ASSEMBLY SIGNIFY?

197. His Excellency, the President of India Shri. Pranab Mukherjee stated the following on 26th January, 2015:

> *"There can be no governance without a 'functioning legislature'. The legislature reflects the will of the people. It is the platform where progressive legislation using civilized dialogue must create delivery mechanisms for realizing the aspirations of the people. It calls for reconciling the differences amongst stakeholders and building a consensus for the law to be enacted. Enacting laws without discussion impacts the law-making role of the*

[25] Supra 9 at pg. 185

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Parliament. It breaches the trust reposed in it by the people. This is neither good for the democracy nor for the policies relating to those laws."

198. The instant issue shall be best understood by first understanding the concept and rationale behind the importance and object of a legislature, especially State legislature in a federal setup. Black's Law Dictionary defines Legislature as *"[t]he branch of government responsible for making statutory laws".*[26] The above definition being self-explanatory, that branch of the government which wields the authority to make laws (in the form of statutes/rules/bye-laws etc.) is known as legislature.

199. Part V Chapter II (Article 79 - 122) of the Constitution of India deals with Parliament i.e. the Union Legislature and Part VI Chapter II (Article 168 - 213) of the Constitution of India deals with State Legislature. It is relevant to understand the background behind framing the above provisions.

[26] Garner Bryan A., *Black's Law Dictionary*, 8th ed., Thomson West, 2004

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200. Noted expert on the Constitution of India, Granville Austin, has observed,

> *"The members of the Constituent Assembly had one predominant aim when framing the Legislative provisions of the Constitution: to create a basis for social and political unity of the country. They chose to do this by uniting Indians into one mass electorate having universal adult suffrage, and by providing for the direct representation of the voters in genuinely popular assemblies."* [27]

201. Thus, in order to give voice to a large and heterogeneous population of India, the legislatures were created with the vision of them being the repository of faith of the Indian citizenry. Every voter was given an opportunity to have a direct representation in order to participate in the process of making of laws which shall govern him and his fellow countrymen.

202. Furthermore, in the Constituent Assembly Debates, Shri Krishna Chandra Sharma's speech reflects the intention behind the creation of legislature in the following words:

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[27] Austin Granville, *The Indian Constitution: Cornerstone of a Nation*, Oxford, 2008, pg. 144

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> *"The function of the legislature is to pass laws subject to the maintenance of the sovereignty of the people. Our Constitution, like all democratic Constitutions, upholds the sovereignty of the people. Like the American Constitution, our Constitution in its Preamble begins with the expressive words: "We, the people of India, having.....". We have universal suffrage. We can be sure that every man who can think will have the right to vote and contribute his share in the building of this great country. A broad-based legislature elected on adult franchise can express the will of the people and carry it out. Such a legislature would make law in the real sense of the term because through the long evolution of the judicial process, we have come to the conclusion that law means the will of the people. In the olden days law meant the will of one man later it came to be meant the will of the few, but now law really means the will of the people. Because we have adult suffrage, our legislature will express the will of the nation as a whole."*[28]

203. In *State of Rajasthan v. Union of India* [(1977) 3 SCC 592, para 153], while answering the question of whether the proclamation of President's Rule under Article 356(1) of the Constitution was warranted when the Legislative Assembly of a State had ceased to reflect the will of the electorate when the Legislative Assembly and the electorate were at variance with each other, Beg J held as under:

[28] Constituent Assembly Debates, Friday 18th November, 1949, Volume 11, page

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> "153. ... *The consent of the people is the basis of democratic form of Government and when that is withdrawn so entirely and unequivocally as to leave no room for doubt about the intensity of public feeling against the ruling party, the moral authority of the Government would be seriously undermined and a situation may arise where the people may cease to give respect and obedience to governmental authority and even conflict and confrontation may develop between the Government and the people leading to a collapse of administration. These are all consequences which cannot be said to be unlikely to arise from such an unusual state of affairs and they may make it impossible for the Government of the State to be carried on in accordance with the provisions of the Constitution. Whether the situation is fraught with such consequences or not is entirely a matter of political judgment for the executive branch of Government. But it cannot be said that such consequences can never ensue and that the ground that on account of total and massive defeat of the ruling party in the Lok Sabha elections, the Legislative Assembly of the State has ceased to reflect the will of the people and there is complete alienation between the Legislative Assembly and the people is wholly extraneous or irrelevant to the purpose of Article 356, clause (1).*"

204. In *S.R. Bommai v. Union of India* [(1994) 3 SCC 1, para 395], the Hon'ble Supreme Court was considering whether the proclamation of Presidential Rule under Article 356 of the Constitution was justifiable when democratically elected governments holding majorities in the Legislative Assemblies

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of the states of Karnataka, Nagaland, Meghalaya, Madhya Pradesh, Rajasthan and Himachal Pradesh were dissolved. The Supreme Court found the judgment of the High Court to be erroneous on the ground that the Governor did not deem it obligatory for the ruling party to pass the floor test in order to prove its majority. Instead, the Governor dissolved the Assembly. The following observation is relevant:

> "395. *The High Court, in our opinion, erred in holding that the floor test is not obligatory. If only one keeps in mind the democratic principle underlying the Constitution and the fact that it is the Legislative Assembly that represents the will of the people — and not the Governor — the position would be clear beyond any doubt. In this case, it may be remembered that the Council of Ministers not only decided on April 20, 1989 to convene the Assembly on 27th of that very month, i.e., within 7 days, but also offered to prepone the Assembly if the Governor so desired. It pains us to note that the Governor did not choose to act upon the said offer. Indeed, it was his duty to summon the Assembly and call upon the Chief Minister to establish that he enjoyed the confidence of the House. Not only did he not do it but when the Council of Ministers offered to do the same, he demurred and chose instead to submit the report to the President. In the circumstances, it cannot be said that the Governor's report contained, or was based upon, relevant material. There could be no question of the Governor making an assessment of his own. The loss of confidence of the House*

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> *was an objective fact, which could have been demonstrated, one way or the other, on the floor of the House. In our opinion, wherever a doubt arises whether the Council of Ministers has lost the confidence of the House, the only way of testing it is on the floor of the House except in an extraordinary situation where because of all-pervasive violence, the Governor comes to the conclusion — and records the same in his report — that for the reasons mentioned by him, a free vote is not possible in the House."*

205. In view of the above, it becomes clear that inspite of there being assymetrical federalism in India, the concept of a legislature, i.e. the Parliament at the Centre and the Legislative Assemblies in the States, was intended to be a repository of the will of the People of India who had solemnly resolved to constitute themselves into a sovereign, socialist, secular, democratic republic and to adopt the Constitution. This is the primary reason why the Constitution sets out the legislative sphere of the Union and State in List I (Union List), List II (State List) and List III (Concurrent List), by which the State legislature is vested with exclusive legislative powers on the subjects in List II, without being subjected to any overriding powers of the Parliament. This is one of the basic features of our Constitution.

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206. It may also not be out of place to mention herein that because the legislature reflects the will of the people, any Act which is passed by the Parliament or the State Legislature is prima facie presumed to be constitutional. In *State of Bihar v. Bihar Distillery Ltd.*, (1997) 2 SCC 453 at para 17, the Supreme Court has observed with respect to the above as under:

> *"The approach of the court, while examining a challenge to the constitutionality of an enactment is to start with the presumption of constitutionality. The court should try to sustain its validity to the extent possible. It should strike down the enactment only when it is not possible to sustain it. The court should not approach the enactment with a view to pick holes or to search for defects of drafting, much less inexactitude of language employed. Indeed any such defects of drafting should be ironed out as part of the attempt to sustain the validity/constitutionality of the enactment. After all, an Act made by the legislature represents the will of the people and that cannot be lightly interfered with. The unconstitutionality must be plainly and clearly established before an enactment is declared as void. The same approach holds good while ascertaining intent and purpose of an enactment or its scope and application."*

207. It is widely accepted that the best example of a Federal Constitution is the Constitution of the United States of

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America. In order to understand the rationale behind the 'Federalism' as operative in the United States of America, it will be beneficial to refer to the *'Federalist Papers'* authored by James Madison and others. These papers were written with the intention of garnering votes for the ratification of the U.S. Constitution. The following excerpt from Federalist Paper No. 46, penned by James Madison throws considerable light on the present issue:

> *"The federal and State Governments are in fact but different agents and trustees of the people, instituted with different powers, and designated for different purposes. The adversaries of the constitution seem to have lost sight of the people altogether in their reasonings on this subject; and to have viewed these different establishments, not only as mutual rivals and enemies, but as uncontrolled by any common superior, in their efforts to usurp the authorities of each other. These gentlemen must here be reminded of their error. They must be told, that the ultimate authority, wherever the derivative may be found, resides in the people alone; and that it will not depend merely on the comparative ambition or address of the different governments, whether either, or which of them, will be able to enlarge its sphere of jurisdiction at the expense of the other. Truth, no less than decency, requires, that the event in every case, should be supposed to depend on the sentiments and sanction of their common constituents.*

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Many considerations, besides those suggested on a former occasion, seem to place it beyond doubt that the first and most natural attachment of the people, will be to the governments of their respective states. Into the administration of these, a greater number of individuals will expect to rise. From the gift of these, a greater number of offices and emoluments will flow. By the superintending care of these, all the more domestic and personal interests of the people will be regulated and provided for. With the affairs of these, the people will be more familiarly and minutely conversant: and with the members of these, will a greater proportion of the people have the ties of personal acquaintance and friendship, and of family and party attachments. On the side of these, therefore, the popular bias may well be expected most strongly to incline.

Experience speaks the same language in this case. The federal administration, though hitherto very defective, in comparison with what may be hoped under a better system, had, during the war, and particularly whilst the independent fund of paper emissions was in credit, an activity and importance as great as it can well have, in any future circumstances whatever. It was engaged too in a course of measures which had for their object the protection of everything that was dear, and the acquisition of everything that could be desirable to the people at large. It was, nevertheless, invariably found, after the transient enthusiasm for the early congresses was over, that the attention and attachment of the people were turned anew to their own particular governments; that the federal council was at no time the idol of popular favour; and that opposition to proposed enlargements of its powers and importance, was the side usually taken by the men, who wished to build their political

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> *consequence on the prepossessions of their fellow citizens.*
>
> *If, therefore, as has been elsewhere remarked, the people should in future become more partial to the Federal than to the State Governments, the change can only result from such manifest and irresistible proofs of a better administration, as will overcome all their antecedent propensities. And in that case, the people ought not surely to be precluded from giving most of their confidence where they may discover it to be most due: but even in that case, the State Governments could have little to apprehend, because it is only within a certain sphere, that the federal power can, in the nature of things, be advantageously administered."*

208. In simpler words, the vision of James Madison was that the state's ultimate security lies in the confidence of its people. That confidence is expressed through the political process, but ultimately turns upon the continuing relevance of governmental institutions to the day to day life of the citizenry. Thus, the issues raised by the Government of Delhi are basically raising the issue of whether it can uphold the confidence the people reposed in it with the extremely limited powers that have been granted to it in *status quo.*

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209. At this juncture, it is relevant to mention herein that there is a marked difference between the constitutional position in United States and India so far as the residuary powers are concerned. In the United States of America, the residuary powers to legislate rest with the States, whereas in India, the same is with the Centre. The same has also been taken note of by the Supreme Court of India in *S.R. Bommai* which is reproduced as hereunder:

> *"24. Thus the significant absence of the expressions like 'federal' or 'federation' in the constitutional vocabulary, Parliament's powers under Articles 2 and 3 elaborated earlier, the extraordinary powers conferred to meet emergency situations, the residuary powers conferred by Article 248 read with Entry 97 in List I of the VIIth Schedule on the Union, the power to amend the Constitution, the power to issue directions to States, the concept of a single citizenship, the set-up of an integrated judiciary, etc., etc., have led constitutional experts to doubt the appropriateness of the appellation 'federal' to the Indian Constitution. Said Prof. K.C. Wheare in his work Federal Government:*
>
> > *What makes one doubt that the Constitution of India is strictly and fully federal, however, are the powers of intervention in the affairs of the States given by the Constitution to the Central Government and Parliament.*

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> *Thus in the United States, the sovereign States enjoy their own separate existence which cannot be impaired; indestructible States having constituted an indestructible Union. In India, on the contrary, Parliament can by law form a new State, alter the size of an existing State, alter the name of an existing State, etc., and even curtail the power, both executive and legislative, by amending the Constitution..."*

210. However, in recent times, there has been a growing demand for 'sovereign dignity' in the United States of America. The same flows from the fact that States in the U.S. Constitution enjoy wide residuary powers, unlike India where the Centre enjoys residuary powers to make law.

211. From the aforesaid, it is a foregone conclusion, that even though India is not a classic 'Federation', as the Union has power to legislate on residuary subjects, the Constitutional scheme carefully balances the sharing of powers between the Union and the Sates. Articles 249, 250 and 357 are meant to operate in exceptional situations which call for Parliament to step in and make laws in respect of matters enumerated in List II and which laws have effect for a limited period. Article 252 is a case where the State

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Legislatures themselves invite Parliament to make a law on their behalf. These are all situations of what may be called "substitute legislation" — either because of a particular situation or because there is no legislature at a given moment to enact laws.

212. It was never the intention of the framers of the Constitution to give untramelled powers to the Parliament to encroach upon the legislative subjects reserved for States. Any act of Parliament which disturbs this balance is manifestly contrary to the federal fabric adopted by our Constitution, which is a part of the basic structure of our Constitution. A logical corollary of this exposition is therefore that the very fact of the existence of a Legislature, which is a reflection of the will of the people vesting constituent powers in the Legislative Assembly to legislate on subjects reserved for preservation of the local aspirations of the people and good governance of the State, signifies the autonomy of State in the Indian federal scheme. Existence of a legislature, therefore, is a relevant factor to ascertain the constitutional status of a unit in the federation.

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213. The very concept of responsible Government and representative democracy signifies government by the people. In constitutional terms, it denotes that the sovereign power which resides in the people is exercised on their behalf by the chosen representatives and for exercise of those powers, the representatives are necessarily accountable to the people for what they do. The members of the legislature, thus, must trace their power directly or indirectly to the people. The members of the State Assemblies, like the Lok Sabha, trace their power directly to being elected by the people. The Council of Ministers, of which the Chief Minister is the head in the State and on whose aid and advice the Governor has to act, must trace their power to the people directly or indirectly.[29]

214. It is well settled that the law must be one that commands legitimacy with the people, and legitimacy of the law itself would depend upon whether it accords with Justice. The legitimacy of law would depend on its ability to ensure that the role of the political sovereign – i.e. the people – is not

[29] *S.R. Chaudhary v. State of Punjab and Ors.*, (2001) 7 SCC 126 at para 34.

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undermined. The interpretation of the Constitution, therefore, must be such that the expectation of the founding fathers and the constitutionalists are fulfilled.[30] The former Chief Justice of India, Shri M. N. Venkatchallaiah in his foreward to 'the Constitution of Jammu and Kashmir – its development and comments' said:

> *"the mere existence of a constitution, by itself, does not ensure Constitutionalism. What are important are the political traditions of the people and its spirit and determination to work out its constitutional salvation through the chosen system of its political organisation."*

215. India is a democratic republic. Its chosen system of political organisation is reflected in the Preamble to the Constitution which indicates the source from which the Constitution comes i.e. "*We, the people of India*". The will of the people cannot be permitted to be subordinated to political expediency. The constitutional functionaries must forever remain conscious of their constitutional obligations and should not sacrifice either political responsibility or parliamentary conventions in the altar of political

[30] S. R. Chaudhary v. State of Punjab and others (2001) 7 SCC 126 at 145 paragraph 38

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expediency. Professor B.O. Nwabueze in his book '*Constitutionalism in the Emergent States*' very aptly said:

> *"The successful working of any Constitution depends upon what has aptly been called the 'democratic spirit', that is, a spirit of fair play, of self – restraint and of mutual accommodation of differing interests and opinions. There can be no constitutional government unless the wielders of power are prepared to observe the limits upon governmental powers."*

216. For the Indian Constitutional democracy to evolve and grow, certain principles and policies of public ethics must form its functioning base. Actions of intermittent interference in the name of parliamentary supremacy and supervision by the Union Executive, pose grave danger to the foundations and principles of Constitutionalism and the same must be warded off by developing the right attitude towards constitutional provisions. Constitutional restraints must not be ignored or bypassed if found inconvenient or bent to suit "*political expediency*". The principles of Constitutionalism must not be allowed to be eroded.

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217. It is also relevant to refer to Article 21 (3) of the Universal Declaration of Human Rights which reads as under:

> *"21.(3) the will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by the equivalent free voting procedures."*

218. The Supreme Court in *Samsher Singh v. State of Punjab*[31] succinctly explained the cabinet system of Governance as follows:

> *"It is a fundamental principle of English Constitutional law that Ministers must accept responsibility for every executive act. In England the Sovereign never acts on his own responsibility. The power of the Sovereign is conditioned by the practical rule that the Crown must find advisers to bear responsibility for his action. Those advisers must have the confidence of the House of Commons. This rule of English Constitutional law is incorporated in our Constitution. The Indian Constitution envisages a Parliamentary and responsible form of Government at the Centre and in the States and not a Presidential form of Government. The powers of*

[31] *Samsher Singh v. State of Punjab*, (1974) 2 SCC 831at para 32-35.

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the Governor as the constitutional head are not different.

This Court has consistently taken the view that the powers of the President and the powers of the Governor are similar to the powers of the Crown under the British Parliamentary system. (See Ram Jawaya Kapur v. State of Punjab, A. Sanjeevi Naidu v. State of Madras, U.N.R. Rao v. Indira Gandhi). In Ram Jawaya Kapur case Mukherjea, C.J. speaking for the Court stated the legal position as follows. The Executive has the primary responsibility for the formulation of governmental policy and its transmission into law. The condition precedent to the exercise of this responsibility is that the Executive retains the confidence of the legislative branch of the State. The initiation of legislation, the maintenance of order, the promotion of social and economic welfare, the direction of foreign policy, the carrying on of the general administration of the State are all executive functions. The Executive is to act subject to the control of the Legislature. The executive power of the Union is vested in the President. The President is the formal or constitutional head of the Executive. The real executive powers are vested in the Ministers of the Cabinet. There is a Council of Ministers with the Prime Minister as the

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head to aid and advise the President in the exercise of his functions.[32]

The scheme was upheld for these reasons. The Governor makes rules under Article 166(3) for the more convenient transaction of business of the Government of the State. The Governor cannot only allocate the various subjects amongst the Ministers but may go further and designate a particular official to discharge any particular function. But that could be done on the advice of the Council of Ministers. The essence of Cabinet System of Government responsible to the Legislature is that an individual Minister is responsible for every action taken or omitted to be taken in his Ministry. In every administration, decisions are taken by the civil servants. The Minister lays down the policies. The Council of Ministers settle the major policies. When a civil servant takes a decision, he does not do it as a delegate of his Minister. He does it on behalf of the Government. The officers are the limbs of the Government and not its delegates. Where functions are entrusted to a Minister and these are performed by an official employed in the Minister's department, there is in law no delegation because constitutionally the act or decision of the official is that of the Minister...

[32] *Samsher Singh v. State of Punjab, (1974) 2 SCC 831 para 33*

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48. The President as well as the Governor is the constitutional or formal head. The President as well as the Governor exercises his powers and functions conferred on him by or under the Constitution on the aid and advice of his Council of Ministers, save in spheres where the Governor is required by or under the Constitution to exercise his functions in his discretion. Wherever the Constitution requires the satisfaction of the President or the Governor for the exercise by the President or the Governor of any power or function, the satisfaction required by the Constitution is not the personal satisfaction of the President or Governor but the satisfaction of the President or Governor in the constitutional sense in the Cabinet system of Government, that is, satisfaction of his Council of Ministers on whose aid and advice the President or the Governor generally exercises all his powers and functions. The decision of any Minister or officer under Rules of Business made under any of these two Articles 77(3) and 166(3) is the decision of the President or the Governor respectively. These articles did not provide for any delegation. Therefore, the decision of a Minister or officer under the Rules of Business is the decision of the President or the Governor."[33]

[33] *Samsher Singh v. State of Punjab,* (1974) 2 SCC 831 at para 35.

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219. The view was reiterated in *Supreme Court Advocates-on-Record Assn. v. Union of India*, (1993) 4 SCC 441 in following words:

> *"354. The Constitution of India has borrowed the British form of Government, making the Cabinet collectively responsible to the House of People. The machinery of Government is essentially on the British pattern and the whole collection of British constitutional conventions has either been incorporated in the Constitution or are being followed as unwritten constitutional conventions. While framing the Constitution of India, the Constituent Assembly debated whether to have a written code based on British practice, but eventually it was decided to leave the Cabinet system of Government to be governed mainly by the unwritten conventions of the Constitution. Needless to say that the conventions necessary to govern the Cabinet system, based on British pattern, are being strictly followed in this country. Dr Rajendra Prasad in his speech, as President of the Constituent Assembly while moving for adoption of the Constitution of India observed as under:*
> *"Many things which cannot be written in a Constitution are done by conventions. Let me hope that we shall show those capacities and develop those conventions."*

220. But, the question which needs to be considered is whether popular will of the people, which constitutes in the Legislative Assembly, could be demoralised by executive interference by virtue of Article 239 AA (3) (b) and Article 246 (4) read with Article 73 of the Constitution. Even if Parliamentary supremacy was to be maintained, the

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interference with the day to day governance by the Local Executive does not seem to have been sanctioned by Article 239AA. If that was the intention, 239AB could have read differently. The true nature of balance between maintaining Delhi as the Capital of the Country and as a State was required to be done in such a manner that the basic democratic principles enshrined in the Constitution are not compromised. We cannot have a balance between the Council of Ministers and the Lt. Governor tilting one way or the other every now and then. The responsibility of the democratically elected government has been well recognised in Article 239 AA of the Constitution in clause (4) and (6) and the exception thereto carved out in the very same clause cannot be permitted to dilute the main provision, incorporating a well settled principle of cabinet system of government. This is a basic feature of the Constitution. The dilution of this by the proviso to Article 239AA (4) will either have to be read down or it would be rendered unconstitutional. In any event, it is void and unsustainable. It must be noted that in the democratic form of Government,

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the elected Government is accountable to the legislature and also is responsible for carrying out executive functions.

221. The concept of basic structure is well settled and does not need elaboration. However, a reference to the Judgement in ***Kesavananda Bharti*** is imperative. In ***Kesavananda Bharti's case,***[34] the Supreme Court enunciated the salient features of the basic structure of the Constitution.

222. Sikri, C.J.[35] was of the opinion that although every provision of the Constitution was essential; that did not place every provision of the Constitution in the same position. The true position was that every provision of the Constitution could be amended provided that, the basic foundation and structure of the constitution remains the same. Sikri C.J., thus, enumerated the features of the basic structure as follows:

(1) Supremacy of the Constitution;

(2) Republican and Democratic form of Government;

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[34] (1973) 4 SCC 225
[35] Per Sikri, CJ at para 292.

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(3) Secular character of the Constitution;

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

(5) Federal character of the Constitution.

223. On the question of separation of powers, Shelat & Grover, J.J. opined as follows[36]:

> *"We are unable to see how the power of judicial review makes the judiciary supreme in any sense of the word. This power is of paramount importance in a Federal Constitution. Indeed it has been said that the heart and core of a democracy lies in the judicial process; (per Bose, J., in Bidi Supply Co. v. Union of India.) The observations of Patanjali Sastri, C.J., in State of Madras v. V.G. Row which have become locus classicus need alone be repeated in this connection. Judicial review is undertaken by the courts "not out of any desire to tilt at legislative authority in a crusader's spirit, but in discharge of a duty plainly laid down upon them by the Constitution". The respondents have also contended that to let the court have judicial review*

[36] Per Shelat & Grover, JJ at para 577.

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over constitutional amendments would mean involving the court in political questions.....There is ample evidence in the Constitution itself to indicate that it creates a system of checks and balances by reason of which powers are so distributed that none of the three organs it sets up can become so pre-dominant as to disable the others from exercising and discharging powers and functions entrusted to them. Though the Constitution does not lay down the principle of separation of powers in all its rigidity as is the case in the United States Constitution yet it envisages such a separation to a degree as was found in Ranasinghe case. The judicial review provided expressly in our Constitution by means of Articles 226 and 32 is one of the features upon which hinges the system of checks and balances. Apart from that, as already stated, the necessity for judicial decision on the competence or otherwise of an Act arises from the very federal nature of a Constitution..."

224. Shelat & Grover, J.J., further observed that[37]:

"The basic structure of the Constitution is not a vague concept and the apprehensions expressed

[37] Per Shelat & Grover, JJ at para 582

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on behalf of the respondents that neither the citizen nor the Parliament would be able to understand it are unfounded. If the historical background, the preamble, the entire scheme of the Constitution, relevant provisions thereof including Article 368 are kept in mind there can be no difficulty in discerning that the following can be regarded as the basic elements of the constitutional structure. (These cannot be catalogued but can only be illustrated):

(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."

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225. Hegde & Mukherjea, J.J., were of the opinion that the elements of the basic structure of the Constitution could be found in provisions other than Part III. They observed[38]:

> *"It is true that this Court has characterised the Fundamental Rights as "paramount" in A.K. Gopalan v. State of Madras, as "sacro-sanct" in State of Madras v. Smt Champakam Dorairajan as "rights reserved by the people" in Pandit M.S.M. Sharma v. Shri Srikrishna Sinha, as "inalienable and inviolable" Smt Ujjam Bhai v. State of U.P., and as transcendental" in several other cases. In so describing the Fundamental Rights in those cases, this Court could not have intended to say that the Fundamental Rights alone are the basic elements or fundamental features of the Constitution. Mr Palkhivala conceded that the basic elements and fundamental features of the Constitution are found not merely in Part III of the Constitution but they are spread out in various other parts of the Constitution. They are also found in some of the Directive Principles set out in Part IV of the Constitution and in the provisions relating to the sovereignty of the country, the Republican and the*

[38] Per Hegde & Mukherjea, JJ at para 632

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Democratic character of the Constitution. According to the Counsel, even the provisions relating to the unity of the country are basic elements of the Constitution."

226. Dissenting from the views expressed by Sikri C.J., Shelat, Grover, Hegde and Mukherjea J.J., Justice Ray observed[39]:

"A constitution is essentially a frame of government laying down governmental powers exercisable by the legislature, executive and the judiciary. Even so other provisions are included in the Constitution of a country which provisions are considered by the frames of that Constitution to have such special importance that those should be included in the Constitution or organic law. Thus all provisions of the Constitution are essential and no distinction can be made between essential and non-essential features from the point of view of amendment unless the makers of the Constitution make it expressly clear in the Constitution itself."

227. In his opinion, Jaganmohan Reddy J., observed[40]:

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[39] Per Ray J at para 901.
[40] Per Jaganmohan Reddy J at para 1159.

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"I will now consider the question which has been strenuously contended, namely, that there are no essential features, that every feature in the Constitution is essential, and if this were not so, the amending power under the Constitution will apply only to now essential features which it would be difficult to envisage was the only purpose of the framers in inscribing Article 368 and that, therefore, there is no warrant for such a concept to be read into the Constitution. The argument at first flush is attractive, but if we were to ask ourselves the question whether the Constitution has any structure or is structureless or is a "jelly fish" to use an epithet of the learned advocate for the petitioner, the answer would resolve our doubt. If the Constitution is considered as a mechanism, or call it an organism or a piece of constitutional engineering, whichever it is, it must have a structure, or a composition or a base or foundation. What it is can only be ascertained, if we examine the provisions which the Hon'ble Chief Justice has done in great detail after which he has instanced the features which constitute the basic structure. I do not intend to cover the same field once again. There is nothing vague or unascertainable in the Preamble and if what is stated therein is subject to this criticism it would

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be equally true of what is stated in Article 39(b) and (c) as these are also objectives fundamental in the governance of the country which the State is enjoined to achieve for the amelioration and happiness of its people. The elements of the basic structure are indicated in the Preamble and translated in the various provisions of the Constitution. The edifice of our Constitution is built upon and stands on several props, remove any of them, the Constitution collapses. These are: (1) Sovereign Democratic Republic; (2) Justice, social, economic and political; (3) Liberty of thought, expression, belief, faith and worship; (4) Equality of status and of opportunity. Each one of these is important and collectively they assure a way of life to the people of India which the Constitution guarantees. To withdraw any of the above elements the structure will not survive and it will not be the same Constitution, or this Constitution, nor can it maintain its identity if something quite different is substituted in its place, which the sovereign will of the people alone can do. There can be a Democratic Republic in the sense that people may be given the right to vote for one party or only one candidate either affirmatively or negatively, and are not given the choice to choose another opposed to it or him.

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Such a republic is not what has been assured to our people and is unthinkable by any one foresworn to uphold, defend, protect or preserve or work the Constitution. A democratic republic that is envisaged is the one based on a representative system in which people holding opposing view to one another can be candidates and invite the electorate to vote for them. If this is the system which is the foundation of a democratic republic, it is unthinkable that it can exist without elements (2) to (4) above either collectively or separately. What is democracy without social, economic and political justice, or what value will it have, where its citizens have no liberty of thought, belief, faith or worship or where there is no equality of status and of opportunity? What then are the essential features or the basic elements comprising the structure of our Constitution need not be considered in detail as these will fall for consideration in any concrete case where they are said to have been abrogated and made non-existent. The fact that a complete list of these essential elements constituting the basic structure are not enumerated, is no ground for denying that these exist. Are all the elements which make a law void and unconstitutional ever required to be concatenated for the recognition of the validity or

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invalidity of laws judged on the anvil of the Constitution? A sovereign democratic republic. Parliamentary democracy, the three organs of the State, certainly in my view constitute the basic structure. But do the fundamental rights in Part III and directive principles in Part IV constitute the essential elements of the basic structure of our Constitution in that the Constitution will be the Constitution without them? In other words, if Parts III and IV or either of them are totally abrogated, can it be said that the structure of the Constitution as an organic instrument establishing sovereign democratic republic as envisaged in the preamble remains the same? In the sense as I understand the sovereign democratic republic, it cannot; without either fundamental rights or directive principles, what can such a government be if it does not ensure political, economic, or social justice?"

228. Palekar J., in his dissent, observed[41]:

"This only emphasises that all provisions in a Constitution must be conceded the same character and it is not possible to say that one is more important and the other less important. When a

[41] Per Palekar J at para 1242.

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legislature has the necessary power to amend, it can amend an important constitutional provision as unceremoniously as it can amend an unimportant provision of the Constitution. Dicey observes in his Law of the Constitution, 10th Edn., p. 127: "The 'flexibility' of our Constitution consists in the right of the Crown and the two Houses to modify or repeal any law whatever, they can alter the succession to the Crown or repeal the Acts of Union in the same manner in which they can pass an Act enabling a company to make a new railway from Oxford to London".

229. Palekar J., further observed[42]:

"Since the 'essential features and basic principles' referred to by Mr Palkhivala are those culled from the provisions of the constitution it is clear that he wants to divide the constitution into parts — one of provisions containing the essential features and the other containing non-essential features. According to him the latter can be amended in any way the Parliament likes, but so far as the former provisions are concerned, though they may be amended, they cannot be amended so as to damage or destroy the core of the essential

[42] Per Palekar J at para 1311.

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features. Two difficulties arise, who is to decide what are essential provisions and non-essential provisions? According to Mr Palkhivala it is the court which should do it. If that is correct, what stable standard will guide the court in deciding which provision is essential and which is not essential? Every provision, in one sense, is an essential provision, because if a law is made by the Parliament or the State Legislatures contravening even the most insignificant provision of the constitution, that law will be void. From that point of view the courts acting under the constitution will have to look upon its provisions with an equal eye. Secondly, if an essential provision is amended and a new provision is inserted, which in the opinion of the constituent body, should be presumed to be more essential than the one repealed, what is the yardstick the court is expected to employ? It will only mean that whatever necessity the constituent body may feel in introducing a change in the constitution, whatever change of policy that body may like to introduce in the Constitution, the same is liable to be struck down if the court is not satisfied either about the necessity or the policy. Clearly this is not a function of the courts. The difficulty assumes greater proportion when an amendment

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is challenged on the ground that the core of essential feature is either damaged or destroyed. What is the standard? Who will decide where the core lies and when it is reached? One can understand the argument that particular provisions in the constitution embodying some essential features are not amendable at all. But the difficulty arises when it is conceded that the provision is liable to be amended, but not so as to touch its 'core'. Apart from the difficulty in determining where the 'core' of an "essential feature" lies, it does not appear to be sufficiently realized what fantastic results may follow in working the constitution. Suppose an amendment of a provision is made this year. The mere fact that an amendment is made will not give any body the right to come to this court to have the amendment nullified on the ground that it affects the core of an essential feature. It is only when a law is made under the amended provision and that law affects some individual's right, that he may come to this Court. At that time he will first show that the amendment is bad because it affects the core of an essential feature and if he succeeds there he will automatically succeed and the law made by the Legislature in the confidence that it is protected by the amended constitution

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will be rendered void. And such a challenge to the amendment may come several years after the amendment which till then is regarded as a part of the constitution. In other words, every amendment, however innocuous it may seem when it is made is liable to be struck down several years after the amendment although all the people have arranged their affairs on the strength of the amended constitution. And in dealing with the challenge to a particular amendment and searching for the core of the essential feature the court will have to do it either with reference to the original constitution or the constitution as it stood with all its amendments up-to date. The former procedure is clearly absurd; because the constitution has already undergone vital changes by amendments in the meantime. So the challenged amendment will have to be assessed on the basis of the constitution with all its amendments made prior to the challenged amendment. All such prior amendments will have to be accepted as good because they are not under challenge, and on that basis Judges will have to deal with the challenged amendment. But the other amendments are also not free from challenge in subsequent proceedings, because we have

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already seen that every amendment can be challenged several years after it is made, if a law made under it affects a private individual. So there will be a continuous State of flux after an amendment is made and at any given moment when the court wants to determine the core of the essential feature, it will have to discard, in order to be able to say where the core lies, every other amendment because these amendments also being unstable will not help in the determination of the core. In other words, the courts will have to go by the original constitution to decide the core of an essential feature ignoring altogether all the amendments made in the meantime, all the transformations of rights that have taken place after them, all the arrangements people have made on the basis of the validity of the amendments and all the laws made under them without question. An argument which leads to such obnoxious results can hardly be entertained. In this very case if the core argument were to be sustained several previous amendments will have to be set aside because they have undoubtedly affected the core of one or the other fundamental right. Prospective overruling will be the order of the day."

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230. Justice Khanna, on the other hand observed[43]:

> *"Fundamental rights contained in Part III of our Constitution can, in my opinion, be abridged or taken away in compliance with the procedure prescribed by Article 363, as long the basic structure of the Constitution remains unaffected."*

231. Thus, to the extent the proviso to clause (4) of Article 239 AA has the potential of diluting clause (4) and clause (6), which provides for Cabinet form of Government for National Capital Territory of Delhi, would be directly hit by the Doctrine of Basic Structure evolved in ***Kesavananda Bharti's case***.

IS NATIONAL CAPITAL OF DELHI A STATE?

232. This issue was considered by a 9 judge Bench of the Supreme Court in the NDMC case. Although, this was not the question which arose directly in the case, it was interpreted in the context of whether the property tax

[43] Per Khanna J at para 1508

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applied in the National Capital Territory of Delhi, would amount to Union Taxation or State Taxation for the purposes of exemption under Article 289 of the Constitution.

233. Justices Ahmadi, Verma, Agrawal and Hansaria (speaking through Chief Justice Ahmadi) held that a Union Territory is not a State in the following words.

> *"53. Before dealing with the specific circumstances of, and the decision in, each of these cases, it is necessary that a few provisions which figure prominently be dealt with. Article 246(4) of the Constitution, as it stood on 26-1-1950, allowed Parliament to "make laws with respect to any matter for any part of the territory of India not included in Part A or Part B of the First Schedule". The Seventh Amendment Act brought about a number of changes affecting Union Territories, some of which have already been noticed by us. The other changes brought about by it are also relevant; it caused Article 246 to be changed to its present form where Parliament is empowered to make laws with respect to "any part of the territory of India not included in a State". The word "State" has not been defined in the Constitution. Article 1(3) defines the territory of India as comprising: (a) the territories of the States; (b) the Union*

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Territories specified in the First Schedule; and (c) such other territories as may be acquired. The word "Union Territory" has been defined in Article 366(30) to mean "any Union Territory specified in the First Schedule and includes any other territory comprised within the territory of India but not specified in that Schedule".

.....

87. It has been urged that when Parliament legislates for Union Territories in exercise of powers under Article 246(4), it is a situation similar to those enumerated above and is to be treated as an exceptional situation, not forming part of the ordinary constitutional scheme and hence falling outside the ambit of "Union taxation". Having analysed the scheme of Part VIII of the Constitution including the changes wrought into it, we are of the view that despite the fact that, of late, Union Territories have been granted greater powers, they continue to be very much under the control and supervision of the Union Government for their governance. Some clue as to the reasons for the recent amendments in Part VIII may be found in the observations of this Court in Ramesh Birch case [1989 Supp (1) SCC 430] , which we have extracted earlier. It is possible that since Parliament may not have enough time at its disposal to enact entire volumes of legislations for certain Union Territories, it may decide, at least in respect of those Union Territories whose importance is enhanced on account of the size of their territories and their geographical location, that they should be given more autonomy in legislative matters. However, these changes will not have the effect of making such Union Territories as independent as the States. This point is best illustrated by referring to the case of the National Capital Territory of Delhi which is today a Union Territory and enjoys the maximum autonomy on account of the fact that it has a legislature

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created by the Constitution. However, clauses (3)(b) and (3)(c) of Article 239-AA make it abundantly clear that the plenary power to legislate upon matters affecting Delhi still vests with Parliament as it retains the power to legislate upon any matter relating to Delhi and, in the event of any repugnancy, it is the parliamentary law which will prevail. It is, therefore, clear that Union Territories are in fact under the supervision of the Union Government and it cannot be contended that their position is akin to that of the States. Having analysed the relevant constitutional provisions as also the applicable precedents, we are of the view that under the scheme of the Indian Constitution, the position of the Union Territories cannot be equated with that of the States. Though they do have a separate identity within the constitutional framework, this will not enable them to avail of the privileges available to the States.

234. Justice Jeeven Reddy, (for himself, Justice Anand, Sen, Paripoornan and Kirpal) answered this issue in the following paragraphs.

"149. The crucial question arising in this batch of appeals pertains to the meaning of the expression "Union taxation" occurring in Article 289(1). According to the appellants-municipal corporations, the property taxes levied either by the Punjab Municipal Act, 1911, as extended to and applicable in the New Delhi Municipal Council area or by the Delhi Municipal Corporation Act, 1957 applicable to the Delhi Municipal Corporation area do not fall within the ambit of the expression "Union taxation". According to them, "Union taxation" means levy of any of the taxes mentioned in the Union List (List I in the Seventh Schedule to the Constitution). May be, it may also take in levy of Stamp duties (which is the only taxation entry in the

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Concurrent List) by Parliament, but by no stretch of imagination, they contend, can levy of any tax provided in the State List (List II in the Seventh Schedule) can be characterised as Union taxation. Merely because Parliament levies the tax provided in List II, such taxation does not amount to Union taxation. There are many situations where Parliament is empowered by Constitution to make laws with respect to matters enumerated in List II. For example, Articles 249, 250, 252 and 357 empower Parliament to make laws with respect to matters enumerated in List II in certain specified situations. If any taxes are levied by Parliament while legislating under any of the above articles, such taxation cannot certainly be termed as "Union taxation". It would still be State taxation. The levy of taxation by Parliament within the Union Territories is of a similar nature. Either because the Union Territory has no legislature or because the Union Territory has a legislature but Parliament chooses to act in exercise of its overriding power, the taxes levied by a parliamentary enactment within such Union Territories would not be Union taxation. It is relevant to notice, the learned counsel contend, that the legislatures of the Union Territories referred to in Article 239-A as well as the legislature of Delhi created by Article 239-AA are empowered to make laws with respect to any of the matters enumerated in List II and List III of the Seventh Schedule, just like any other State Legislature; any taxes levied by these legislatures cannot certainly be characterised as "Union taxation". Merely because Parliament has been given an overriding power to make a law with respect to matters enumerated even in List II, in supersession of the law made by the legislature of the Union Territory, it does not follow that the law so made is any the less a law belonging to the sphere of the State. The test in such matters — it is contended — is not who makes the law but to which matter in which List does the law in question pertain. Clause (4) of Article 246 specifically empowers Parliament to make laws with respect to any matter enumerated in List II in

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the case of Union Territories. This shows that even the said clause recognises the distinction between List I and List II in the Seventh Schedule, it is submitted.

152. On a consideration of rival contentions, we are inclined to agree with the respondents-States. The States put together do not exhaust the territory of India. There are certain territories which do not form part of any State and yet are the territories of the Union. That the States and the Union Territories are different entities, is evident from clause (2) of Article 1 — indeed from the entire scheme of the Constitution. Article 245(1) says that while Parliament may make laws for the whole or any part of the territory of India, the legislature of a State may make laws for the whole or any part of the State. Article 1(2) read with Article 245(1) shows that so far as the Union Territories are concerned, the only law-making body is Parliament. The legislature of a State cannot make any law for a Union Territory; it can make laws only for that State. Clauses (1), (2) and (3) of Article 246 speak of division of legislative powers between Parliament and State legislatures. This division is only between Parliament and the State legislatures, i.e., between the Union and the States. There is no division of legislative powers between the Union and Union Territories. Similarly, there is no division of powers between States and Union Territories. So far as the Union Territories are concerned, it is clause (4) of Article 246 that is relevant. It says that Parliament has the power to make laws with respect to any matter for any part of the territory of India not included in a State notwithstanding that such matter is a matter enumerated in the State List. Now, the Union Territory is not included in the territory of any State. If so, Parliament is the only law-making body available for such Union Territories. It is equally relevant to mention that the Constitution, as originally enacted, did not provide for a legislature for any of the Part 'C' States (or, for that matter, Part 'D' States). It is only by virtue of the Government of Part 'C' States Act,

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1951 that some Part 'C' States including Delhi got a legislature. This was put an end to by the States Reorganisation Act, 1956. In 1962, the Constitution Fourteenth (Amendment) Act did provide for creation/constitution of legislatures for Union Territories (excluding, of course, Delhi) but even here the Constitution did not itself provide for legislatures for those Part 'C' States; it merely empowered Parliament to provide for the same by making a law. In the year 1991, the Constitution did provide for a legislature for the Union Territory of Delhi [National Capital Territory of Delhi] by the Sixty-Ninth (Amendment) Act (Article 239-AA) but even here the legislature so created was not a full-fledged legislature nor did it have the effect of — assuming that it could — lift the National Capital Territory of Delhi from Union Territory category to the category of States within the meaning of Chapter I of Part XI of the Constitution. All this necessarily means that so far as the Union Territories are concerned, there is no such thing as List I, List II or List III. The only legislative body is Parliament — or a legislative body created by it. Parliament can make any law in respect of the said territories — subject, of course, to constitutional limitations other than those specified in Chapter I of Part XI of the Constitution. Above all, the Union Territories are not "States" as contemplated by Chapter I of Part XI; they are the territories of the Union falling outside the territories of the States. Once the Union Territory is a part of the Union and not part of any State, it follows that any tax levied by its legislative body is Union taxation. Admittedly, it cannot be called "State taxation" — and under the constitutional scheme, there is no third kind of taxation. Either it is Union taxation or State taxation. This is also the opinion of the majority in Sea Customs Act, Re[(1964) 3 SCR 787 : AIR 1963 SC 1760] . B.P. Sinha, C.J., speaking on behalf of himself, P.B. Gajendragadkar, Wanchoo and Shah, JJ. — while dealing with the argument that in the absence of a power in Parliament to levy taxes on lands and buildings (which power exclusively belongs to State

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Legislatures, i.e., Item 49 in List II), the immunity provided by Article 289(1) does not make any sense — observed thus: (SCR p. 812)

155. In this connection, it is necessary to remember that all the Union Territories are not situated alike. There are certain Union Territories (i.e., Andaman and Nicobar Islands and Chandigarh) for which there can be no legislature at all — as on today. There is a second category of Union Territories covered by Article 239-A (which applied to Himachal Pradesh, Manipur, Tripura, Goa, Daman and Diu and Pondicherry — now, of course, only Pondicherry survives in this category, the rest having acquired Statehood) which have legislatures by courtesy of Parliament. Parliament can, by law, provide for constitution of legislatures for these States and confer upon these legislatures such powers, as it may think appropriate. Parliament had created legislatures for these Union Territories under the "the Government of Union Territories Act, 1963", empowering them to make laws with respect to matters in List II and List III, but subject to its overriding power. The third category is Delhi. It had no legislature with effect from 1-11-1956 until one has been created under and by virtue of the Constitution Sixty-Ninth (Amendment) Act, 1991 which introduced Article 239-AA. We have already dealt with the special features of Article 239-AA and need not repeat it. Indeed, a reference to Article 239-B read with clause (8) of Article 239-AA shows how the Union Territory of Delhi is in a class by itself but is certainly not a State within the meaning of Article 246 or Part VI of the Constitution. In sum, it is also a territory governed by clause (4) of Article 246. As pointed out by the learned Attorney General, various Union Territories are in different stages of evolution. Some have already acquired Statehood and some may be on the way to it. The fact, however, remains that those surviving as Union Territories are governed by Article 246(4) notwithstanding the differences in their respective set-

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ups — and Delhi, now called the "National Capital Territory of Delhi", is yet a Union Territory.

160. It is then argued for the appellants that if the above view is taken, it would lead to an inconsistency. The reasoning in this behalf runs thus: a law made by the legislature of a Union Territory levying taxes on lands and buildings would be "State taxation", but if the same tax is levied by a law made by Parliament, it is being characterised as "Union taxation"; this is indeed a curious and inconsistent position, say the learned counsel for the appellants. In our opinion, however, the very premise upon which this argument is urged is incorrect. A tax levied under a law made by a legislature of a Union Territory cannot be called "State taxation" for the simple reason that Union Territory is not a "State" within the meaning of Article 246 (or for that matter, Chapter I of Part XI) or Part VI or Articles 285 to 289.

235. The aforeasaid ratio of NDMC decision, amongst other cases, was followed in the *Delhi Bar Assn. (Regd.) v. Union of India*, (2008) 13 SCC 628 at page 652:

"66. Therefore, from the aforesaid constitutional provisions, it is clear that in the NCT of Delhi the laws made by the Delhi Legislative Assembly are always subordinate to the laws of Parliament whether prior or post in time. This has been reiterated by a Constitution Bench of nine Judges of this Court in NDMC v. State of Punjab [(1997) 7 SCC 339] , wherein the Court held that the Delhi Legislative Assembly is inferior to Parliament in hierarchy.

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> *67. The power to legislate of the Legislative Assembly of Delhi shall not supersede the powers of Parliament to make laws with respect to any matter for Union Territory or any part thereof. If any provision made by the Legislative Assembly with respect to any matter is repugnant to any provision of law made by the Parliament with respect to that matter, whether passed before or after the law made by the Legislative Assembly, then, in either case the law made by the Parliament or such earlier law shall prevail and the law made by the Legislative Assembly shall, to the extent of repugnancy, be void."*

236. At this stage it is also worth mentioning the following observations in Govt. of NCT, Delhi v. All India Central Civil Accounts, JAO's Assn., (2002) 1 SCC 344:

> *"8. Shri P.P. Malhotra, learned Senior Advocate appearing for the Union of India raised a preliminary objection on the basis of Section 52(b) of the Act which provides that all suits and proceedings in connection with the administration of the capital shall be instituted by or against the Government of India. The objection raised by the learned counsel ignores the fact that the matter arises out of an order passed by the Tribunal before which the Government of NCT, Delhi was impleaded as Respondent 3 while the Union of India was impleaded as Respondent 1. When the Union of India was also impleaded as a party and the appellant as another separate party and the order made by the Tribunal affects one of the parties, it is difficult to conceive as to why that party cannot file an appeal invoking the provisions of Article 136 of the Constitution which is a proceeding against the orders made by the courts and the tribunals. <u>The position in law is clear that though the Union Territories are centrally</u>*

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administered under the provisions of Article 239 of the Constitution, they do not become merged with the Central Government and they form part of no State and yet are the territories of the Union, as has been held by this Court in Satya Dev Bushahri v. Padam Dev2 and NDMC v. State of Punjab1. Thus, it must be held that the Union Territory does not entirely lose its existence as an entity though large control is exercised by the Union of India. In this view of the matter, we do not think the preliminary objection raised on behalf of the respondents by Shri Malhotra is justified and the same is rejected." (emphasis supplied)

237. In my view, the said judgements overlook the concept of democracy implicit in the creation of a legislature and the cabinet form of government. Hence, it may be argued that the same are inconsistent with the doctrine of basic structure.

238. Since there are no express provisions providing for the extent of executive power of National Capital Territory of Delhi, the same will have to be ascertained by reference to the provisions of the Constitution dealing with the extent of executive power. In this regard, it would be pertinent to consider Article 73 of the Constitution. Article 73 of the Constitution provides that subject to the provisions of the Constitution, the executive power of the Union shall extend

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– (a) to the matter with respect to which Parliament has power to make laws; and (b) to the exercise of such rights, authority and jurisdiction as are exerciseable by the Government of India by virtue of any treaty or agreement. What is relevant for the present purposes is the proviso to clause (1) of article 73 which reads as follows:

> " *Provided that the executive power referred to in sub – clause (a) shall not, save as expressly provided in this Constitution or in any law made by Parliament, extend in any state to matters with respect to which the Legislature of the State has also power to make laws."*

239. Since the legislative powers have been devolved originally either to the Union or to the State and the legislative power which has now been conferred on the National Capital Territory of Delhi Legislature is unique, the nature of the power would have to be understood. If Article 239 AA was to be considered completely, what was retained by the Parliament by virtue of sub-clause (b) of clause (3) was not the original power to legislate but rather a Concurrent power. It could not have been the intention of

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the Parliament amending the Constitution to create duality and ambiguity in respect of legislative competence. Therefore, except the areas which have been kept from the competence of the Legislative Assembly of National Capital Territory of Delhi, all the other areas of legislation contained in the State List of the VIIth schedule will have to be held to be original Legislative power of the Legislative Assembly of National Capital Territory of Delhi. Thus, for the purposes of Article 73 read with Article 162, in respect of all the areas of legislation in the State List, except those excluded by Article 239AA (3) (a), and all the areas of legislation contained in Concurrent List, it is clear that the Legislative Assembly of National Capital Territory of Delhi will also have jurisdiction to legislate. This would mean that the Government of National Capital Territory of Delhi will have executive power to that extent by virtue of the proviso to clause (1) of Article 73 of the Constitution read with Article 162 of the Constitution. I may add that these are additional reasons to differ from the view taken by the Hon'ble Supreme Court in the NDMC judgement.

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240. In any event, even though the National Capital Territory of Delhi may have been retained in the Chapter pertaining to the Union Territory and Parliamentary supremacy as to legislation may have been maintained in respect of it, it is equally important to consider that an arrangement of governance of the region through directly elected representative has been provided for. It has been provided that the Council of Ministers would ultimately be responsible for the governance. If that is so, then it follows that the said Chief Minister and his Council of Ministers will also have constitutionally recognised powers and control to provide good governance to their people. Whether it is a State or not, the Constitution recognizes that the Chief Minister and his Council of Ministers will have all the necessary attributes of a government which freely and fully will be able to provide to its people good and effective governance, peace and tranquility. Any interference with such a scheme would be an interference with the democratic process.

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IMPACT OF EXCLUSION OF CERTAIN ITEMS OF LEGISLATION FROM THE PURVIEW OF THE LEGISLATIVE ASSEMBLY OF THE NATIONAL CAPITAL TERRITORY OF DELHI

241. Article 239 AA (3) (a) excludes from the jurisdiction of the Legislative Assembly of National Capital Territory matters with respect to entries 1, 2 and 18 of the State List and entries 64, 65 and 66 of that list, insofar as they relate to the said Entries 1, 2 and 18. In order to fully understand the extent of exclusion it would be desirable to consider the said Entries.

242. Entry 1. Public order (but not including the use of any naval, military or air force or any other armed force of the Union or of any other force subject to the control of the Union or of any contingent unit thereof in aid of the civil power).

243. Public order is what the French call '*Ordre Publique*' and is something more than maintenance of law and order. The

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test to be applied in determining whether the act affects law and order or public order is: does it lead to disturbance of the current life of the community, so as to amount to disturbance of the public order or does it affect merely an individual leaving the tranquillity of society undisturbed?[44] The distinction between 'law and order' and 'public order' is one of degree and the extent of the reach of the act in question upon society. The act by itself is not determinant of its own gravity. Law and Order comprehends disorder of less gravity than those affecting 'public order', just as 'public order' comprehends disorder of less gravity than those affecting 'security of state'.[45] Public order has been equated with public safety and tranquillity. Any enactment by the State with regard to public order has to be confined within the boundaries of that State.

244. In *Ram Manohar Lohia (Dr.)* v. *State of Bihar,*[46] Hidayatullah, J., held that any contravention of law always affected order, but before it could be said to affect public order, it must

[44] Kanu Biswas versus State of West Bengal (1972) 3 SCC 831
[45] Kuso Shah versus State of Bihar (1974) 1 SCC 185
[46] AIR 1966 SC 740

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affect the community at large. He was of the opinion that offences against 'law and order;, 'public order', and 'security of State' are demarcated on the basis of their gravity. The said observation is as follows:

> *"52. It will thus appear that just as 'public order' in the rulings of this Court (earlier cited) was said to comprehend disorders of less gravity than those affecting 'security of State', 'law and order' also comprehends disorders of less gravity than those affecting 'public order'. One has to imagine three concentric circles. Law and order represents the largest circle within which is the next circle representing public order and the smallest circle represents security of State. It is then easy to see that an act may affect law and order but not public order just as an act may affect public order but not security of the State."*

245. It would also be pertinent to note the findings of the Federal Court in *Lakhi Narayan Das* v. *Province of Bihar,*[47] where the Federal Court while considering the scope and ambit of the expression "public order" used in Entry 1 of the Provincial List in the Government of India Act, 1935, in para 12 of the judgment observed as follows:

[47] AIR 1950 FC 59

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> *"The expression 'public order' with which Item 1 begins, is, in our opinion, a most comprehensive term and it clearly indicates the scope or ambit of the subject in respect to which powers of legislation are given to the province. Maintenance of public order within a province is primarily the concern of that province and, subject to certain exceptions which involve the use of His Majesty's forces in aid of civil power, the Provincial Legislature is given plenary authority to legislate on all matters which relate to or are necessary for maintenance of public order."*

246. Entry 2: Police (including railway and village police) subject to the provisions of entry 2A of the list I.

247. Police means the civil force charged with the duty to maintain internal peace and order. The police power of the state in respect of any offence committed in a state comes within the legislative competence of the state. The state can have extra–territorial jurisdiction when an offence is committed in more than one state. In such a situation, one state has to act with the consent of the other state or must work with the police of the other state. In the matter of

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investigation of an offence, the jurisdiction of Central Government is ousted.[48]

248. The Committee on Reorganisation of Delhi Setup, although in agreement that the subjects of public order and the police should be excluded from the purview of the Legislative Assembly for Delhi and retained with Centre, also noted that the maintenance of public order cannot be achieved in vacuum without the cooperation of the people or without a feedback mechanism. In order to achieve such an end, it was suggested that a convention of consultation with the Chief Minister should be adopted.

249. However, the Committee failed to appreciate that police power was one of the essential powers required to discharge governmental functions. The police power is the legal capacity of the sovereign or its governmental agents, to limit the personal liberty of persons by means, which bear a substantial relation to the end to be accomplished for the protection of social interests, which reasonably need

[48] Bhavesh Jayanti Lakshmi versus State of Maharashtra (2009) 9 SCC 551

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protection. The police power is essential for peace and governance.

250. Now we may consider Entry 2 of the Concurrent List, which has not been excluded from the jurisdiction of the Legislative Assembly of National Capital Territory of Delhi. Entry 2 reads 'Criminal Procedure, including all matters included in criminal procedure at the commencement of this 'Constitution'. A perusal of various provisions of the Code of Criminal Procedure would indicate that, *inter alia*, it also deals with powers assigned to police officers of various rank and provides for detection, prevention and prosecution of crimes and offences.

251. A comparison of Entry 2 of the State List and the Concurrent List would show that, whereas the entry in the State List would deal with creation of an armed body of men/women to perform police functions, on the other hand, criminal procedure would deal with necessary attributes of their duties in respect of detection and prevention of crime. Thus, Entry 2 of the Concurrent List cannot have any meaning unless and until the Police co-operate and are

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brought under the executive branch of the State Government. If however, there is a failure of co-operation, then the Central Government would be open to the charge of preventing lawful exercise of executive power by the Government of the National Capital Territory. Such co-operation is expected from the Central Government, although it retains an overall control in the matter of appointments and allied matters.

252. Similarly since both Entry 1 and Entry 2 of the Concurrent List fall within the legislative competence of the Legislative Assembly of National Capital Territory of Delhi, it also follows that the Anti-Corruption Branch of the Government of National Capital Territory of Delhi will fall within the Executive Powers of the Government of National Capital Territory of Delhi, the extent of jurisdiction of the said branch can only be prescribed by the Government of National Capital Territory of Delhi. However, the Anti-Corruption Branch must be a duly and validly constituted force.

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ILLUSTRATIONS OF THE ADMINISTRATIVE STRUCTURE OF THE 'SEAT OF THE CAPITAL' IN CERTAIN JURISDICTIONS.

253. The structure of Governance in Delhi reveals a very unique situation, wherein although an elected representative government has been established, it remains, in substance, subordinate to the Federal Government. To understand the feasibility and legality of such a situation within the federal scheme, an analysis must be conducted of how other Federal jurisdictions have dealt with the situation of having a Capital District, and the balance that they have sought to achieve between 'state autonomy' and 'federal control' over the Capital.

WASHINGTON D.C.: THE UNITED STATES OF AMERICA

254. Washington D.C. (hereinafter, D.C.), was founded in the year 1791, as the national capital of the United States of America. Presently, D.C. has an area of 177 km^2 and houses a population of about 658,893 people. D.C. became the capital of the United States in a peculiar fashion wherein, the states of Virginia and Maryland (adjoining D.C.)

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donated land near the Potomac river. It may be noted that before D.C., Philadelphia and New York City were frontrunners in the race to become the capital city; however, there was a strong resistance from the southern states who wanted the capital city to be near their states. On November 21, 1800 the US Congress convened for the first time in D.C..[49]

Constitutional position:

255. The Constitution of the United States was adopted in 1789. As D.C. was yet to come into existence, the Constitution itself provided for the site and administration of the upcoming Federal Capital. As stated above, there was already a clash between the northern states and the southern states with respect to the Capital of USA. This further aggravated the need to provide for the seat of the Federal Government and its administration within the Constitution itself.

Statehood for D.C.

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[49] Green Constance McLaughlin, *Washington: A History of the Capital*, 1800-1950(1962), pg. 23

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256. A former US Court of Appeals judge for the District of Columbia, Justice Kenneth Starr, advanced a theory during the hearing of a case wherein the statehood of D.C. was not in question. However, he noted that while under Article I Section 8 Clause 17-(*the seat of Government Clause*), the Congress had wide authority to govern over D.C., the Constitution did not affirmatively grant the districts residents the right to vote in congressional elections. Thus, the Constitution did not give Congress plenary powers to govern the District's affairs. He further cited the *Report of the Attorney General: The Question of D.C. Statehood* wherein, for various purposes, D.C. was considered as a State.[50] A relevant extract of the said report is reproduced hereunder:

> *Statehood for the District of Columbia is not a racial issue. It is not a civil rights issue. It is a constitutional issue that goes to the very foundation of our federal union. A change in the*

[50] Johnny Barnes, *Towards Equal Footing: Responding to the Preceived Constitutional, Legal and Practical Impediments to Statehood for the District of Columbia*, University of the District of Columbia Law Review, Vol. 13, pg. 1, pg. 20

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> *status of the District of Columbia would signal a substantial change in our form of federalism.*[51]

257. Article I Section 8 Clause 17 of the Constitution of the United States clothes Congress with exclusive legislative powers over the district, which would eventually become the seat of the Government. The same is reproduced as hereunder:

> *The Congress shall have Power to exercise exclusive Legislation in all cases whatsoever, over such District (not exceeding ten Miles square) as may, by cession of particular states, and the acceptance of Congress, become the Seat of the Government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings;*

258. In case of D.C., the purpose of demanding statehood was that residents of D.C. did not have voting rights in Presidential elections in the United States. The basis for not giving voting rights to the residents of D.C. was that they had agreed to give up benefits (including voting rights) when

[51] Office of Legal Policy, US Department of Justice, Report of the Attorney General on the Question of Satehood for the District of Columbia 50(1987)

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they accepted to be residents of the Federal Capital, as the same entitled them to receive various other benefits. However, this argument may have been in contravention of the equal protection clause.

259. Control of the Federal Government over the seat of the Federal Government i.e., D.C., is also reflected in the Federalist Papers No. 43, authored by James Madison, wherein the following extract is relevant:

> *The indispensable necessity of complete authority at the seat of government, carries its own evidence with it. It is a power exercised by every legislature of the Union, I might say of the world, by virtue of its general supremacy. Without it, not only the public authority might be insulted and its proceedings interrupted with impunity, but [also] a dependence of the members of the general government on the State comprehending the seat of government for protection in exercise of their duty, might bring on the national councils an imputation of awe or influence, equally dishonourable to the government and dissatisfactory to the other members of the confederacy.*

260. It is in view of the above that the administration of D.C. was kept under the Congress, by giving Congress plenary powers under '*the seat of the government clause*'.

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261. Apart from this, under Article IV Section 3 (1) of the U.S. Constitution exclusive power to admit a new state vests with the Congress:

> *New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.*
>
> *The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.*

262. In view of the above Article IV, it becomes evident that the Congress has the plenary power with respect to admitting a new state into the Union/Nation/Country. Thus, the position is similar to India where the Parliament has the sole power to create a new state under Article 3. Thus, the capital of the United States of America, i.e. Washington D.C., is a federally administered District under the

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Constitution of the USA, which is similar to Article 239AA of the Constitution of India.

CANBERRA :AUSTRALIA

263. Canberra, the Capital of Australia, is located in the federally administered area known as the 'Australian Capital Territory'. The Australian Capital Territory is spread over an area of 2,358 sq. km. Canberra was chosen as the capital in view of Section 125 of the Australian Constitution, which provided that the Commonwealth Seat of Government should be within Commonwealth Territory, not less than 258 sq. km in area, situated within the state of New South Wales not less than 160 km from Sydney. The territory to constitute the Australian Capital Territory was given by New South Wales in favour of the Federation.

264. Since its inception, there were calls for administrative autonomy with respect to the Australian Capital Territory, but they were whittled down on the following grounds:

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(a) The Commonwealth of Australia was keen to protect its control over the national capital, which was also the seat of Government of Australia;

(b) The level of financial support need from the Commonwealth provided to the Australian Capital and a change would require local residents to make a return contribution to the Territory's running costs.

265. After numerous attempts, the Australian Self Government Territory Act, 1988 (hereinafter, the 1988 Act) was passed. Section 8 of the 1988 Act[52] provides for creation of a legislative assembly, which shall be headed by the Presiding Officer appointed in the manner provided under Section 11 of the 1988 Act.[53] Furthermore, under Section 40 of the

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[52] **8. Legislative Assembly:** (1) There shall be a Legislative Assembly for the Australian Capital Territory.
(2) The Assembly is to consist of:
(a) such number of members as is provided by enactment (subject to subsection (3)); or
(b) until provision is made--17 members.
(3) An enactment providing for the number of members of the Assembly (or an enactment amending or repealing such an enactment) has no effect unless it is passed by a number of members at least equal to two-thirds of the number of members provided for, at that time, by or in accordance with subsection (2).
(4) Subsection (3) has effect despite anything else in this Act.

[53] **11. Presiding Officer of Assembly:** (1) At the first meeting of the Assembly after a general election, the members present shall, before any other business, elect one of their number to be the Presiding Officer of the Assembly.
(2) The title of the Presiding Officer shall be determined by the Assembly.

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1988 Act, there shall be a Chief Minister for the Australian Capital Territory.

266. It may be noted that under Section 22 of the 1988 Act[54], the Legislative Assembly for the Australian Capital Territory has been given wide powers to legislate with respect to peace, order and good governance. In addition, Section 37 read with Schedule 4 of the 1988 Act gives power to the Australian Capital Territory Executive to govern the Australian Capital Territory with respect to various matters including use, planning and development of land and public order.

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(3) If there is a vacancy in the office of Presiding Officer (not because of a dissolution of the Assembly), then:
(a) if the vacancy happens at a meeting, the members present shall, before any further business, elect one of their number to be the Presiding Officer; or
(b) if the vacancy happens at any other time, at the next meeting the members present shall, before any other business, elect one of their number to be the Presiding Officer.
(4) This section does not prevent the Assembly from appointing a person to preside at meetings in the absence of the Presiding Officer, but a person holding office as a Minister shall not be so appointed.

[54] **Power of Assembly to make laws:** (1) Subject to this Part and Part VA, the Assembly has power to make laws for the peace, order and good government of the Territory.
(2) The power to make laws extends to the power to make laws with respect to the exercise of powers by the Executive.

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267. It is only under Section 23 of the 1988 Act that the power to legislate on issues pertaining to the provision by the Australian Federal Police for police services in relation to Australian Capital Territory have been kept out of the purview of the Australian Capital Territory Legislative Assembly.[55]

268. Although absolute self-governance has not been granted to Australian Capital Territory, it has a fair degree of self-governance. Additionally, the executive of the Australian Capital Territory can make laws on issues central to the

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[55] **Matters excluded from power to make laws:** (1) Subject to this section, the Assembly has no power to make laws with respect to:
(a) the acquisition of property otherwise than on just terms;
(c) the provision by the Australian Federal Police of *police services in relation to the Territory*;
(d) the raising or maintaining of any naval, military or air force;
(e) the coining of money;
(g) the classification of materials for the purposes of censorship.
(1A) The Assembly has no power to make laws permitting or having the effect of permitting (whether subject to conditions or not) the form of intentional killing of another called euthanasia (which includes mercy killing) or the assisting of a person to terminate his or her life.
(1B) The Assembly does have power to make laws with respect to:
(a) the withdrawal or withholding of medical or surgical measures for prolonging the life of a patient but not so as to permit the intentional killing of the patient; and
(b) medical treatment in the provision of palliative care to a dying patient, but not so as to permit the intentional killing of the patient; and
(c) the appointment of an agent by a patient who is authorised to make decisions about the withdrawal or withholding of treatment; and
(d) the repealing of legal sanctions against attempted suicide.
(2) The regulations may omit any of the paragraphs in subsection (1) or reduce the scope of any of those paragraphs.

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governance of the Australian Capital Territory, such as, public order, use and development of land etc. However, such powers are absent from the purview of Delhi Legislative Assembly in view of the express language of Article 239AA of the Constitution. The Committee on Reorganisation of Delhi Setup failed to consider this aspect of the matter while considering the Australian Capital in Chapter 5 of its Report at chapter heading 5.3.

CANADA

269. The city of Ottawa is the capital of Canada and is part of the province of Ontario. It has a total area of 2,778 km^2. 883,391 people populate the Canadian capital.

270. The structure of Ottawa is distinct from any other federal capital since it is neither a federal unit, special capital district, nor a capital of federal units. Although it is the capital of Canada, it is still a part of the Province of Ontario for the purposes of governance.

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271. Ottawa is a single-tier municipality division in Ontario, meaning it is in itself a census division and has no county or regional municipality government above it. It has its own municipality government, which functions under the provincial government.

272. The official federal designation for the Canadian Capital is "National Capital Region" (NCR), which includes the Canadian capital of Ottawa (in Ontario), the neighbouring city of Gatineau (in Quebec), and the surrounding urban and rural communities. However, this is merely a designation provided to define the region and it is not established as a separate political entity. The said regions still remain very much a part of the provinces of Ontario and Quebec. This division merely represents the jurisdictional area of the government agency that administers federally owned lands and buildings, and is not an actual administrative unit.

273. As far as governance is concerned, the Federal Government does not interfere with the Ottawa Municipal government. It, however, has set up a body to administer federal buildings

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in the said region. Prior to 1960, the Federal District Commission (FDC) existed in the NCR to administer Federal Activities. However, the FDC could not cooperate with the provincial governments for the development of the NCR. Hence, the Federal Government passed the National Capital Act, 1960 by which it firstly established the exact geographical demarcations of the NCR. Secondly, the act established the National Capital Commission (NCC) to replace the FDC.

274. The NCC was a purely administrative body with no legislative functions of its own. It's primary purpose was to "prepare plans for and assist in the development, conservation and improvement of the National Capital Region in order that the nature and character of the seat of the Government of Canada may be in accordance with its national significance."[56]

275. To achieve this purpose, the NCC was given certain powers, including the power to acquire and develop property,

[56] Section 10, National Capital Act, 1960.

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cooperate and engage in joint projects with the municipal government, etc.

276. Thus, the NCC was primarily established to administer the Federal Buildings as well as take active part in the planning, development and beautification of the NCR. It was also meant to co-ordinate with the provincial and municipal governments for the same, which is also enumerated in Section 11 of the Act. The NCC has no legislative powers of its own. Despite this, the NCC does exercise a large amount of influence over the development plans of the NCR region, and in practice, it is the NCC which is carrying out all development activities in the said region. Legislative and executive competence over matters concerning land, however, still remain a subject of provincial control.[57]

277. Canada, thus, has evolved a unique setup, wherein the Central Government does not in any way exercise legislative or executive control over its capital region. While a special body is set up to administer the NCR, the autonomy of the province is not disturbed.

[57] Section 92, The Constitution Act, 1870

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278. The Committee on Reorganisation of Delhi Setup considered the case of Ottawa (Canada) and pointed out that the federal government had attempted to resolve the problem of divided jurisdiction using federal financing as its primary mechanism to ensure that the federal interests in the affairs of the capital city are given due weight through the instrumentality of the National Capital Commission. The creation of the National Capital Commission might have resolved, to some extent, the problem of land use and development in the capital region. However, it offers no solution to other problems, particularly the important matter of relationship between the federation and provinces and the capital city, the ethnic division and other such complex problems of Administration. (Paragraph 5.4.8).

MALAYSIA

279. Since 1948, Malaysia practised a federal system of government. When the Federation of Malaya achieved independence on 31 August 1957, it consisted of eleven states: Perlis, Kedah, Penang, Perak, Kelantan, Terengganu, Pahang, Selangor, Negeri Sembilan, Melaka, and Johor.

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280. The capital city of Malaysia is Kuala Lampur. It is a Federal Territory with a population of approximately 1,670,000. Dewan Negara, the Upper House of the Legislature, receives two members from Kuala Lampur, each appointed by the King on the advice of the Prime Minister.

281. The Reid Commission, an independent commission for the drafting of a constitution for an independent Federation of Malaya, suggested that Kuala Lumpur be maintained as the seat of government, unless the post-independence government decided otherwise.[58] However, after achieving independence, the Central Government had planned to develop a satellite town to substitute Kuala Lumpur as the administrative centre. The plan, however, failed to materialise due to financial constraints and lack of significant alternatives; the federal government decided to maintain Kuala Lumpur as the administrative centre.

282. The Malaysian Government wanted complete federal control over the said capital region, which was recommended by the Constitution Commission set up after its independence. For

[58] Report of the Federation of Malaya Constitutional Commission, 1957

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this reason, it first shifted the State Legal Administrative Center of Selangor from Kuala Lampur to Sungai Renggam.

283. The Federal Capital Act, 1960, came to be passed whereby the Federal Government officially took over the Kuala Lumpur Municipal Council and transferred it to Federal Capital Kuala Lumpur Commissioner. However, land affairs were still within the purview of the Selangor State Government.

284. The Federal Territory Enactment Bill, 1973, proposed to enhance the territory of Kuala Lampur and transfer all powers with respect to the territory to the Federal Government. There were several oppositions to this Bill. Resistance to this scheme arose as the opposition wanted a referendum on the said issue. Another reason for protest was abolition of seats reserved for Kuala Lumpur in the State Assembly with the formation of the Federal Territory. With such abolishment, the Kuala Lumpur residents could only vote in the election for Federal Parliament. Despite the opposition, the Bill was passed in Parliament and the State

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Assembly, and Kuala Lumpur was officially transferred on 1 February 1974 through the Kuala Lumpur Agreement.[59]

285. The Federal Government of Malaysia has further taken over two other territories from the states. The first is Labuan, an island off the coast of mainland Sabah, which has been chosen by the Federal Government for development into an offshore financial centre. Labuan became the second federal territory in 1984. The second is Putrajaya, which is a planned city designed to replace Kuala Lumpur as the seat of the Federal Government. Putrajaya became the third federal territory on February 1, 2001.

286. In the recent years, efforts were made to forge a common identity for the three federal territories. A flag of Federal Territory was introduced to represent the federal territories as a whole.

287. Malaysia, thus, opted for complete Federalisation of its capital city, retaining control over all legislative and executive functions of the state. Currently, there is no local

[59] Azmeer Azmi, An Anguish Cession: Issues during the Shaping of the Federal Territory of Kuala Lumpur, 1974, Academic Journal of Interdisciplinary Studies, Vol. 3 No. 6, November, 2014.

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government in Kuala Lampur. The citizens are only allowed to vote in the federal elections. The administration of the city is carried out by Lord Mayor, who is appointed by the Federal Government every 3 years. However, the following model was not adopted without dissent. Further, the size and population of Kuala Lampur, which are about 1/7th and 1/10th of Delhi respectively, was what made it logistically possible to have such a situation.

GERMANY

288. The German capital Berlin is an autonomous state with a population of 3,562,166. The city has reserved for itself, four seat in the *Bundesrat* (Upper House).

289. Post the unification of Germany in 1990, Berlin became the Capital of the Federal Republic of Germany. Berlin is one of the 16 states of Germany and has all the powers that have been devolved on a state by the 'Basic Law of the Federal Republic of Germany, 1949', which is the Constitution of Germany. In 1995, Berlin adopted its own constitution

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which provides for the structure of the government in Berlin.

290. As per the Constitution of Berlin, Berlin has a completely autonomous government. The House of Representatives of Berlin, has 169 representatives, who are elected for a term of four years by democratic elections. The House elects the Mayor of Berlin and the Mayor then elects the 8 Senators. Only the House has the authority to dismiss a Senator. The House also controls the budget for the State of Berlin.

291. There is no special Federal Control over the state of Berlin. The division of legislative powers between the Federal Government and the state of Berlin is as per the Basic Law of the Federal Republic of Germany. The Basic Law reserves certain powers for the Federal Government, which, as per Section 73 include foreign affairs, defence, currency, law on weapons etc. The Law also contains a Concurrent List (under Section 74) which includes matters such as criminal procedure, civil procedure etc. There is, however, no list which specifies the legislative powers of the state legislatures. As per Sections 70-72, the State Legislature

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can legislate on all matters not covered under the Federal List and also on all matters covered under the Concurrent List, as long as there is no federal law to that effect.

292. Germany has thus opted for a situation where there is no special status given to the capital of the Federation. It has its own elected representatives who carry out the legislative and executive functions in the region. It is merely the seat of the Federal Government.

AUSTRIA

293. Vienna is the capital of Austria and is one of the 9 states of Austria. It is also the largest state in Austria with a population of 1,794,770 and an area of 414.65 km^2. It is an autonomous state with its own government, with no federal control, and with 11 seats in the Federal Council (Upper House).

294. The legislative body in Vienna is the Provincial Parliament, which has 100 members. This body elects the Mayor for the province. The Mayor in turn appoints 12 people to the

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Provincial Government, which is the executive body of the state.

295. The legislative division of powers between the Federal Government and the Provincial Government is prescribed by 'Austria's Constitution', 1920. Austria, as far as legislative powers are concerned, is highly centralized. The Federal Government has exclusive legislative powers over several subjects, including security and public order. Austria has a centralized police, called the Federal Police, which functions at both the Central and the provincial levels.

296. Although the Constitution does provide municipal authorities executive control over local public security, traffic police, market police etc., it is still subject to Federal Control. Planning and development of the regions are, however, within the control of the municipal authorities.

297. The Austrian model is exactly the same as the German model as far as the structure of the capital is concerned. However, the legislative division of powers in Austria is much more centralized, giving the Federal Government

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ample control over even the provinces. This might be a reason why Austria has never felt the need to confer control over its capital region to the Federal Government. Furthermore, Vienna, apart from being the capital, is also the largest state in the country, which is also a reason for ensuring the citizens have a right to elect their own representatives.

BRAZIL

298. Prior to 1960, Rio de Janeiro was the capital of Brazil. In the 1950's it was felt that the capital should be situated at a more central location. This led to the formation of the Federal District of Brazil. The Federal District was split into 29 Administrative Regions, one of which was Brasilia. In 1960, the city of Brasilia was designated as the official capital of Brazil. Its current population is 2,852,372 and it is spread over approximately 5,802 square-kilometres.

299. Until the 1980s, the Governor of the Federal District was appointed by the Federal Government, and the laws of Brasília were issued by the Brazilian Federal Senate. With

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the Constitution of 1988, Brasília gained the right to elect its Governor, and a District Assembly was elected to exercise legislative power. The Constitution of Brazil under Art. 32, provides the Federal District all the powers of the states and municipalities, but prohibits division of the District into further municipalities.

300. The Brazilian Constitution provides for the legislative and executive powers of the Union Government, as well as a Concurrent List providing for common legislative and executive powers. It does not provide any list for the legislative and executive competence of the states, through grants the states all legislative and executive power that they are not specifically prohibited from exercising as per the constitution (Art. 25). This includes the power to legislate on and control lands.

301. Although the Federal District has its own legislative structure, the Brazilian Constitution grants certain executive and legislative powers over the said region to the Union. These include executive power to:-

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XIII – organize and maintain the Judicial Power, the Public Prosecution and the Public Legal Defense of the Federal District and territories;

XIV – organize and maintain the plainclothes police, the uniformed police force, and the uniformed fire brigade of the Federal District, as well as to provide financial support to the Federal District for the carrying out of public services by means of a specific fund; and legislative power over :-

XVII – the judicial organization of the Public Prosecution and of the Public Legal Defense of the Federal District and of the territories, as well as their administrative organization;

302. Although the Union has retained the power to maintain a police force in the Federal District, public security is still within the jurisdiction of the Federal District. As per Art. 144, the Federal District has the power to have its own Military Police, for the ostensive policing and the maintenance of the public order; and a civil police, to exercise the functions of criminal police and to investigate criminal offenses.

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303. Brazil, it would seem, is the ideal model for studying the transition of a capital district from complete Federal Control to an autonomous province. Brazil has retained certain powers over the Federal District that it might consider essential for proper functioning of the Central Government, but has not assumed the power to supersede the Provincial Government. This model could most closely be linked to Delhi, since Delhi has also been transformed from a centrally controlled Union Territory, to a partially autonomous region. However, unlike Brazil, the Central Government in India has, in a legal sense, authoritative control over the legislature in Delhi, which strikes at the very roots of a democratic set-up.

ARGENTINA

304. The Argentine Republic serves as a relevant example of capital cities that have considerable power over the city's internal security. The Autonomous City of Buenos Aires is the capital of Argentina. The city was removed from the Buenos Aires Province in 1880; thereafter, it stood federated. The city's population is approximately three

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million, making it considerably less populated than the NCT of Delhi.

305. In 1994, the Argentine Constitution was amended, giving the once centrally administered capital the special status of an Autonomous City, while also giving its people the right to elect a Chief of Government. The city also elects its own representatives in the Federal Government – three senators to the Argentine Senate and twenty-five national deputies to the Chamber of Deputies.

306. Since its establishment in 1943, the responsibility of policing Buenos Aires lay with the Argentine Federal Police[60], i.e. under central control.[61] In 2010, however, the 1850 officer strong Metropolitan Police Force was formed, functioning under the authority of the Autonomous City of Buenos Aires. Security of the capital city is currently under the Metropolitan Police Force and the Argentine Federal Police

[60] The Argentine Federal Police was established by Decree Nr. 17.750 of the 24 December 1943. The force operates under the Ministry id Security of the Federal Government.
[61] National Law 24.588 stated that authority over the 25,000 strong Federal Police and responsibility over federal institutions within the city would not be transferred to the Autonomous City Government.

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307. Buenos Aires is an important example for two reasons. First, it points to a need of having power over internal security in provincial hands. Second, it is unique inasmuch as two separate police forces, one administered by the centre and one by the city, operate together.

MEXICO

308. The Federal District of Mexico is the capital of Mexico. The city does not form part of any one of the nation's 31 states. In 2009, the population of the city was 8.84 million, while the Greater Mexico City[62] or the Mexico City Metropolitan Area had, in 2013, a population of 21.2 million people.

309. The Senate of the Republic is the Upper House of Mexico's bi-cameral Congress. The Federal District sends two representatives to the Senate from the party that wins the election and one representative from the party that received the highest minority vote. The Chamber of Deputies, the Lower House, is composed of 300 Deputies who are elected directly from Federal Electoral Districts (constituencies) and

[62] The Greater Mexico City is a conurbation, which consists of the 16 boroughs that constitute the Federal District and 41 other municipalities from the states of Mexico and Hidalgo.

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200 Deputies elected through proportional representation. The Mexico City Federal District directly elects 27 Deputies to the Chamber.

310. The Political Constitution of the Unites States of Mexico ("Mexican Constitution") states that Mexico City shall be considered as the Federal District, the residence of the Union's Powers and the Capital of the Mexican United States.[63]

311. In the 1980s, due to a sudden increase in population, residents of the Federal District began to claim political and administrative autonomy to manage their local affairs. Proposals included a demand for full statehood for the Federal District. In 1987, the Federal District received a greater degree of Autonomy with the enactment of the first Statute of Government[64] and the creation of an Assembly of Representatives.[65] Since 1997, residents of the Federal

[63] The Political Constitution of the United States of Mexico, Article 44

[64] Unlike other States, the Mexico City Federal District does not have a Constitution, rather a Statute of Government. The Budget is administered locally on being proposed by the Head of Government and approved by the Legislative Assembly.

[65] Article (VI) (1) of the Mexican Constitution gave Congress the power to legislate on all matters concerning the Federal District & Territories. The Government if the Federal District was to be entrusted to the President of the Republic, who would exercise it through the organs that were prescribed by law. The said Article stands repealed.

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District have had the right to elect directly the Head of Government and representatives to the unicameral Legislative Assembly.

312. The Federal District has complete legal capacity to acquire and possess all the real estate required for public services. The Congress of the Union has powers to legislate on matters concerning Public Debt of the Federal District. Among other things, the President has the power to initiate laws in the Congress of the Union on all subject matters relating to the Federal District.

313. In accordance with the terms of the Statute of Government of the Federal District, the Assembly of the Federal District has powers to enact, *inter alia*, its organic law, to examine, discuss and approve the annual budget and income law, taxes and government spending necessary to cover the budget. Additionally, the Assembly holds the powers to legislate in matters of a civil and criminal nature, to regulate the organism for the protection of human rights, citizen participation, public notaries, the public registry of property and commerce, and the office of the public defender.

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Further, the Assembly may regulate civil protection, police and government infractions, crime prevention and social welfare. Further still, the Assembly can legislate in matters of planning for development, urban development, the uses of land and the use of property under the domain of the Federal District. The Secretariat of Public Security of the Federal District manages a combined force of over 90,000 officers within the Federal District.

314. Mexico City differs from the NCT of Delhi in many respects. Apart from being the capital of a Civil Law nation, it also has a GDP much greater than GDP of the NCT of Delhi. The Mexican experience may provide some assistance while rethinking about the present administrative set-up in Delhi. Particularly, the fact that the government of the Mexico city has control over the land of the city. The control over matters of both a civil and criminal nature, as indeed control over the capital's police force, also rests with the Federal District.

315. Having briefly analysed the political scenario in the aforementioned nations, one may conclude that some

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nations have favoured either complete Federal control or complete provincial autonomy. It is no doubt true that about the seat of Union Government, the Central Government cannot not have any say or control, but such a say may have to be only to the extent it is required for the purposes of either maintaining security, peace and standard of the kind required to be maintained for a Capital of the country. However, such maintenance may not require intermittent interference with governance by the democratically elected government of the people. If at all a constant supervision is imperative, the same should be well guided, so that exercise of the power by the delegatee of the Central Government is within the parameters of the requirement of such supervision and the supervision does not overtake local-governance and assume supremacy over the democratically elected government of the people.

316. The people of Delhi have a right to good governance; the source of which has also been traced to Article 21 of the Constitution. In *Goberdhan Lal v. State of U.P.* [2000 SCC OnLine All 308 at para 12], it was recognized that Article 21

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also includes in itself the fundamental right to good governance. The following excerpt is noteworthy:

> *12. In our opinion the citizens have a fundamental right to good governance, and this right to have good governance is part of Article 21 of the Constitution. Article 21 has been interpreted by the Supreme Court in several decisions to mean that the citizens have a right to a dignified and civilized life, and not merely an animal life. Unless the citizens get good governance it is not possible for them to have a dignified and civilized life.*

317. The conjoint reading of Article 239 AA and Article 239 AB would show that although parliamentary supremacy has been provided in sub-clause (b) of clause (3) of Article 239 AA read with Article 246 (4), the executive power to the exercise has been guided by Article 239 AB (b) which contemplates that if the President, on receipt of a report from the Lieutenant Governor or otherwise is satisfied that for the proper Administration of National Capital Territory it is necessary or expedient so to do, the President may by order suspend the operation of any provision of Article 239 AA or of all or any of the provisions of any law made in pursuance of that Article for such period and subject to

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such conditions as may be specified in such law and make certain incidental and consequential provisions as may appear to him to be necessary or expedient for administration of the National Capital Territory, in accordance with the provisions of Article 239 and Article 239 AA. Therefore, it is clear that the autonomy contemplated by Articles 239 AA and Article 239 AB to the local government is of a much higher degree and must be respected.

Does Section 22 of Government of National Capital Territory Act, 1999 ("NCT Act") impose unreasonable restrictions on the powers of the Delhi Legislature and, if so, whether they are unconstitutional? **Is Section 22 of the NCT Act unconstitutional?**

318. In exercise of the powers conferred upon the Parliament by Article Clause 7(a) of Article 239AA, the Parliament enacted the Government of NCT of Delhi Act, 1991. The NCT Act was meant to "supplement the provisions of the Constitution relating to the Legislative

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Assembly and a Council of Ministers for the National Capital Territory of Delhi and for matters connected therewith or incidental thereto".

319. Part II of the NCT Act deals with the 'Legislative' organ of the NCT of Delhi and is titled 'Legislative Assembly'. Accordingly, the said Part contains provisions relating to, *inter alia,* the elections, composition, duration, sessions, prorogation, and dissolution of the Legislative Assembly. Furthermore, it provides for the qualifications, disqualifications, powers, privileges, salaries etc. of the members of the Legislative Assembly. Another aspect that Part II touches upon is the procedure to be followed in the Legislative Assembly in relation to passing of Bills. Accordingly, it stipulates, *inter alia*, the provisions for voting in the Assembly, procedure as to lapsing of Bills, Assent to Bills, Appropriation Bills and Special Provisions as to Financial Bills.

320. Section 22 is the provision which deals with the 'Special Provisions as to Financial Bills'. As per Section 22:

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(1) A Bill or amendment shall not be introduced into, or moved in the Legislative Assembly except on the recommendation of the Lieutenant Governor, if such Bill or amendment makes provision for any of the following matters, namely :-

(a) the imposition, abolition, remission, alteration or regulation of any tax ;

(b) the amendment of the law with respect to any financial obligations undertaken or to be undertaken by the Government of the Capital;

(c) the appropriation of moneys out of the Consolidated Fund of the Capital;

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

(e) the receipt of money on account of the consolidated fund of the capital or the custody or issue of such money.

Provided that no recommendation shall be required under this sub-section for the moving or an amendment making provision for the reduction or abolition of any tax.

(2) A Bill or amendment shall not be deemed to make provision for any of the matters aforesaid by reason only that it provides for the imposition of fines or other pecuniary penalties, or for the demand or payment of fees for licences or fees for services rendered, or by

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reason that it provides for the imposition, abolition, remission, alteration or regulation of any tax by any local authority or body for local purposes.

(3) A Bill which, if enacted and brought into operation, would involve expenditure from the Consolidated Fund of the Capital shall not be passed by the Legislative Assembly unless the Lieutenant Governor has recommended to that Assembly the consideration of the Bill.

321. *Prima facie,* Section 22 reflects the provisions of the Constitution which deal with the procedure for Financial Bills. The Constitution prescribes a special procedure for the introduction of Financial Bills both in Parliament, as well as the Legislative Assemblies of the States. Art. 117 requires the recommendation of the President for introducing Financial Bills in the Parliament. Art. 207 seeks recommendation from the Governor for moving such a Bill in the State Legislative Assemblies. Further, both Articles also make it clear that a money bill can only be introduced in the lower house of the Parliament / State Legislature.

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322. It is pertinent to note that the bar to introduce a financial Bill in any House other than the House of elected representatives of the people was not adopted in the Government of NCT Act due to the absence of a bicameral legislature in the State of Delhi. Since the Legislative Assembly established for Delhi under Art. 239AA is an elected body which forms the only house in the Delhi legislature, adopting restrictions similar to the one stipulated in Arts. 117 and 207 was rendered otiose.

323. On a preliminary reading, it may seem that the abovesaid principles are unconnected to each other since one deals with the Executive involvement in financial Bills while the other deals with the relation between the the two Houses of the legislature in relation to financial bills. However, the two principles are inextricably linked to each other and form the core rationale for adopting special procedures in relation to financial Bills. For examining the

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basis of the two principles, it is apposite here to trace the history of the two cardinal principles.

324. As early as the twelfth century, when the Saladin tithe was imposed in England, taxation and representation were connected; the tithe was assessed by a jury and in some sense, a representative of the taxpayer and of the parish in which he lived, and the towns sent representative burgesses to Westminster to bargain with the Crown. Through the centuries, the principle was maintained that taxation required representation and consent. The earliest distinct precedent however, for the exclusive right of the elected representatives to initiate Money Bills is the Indemnity of the Lords and Commons in England in the year 1407. The assertion or re-assertion of this exclusive right of the House of Commons in relation to financial bills also followed the English civil wars and Restoration of 1660. In 1671, the Commons resolved: 'That in all aids given to the King by the Commons, the rate or tax ought not to be altered by the Lords...' Finally, on 3rd July 1678 the House of Commons

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amplified the terms of its financial powers by declaring its exclusive right to propose how public funds would be spent:

> *That all aids and supplies, and aids to his majesty in Parliament, are the sole gift of the commons; and all bills for the granting of any such aids and supplies ought to begin with the commons: and that it is the undoubted and sole right of the commons to direct, limit, and appoint in such bills the ends, purposes, considerations, conditions, limitations, and qualifications of such grants; which ought not to be changed or altered by the House of Lords.*

325. Erskine May Esq. in his book 'A Treatise Upon The Law, Privileges and Usage of Parliament' associates the claims and practices establishing the financial powers of the Commons with its representative character as under:

> *"The dominant influence enjoyed by the House of Commons within Parliament may be ascribed principally to its status as an elected assembly, the members of which serve as the chosen representatives of the people. As such the House of Commons possesses the most important power vested in any branch of the legislature, the right of imposing taxes upon the people and of voting money for the public service."*

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326. Historically, the Crown acting with the advice of its responsible ministers, being the executive power, was charged with the management of all the revenues of the state, and with all payments for the public service. The financial initiative of the executive ensured that public money was provided for purposes that the government declares to be for public good. In his treatise, May also traces the roots of the financial procedure:

> *"The Crown, therefore, in the first instance, makes known to the commons the pecuniary necessities of the government, and the commons grant such aids or supplies as are required to satisfy these demands; and provide by taxes, and by the appropriation of other sources of the public income, the ways and means to meet the supplies which are granted by them. Thus the Crown demands money, the commons grant it, and the lords assent to the grant. But the commons do not vote money unless it be required by the Crown; nor impose or augment taxes, unless they be necessary for meeting the supplies which they have voted, or are about to vote, or for supplying general deficiencies in the revenue. The Crown has no concern in the nature or distribution of the taxes; but the foundation of all*

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parliamentary taxation is, its necessity for the public service, as declared by the Crown and its constitutional advisers."

327. In England therefore, the recommendations of the Crown in relation to financial provisions are recognized as constitutional declarations of the Crown, suggested by the advice of its responsible ministers, by whom they are announced to Parliament, in compliance with established usage. They cannot be misconstrued as an interference with the proceedings of Parliament, as some of them are rendered necessary by resolutions of the House of Commons, and others are consistent within the strictest limits of royal prerogative, and the unquestionable rights and interests of the Crown. In modern times, her Majesty's speech at the commencement of each session recognizes the peculiar privilege of the commons to grant all supplies; the preamble of every Act of Supply distinctly confirms it; and the form in which the royal assent is given is a further confirmation of their right.

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328. The principle of waiting for the suggestion and authority of the Crown for the voting of public money is extended further than to the annual grants. Thus, by a standing order, on 11th December 1706, it was declared, "That this house will receive no petition for any sum of money relating to public service, but what is recommended from the Crown."' And this rule was extended, by the uniform practice of the house, to all direct motions for grants, and to any motion which indirectly involves the expenditure of public money. So strictly is this principle enforced, that the house will not even receive a report from a select Committee, suggesting an advance of money, without being recommended by the Crown.

329. The principle established in England is reflected in the Constitutions of various jurisdictions. Section 56 of Australia's Constitution requires that the House of Representatives receive a message from the Governor-General recommending the purpose of the appropriation in the same parliamentary session that it passes the bill. As the Governor-General acts on ministerial advice, Section 56

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establishes ministerial primacy in relation to proposed appropriations. Together, Sections 53 and 56 establish a financial initiative of the executive and they require that the Government of the day is responsible to Parliament primarily through the House of Representatives. They invest an exclusive power in ministers, appointed by the executive, to propose how public funds are spent (Section 56) and require that the ministry enjoy the confidence of the House of Representatives in order to fund its government (Section 53).

330. Similarly, Section 54 of the Canadian Constitution requires a royal recommendation for any "Bill for the Appropriation of any Part of the Public Revenue, or of any Tax or Impost". The royal recommendation is a message from the Governor General, an exercise of the prerogative of the Crown in financial matters.

331. It is pertinent to note that the Constitutional practice of England in relation to financial bills was consciously

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adopted by our Constitution makers. This is evident from the Constituent Assembly Debates, which reveal that several amendments which proposed to dilute the powers of the Executive in relation to financial Bills were rejected by the Constituent Assembly. In response to the proposed dilution of the principle of financial initiative of the executive in Draft Article 97 (Article 117 of the Constitution), T.T. Krishnamachari made the following observations:

> *"....He wants to cut out the initiative of the executive which has been preserved right through in these articles dealing with the financial provisions so far as expenditure and taxation are concerned. Actually it is a tradition which we have been following in this country within the limited powers that have been afforded to the Legislatures and which we have also incorporated in this Draft Constitution from the British model which has all through the centuries made it a matter of pure executive responsibility to initiate motions which involve taxation or expenditure. If it happens that a private member of Parliament can initiate Bills which will involve taxation and expenditure then the responsibility of the executive will be blurred for one thing and then it will be difficult for them to devise the ways and means to cover the expenditure. It is a principle well accepted*

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in all constitutions that this initiative must rest with the executive....."

"...But I do feel that if he follows the same line of thought he will find that a provision of this nature which he seeks to amend is already in the Government of India Act today and is to be found in the standing orders of the British Parliament and in practically every other legislature following this method of parliamentary system of Government, that the initiative must be kept absolutely without any dilution in the hands of the executive. Therefore there has been no attempt in any of the Dominion Legislatures to take away this particular power that has been given to the executive. I think the amendment of Professor Shibban Lal Saksena cannot therefore be accepted and the clause must remain as it is.

So, far as Professor Shah's amendment is concerned I do not know if I need anticipate Dr. Ambedkar. The reasons that he has adduced are fairly clear, namely, that he does not want to give the President or the executive any powers for initiating any Bill which will involve expenditure to be incurred outside India for the reason that he does not want the future Government of India to participate in any Imperial wars. It is quite possible that a future Government of India may have to

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take some steps to safeguard the frontiers of India the operations in respect of which might take it just a little beyond the frontiers, and the very purpose of his wanting to preserve the integrity of this Government in the future will be defeated if Professor Shah's amendment is accepted and the hands of the executive are tied by a provision of his nature. It might be very reasonable from a point of view which considers that all wars are imperialistic. Sometimes countries have got to participate in wars for purely defensive purposes and even that purpose will be jeopardized by accepting the amendment moved by Prof. Shah. I therefore suggest to the House that these two amendments have no validity so for as the particular article is concerned and they have to be rejected.

332. In light of the above, it is imperative to judge the constitutionality of Section 22 against the two cardinal principles, namely, the elected legislature's exclusive right over financial bills and the financial initiative of the executive.

333. In exercise of the powers of conferred by Section 44 of the NCT Act, 1991 the Transaction of Business of the Government of National Capital Territory of Delhi Rules,

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1993 were made ("Delhi Rules of Business"). Rule 55(1)(c) of the Delhi Rules of Business requires the Lieutenant Governor to refer every legislative proposal before the Central Government which "relates to any matter which may ultimately necessitate additional financial assistance from the Central Government through substantive expenditure from the Consolidated Fund of the Capital or abandonment of revenue or lowering of rate of any tax." According to Rule 56, further action cannot be taken on matters referred to the Central Government "except in accordance with the decision of the Central Government."

334. Thus, it appears that the constitutional scheme has completely been discarded by s. 22 of the Act and the Delhi Rules of Business, most particularly Rules 55 and 56.

335. It is a matter of great concern that the scheme of the NCT Act and its Rules of Business do not stipulate the requirement of the Government of the day in Delhi to make recommendations in relation to the finances concerning the

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NCT. Rather, it authorizes the Central Government without associating in any manner the elected representatives of the populace of Delhi, to take decisions regarding NCT's financial issues.

336. Therefore, in my opinion, it is clear that the scheme envisaged by Section 22 of the NCT Act falls foul of the scheme of legislative assemblies under the Constitution.

Is Section 44 of NCT Act unconstitutional?

337. Section 44 of the Act deals with the making of rules for "Conduct of Business" of the Government. The said Section reads as under:

'44. Conduct of business :

(1) The President shall make rules :

(a) for the allocation of business to the Ministers insofar as it is business with respect to which the Lieutenant Governor is required to act on the aid and advice of his Council of Ministers; and

(b) for the more convenient transaction of business with the ministers, including the procedure to be

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adopted in the case of a difference of opinion between the Lieutenant Governor and the Council of Ministers or a Minister.

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

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

338. Thus, as per the provisions of the said section, the President of India is required to make rules for the conduct of business of the Government of the National Capital Territory of Delhi. At the outset that in view of my opinion recorded above, the provision of framing of Conduct of Business Rules by the President is contrary to the scheme of Articles 239AA and Article 239AB.

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339. In my view the framing of Conduct of Business Rules and such rules which interpose the executive authority of the Central Government to frustrate the legitimate decisions of the State Government would be *ultra vires* Articles 14 and 239AA and would offend the basic structure of the Constitution. The said rules are for allocation of business to ministers (insofar as business which is within the domain of the GoNCT is concerned), for the convenient transaction of such business and for the procedure to be adopted in the case of a difference of opinion between the Lieutenant Governor and either Council of Ministers or an individual Minister. Consequently, in exercise of his powers under the said section, the President of India made Delhi Rules of Business.

340. The said Rules provide for, *inter alia*, how ministries and departments are to interact and coordinate with each other (particularly with emphasis on the role of the law department and the finance department), how the Council of Ministers should function, how proposals should be circulated, the disposal of business allocated to ministers,

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and how all contracts in connection with the administration of Delhi shall be made and executed on behalf of the President of India. However, of all the provisions of the Rules, Chapter V is perhaps the most germane to the query that has been made.

341. Chapter V of the Rules deals with "Referring matters to the Central Government" and seeks to establish the supremacy of the Central Government over the GoNCT, which is contrary to the constitutional scheme of Article 239AA and Article 239AB. As per the scheme laid out in Rules 49-52, where there is a difference between the Lieutenant Governor (who is for practical purposes an appointee of the Central Government) and a Minister and the same cannot be resolved amicably, the matter shall be referred to the Council of Ministers for resolution. However, in case there is a difference of opinion between the Lieutenant Governor and the Council of Ministers with respect to any matter, the Lieutenant Governor shall refer the matter to the Central Government for the decision of the President and action will eventually be taken in accordance with the decision of the

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President. Where any matter is referred to the Central government (as envisaged above), the Lieutenant Governor has the power to decide on what is to be done pending such a decision. The Lieutenant Governor may direct that status quo be maintained or (in cases where he is of the opinion that there is a need for urgent action) issue such direction or take such action as he deems necessary. This clearly undermines the force of democracy and seeks to provide superiority to the Lt. Governor who does not enjoy the confidence of the people and who, according to the scheme of Article 239AA and Article 239AB, is a constitutional figurehead. Rules 49-52 provide as under: –

> *'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*

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any matter, the Lieutenant Governor shall refer it to the Central Government for the decision of the President and shall act according to the decision of the President.

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

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.'

342. The provisions of these rules seem to be strictly in keeping with the scheme envisaged in the proviso to Article 239AA(4), which reads as under: –

(4)There shall be a Council of Ministers consisting of not more than ten percent, of the total number of members in the Legislative Assembly, with the Chief

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Minister at the head to aid and advise the Lieutenant Governor in the exercise to his functions in relation to matters with respect to which the Legislative Assembly has power to make laws, except insofar as he is, by or under any law, required to act in his discretion.

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

343. I have already indicated hereinabove that the proviso to clause (4) of Article 239AA is *ultra vires* since it deviates from the scheme of a cabinet system of government, which is followed in the scheme of governance provided under the Constitution of India.

344. Further, Rules 53 and 54 ensure that the Central Government has complete financial control over the affairs and budget of the GoNCT. Rules 53 and 54 provide as under: –

'53. (1) In respect of each financial year, the Lieutenant Governor shall have an Annual Plan (which shall represent the approved phase for that

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year in the Five Year Plan for the National Capital Territory) drawn up with such details as the Central Government may, by order prescribe.
(2) After the Annual Plan has been considered by the Lieutenant Governor and his Council, it shall be referred to the Central Government for approval.

54. (1) The form of Annual financial statement of the National Capital Territory (including the Grants and appropriations into which it shall be divided) and the procedure for obtaining the approval of the President to this statement shall be such as the Central Government may by order prescribe.
(2) Each demand for Grant or appropriation shall be so drawn up as to indicate separately the provision for plan schemes and the provision for non-plan expenditure.'

345. Thus, every year the annual financial plan (budget) drawn up by the Council of Ministers of the GoNCT, must be referred to the Central Government for approval. Even the annual financial plan that is sent for approval must be drawn up with whatever details and in whatever form the Central Government may have prescribed. Thus, in effect, the Central Government has a virtual veto power over the manner in which the Council of Ministers of the GoNCT can spend the finances available to them.

346. Similarly, Rule 55 reinforces the control exercised by the Central Government over the National Capital Territory of

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Delhi by extending the same legislative sphere to the Central Government. At the same time, Rule 55 (2) also requires the Lieutenant Governor to make reference to the Central Government in respect of various kinds of matters and police cases as per the instructions of the Central Government. Rule 56 once again asserts the primacy of the Central Government and makes it clear that in the case of a conflict between the GoNCT and Central Government, it will be the views of the Central Government that will prevail. The concerned rules read as under:-

> *55. (1) The Lieutenant Governor shall refer to the Central Government every legislative proposal, which*
> *(a) if introduced in a Bill form and enacted by the Legislative Assembly, is required to be reserved for the consideration of the President under the proviso to sub-clause (c) of clause (3) of article 239 AA or, as the case may be, under the second proviso to section 24 of the Act;*
> *(b) attracts provisions of articles 286, 287, 288 and 304 of the Constitution as applicable to the Capital;*
> *(c) relates to any matter which may ultimately necessitate additional financial assistance from the Central Government through substantive expenditure from the Consolidated Fund of the Capital or abandonment of revenue or lowering of rate of any tax.*
> *(2) Subject to any instructions which may from time to time be issued by the Central Government, the*

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Lieutenant Governor shall make a prior reference to the Central Government in the Ministry of Home Affairs or to the appropriate Ministry with a copy to the Ministry of Home Affairs in respect of the following matters:-

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

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

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

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

56. When a matter has been referred by the Lieutenant Governor to the Central Government under these rules, further action thereon shall not be taken except in accordance with the decision of the Central Government.

347. The Rules, particularly the provisions of Chapter V, are certainly beyond what is envisaged in Section 44 of the Act and the overall scheme of Articles 239AA and 239AB.

348. Section 44 clearly states that the President shall make rules for:-

1. The allocation of business to ministers; and
2. For the more convenient transaction of business with the ministers (including the procedure to be adopted

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in the case of a difference of opinion between the Lieutenant Governor and the Council of Ministers or a Minister).

349. Section 44 does not allow for the making of rules of conduct of business that extend beyond this in their scope. Section 44 certainly does not envisage the President making rules of conduct of business that have the effect of interfering with the legislative powers of the elected Legislative Assembly. Consequently, the Rules 55 and 56 which have the effect of allowing the Central Government to exercise a supervision over and exercise of legislative powers by the Delhi Legislative Assembly may be open to question. There can be no doubt that the provisions of Article 239AA allow for the Union Executive to have precedence over the Delhi Executive and for the Union Parliament to have precedence over the Delhi Legislative Assembly. However, there is nothing in Article 239AA that allows the Union Executive (i.e. the Central Government) to have precedence/exercise authority over the Delhi Legislative Assembly. In fact, for the executive (whether Union or State) to interfere with the

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functioning of the legislature in any manner not expressly authorised by the Constitution, is tantamount to a violation of the doctrine of separation of powers. Such interference and any provisions of any law that purport to permit the same are violative of the basic structure of the Constitution and consequently *ultra vires*.

CONCLUSION

350. In view of the above, I am of the opinion that this is a matter which should be referred by the President under Article 143 of the Constitution of India to the Hon'ble Supreme Court of India. A presidential reference is warranted to resolve anomalies contained in the proviso to Article 239 AA (4), as well as the aforementioned provisions (including ss. 22 and 44) of the Act, and whether the judgement of the Hon'ble Supreme Court of India in the *NDMC case* (supra) is correct. I must also add that in view of the decision of the Hon'ble Supreme Court in *Samsher Singh's case* (supra), the decision to make such a reference will be at the sole and exclusive discretion of the President of India. As already stated by me above, I am of the opinion that the view taken

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by the Hon'ble Supreme Court in the *NDMC case* (supra) is incorrect and requires reconsideration.

351. I am further of the opinion that a strong case can be made out to suggest that the exercise of powers by the Government of Delhi cannot be overruled by the Lieutenant Governor, as this would violate the Constitutional scheme. In particular, it would be *ultra vires* Articles 14 and 239AA and would also fall foul of the basic structure of the Constitution as it undermines the basic features of democracy and the cabinet form of Government.

352. I must further add that, given this position of law, it would be constitutionally unviable for the Lieutenant Governor to act *de hors* the aid and advice of the Council of Ministers on any such matter. Any such action would be clearly contrary to the provisions of Articles 14 and 239AA, as well as being *ultra vires* the provisions of the Government of National Capital Territory Act, 1991 and the Transaction of the Business of the Government Rules, 1993. For the Lieutenant Governor to act in such a manner would completely undermine the democratic mandate of an elected

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Government and would render otiose the entire election process for the Delhi Legislature under Article 239AA.

353. In a democratic setup there cannot be two reporting authorities, i.e. the Lieutenant Governor and the Chief Minister. The Lieutenant Governor, in law, cannot be placed in a higher position than the Governor of a State, who has to act on the aid and advice of the Council of Ministers. In any event, the mere existence of wide powers must not encourage their exercise. If the Lieutenant Governor is a representative or delegate of the President, he must report to His Excellency, the President, and cannot be an extra-constitutional authority unto himself.

354. I have every reason to believe that the present Lieutenant Governor being an administrator, scholar and thinker of great repute, would not be oblivious to the manner in which democratic institutions have to be strengthened. The way to empower democratic institutions is by minimising interference and providing guidance in a positive direction.

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355. The Chief Minister of Delhi, however, must respect the Constitution and the authority of the Lieutenant Governor and above all await a just legal outcome to certain vexed constitutional issues. As already discussed, the National Capital Territory is not a mere Union Territory with privileges, but must be considered co-extensively as a democratically elected organ. While the responsibility to fulfil promises to the people or offer transparent governance is that of the Chief Minister, the President, Central Government and Lieutenant Governor must permit and facilitate all lawful exercise of authority, which is within the constitutional domain of the Chief Minister. However, it may be added that just as the institution of the Chief Minister and his Council of Minsters is a constitutionally recognised institution, in a democracy, Parliament and the Union Cabinet must also be respected as important institutions of the State.

356. I am sure that if the matter is referred to His Excellency, the Hon'ble Shri Pranab Mukherjee, whose scholarship in law and knowledge of the working of the Constitution, I can say

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from personal knowledge, is remarkable, he would be able to devise a solution by which the language of co-operation replaces the language of assertiveness of power. The President is indeed the moral conscience of the Constitution, and every citizen will hope that he will always rise to every occasion to uphold it.

Jai Hind!

New Delhi:
19th May, 2015

[**GOPAL SUBRAMANIUM**]