Reportable

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

Civil Appeal No 2357 of 2017

Government of NCT of Delhi …Appellant

Versus

Union of India …Respondent

J U D G M E N T

Dr. Dhananjaya Y Chandrachud, CJI

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A. The Reference

1. This case before us deals with the asymmetric federal model of governance in India, involving the contest of power between a Union Territory and the Union Government. The issue is who would have control over the "services" in the National Capital Territory of Delhi[1]: the Government of NCTD[2] or the Lieutenant Governor acting on behalf of the Union Government. The question arose subsequent to a notification[3] dated 21 May 2015 issued by the Union Ministry of Home Affairs, which stated as follows:

> "... in accordance with the provisions contained in article 239 and sub-clause (a) of clause (3) of 239AA, the President hereby directs that –
>
> subject to his control and further orders, the Lieutenant Governor of the National Capital Territory of Delhi, shall in respect of matters connected with 'Public Order', 'Police', 'Land' and 'Services' as stated hereinabove, exercise the powers and discharge the functions of the Central Government, to the extent delegated to him from time to time by the President.
>
> Provided that the Lieutenant Governor of the National Capital Territory of Delhi may, in his discretion, obtain the views of the Chief Minister of the National Capital Territory of Delhi in regard to the matter of 'Services' wherever he deems it appropriate."

The notification provided that the Lieutenant Governor of NCTD shall exercise control "to the extent delegated to him from time to time by the President" over

[1] "NCTD"
[2] "GNCTD"
[3] "2015 notification"

"services", in addition to "public order", "police", and "land." The Lieutenant Governor may seek the views of the Chief Minister of NCTD at his "discretion".

2. "Services" are covered under Entry 41 of the State List of the Seventh Schedule to the Constitution. The 2015 notification excludes Entry 41 of the State List, which has as its subject, "*State Public Services; State Public Services Commission*", from the scope of powers of GNCTD. The notification stipulates that the rationale for excluding "services" from the ambit of the legislative and executive power of NCTD is that NCTD does not have its own State public services:

> "Further, the Union Territories Cadre consisting of Indian Administrative Service and Indian Police Service personnel is common to Union Territories of Delhi, Chandigarh, Andaman and Nicobar Islands, Lakshadweep, Daman and Diu, Dadra and Nagar Haveli, Puducherry and States of Arunachal Pradesh, Goa and Mizoram which is administered by the Central Government through the Ministry of Home Affairs; and similarly DANICS and DANIPS are common services catering to the requirement of the Union Territories of Daman & Diu, Dadra Nagar Haveli, Andaman and Nicobar Islands, Lakshadweep including the National Capital Territory of Delhi which is also administered by the Central Government through the Ministry of Home Affairs. As such, it is clear that the National Capital Territory of Delhi does not have its own State Public Services. Thus, 'Services' will fall within this category.
>
> And whereas it is well established that where there is no legislative power, there is no executive power since executive power is co-extensive with legislative power.
>
> And whereas matters relating to Entries 1, 2 & 18 of the State List being 'Public Order', 'Police' and 'Land' respectively and Entries 64, 65 & 66 of that list in so far as they relate to Entries 1, 2 & 18 as also 'Services' fall outside the purview of Legislative Assembly of the National Capital Territory of Delhi and consequently the Government of NCT of Delhi

> will have no executive power in relation to the above and further that power in relation to the aforesaid subjects vests exclusively in the President or his delegate i.e. the Lieutenant Governor of Delhi."

3. The above notification was assailed through a batch of petitions before the High Court of Delhi. The validity of the notification was upheld by the High Court as it declared that "the matters connected with 'Services' fall outside the purview of the Legislative Assembly of NCT of Delhi."[4] On appeal, a two-Judge Bench of this Court was of the opinion that the matter involved a substantial question of law about the interpretation of Article 239AA, which deals with "Special provisions with respect to Delhi", and hence referred the issue of interpretation of Article 239AA to a Constitution Bench on 15 February 2017.

4. Article 239AA provides as under:

> "239-AA. Special provisions with respect to Delhi.—
>
> (1) As from the date of commencement of the Constitution (Sixty-ninth Amendment) Act, 1991, the Union Territory of Delhi shall be called the National Capital Territory of Delhi (hereafter in this Part referred to as the National Capital Territory) and the Administrator thereof appointed under Article 239 shall be designated as the Lieutenant Governor.
>
> (2)(a) There shall be a Legislative Assembly for the National Capital Territory and the seats in such Assembly shall be filled by Members chosen by direct election from territorial constituencies in the National Capital Territory.
>
> (b) The total number of seats in the Legislative Assembly, the number of seats reserved for Scheduled Castes, the division of the National Capital Territory into territorial constituencies (including the basis for such division) and all other matters relating to the functioning of the Legislative

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[4] Government of National Capital Territory of Delhi v. Union of India ("Delhi High Court judgment"), (2016) 232 DLT 196.

Assembly shall be regulated by law made by Parliament.

(c) The provisions of Articles 324 to 327 and 329 shall apply in relation to the National Capital Territory, the Legislative Assembly of the National Capital Territory and the Members thereof as they apply, in relation to a State, the Legislative Assembly of a State and the Members thereof respectively; and any reference in Articles 326 and 329 to "appropriate legislature" shall be deemed to be a reference to Parliament.

(3)(a) Subject to the provisions of this Constitution, the Legislative Assembly shall have power to make laws for the whole or any part of the National Capital Territory with respect to any of the matters enumerated in the State List or in the Concurrent List 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.

(b) Nothing in sub-clause (a) shall derogate from the powers of Parliament under this Constitution to make laws with respect to any matter for a Union Territory or any part thereof.

(c) If any provision of a law made by the Legislative Assembly with respect to any matter is repugnant to any provision of a law made by Parliament with respect to that matter, whether passed before or after the law made by the Legislative Assembly, or of an earlier law, other than a law made by the Legislative Assembly, then, in either case, the law made by Parliament, or, as the case may be, such earlier law, shall prevail and the law made by the Legislative Assembly shall, to the extent of the repugnancy, be void:

Provided that if any such law made by the Legislative Assembly has been reserved for the consideration of the President and has received his assent, such law shall prevail in the National Capital Territory:

Provided further that nothing in this sub-clause shall prevent Parliament from enacting at any time any law with respect to the same matter including a law

adding to, amending, varying or repealing the law so made by the Legislative Assembly.

(4) There shall be a Council of Ministers consisting of not more than ten per cent of the total number of Members in the Legislative Assembly, with the Chief Minister at the head to aid and advise the Lieutenant Governor in the exercise of his functions in relation to matters with respect to which the Legislative Assembly has power to make laws, except 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.

(5) 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 and the Ministers shall hold office during the pleasure of the President.

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

(7)(a) Parliament may, by law, make provisions for giving effect to, or supplementing the provisions contained in the foregoing clauses and for all matters incidental or consequential thereto.

(b) Any such law as is referred to in sub-clause (a) shall not be deemed to be an amendment of this Constitution for the purposes of Article 368 notwithstanding that it contains any provision which amends or has the effect of amending, this Constitution.

(8) The provisions of Article 239-B shall, so far as may be, apply in relation to the National Capital Territory, the Lieutenant Governor and the Legislative Assembly, as they apply in relation to the

> Union Territory of Puducherry, the Administrator and its legislature, respectively; and any reference in that Article to "clause (1) of Article 239-A" shall be deemed to be a reference to this Article or Article 239-AB, as the case may be."

5. The Constitution Bench pronounced its judgment[5] on 4 July 2018. The judgment contained three judicial opinions. The opinion of the majority was authored by Chief Justice Dipak Misra, in which Justice A.K. Sikri, and Justice A.M. Khanwilkar joined.[6] One of us (Dr. D.Y. Chandrachud, J.) and Justice Ashok Bhushan delivered separate concurring opinions. The Constitution Bench dealt with the constitutional status of NCTD and the modalities of its administration based on the division of powers, functions and responsibilities of the elected government of NCTD and the Lieutenant Governor, who as the nominee of the President of India, serves as the representative of the Union Government. We shall discuss the principles laid down in that judgment in Section C of this judgment.

6. Upon deciding the interpretation of Article 239AA, the appeals were directed to be listed before a regular Bench to decide the specific issues. On 14 February 2019, a two-Judge Bench of Justice A.K. Sikri and Justice Ashok Bhushan delivered two separate judgments. The judges differed on whether "services" are excluded in view of Article 239AA(3)(a) from the legislative and executive domain of GNCTD.[7]

7. The matter fell for consideration before a Bench of three Judges. There, the Union argued that the 2018 Constitution Bench did not analyze two crucial phrases in Article 239AA(3)(a): (i) "*in so far as any such matter is applicable to Union*

[5] "2018 Constitution Bench judgment"; (2018) 8 SCC 501
[6] "Judgment of the majority"
[7] "2019 split verdict"

Territories”; and (ii) “*Subject to the provisions of this Constitution"*. By an order dated 6 May 2022, the three-judge Bench observed that:

> “8. From the reference application moved by the Union of India, as well as the rival contentions of the parties, the main bone of contention relates to the interpretation of the phrases: “in so far as any such matter is applicable to Union Territories” and “Subject to the provisions of this Constitution” as contained in Article 239AA(3)(a) of the Constitution. On perusing the Constitution Bench judgment, it appears that all the issues except the one pending consideration before this bench, have been elaborately dealt with. Therefore, we do not deem it necessary to revisit the issues that already stand settled by the previous Constitution Bench.
>
> 9. The limited issue that has been referred to this Bench, relates to the scope of legislative and executive powers of the Centre and NCT Delhi with respect to the term “services”. The Constitution Bench of this Court, while interpreting Article 239AA(3)(a) of the Constitution, did not find any occasion to specifically interpret the impact of the wordings of the same with respect to Entry 41 in the State List.
>
> 10. We therefore deem it appropriate to refer the above limited question, for an authoritative pronouncement by a Constitution Bench in terms of Article 145(3) of the Constitution.”

The above reference forms the subject of adjudication before this Constitution Bench. The limited issue for the consideration of this Constitution Bench only relates to the “scope of legislative and executive powers of the Centre and NCTD with respect to the term “Services.” That is to say, whether the NCTD or the Union government has legislative and executive control over “services.” We will now turn to the arguments made by counsel on opposing sides.

B. Submissions

8. Dr. A M Singhvi, learned Senior Counsel appearing for the appellant, made the following submissions:

a. The Legislative Assembly of NCTD has the power to enact laws under Entry 41 of List II of the Seventh Schedule. The power cannot be excluded merely because the entry uses the term "state public services" and not "Union Territory public services". In fact, the Delhi Legislative Assembly has enacted laws that fall within Entry 41;
b. Even if it is found that the legislature of NCTD has not exercised legislative power related to Entry 41 of List II, it does not imply that the power ceases to exist;
c. NCTD has legislative power and executive power over all entries in List II other than entries 1,2, and 18 which have been expressly excluded by Article 239AA;
d. The phrase "insofar as such matter is applicable to Union Territories" in Article 239AA is inclusionary and not exclusionary. Multiple entries in List II and List III use the term "State." The phrase "insofar as such matter is applicable to Union Territories" is a facilitative phrase which permits such entries being made available to the Union Territory of NCTD without an amendment of the Lists in the Seventh Schedule. Without the facilitative phrase, NCTD would not have legislative competence over those entries in Lists II and III which use the term "State";
e. NCTD is *sui generis*. It cannot be brought within the common class of 'Union Territories';

f. This Court in **Union of India** v. **Prem Kumar Jain**[8] has recognised that the provisions of Part XIV of the Constitution extend to Union territories;

g. The report of the Balakrishnan Committee opined against the inclusion of "services" within the legislative and executive ambit of NCTD, does not have any relevance because:

    (i) It preceded the inclusion of Article 239AA, by which three entries from List II have been expressly excluded from the legislative competence of NCTD;

    (ii) The conclusion that only States (and not Union territories) can have services is conceptually wrong;

    (iii) The judgment of this Court in **Prem Kumar Jain** (supra) was not considered; and

    (iv) The opinion of the majority in the 2018 Constitution Bench judgment expressly notes that the report of the Balakrishnan Committee will not be used as an aid to interpret Article 239AA.

h. Personnel belonging to All-India Services and Central Government Services are governed by the Indian Administrative Service (Cadre) Rules 1954 and the All-India Services (Joint Cadre) Rules 1972 respectively. In terms of these rules, while it is the prerogative of the Joint Cadre Authority to make an officer available to GNCTD, the actual posting of the officer within the departments of GNCTD is the prerogative of the latter. Similarly, under DANICS and

[8] (1976) 3 SCC 473

DANIPS Rules 2003, once an officer is alloted to NCTD, it is the Administrator who appoints that officer to a post within NCTD.

9. Mr. Shadan Farasat, learned counsel appearing for the appellant, provided an overview of the control of services in national capital territories across the world. He argued that regardless of the level of devolution of power in countries across the world, even in countries with centralized forms of government, the power to control "services" has been devolved upon the local government of the National Capital Territory.

10. Mr. Tushar Mehta, learned Solicitor General, made the following submissions on behalf of the Union of India:

a. Entry 41 of List II is not available to Union Territories, as it cannot have either a State Public Service or a State Public Service Commission;
b. The 2018 Constitution Bench judgment did not decide whether NCTD has legislative competence over Entry 41 of List II;
c. Delhi, being the national capital, enjoys a special status which requires the Union to have control over services, in the absence of which it would become impossible for the Union to discharge its national and international responsibilities;
d. The expression *"in so far as any such matter is applicable to Union Territories"* in Article 239AA means that the entries contained in List II are available to NCTD to the limited extent to which they are applicable to Union Territories. The legislative powers of NCTD shall extend to only those matters which are 'applicable' to Union Territories. Since the

Constitution uses the term 'applicable' and not 'relating' to Union Territories, the legislative power of NCTD will extend to an Entry only when that Entry is clearly and unequivocally applicable to Union Territories as a class. Consequently, List II has to be read contextually and certain entries can be excluded from the domain of GNCTD;

e. The control of Union of India over "services" has not led to any issue pertaining to the governance of NCTD; and

f. The Transaction of Business Rules 1993 provide enough powers to Ministers of GNCTD to ensure supervisory and functional control over civil services to ensure their proper functioning; the rules applicable to the civil services indicate that administrative control vests with the Union.

11. The arguments advanced indicate that this Constitution Bench is called upon to decide the limited question of whether NCTD has the power to legislate under Entry 41 of the State List, and the meaning of the term "*in so far as any such matter is applicable to Union Territories"* in Article 239AA(3)(a). This Bench will refer to the principles laid down in the 2018 Constitution Bench judgment to facilitate the analysis.

Though both sides relied on the subordinate rules referred to above to argue that they have control over postings of officers, we do not deem it appropriate to interpret each of these rules to elucidate on the framework of governance in each of the cadres. The reference is limited to the scope of executive and legislative power of NCTD over "services" with reference to the interpretation of Article 239AA(3)(a).

C. Interpretation of Article 239AA: The 2018 Constitution Bench judgment

(a) Delhi: A *sui generis* model

12. The 2018 Constitution Bench decision held that NCTD is not similar to other Union Territories. The decision elucidates the manner in which the insertion of Article 239AA accorded a "*sui generis"* status to NCTD setting it apart from other Union Territories. The judgment noted that the constitutional entrenchment of a Legislative Assembly, Council of Ministers, and Westminster style cabinet system of government brought into existence the attributes of a representative form of government. As a consequence, the residents of Delhi have been, through their elected representatives, afforded a voice in the governance of NCTD, while balancing the national interests of Union of India. The majority decision, speaking through Chief Justice Dipak Misra, held:

> "196. Thus, NDMC [NDMC v. State of Punjab, (1997) 7 SCC 339] makes it clear as crystal that all Union Territories under our constitutional scheme are not on the same pedestal [...]
>
> S. Essence of Article 239-AA of the Constitution
>
> 206. It is perceptible that the constitutional amendment conceives of conferring special status on Delhi. This has to be kept in view while interpreting Article 239-AA…
>
> 207. At the outset, we must declare that the insertion of Articles 239-AA and 239-AB, which specifically pertain to NCT of Delhi, is reflective of the intention of Parliament to accord Delhi a sui generis status from the other Union Territories as well as from the Union Territory of Puducherry to which Article 239-A is singularly applicable as on

> date. The same has been authoritatively held by the majority judgment in *NDMC case* to the effect that the NCT of Delhi is a class by itself…
>
> 209. The exercise of establishing a democratic and representative form of Government for NCT of Delhi by insertion of Articles 239-AA and 239-AB would turn futile if the Government of Delhi that enjoys the confidence of the people of Delhi is not able to usher in policies and laws over which the Delhi Legislative Assembly has power to legislate for NCT of Delhi.
>
> 210. Further, the Statement of Objects and Reasons for the Constitution (Seventy-fourth Amendment) Bill, 1991 which was enacted as the Constitution (Sixty-ninth Amendment) Act, 1991 also lends support to our view as it clearly stipulates that in order to confer a special status upon the National Capital, arrangements should be incorporated in the Constitution itself."

13. The concurring opinion of Justice Chandrachud emphasized the significance legislative and constitutional history in interpreting Article 239AA. In that context, the judgment notes:

> "383. Having regard to this history and background, it would be fundamentally inappropriate to assign to the NCT a status similar to other Union Territories. Article 239-AA(4) is a special provision which was adopted to establish a special constitutional arrangement for the governance of the NCT, albeit within the rubric of Union Territories. In interpreting the provisions of Article 239-AA, this Court cannot adopt a blinkered view, which ignores legislative and constitutional history. While adopting some of the provisions of the Acts of 1963 and 1966, Parliament in its constituent capacity omitted some of the other provisions of the legislative enactments which preceded the Sixty-ninth Amendment […]"

14. Having imparted a purposive interpretation to Article 239AA, the judgment underscores that the governance structure which Parliament adopted for NCTD is

unique and different from that of other Union Territories. It was held that the constituent power of Parliament was exercised "to treat the Government of NCT of Delhi as a representative form of Government". The judgment of the majority held:

> "213… Article 239-A gives discretion to Parliament to create by law for the Union Territory of Puducherry a Council of Ministers and/or a body which may either be wholly elected or partly elected and partly nominated to perform the functions of a legislature for the Union Territory of Puducherry.
>
> 214. **On the other hand, Article 239-AA clause (2), by using the word "shall", makes it mandatory for Parliament to create by law a Legislative Assembly for the National Capital Territory of Delhi.** Further, sub-clause (*a*) of clause (2) declares very categorically that the Members of the Legislative Assembly of the National Capital Territory of Delhi shall be chosen by direct election from the territorial constituencies in the National Capital Territory of Delhi. **Unlike Article 239-A clause (1) wherein the body created by Parliament by law to perform the functions of a legislature for the Union Territory of Puducherry may either be wholly elected or partly elected and partly nominated, there is no such provision in the context of the Legislative Assembly of NCT of Delhi as per which Members can be nominated to the Legislative Assembly.** This was a deliberate design by Parliament.
>
> 215. **We have highlighted this difference to underscore and emphasise the intention of Parliament, while inserting Article 239-AA in the exercise of its constituent power, to treat the Legislative Assembly of the National Capital Territory of Delhi as a set of elected representatives of the voters of NCT of Delhi and to treat the Government of NCT of Delhi as a representative form of Government.**
>
> 216. **The Legislative Assembly is wholly comprised of elected representatives who are chosen by direct elections and are sent to Delhi's Legislative Assembly by the voters of Delhi. None of the Members of Delhi's Legislative Assembly are nominated. The**

> **elected representatives and the Council of Ministers of Delhi, being accountable to the voters of Delhi, must have the appropriate powers so as to perform their functions effectively and efficiently…**"
>
> (emphasis supplied)

15. In his concurring opinion, Justice Chandrachud also held that NCTD is "special class among Union Territories". It was held:

> "384. All Union territories are grouped together in Part VIII of the Constitution. While bringing them under the rubric of one constitutional pairing, there is an unmistakable distinction created between them by the Constitution…
>
> 388. **Delhi presents a special constitutional status Under Article 239AA.** This is fortified when those provisions are read in contrast with Articles 239A and 240. Article 239AA does not incorporate the language or scheme of Article 240(1), which enables the President to frame Regulations for peace, progress and good government of the Union territories referred to in Article 240(1). This proviso to Article 240(1) indicates that once a Parliamentary law has been framed, the President shall not frame Regulations for Puducherry. In the case of Delhi, Article 239AA does not leave the constitution of a legislature or the Council of Ministers to a law to be framed by Parliament in future. Article 239AA mandates that there shall be a legislative assembly for the NCT and there shall be a Council of Ministers, with the function of tendering aid and advice to the Lieutenant Governor. **The "there shall be" formulation is indicative of a constitutional mandate.** Bringing into being a legislative assembly and a Council of Ministers for the NCT was not relegated by Parliament (in its constituent power) to its legislative wisdom at a future date upon the enactment of enabling legislation. Clause 7(a) of Article 239AA enables Parliament by law to make provisions to give effect to or to supplement the provisions contained in that Article. Parliament's power is to enforce, implement and fortify Article 239AA and its defining norms.
>
> 389. **The above analysis would indicate that while Part VIII brings together a common grouping of all Union territories, the Constitution evidently did not intend to use the same brush to paint the details of their position, the institutions of governance (legislative or**

> **executive), the nature of democratic participation or the extent of accountability of those entrusted with governance to their elected representatives…**"
>
> (emphasis supplied)

16. Thus, it is evident from the 2018 Constitution Bench judgment that the constitutional status of NCTD is not similar to other Union Territories, which are covered under Part VIII of the Constitution.

17. The judgment of the majority in the 2018 Constitution Bench decision underscores the importance of interpreting the Constitution to further democratic ideals. It was held:

> "284.1. While interpreting the provisions of the Constitution, the safe and most sound approach for the constitutional courts to adopt is to read the words of the Constitution in the light of the spirit of the Constitution **so that the quintessential democratic nature of our Constitution and the paradigm of representative participation by way of citizenry engagement are not annihilated. The courts must adopt such an interpretation which glorifies the democratic spirit of the Constitution.**"
>
> (emphasis supplied)

Therefore, in adjudicating the present dispute, it becomes imperative to adopt an interpretation which upholds the spirit of the unique constitutional democratic mandate provided to the Government of NCTD by the inclusion of Article 239AA.

(b) Legislative and executive power of NCTD

18. Article 239AA(3)(a) stipulates that the Legislative Assembly of Delhi shall have the power to make laws for the whole or any part of NCTD with respect to matters in the State List and the Concurrent List "insofar as any such matter is

applicable to Union Territories" except for certain subjects expressly excluded. The provision expressly excludes entries 1, 2, and 18 of the State List, and entries 64, 65 and 66 of List II insofar as they relate to the entries 1, 2, and 18. Article 239AA(3)(b) confers on Parliament the power "to make laws with respect to *any matter*" for a Union Territory or any part of it. Thus, while the Legislative Assembly of NCTD has legislative competence over entries in List II and List III except for the excluded entries of List II, Parliament has legislative competence over all matters in List II and List III in relation to NCTD, including the entries which have been kept out of the legislative domain of NCTD by virtue of Article 239AA(3)(a). This is where there is a departure from the legislative powers of Parliament with respect to States. While Parliament does not have legislative competence over entries in List II for States, it has the power to make laws on entries in List II for NCTD. This was the view taken in the 2018 Constitution Bench judgment. As the concurring opinion of Justice Chandrachud held:

> "316… Unlike State Legislative Assemblies which wield legislative power exclusively over the State List, under the provisions of Article 246(3), the legislative assembly for NCT does not possess exclusive legislative competence over State List subjects. By a constitutional fiction, as if it were, Parliament has legislative power over Concurrent as well as State List subjects in the Seventh Schedule. Sub Clause (c) of Clause 3 of Article 239AA contains a provision for repugnancy, similar to Article 254. A law enacted by the legislative assembly would be void to the extent of a repugnancy with a law enacted by Parliament unless it has received the assent of the President. Moreover, the assent of the President would not preclude Parliament from enacting legislation in future to override or modify the law enacted by the legislative assembly… "

19. The 2018 Constitution Bench judgment held that the executive power of NCTD is co-extensive with its legislative power, that is, it shall extend to all matters with respect to which it has the power to legislate. Article 239AA(4) provides that the Council of Ministers shall aid and advise the Lieutenant Governor in the exercise of the functions of the latter in relation to matters with respect to which the Legislative Assembly has the power to make laws. Thus, the executive power of NCTD shall extend over entries in List II, except the excluded entries. After analysing the provision of Article 239AA(4), it was held in the opinion of the majority in the 2018 Constitution Bench judgment that the Union has executive power only over the three entries in List II over which NCTD does not have legislative competence, that is, entries 1,2, and 18 in List II. It was held:

> "222. A conjoint reading of Article 239-AA(3)(*a*) and Article 239-AA(4) reveals that the executive power of the Government of NCT of Delhi is coextensive with the legislative power of the Delhi Legislative Assembly which is envisaged in Article 239-AA(3) and which extends over all but three subjects in the State List and all subjects in the Concurrent List and, thus, Article 239-AA(4) confers executive power on the Council of Ministers over all those subjects for which the Delhi Legislative Assembly has legislative power.
>
> 223. Article 239-AA(3)(*a*) reserves Parliament's legislative power on all matters in the State List and Concurrent List, but clause (4) nowhere reserves the executive powers of the Union with respect to such matters. On the contrary, clause (4) explicitly grants to the Government of Delhi executive powers in relation to matters for which the Legislative Assembly has power to legislate. The legislative power is conferred upon the Assembly to enact whereas the policy of the legislation has to be given effect to by the executive for which the Government of Delhi has to have coextensive executive powers…

> 224. Article 239-AA(4) confers executive powers on the Government of NCT of Delhi whereas the executive power of the Union stems from Article 73 and is coextensive with Parliament's legislative power. Further, the ideas of pragmatic federalism and collaborative federalism will fall to the ground if we are to say that the Union has overriding executive powers even in respect of matters for which the Delhi Legislative Assembly has legislative powers. Thus, it can be very well said that the executive power of the Union in respect of NCT of Delhi is confined to the three matters in the State List for which the legislative power of the Delhi Legislative Assembly has been excluded under Article 239-AA(3)(*a*). Such an interpretation would thwart any attempt on the part of the Union Government to seize all control and allow the concepts of pragmatic federalism and federal balance to prevail by giving NCT of Delhi some degree of required independence in its functioning subject to the limitations imposed by the Constitution…
>
> 284.16. As a natural corollary, the Union of India has exclusive executive power with respect to NCT of Delhi relating to the three matters in the State List in respect of which the power of the Delhi Legislative Assembly has been excluded. In respect of other matters, the executive power is to be exercised by the Government of NCT of Delhi. This, however, is subject to the proviso to Article 239-AA(4) of the Constitution. Such an interpretation would be in consonance with the concepts of pragmatic federalism and federal balance by giving the Government of NCT of Delhi some required degree of independence subject to the limitations imposed by the Constitution."

20. The judgment of the majority, however, clarified that if Parliament makes a law in relation to any subject in List II and List III, the executive power of GNCTD shall then be limited by the law enacted by Parliament. It was held:

> "284.15. A conjoint reading of clauses (3)(*a*) and (4) of Article 239-AA divulges that the executive power of the Government of NCTD is coextensive with the legislative power of the Delhi Legislative Assembly

> and, **accordingly, the executive power of the Council of Ministers of Delhi spans over all subjects in the Concurrent List and all, but three excluded subjects,** in the State List. However, if Parliament makes law in respect of certain subjects falling in the State List or the Concurrent List, **the executive action of the State must conform to the law made by Parliament.** (sic)"
>
> (emphasis supplied)

21. The above view was also taken by Justice Chandrachud in his concurring opinion:

> "316.... the provisions of Clause 2 and Clause 3 of Article 239AA indicate that while conferring a constitutional status upon the legislative assembly of NCT, the Constitution has circumscribed the ambit of its legislative Powers firstly, by carving out certain subjects from its competence (vesting them in Parliament) and secondly, by enabling Parliament to enact law on matters falling both in the State and Concurrent lists. Moreover, in the subjects which have been assigned to it, the legislative authority of the Assembly is not exclusive and is subject to laws which are enacted by Parliament."

22. The 2018 Constitution Bench judgment authoritatively held that the legislative and executive power of NCTD extends to all subjects in Lists II and III, except those explicitly excluded. However, in view of Article 239AA(3)(b), Parliament has the power to make laws with respect to all subjects in List II and III for NCTD.

(c) "Insofar as any such matter is applicable to Union Territories"

23. It has been argued by the Union of India that the phrase *'in so far as any such matter is applicable to Union Territories'* in Article 239AA has not been

construed by the Constitution Bench, and that the phrase limits the legislative power of NCTD.

24. However, reference has to be made to the concurring opinion of Justice Chandrachud in the 2018 Constitution Bench judgment, which dealt with the above phrase. It was held:

> "Insofar as any such matter is applicable to Union Territories
>
> 460. In the State List and the Concurrent List of the Seventh Schedule, there are numerous entries which use the expression "State". These entries are illustratively catalogued below:
>
> […]
>
> 461. **Article 239-AA(3)(*a*) permits the Legislative Assembly of the NCT to legislate on matters in the State List, except for Entries 1, 2 and 18 (and Entries 64, 65 and 66 insofar as they relate to the earlier entries) and on the Concurrent List, "*insofar as any such matter is applicable to Union Territories*". In forming an understanding of these words of Article 239-AA(3)(*a*), it has to be noticed that since the decision in *Kanniyan* right through to the nine-Judge Bench decision in *NDMC*, it has been held that the expression "*State*" *in Article 246* does not include a Union Territory. The expression "insofar as any such matter is applicable to Union Territories" cannot be construed to mean that the Legislative Assembly of NCT would have no power to legislate on any subject in the State or Concurrent Lists, merely by the use of the expression "State" in that particular entry. This is not a correct reading of the above words of Article 239-AA(3)(*a*).** As we see below, that is not how Parliament has construed them as well.
>
> 462. Section 7(5) of the GNCTD Act provides that salaries of the Speaker and Deputy Speaker of the Legislative Assembly may be fixed by the Legislative Assembly by law. Section 19 provides that the Members of the Legislative Assembly shall

> receive salaries and allowances as determined by the Legislative Assembly by law. Section 43(3) similarly provides that the salaries and allowances of Ministers shall be determined by the Legislative Assembly. However, Section 24 provides that a Bill for the purpose has to be reserved for the consideration of the President. **Parliament would not have enacted the above provisions unless legislative competence resided in the States on the above subject**. **The subjects pertaining to the salaries and allowances of Members of the Legislature of the State (including the Speaker and Deputy Speaker) and of the Ministers for the State are governed by Entry 38 and Entry 40 of the State List. The GNCTD Act recognizes the legislative competence of the Legislative Assembly of NCT to enact legislation on these subjects. The use of the expression "State" in these entries does not divest the jurisdiction of the Legislative Assembly. Nor are the words of Article 239-AA(3)(*a*) exclusionary or disabling in nature.**
>
> 463. The purpose of the above narration is to indicate **that the expression "State" is by itself not conclusive of whether a particular provision of the Constitution would apply to Union Territories**. Similarly, it can also be stated that the definition of the expression State in **Section 3(58) of the General Clauses Act (which includes a Union Territory) will not necessarily govern all references to "State"** in the Constitution. If there is something which is repugnant in the subject or context, the inclusive definition in Section 3(58) will not apply. This is made clear in the precedent emanating from this Court. In certain contexts, it has been held that the expression "State" will not include Union Territories while in other contexts the definition in Section 3(58) has been applied. **Hence, the expression "insofar as any such matter is applicable to Union Territories" is not one of exclusion nor can it be considered to be so irrespective of subject or context."**
>
> (emphasis supplied)

It is evident that the concurring opinion held that the phrase "insofar as any such matter is applicable to Union Territories" is an inclusive term, and "not one of

exclusion". Justice Chandrachud interpreted the term to mean that the Legislative Assembly of NCTD shall have the power to legislate on any subject in the State or Concurrent Lists, except the excluded subjects.

25. In his concurring opinion in the 2018 Constitution Bench judgment, Justice Bhushan also interpreted the said phrase in the following terms:

> "551. The provision is very clear which empowers the Legislative Assembly to make laws with respect to any of the matters enumerated in the State List or in the Concurrent List except the excluded entries. One of the issue is that power to make laws in State List or in Concurrent List is hedged by phrase "in so far as any such matter is applicable to Union territories".
>
> 552. **A look of the Entries in List II and List III indicates that there is no mention of Union Territory. A perusal of the List II and III indicates that although in various entries there is specific mention of word "State" but there is no express reference of "Union Territory" in any of the entries.** For example, in List II Entry 12, 26, 37, 38, 39, 40, 41, 42 and 43, there is specific mention of word "State". Similarly, in List III Entry 3, 4 and 43 there is mention of word "State". **The above phrase "in so far as any such matter is applicable to Union Territory" is inconsequential. The reasons are two fold. On the commencement of the Constitution, there was no concept of Union Territories and there were only Part A, B, C and D States. After Seventh Constitutional Amendment, where First Schedule as well as Article 2 of the Constitution were amended which included mention of Union Territory both in Article 1 as well as in First Schedule. Thus, the above phrase was used to facilitate the automatic conferment of powers to make laws for Delhi on all matters including those relatable to the State List and Concurrent List except where an entry indicates that its applicability to the Union Territory is excluded by implication or any express Constitutional provision.**

> 553. Thus, there is no difficulty in comprehending the Legislative power of the NCTD as expressly spelled out in Article 239AA…"
>
> (emphasis supplied)

26. Justice Bhushan also agreed that the phrase "in so far as any such matter is applicable to Union territories" cannot be used to restrict the legislative power of the Legislative Assembly of Delhi. He held that the "phrase was used to facilitate the automatic conferment of powers to make laws for Delhi on all matters including those relatable to the State List and Concurrent List" except for excluded entries.

27. The judgment of the majority did not make a direct observation on the interpretation of the said phrase. However, the reasoning indicates that the phrase was to be considered in a broader sense. As noted previously, the judgment of the majority held that the executive power of NCTD is coextensive with its legislative power on subjects except the excluded subjects under Article 239AA(3)(a). This means that the executive power flows from the legislative power, that is, if NCTD has executive power on a subject in List II, it is because it has legislative power under the entries of that List. The judgment of the majority held that the Union shall have exclusive executive power with respect to NCTD only for "the three matters in the State List in respect of which the power of the Delhi Legislative Assembly has been excluded". It was further held that in respect of "all other matters," executive power is to be exercised by GNCTD. This would mean that NCTD has executive power on "all other matters". This indicates that the judgment of the majority interpreted Article 239AA(3)(a) and the phrase "in so far as any such matter is applicable to Union Territory" to give legislative power to NCTD on "all

other matters" except the three matters in the State List in respect of which the power of the Legislative Assembly of NCTD has been excluded.

28. The above discussion implies that all the five Judges in the 2018 Constitution Bench judgment did not construe the phrase "in so far as any such matter is applicable to Union Territories" in Article 239AA to be exclusionary.

29. However, in his opinion in the 2019 split verdict, Justice Bhushan was of the contrary view. He held that the majority opinion in the 2018 Constitution bench judgment did not interpret the phrase "insofar as any such matter is applicable to Union Territories":

> "187. As noticed above, the Constitution Bench in para 39 extracted above has noticed the submissions of the counsel for the respondent that words "insofar as any such matter is applicable to Union Territories…" in Article 239-AA(3)(*a*) restrict the legislative power of the Legislative Assembly of Delhi to only those entries which are only applicable to Union Territories and not all. **The elaborate discussion on its answer is not found in the majority opinion expressed by Justice Dipak Misra, C.J. (as he then was).** The submission having been made before the Constitution Bench which submission was considered in other two opinions expressed by Dr Justice D.Y. Chandrachud and myself, it is useful to notice as to what has been said in other two opinions in the Constitution Bench…
>
> 191. Dr D.Y. Chandrachud, J., thus, held that the expression "State" is by itself not conclusive of whether a particular provision of the Constitution would apply to Union Territories. His Lordship opined that the expression "insofar as any such matter is applicable to Union Territories" is not one of exclusion nor can it be considered to be so irrespective of subject or context.
>
> 192. I had also dealt with the above submission in paras 500, 551 and 552 in the following words:

> […]
>
> 193. In the above paragraphs, the opinion is expressed that all matters including those relatable to the State List and Concurrent List are available to the Legislative Assembly of Delhi *except where an entry indicates that its applicability to the Union Territory is excluded by implication or by any express constitutional provision*. The conclusion is, thus, that all entries of List II and List III are available to Legislative Assembly for exercising legislative power except when an entry is excluded by implication or by any express provision.
>
> 194. **The majority opinion delivered by Dipak Misra, C.J. (as he then was) having not dealt with the expression "insofar as any such matter is applicable to Union Territories", it is, thus, clear that no opinion has been expressed in the majority opinion of the Constitution Bench…"**
>
> (emphasis supplied)

30. We are unable to agree with the view of Justice Bhushan in the 2019 split verdict. As indicated previously, the majority decision in the 2018 Constitution Bench judgement rendered a broad interpretation of Article 239AA(3)(a) to provide NCTD with vast executive and co-extensive legislative powers except in the excluded subjects. A combined reading of the majority opinion and the concurring opinions of Justice Chandrachud and Justice Bhushan indicates that the phrase "in so far as any such matter is applicable to Union Territories" does not restrict the legislative powers of NCTD.

31. While the 2018 Constitution Bench judgment provides sufficient clarity on the interpretation of the phrase "in so far as any such matter is applicable to Union Territories", we find it necessary to deal with the arguments made by the Union of India that the phrase must be read in a restrictive manner to limit the legislative

power of NCTD on certain subjects (in addition to already excluded subjects) in List II.

D. The 'class' of Union territories

32. The opinion of the majority in the 2018 Constitution Bench judgment acknowledged the special status of NCTD. A reference to the historical background which led to the conceptualization of Union Territories would be useful to assess the argument of the Union that there exists a class of Union territories. When the Indian Constitution was adopted, the States of the Indian Union were classified into Part A, Part B, and Part C States. Delhi was a Part C State and was governed by the Government of Part C States Act 1951. The Act provided for a Council of Ministers and a legislature of elected representatives for Delhi with the power of making laws with respect to any of the matters enumerated in the State List or the Concurrent List except for the subjects which were expressly excluded. The excluded subjects corresponded to those in Article 239AA along with the subject of 'Municipal Corporations.' These powers were limited in nature and subject to the legislative power of Parliament.

33. The Constitution (Seventh Amendment) Act 1956,[9] based broadly on the recommendations of the Fazl Ali Commission and designed to implement the provisions of the States Reorganization Act 1956, *inter alia* did away with the erstwhile classification of States into Part A, Part B, and Part C States, and Part D territories. Instead, it introduced States and Union Territories. The newly created

[9] "1956 Constitution Amendment"

Union Territories were to be administered by the President acting through an Administrator in terms of Article 239 of the Constitution.

34. However, it is important to note that the Fazl Ali Commission was alive to the special needs of Delhi and the importance of accounting for local needs and wishes of the residents of NCTD. It noted that:

> "593. […] Having taken all these factors into account, we are definitely of the view that municipal autonomy in the form of a corporation, which will provide greater local autonomy than is the case in some of the important federal capitals, is the right and in fact the only solution of the problem of Delhi State."

35. Soon thereafter, in 1962, Article 239A was inserted in the Constitution by the Constitution (Fourteenth Amendment) Act 1956. This envisaged the creation of local legislatures or a Council of Ministers or both for certain Union Territories. Thus, a significant change was introduced in the governance structure for Union Territories. Article 239A created a separate category of Union Territories since all Union Territories were no longer envisaged to be administered only by the President. The introduction of Article 239A was followed by the Government of Union Territories Act 1963. Currently, the Union Territory of Puducherry is administered in terms of the governance structure envisaged by this enactment.

36. By the Constitution (Sixty-ninth Amendment) Act 1991[10], Article 239AA was inserted in the Constitution. It introduced a unique structure of governance for

[10] "1991 Constitution Amendment"

NCTD vis-à-vis the Union Territories. The Statement of Objects and Reasons of provides as follows:

> "1. … After such detailed inquiry and examination, it recommended that Delhi should continue to be a Union Territory and provided with a Legislative Assembly and a Council of Ministers responsible to such Assembly with appropriate powers to deal with matters of concern to the common man. The Committee also recommended that with a view to ensure stability and permanence, **the arrangements should be incorporated in the Constitution to give the National Capital a special status among the Union Territories**."
>
> (emphasis supplied)

37. The 1991 Constitution Amendment brought a fresh dimension to the governance of Union Territories. By virtue of the provisions of Article 239AA, NCTD became the only Union Territory with a special status of having a constitutionally mandated legislature and Council of Ministers. This was a departure from the earlier model of governance for Union territories. Article 239AA, in contrast, constitutionally mandates a legislature and prescribes the scope of legislative and executive power for NCTD.

38. Article 239AA creates a wide variation in structures of governance of NCTD as compared to other Union Territories, with differences even as regards the manner in which legislative powers have been bestowed upon them. For instance, Article 239A provides that Parliament "may" create a legislature for Puducherry. On the other hand, for NCTD, the Constitution itself (in terms of Article 239AA) has created a Legislative Assembly and a Council of Ministers. The constitutionally coded status of NCTD results in a creation of a significant degree of variance in the governance structure when compared to other States and Union territories.

39. The concurring opinion of Justice Chandrachud in the 2018 Constitution Bench judgment expressly discussed this aspect and held that no single homogeneous class of Union Territories exits. Instead, Union Territories fall in various categories:

> "453. **The judgment of the majority [**New Delhi Municipal Council v State of Punjab**] also holds that all Union Territories are not situated alike.** The first category consists of Union Territories which have no legislature at all. The second category has legislatures created by a law enacted by Parliament under the Government of Union Territories Act, 1963**. The third category is Delhi which has "special features" under Article 239-AA. Though the Union Territory of Delhi "is in a class by itself", it "is certainly not a State within the meaning of Article 246 or Part VI of the Constitution". Various Union Territories — the Court observed — are in different stages of evolution…**
>
> 475.1. The introduction of Article 239-AA into the Constitution was the result of the exercise of the constituent power. **The Sixty-ninth Amendment to the Constitution has important consequences for the special status of Delhi as the National Capital Territory,** albeit under the rubric of a Union Territory governed by Part VIII of the Constitution."
>
> (emphasis supplied)

40. This variance in the constitutional treatment of Union Territories as well as the absence of a homogeneous class is not unique only to Union Territories. The Constitution is replete with instances of special arrangements being made to accommodate the specific regional needs of States in specific areas. Therefore, NCTD is not the first territory which has received a special treatment through a constitutional provision, but it is another example - in line with the practice of the Constitution - envisaging arrangements which treat federal units differently from

each other to account for their specific circumstances. For instance, Article 371 of the Constitution contains special provisions for certain areas in various States as well as for the entirety of some States. The marginal notes to various articles composed under the rubric of Article 371 provide an overview of a number of States for which arrangements in the nature of *asymmetric federalism* are made in the spirit of accommodating the differences and the specific requirements of regions across the nation:

> "371. Special provision with respect to the States of [* * *] Maharashtra and Gujarat
> 371-A. Special provision with respect to the State of Nagaland
> 371-B. Special provision with respect to the State of Assam
> 371-C. Special provision with respect to the State of Manipur
> 371-D. Special provisions with respect to the State of Andhra Pradesh or the State of Telangana]
> 371-E. Establishment of Central University in Andhra Pradesh
> 371-F. Special provisions with respect to the State of Sikkim
> 371-G. Special provision with respect to the State of Mizoram
> 371-H. Special provision with respect to the State of Arunachal Pradesh
> 371-I. Special provision with respect to the State of Goa
> 371-J. Special provisions with respect to State of Karnataka"

41. The design of our Constitution is such that it accommodates the interests of different regions. While providing a larger constitutional umbrella to different states and Union territories, it preserves the local aspirations of different regions. "Unity in diversity" is not only used in common parlance, but is also embedded in our constitutional structure. Our interpretation of the Constitution must give substantive weight to the underlying principles.

42. Therefore, we are unable to agree with the argument of the Solicitor General that the legislative power of NCTD does not extend to those subjects which are not available to Union Territories as a class because Article 239AA employs the term

"*any such matter is applicable to Union Territories".* The analysis in this section clarifies that there is no homogeneous class of Union territories with similar governance structures.

E. Maintaining the balance between local interests and national interests

43. The Union of India has submitted that the phrase "in so far as any such matter is applicable to Union Territories" in Article 239AA cannot be interpreted inclusively as the Union has a preponderance of interest in the governance of the national capital and therefore the phrase must be read in a narrow manner. It has submitted that as Delhi is the seat of the Union Government, national interests take precedence over and beyond the quibbles of local interests. We find that this argument does not hold merit in light of the text of Article 239AA(3). This argument was already addressed in the 2018 Constitution Bench judgment.

44. Article 239AA(3)(a) confers legislative power to NCTD. However, it does not confer legislative power to NCTD over all entries in List II. Article 239AA(3) provides multiple safeguards to ensure that the interest of the Union is preserved. First, sub-clause (a) of clause (3) removes three entries in List II from the legislative domain of NCTD. It provides that NCTD shall not have the power to enact laws on "matters with respect to entries 1, 2 and 18 of the State List and entries 64, 65 and 66 of that List in so far as they relate to the said entries 1, 2 and 18". Second, sub-clause (b) of clause (3) clarifies that Parliament has the power to legislate on "any

matter" for a Union Territory (including on subjects with respect to which NCTD has legislative power under Article 239AA(3)(a)). In other words, Parliament has the plenary power to legislate on a subject in any of the three Lists of the Seventh Schedule for NCTD. Third, Article 239AA(3)(c) provides that where there is a repugnancy between a law enacted by the Legislative Assembly of NCTD and a law enacted by Parliament, the latter will prevail, and the law enacted by the legislative assembly shall, "to the extent of the repugnancy, be void". Unlike Article 254, which provides for the overriding power of Parliament only on subjects in the Concurrent List, Parliament has overriding power in relation to the NCTD over subjects in both List II and List III. Fourth, the second proviso to Article 239AA(c) provides that Parliament may enact "at any time any law with respect to the same matter including a law adding to, amending, varying or repealing the law so made by the Legislative Assembly" of NCTD. Fifth, under Article 239AA(7)(a), Parliament may by law make provisions for giving effect to, or supplementing the provisions in the forgoing clauses of Article 239AA and for "all matters incidental or consequential thereto". Article 239AA(7)(b) stipulates that such law shall not be deemed to be an amendment of the Constitution for the purposes of Article 368, which deals with the power and procedure to amend the Constitution. Thus, Article 239AA(3) balances between the interest of NCTD and the Union of India.

45. This constitutional balance has been analyzed in the concurring opinion of Justice Chandrachud in the 2018 Constitution Bench judgment in the following terms:

> " While bearing [...] fundamental constitutional principles of a democracy in mind, a balance has to be struck with the second of the above elements which recognises the special status of the NCT. The

> NCT represents the aspirations of the residents of its territory. But it embodies, in its character as a capital city the political symbolism underlying national governance. The circumstances pertaining to the governance of the NCT may have a direct and
>
> immediate impact upon the collective welfare of the nation. This is the rationale for the exclusion of the subjects of public order, police and land from the legislative power and necessarily from the executive power of the NCT. These considerations would necessarily require a careful balance between the two principles."

46. Thus, it is evident that the Legislative Assembly of NCTD does not exercise exclusive legislative powers over all the entries in the State List. It is only in a demarcated constitutional sphere that it is able to exercise its legislative power. Parliament, by virtue of the 1991 Constitution Amedndment, has already reserved certain subjects of national importance to itself. Furthermore, Parliament has overriding legislative powers in relation to NCTD in terms of sub-clauses (b) and (c) of Article 239AA(3) and Article 239AA(7). The intent and purpose of Article 239AA(3(b) and Article 239AA(7) is to confer an expanded legislative competence upon Parliament, when it comes to GNCTD clearly since it is the capital of the country and therefore, must be dealt with different considerations. In this manner, Parliament acting in its constituent power while introducing Article 239AA has provided sufficient safeguards and was cognizant of the necessity to protect concerns related to national interests. The Constitution confers powers to Parliament to such an extent that it would have the effect of amending the Constitution. As discussed, the legislative powers of NCTD are limited. If we interpret the phrase "in so far as any such matter is applicable to Union Territories" is interpreted in a manner to exclude a greater number of entries than what is already excluded by Article 239A(3), it will defeat the very purpose of granting a "special status" to NCTD.

F. Inclusive interpretation of "insofar as any such matter is applicable to Union territories"

47. The Union of India submitted that the phrase "insofar as any such matter is applicable to Union territories" is specifically a term of exclusion and not a term of inclusion. It argued that the phrase was introduced to limit the legislative and executive power over entries in List II over and beyond the entries which have been expressly excluded by Article 239AA. We shall now refer to other provisions of the Constitution to analyse the above arguments.

48. The power of Parliament and legislatures of States to legislate upon entries in the Union List, State List and Concurrent List flows from Article 246 of the Constitution. Article 246(3) confers exclusive power to the legislatures of States to make laws for that State with respect to the matters enumerated in the State List. Article 246(4) provides 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.

49. Article 366 provides meanings of various expressions used in the Constitution, unless the context otherwise requires. The provision stipulates that unless the context otherwise requires, the expressions defined in an Article shall have the meanings respectively assigned to them in the provision. Article 366(26B) provides that 'State' with reference to Articles 246A, 268, 269, 269A and 279A includes a Union Territory with a legislature. Articles 366(26B), incorporated in the Constitution by the Constitution (One Hundred and First Amendment) Act 2016, provides the meaning of 'State' only with reference to five other Articles in the

Constitution, to enable the proper functioning of the goods and services tax regime. However, a universal definition of 'State' has not been provided under Article 366.

50. Article 367(1) provides that unless the context otherwise requires, the General Clauses Act 1897[11], subject to any adaptations and modifications that may be made therein by any Presidential Order made under Article 372 to bring it in conformity with the provisions of the Constitution, is to apply for the interpretation of the Constitution:

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

51. Article 372(2) stipulates that the President may by order make modifications and adaptations to the provisions of any law in force in the territory of India to bring it in accordance with the provisions of the Constitution. This power under Article 372(3) was only granted to the President for three years and thus, it expired on 25 January 1953.

52. The 1956 Constitution Amendment was introduced to make necessary amendments to the provisions of the Constitution to give effect to the reorganisation of States. Article 372A which was introduced pursuant to the 1956 Constitution Amendment confers on the President the power to make modifications and adaptations in provisions of law, in force in India immediately before the amendment, to bring it in consonance with the provisions of the Constitution.

[11] "General Clauses Act"

53. The President amended Section 3(58) of the General Clauses Act by the Adaptation of Laws (No. 1) Order, 1956. Subsequent to the amendment in 1956. Section 3(58) stipulates that the phrase 'State' with respect to any period before the commencement of the 1956 Constitution Amendment shall mean a Part A State, a Part B State, or a Part C State, and with respect to the period after the amendment shall include a State specified in the First Schedule to the Constitution and shall include a Union Territory:

> "(58) "State"— (a) as respects any period before the commencement of the Constitution (Seventh Amendment) Act, 1956, shall mean a Part A State, a Part B State or a Part C State; and (b) as respects any period after such commencement, shall mean a State specified in the First Schedule to the Constitution and shall include a Union territory;]"

54. In **Advance Insurance Corporation Limited** v. **Gurudasmal**,[12] the question before a Constitution Bench of this Court was whether the word 'State' in Entry 80 of List I could be read to include Union territories. Entry 80 read as follows:

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

55. Justice Hidayatullah writing for the Constitution Bench rejected the argument that the amended definition of 'State' under General Clauses Act will not

[12] (1970) 1 SCC 633

apply to the interpretation of provisions of the Constitution. He observed that Article 372A provides the President with a fresh power of adaptation and this power is equal and analogous to the power that the President held under Article 372(2). This Court held that unless the context otherwise requires, the definition provided under the General Clauses Act and as modified by the order under Article 372A shall be applied.

56. However, a separate Constitution Bench of this Court in **Shiv Kirpal Singh** v. **VV Giri**,[13] held that definitions under the General Clauses Act as modified by the President under the adaptation order by virtue of the power conferred under Article 372A do not apply to the interpretation of the Constitution. In this case, the issue was whether the phrase “elected members of the Legislative Assemblies of the States” in Article 54 (which constitutes the electoral college for the election of the President) would include the elected members of the Legislative Assemblies of Union territories. This Court answered in the negative. This Court held that the modifications under Article 372A was limited only to the interpretation of laws of Parliament and would not apply to the interpretation of the Constitution because Article 367 stipulates that the General Clauses Act shall apply to the interpretation of the Constitution, subject to such adaptations made under Article 372. The provision does not provide that the interpretation must also be subject to the adaptation made under Article 372A. Parliament responded to the anomaly created by the judgment in **Shiv Kirpal Singh** (supra), and inserted an Explanation to Article 54 by the Constitution (Seventeenth Amendment) Act 1992. The Explanation clarifies that the reference to ‘State’ in Articles 54 and 55 would include

[13] AIR 1970 SC 2097

the National Capital Territory of Delhi and the Union Territory of Pondicherry for constituting the electoral college for the election of the President. In **Shiv Kirpal Singh** (supra), this Court did not refer to the decision in **Advance Insurance** (supra). Thus, the decision in **Shiv Kirpal Singh** is *per incuriam* to the extent of interpretation of Article 372A.

57. The provisions of the General Clauses Act as modified by the President in exercise of the power under Article 372A shall apply to the interpretation of the Constitution. It cannot be held otherwise merely because Article 367 does not refer to Article 372A. To interpret Article 367 in such a manner would render Article 372A and the amendments in the Constitution by the 1956 Constitution Amendment otiose. The power to make adaptations and modifications was granted to the President by Article 372A to bring the provisions of law in accordance with the Constitution, as amended by the 1956 Constitution amendment. If Article 367 is interpreted as excluding modifications under Article 372A, there would be an apparent inconsistency between the interpretation of the Constitution and the interpretation of statutes. While in the case of the former, the definition of State prior to the 1956 amendment would apply, in the case of the latter, the definition as amended by the 1956 amendment would apply. Thus, a literal interpretation of Article 367 would render the Constitution unworkable and would not give effect to the 1956 Constitution Amendment. This Court must render a purposive interpretation of Article 367. Article 367 must be read to mean that the General Clauses Act, as amended by adaptation and modification orders under Article 372 and Article 372A shall apply to the interpretation of the Constitution, unless the context requires. Thus, unless the context otherwise requires, the term “State” in

the Constitution must be read to include Union territories. Accordingly, we agree with the interpretation of Article 367 rendered by this Court in **Advance Insurance** (supra)*.*

58. The findings in **Advance Insurance** (supra) were later reiterated by this Court in **Prem Kumar Jain** (supra). In **Prem Kumar Jain** (supra)**,** a four-Judge Bench of this Court held that Article 372A is a special provision introduced to make the 1956 Constitution amendment workable:

> "7. [...] The definition of the expression "State" as it stood before November 1, 1956, became unsuitable and misleading on the coming into force of the Constitution (Seventh Amendment) Act, 1956, from November 1, 1956, and it will, for obvious reasons, be futile to contend that it should have continued to be applicable for all time to come and remained "the final definition of 'State'" merely because the period of three years provided by clause (3)(a) of Article 372 of the Constitution expired and was not extended by an amendment of that clause, or because Article 367(1) was not amended by the Seventh Amendment Act "to say that adaptations made in the General clauses Act otherwise than those made under Article 372(2) would be applicable to the interpretation of the Constitution". [...] It was a special provision, and it was meant to serve the purpose of making the Seventh Amendment Act workable. As has been held by this Court in Management of Advance Insurance Co. Ltd. v. Shri Gurudasmal [(1970) 1 SCC 633 : (1970) 3 SCR 881] , Article 372-A gave a fresh power to the President which was equal and analogous to the power under Article 372(2)."

59. We shall now deal with the decisions of this Court which have held that the expression 'State' in Article 246 does not include a Union Territory. In **T.M. Kanniyan** v. **CIT**[14], a Constitution Bench of this Court discussed the applicability

[14] (1968) 2 SCR 103

of Section 3(58) of the General Clauses Act 1897 to Article 246, and held that the inclusive definition of 'State' under the General Clauses Act would not apply to Article 246. Such an interpretation, it was held, would be repugnant to the subject and context of Article 246:

> "4. Parliament has plenary power to legislate for the Union territories with regard to any subject. With regard to Union territories there is no distribution of legislative power. Article 246(4) enacts 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." R.K. Sen v. Union it was pointed out that having regard to Article 367, the definition of "State" in Section 3(58) of the General clauses Act, 1897 applies for the interpretation of the Constitution unless there is anything repugnant in the subject or context. **Under that definition, the expression "State" as respects any period after the commencement of the Constitution (Seventh Amendment) Act, 1956 "shall mean a State specified in the First Schedule to the Constitution and shall include a Union territory". But this inclusive definition is repugnant to the subject and context of Article 246. There, the expression "States" means the State specified in the First Schedule. There is a distribution of legislative power between Parliament and the legislatures of the States.** Exclusive power to legislate with respect to the matters enumerated in the State List is assigned to the legislatures of the States established by Part VI. There is no distribution of legislative power with respect to Union territories. That is why Parliament is given power by Article 246(4) to legislate even with respect to matters enumerated in the State List. **If the inclusive definition of "State" in Section 3(58) of the General Clauses Act were to apply to Article 246(4), Parliament would have no power to legislate for the Union territories with respect to matters enumerated in the State List and until a legislature empowered to legislate on those matters is created under Article 239-A for the Union territories, there would be no legislature competent to legislate on those matters;** moreover, for certain territories such as

> the Andaman and Nicobar Islands no legislature can be created under Article 239-A, and for such territories there can be no authority competent to legislate with respect to matters, enumerated in the State List. **Such a construction is repugnant to the subject and context of Article 246.”**
>
> (emphasis supplied)

60. The position that Section 3(58) of the General Clauses Act is inapplicable to Article 246 was reiterated by a nine Judge Bench of this Court in **NDMC** v. **State of Punjab**[15]. The Seventh Schedule was inserted under Article 246. In view of the position laid down in **Kanniyan** (supra) and **NDMC** (supra), the word “State” used in entries in the Seventh Schedule would also not include Union Territories. Thus, the legislative competence of NCTD would not extend to entries which mention ‘State’. The usage of the phrase “insofar as such matter is applicable to Union Territories” was included to avert such a consequence. The phrase has extended the legislative power of NCTD to all the entries in List II, which use the word “State”.

61. Any amendment to the State List as well as the Concurrent List, being an amendment to the Seventh Schedule must be in accordance with Article 368 of the Constitution. The proviso to Article 368(2) of the Constitution stipulates that an amendment to the Seventh Schedule would need a special majority of two-thirds of the members of each House of Parliament present and voting. The amendment would also need to be ratified by the legislatures of not less than one-half of the States. If the phrase “insofar as such matter is applicable to Union Territories” was not included in Article 239AA, Parliament and the Legislature of States would have

[15] 1997 (7) SCC 339

been required to amend all entries in the Seventh Schedule where the term "State" is used to "State and Union territories". This would have required a special majority. It was to avoid this time consuming process that the expansive phrase of "insofar as such matter is applicable to Union Territories" was used in Article 239AA.

62. Article 239AA expressly excludes entries 1,2, and 18 of List II from the ambit of the legislative competence of the Legislative Assembly of NCTD. Article 239AA also stipulates that the legislative power of NCTD is excluded with respect to entries 64,65, and 66 of List II insofar as they relate to entries 1,2, and 18. Entry 1 deals with public order, Entry 2 deals with police, and Entry 18 deals with Land. Entry 64 deals with "offences against laws with respect to *any of the matters* in this List", Entry 65 states "jurisdiction and powers of all courts, except the Supreme Court, with respect to *any of the matters* in this List", and Entry 66 states "fees in respect of *any of the matters* in this List, but not including fees taken in any court". The exclusion of entries 64,65, and 66 to the *extent that it relates* to entries 1,2, and 18 from the legislative competence of NCTD indicates that the governance structure envisaged in Article 239AA for NCTD was only to exclude the specific entries 1, 2, and 18 from its legislative competence. To read the phrase "insofar as such matter is applicable to the Union Territories" as introducing an implied exclusion of the legislative powers of NCTD with respect to certain other entries would be contrary to the plain meaning of the provision.

63. Article 239AA establishes a Legislative Assembly for NCTD. The seats in the Assembly are filled by a direct election from the constituencies of NCTD. The Legislative Assembly of NCTD embodies the constitutional principle of

representative democracy similar to the Legislative Assembly of the State. The members of the Legislative Assembly of NCTD are selected by the electorate of

Delhi to represent their interests. Article 239AA must be interpreted to further the principle of representative democracy.[16] To interpret the phrase "insofar as any such matter is applicable to Union territories" in a restrictive manner would limit the legislative power of the elected members of the assembly. The members of the Legislative Assembly have been chosen by the electorate to act in their stead. Thus, the legislative competence of NCTD must be interpreted to give full impetus to the will of the electorate.

64. We find that the phrase 'insofar as any such matter is applicable to Union Territories' in Article 239AA(3) cannot be read to further exclude the legislative power of NCTD over entries in the State List or Concurrent List, over and above those subjects which have been expressly excluded by the provision.

G. "Subject to the provisions": A limitation?

65. It has been emphasized by the Union of India that Article 239AA not only restricts the powers of the Legislative Assembly of NCTD through the phrase "insofar as any such matter is applicable to Union Territories" but also through the restrictive phrase of "Subject to the provisions of this Constitution".

66. The phrase "Subject to the provisions of this Constitution" is not unique to Article 239AA. It has been used in twenty-two provisions of the Constitution. Notably, the phrase has also been used in the provisions dealing with the

[16] See Justice Chandrachud's opinion in the 2018 Constitution Bench

legislative power of Parliament and the State Assemblies (Article 245)[17] as well as in the provisions dealing with the executive power of the Union (Article 73(2))[18] and of the States (Article 162(3))[19]. The phrase is used to indicate that the legislative power and competence exercised by a legislature must be within the limits circumscribed by the Constitution. Those boundaries may differ on a case to case basis. For instance, a law made by a legislature cannot violate the fundamental rights of citizens. Another instance is that Parliament can only enact laws on subjects within its legislative competence. Furthermore, any law made by Parliament or a State Legislature shall be subject to the power of judicial review under Article 32 or Article 226. A Constitution Bench of this Court in the case of **Rajendra Diwan v. Pradeep Kumar Ranibala**[20] held:

> "Parliament and the State Legislatures derive their power to make laws from Article 245(1) of the Constitution of India and **such power is subject to and/or limited by the provisions of the Constitution.** While Parliament can make law for the whole or any part of the territory of India, the State Legislature can only make laws for the State or any part thereof, subject to the restrictions in the Constitution of India…
>
> While Parliament has exclusive power Under Article 246(1) of the Constitution to make laws with respect to the matters enumerated in the Union List, the State Legislature has exclusive power to make laws with respect to matters enumerated in the State List, subject to Clauses (1) and (2) of Article 246. Along with the Union Legislature, the State Legislature is also competent to enact laws in respect of the

[17] 245. Extent of laws made by Parliament and by the Legislatures of States - (1) Subject to the provisions of this Constitution, Parliament may make laws for the whole or any part of the territory of India, and the Legislature of a State may make laws for the whole or any part of the State. […]

[18] 73. Extent of executive power of the Union - (1) Subject to the provisions of this Constitution, the executive power of the Union shall extend – […].

[19] 162. Extent of executive power of State - Subject to the provisions of this Constitution, the executive power of a State shall extend to the matters with respect to which the Legislature of the State has power to make laws: […]

[20] [2019] 17 SCR 1089

> matters enumerated in the Concurrent List, subject to the provisions of Article 246(1)…
>
> While the widest amplitude should be given to the language used in one entry**, every attempt has to be made to harmonize its contents with those of other Entries, so that the latter may not be rendered nugatory.**"
>
> (emphasis supplied)

The judgment indicates that the law-making power of even Parliament and State legislatures under Article 245(1) is not absolute. It has to be within the confines of the Constitution. DD Basu, in the *Commentary on the Constitution of India* discusses the constitutional limitations upon legislative power:[21]

> "As the opening words of Art. 245(1) say, the legislative powers of both the Union and State Legislatures are subject to the other provisions of the Constitution, even though their powers are plenary within the spheres assigned to them respectively by the Constitution…
>
> Whether a law has transgressed any of these limitations is to be ascertained by the Court and if it is found so to transgress, the Court will declare the law to be void.
>
> These limitations fall under various categories:
>
> I. The first and foremost is the question of *vires* or legislative competence…
>
> II. Apart from want of legislative competence, a law may be invalid because of contravention of some positive limitation imposed by the Constitution. In such cases, even though the Legislature had the competence to make a law with respect to the subject-matter of the impugned law, it became invalid because of contravention of some specific prohibition or limitation imposed by the Constitution.
>
> Such limitations fall under two heads-
>
> > (i) The Fundamental Rights contained in Part III. The effects of the contravention of a Fundamental Right have been fully discussed under Art. 13.

[21] Dr DD Basu, Commentary on the Constitution of India, 8th Edn., 2012, Vol. 8, pp. 8749-8753

> […]
>
> (ii) Not merely the provisions included in Part III, but any other provision contained in the Constitution (even though it does not confer
>
> any fundamental right) constitutes a limitation upon legislative power on two conditions:
>
> (a) That the provision in question is justiciable, that is to say, intended to be and capable of being judicially enforced.
>
> (b) That the provision is mandatory, e.g., Arts. 255: 286, 301, 303-4.
>
> III. In the case of State legislation, there are further limitations, viz., that (a) its operation cannot extend beyond the boundaries of the State, in the absence of a territorial nexus; Another limitation on the legislative power or a ground of unconstitutionality is that the Legislature concerned has abdicated its essential legislative function as assigned to it by the Constitution and has made an excessive delegation of that power to some other body. (b) it must be for the purposes of the State."

The same meaning as referred above has to be applied to the usage of the phrase "Subject to the provisions of this Constitution" in Article 239AA.

67. We therefore hold that the legislative power of NCTD under Article 239AA(3) is to be guided by the broader principles and provisions of the Constitution. The said phrase in Article 239AA(3) must be interpreted to give effect to the underlying principles in the Constitution. It is in this backdrop that we shall consider the next submission made by the Union.

H. The Constitution is not Unitary

68. The Union of India has argued that the Indian Constitution is often referred to as a federal Constitution with a strong unitary bias, and as far as Union Territories are concerned, the Constitution is unitary in form and in spirit. It is submitted that the generic concept of federalism, as applicable to States cannot

apply to Union Territories. Thus, it is argued that the phrases “Subject to the provisions of this Constitution” and “in so far as any such matter is applicable to Union territories” are to be interpreted accordingly.

69. To analyse the above argument, it is imperative to understand the concept of federalism as the members of the Constituent Assembly envisioned. Dr. B.R. Ambedkar in one of his seminal speeches before the Constituent Assembly explained the dual polity federal model established under the Constitution[22]:

> “Dual Polity under the proposed Constitution will consist of the Union at the Centre and the States at the periphery each endowed with sovereign powers to be exercised in the field assigned to them respectively by the Constitution… the Indian Constitution proposed in the Draft Constitution is not a league of States **nor are the States administrative units or agencies of the Union Government**.”
>
> (emphasis supplied)

70. Further, when Dr. Ambedkar was questioned in the Constituent Assembly on the centralizing tendency of the Constitution, he responded by saying that:[23]

> “**The States, under our Constitution, are in no way dependent upon the Centre for their legislative or executive authority. The Centre and the States are co-equal in this matter**... It may be that the Constitution assigns to the Centre 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 Centre 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 Centre and the**

[22] Constituent Assembly Debates, Vol. 7 at p. 33 (4 November 1948)
[23] Constituent Assembly Debates, Vol. 11 at p. 976 (25 November 1949)

> **Units by the Constitution. This is the principle embodied in our Constitution.**"
>
> (emphasis supplied)

71. It emerges from the speeches of Dr Ambedkar in the Constituent Assembly that India adopted a federal model, in which the Union and the States were meant to operate within their assigned legislative domains. The States are not subservient to the Union. The legislative domain of the States was exclusive, and cannot be interfered with by the Union. This principle has been reiterated in judgments of this Court.

72. Justice B.P. Jeevan Reddy, in his separate opinion, in **S R Bommai** v. **Union of India**[24], where federalism was held to be part of the basic structure, held that, the States were independent and supreme in the sphere allotted to them, even if the Constitution has a centraizing drift:

> "276. The fact that under the scheme of our Constitution, greater power is conferred upon the Centre vis-à-vis the States does not mean that States are mere appendages of the Centre. Within the sphere allotted to them, States are supreme. The Centre cannot tamper with their powers. More particularly, the courts should not adopt an approach, an interpretation, which has the effect of or tends to have the effect of whittling down the powers reserved to the States."

73. In terms of the above discussion in the Constituent Assembly and the judgment of this Court, it is clear that the Constitution provides States with power to function independently within the area transcribed by the Constitution. The

[24] (1994) 3 SCC 1

States are a regional entity within the federal model. The States in exercise of their legislative power satisfy the demands of their constituents and the regional aspirations of the people residing in that particular State. In that sense, the principles of federalism and democracy are interlinked and work together in synergy to secure to all citizens justice, liberty, equality and dignity and to promote fraternity among them. The people's choice of government is linked with the capability of that government to make decisions for their welfare.

74. The principles of democracy and federalism are essential features of our Constitution and form a part of the basic structure.[25] Federalism in a multi-cultural, multi-religious, multi-ethnic and multi-linguistic country like India ensures the representation of diverse interests. It is a means to reconcile the desire of commonality along with the desire for autonomy and accommodate diverse needs in a pluralistic society. Recognizing regional aspirations strengthens the unity of the country and embodies the spirit of democracy. Thus, in any federal Constitution, at a minimum, there is a dual polity, that is, two sets of government operate: one at the level of the national government and the second at the level of the regional federal units. These dual sets of government, elected by "We the People" in two separate electoral processes, is a dual manifestation of the public will. The priorities of these two sets of governments which manifest in a federal system are not just bound to be different, but are intended to be different.

75. While NCTD is not a full-fledged state, its Legislative Assembly is constitutionally entrusted with the power to legislate upon the subjects in the State

[25] SR Bommai v. Union of India, (1994) 3 SCC 1

List and Concurrent List. It is not a State under the First Schedule to the Constitution, yet it is conferred with power to legislate upon subjects in Lists II and III to give effect to the aspirations of the people of NCTD. It has a democratically elected government which is accountable to the people of NCTD. Under the constitutional scheme envisaged in Article 239AA(3), NCTD was given legislative power which though limited, in many aspects is similar to States. In that sense, with addition of Article 239AA, the Constitution created a federal model with the Union of India at the centre, and the NCTD at the regional level. This is the asymmetric federal model adopted for NCTD. While NCTD remains a Union Territory, the unique constitutional status conferred upon it makes it a federal entity for the purpose of understanding the relationship between the Union and NCTD. The majority in the 2018 Constitution Bench judgment held that while NCTD could not be accorded the status of a State, the concept of federalism would still be applicable to NCTD:

> "122. **We have dealt with the conceptual essentiality of federal cooperation** as that has an affirmative role on the sustenance of constitutional philosophy. We may further add that though the authorities referred to hereinabove pertain to the Union of India and the State Governments in the constitutional sense of the term "State", yet **the concept has applicability to the NCT of Delhi regard being had to its special status and language employed in Article 239AA and other articles."**
>
> (emphasis added)

76. Our model of federalism expects a sense of cooperation between the Union at the centre, and the regional constitutionally recognised democratic units. The spirit of cooperative federalism requires the two sets of democratic governments to iron out their differences that arise in the practice of governance and collaborate

with each other. The Union and NCTD need to cooperate in a similar manner to the Union and the States. Our interpretation of the Constitution must enhance the spirit of federalism and democracy together. This approach of interpretation is located in the 2018 Constitution Bench judgment, wherein the opinion of the majority held as follows:

> "284.7. Our Constitution contemplates a meaningful orchestration of federalism and democracy to put in place an egalitarian social order, a classical unity in a contemporaneous diversity and a pluralistic milieu in eventual cohesiveness without losing identity. Sincere attempts should be made to give full-fledged effect to both these concepts"

77. In the spirit of cooperative federalism, the Union of India must exercise its powers within the boundaries created by the Constitution. NCTD, having a *sui generis* federal model, must be allowed to function in the domain charted for it by the Constitution. The Union and NCTD share a unique federal relationship. It does not mean that NCTD is subsumed in the unit of the Union merely because it is not a "State". As the opinion of the majority in 2018 Constitution Bench judgement held:

> "Such an interpretation would be in consonance with the concepts of pragmatic federalism and federal balance by giving the Government of NCT of Delhi some required degree of independence subject to the limitations imposed by the Constitution."

The interpretation of Article 239AA(3)(a) in an expansive manner would further the basic structure of federalism.

I. Scope of Legislative and Executive Power between the Union and NCTD

78. Article 239AA(3)(a) indicates that the Legislative Assembly of Delhi shall have the power to make laws for the whole or any part of NCTD with respect to matters in the State List and the Concurrent List, except for entries 1, 2, and 18 of the State List, and entries 64, 65 and 66 insofar as they relate to the entries 1, 2, and 18. Therefore, the legislative power of NCTD is limited to entries it is competent to legislate on.

79. Article 239AA(3)(b) provides that Parliament can "make laws with respect to *any matter*" for a Union Territory or any part of it. Therefore, the legislative power of Parliament shall extend to all subjects in the State List and the Concurrent List in relation to NCTD, besides of course the Union List. In case of a repugnancy between a law enacted by Parliament and a law made by Legislative Assembly of NCTD, the former shall prevail in terms of Article 239AA(3)(d).

80. The position that emerges from Article 239AA(3) is that NCTD has legislative power over entries in List II with limits (as excluded by the provision) but Parliament's legislative power extends to subjects in all three lists relation to NCTD. As noted previously, the scope of division of legislative and executive powers between the Union and NCTD fell for the consideration in the 2018 Constitution Bench judgment. Interpreting Article 239AA(4), the 2018 Constitution Bench judgment held that the executive power of GNCTD was co-extensive with the legislative power of NCTD.

81. Article 73(1) of the Constitution stipulates that the executive power of the Union shall extend to matters with respect to which Parliament has the power to

make laws. The proviso to Article 73(1) provides that the executive power of the Union shall not extend "in any State" to matters with respect to which the Legislature of the State also has power to make laws unless expressly provided in the Constitution or by a law made by Parliament:

> "Article 73. Extent of executive power of the Union- (1) Subject to the provisions of this Constitution, the executive power of the Union shall extend-
>
> To the matters with respect to which Parliament has power to make laws;
>
> [...]
>
> Provided that the executive power referred in sub-clause (a) shall not, save as expressly provided in this Constitution, or in any law made by Parliament, extend to any State to matters with respect to which the Legislature of the State has also power to make laws."

82. Article 162 provides that subject to the provisions of the Constitution, the executive power of a State shall extend to the matters with respect to which the Legislature of the State has the power to make laws. The proviso stipulates that with respect to matters which both the Legislature of a State and Parliament have legislative competence, the executive power of the State shall be limited by the Constitution or by any law made by Parliament:

> "Article 162. Extent of executive power of State.- Subject to the provisions of this Constitution, the executive power of a State shall extend to the matters with respect to which the Legislature of the State has power to make laws.
>
> Provided that in any matter with respect to which the Legislature of a State and Parliament have power to make laws, the executive power of the State shall be subject to, and limited by, the executive power expressly conferred by this Constitution or by any

> law made by Parliament upon the Union or authorities thereof."

83. A combined reading of Articles 73 and 162 indicates that the Union has exclusive executive power over entries in List I. The States have exclusive executive power over entries in List II. With respect to List III, that is, the concurrent list, the Union shall have executive power only if provided by the Constitution or by a law of Parliament. The States shall have executive power over the entries in List III. However, if a Central legislation or a provision of the Constitution confers executive power to the Union with respect to a List III subject, then the executive power of the State shall be subject to such law or provision. The executive power of the Union "in a State" over matters on which both States and the Union of India can legislate (that is, the concurrent list) is limited to ensure that the governance of States is not taken over by the Union. This would completely abrogate the federal system of governance and the principle of representative democracy. It is with this objective in mind that the members of the Constituent Assembly thought it fit to limit the executive power of the Union in a State over matters on which the State also has legislative competence.

84. The principle in Articles 73 and 162 would equally apply to the scope of executive power over matters which are within the legislative competence of both the Union and the GNCTD. This is because the objective of the provisions is to limit the executive power of the Union in the territorial limits where there is an elected government of a federal unit.

85. Both Parliament and the Legislature of NCTD have legislative competence over List II and List III. For the purposes of NCTD, both List II and List III are "concurrent lists". Thus, the delimitation of executive power between Parliament and Government of NCTD with respect to entries in List II and List III are guided by these principles. Both Parliament and the legislature of NCTD have the power to enact laws with respect to List II (subject to the caveat that entries 1,2,and 18; and entries 64, 65, and 66 in as much as they relate to entries 1, 2, and 18 are carved out of the domain of the Legislative Assembly of GNCTD) and List III. The executive power of NCTD shall extend to all entries in List II and List III, other than the entries expressly excluded in Article 239AA(3). Such power shall be subject to the executive power of the Union (through the Lieutenant Governor) only when the Union has been granted such power by the Constitution or a law of Parliament. Therefore, the executive power of NCTD, in the absence of a law by Parliament, shall extend to all subjects on which it has power to legislate.

86. It was held in the 2018 Constitution Bench judgment that the Lieutenant Governor is bound by the aid and advice of the Council of Ministers under Article 239AA(4) while exercising executive powers in relation to matters falling within the legislative domain of the legislative assembly of NCTD except where he exercises the limited route provided under the proviso to Article 239AA(4). This limited discretionary power under the proviso, as the Constitution Bench held, ought to be exercised in a careful manner in rare circumstances such as on matters of national interest and finance. The Lieutenant Governor could not refer every matter to the President.[26] After analysing the provisions of Article 239AA(4), Government of

[26] Para 284.18 (opinion of the majority); Para 475 (concurring opinion of Justice Chandrachud)

NCTD Act 1991[27], and the applicable Transaction of Business Rules 1993, it was held by the majority that:

> "284.16. As a natural corollary, the Union of India has exclusive executive power with respect to NCT of Delhi relating to the three matters in the State List in respect of which the power of the Delhi Legislative Assembly has been excluded. In respect of other matters, the executive power is to be exercised by the Government of NCT of Delhi. This, however, is subject to the proviso to Article 239AA(4) of the Constitution…
>
> 284.17. The meaning of "aid and advise" employed in Article 239AA(4) has to be construed to mean that the Lieutenant Governor of NCT of Delhi is bound by the aid and advice of the Council of Ministers and this position holds true so long as the Lieutenant Governor does not exercise his power under the proviso to clause (4) of Article 239-AA. The Lieutenant Governor has not been entrusted with any independent decision-making power. He has to either act on the "aid and advice" of Council of Ministers or he is bound to implement the decision taken by the President on a reference being made by him.
>
> 284.18. The words "any matter" employed in the proviso to clause (4) of Article 239-AA cannot be inferred to mean "every matter"."

87. In matters which fall outside the legislative powers of NCTD, the doctrine of "aid and advice" does not apply. In those matters, the GNCTD Act and the Transaction of Business Rules of the Government of National Capital Territory of Delhi 1993[28] shall act as a guide for the exercise of power. Under Section 41 of the GNCTD Act, the Lieutenant Governor may be required to act in his discretion in respect of which powers or functions which have been delegated to him by the

[27] "GNCTD Act"
[28] "Transaction of Business Rules"

President under Article 239, or where he is required to act in his discretion under a specific provision of law or where he exercises judicial or quasi-judicial functions. Section 41, dealing with the discretion of the Lieutenant Governor, provides that:

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

88. Accordingly, the Lieutenant Governor may act in his discretion only in two classes of matters. firstly, where the matter deals with issues which are beyond the powers of the Legislative Assembly and where the President has delegated the powers and functions to the Lieutenant Governor in relation to such matter; and secondly, matters which by law require him to act in his discretion or where he is exercising judicial or quasi-judicial functions.

89. Section 44 of the GNCTD Act confers the President the power to make rules regarding the allocation of business to Ministers wherein the Lieutenant Governor is required to act on the aid and advice of his Council of Ministers. It also provides for rules to ensure convenient transaction of business with the Ministers, including

the procedure to be adopted in case of a difference of opinion between the Lieutenant Governor and the Council of Ministers or a Minister. In exercise of the power under Section 44, the President framed the Transaction of Business Rules of the Government of National Capital Territory of Delhi 1993. In his concurring opinion in the 2018 Constitution Bench judgment, Justice Chandrachud held that these Rules provide a mechanism to be followed in matters relating to the executive functions of GNCTD. It was held:

> "428. **A significant aspect of the Rules is that on matters which fall within the ambit of the executive functions of the Government of NCT, decision-making is by the Government comprised of the Council of Ministers with the Chief Minister at its head**…
>
> Rule 24 deals with an eventuality when the Lieutenant Governor may be of the **opinion** that any further action should be taken or **that action should be taken otherwise than in accordance with an order which has been passed by a Minister**. In such a case, the Lieutenant Governor does not take his own decision. **He has to refer the proposal or matter to the Council of Minister for consideratio**n…
>
> **the Lieutenant Governor has not been conferred with the authority to take a decision independent of and at variance with the aid and advice which is tendered to him by the Council of Ministers.** If he differs with the aid and advice, the Lieutenant Governor must refer the matter to the Union Government (after attempts at resolution with the Minister or Council of Ministers have not yielded a solution). **After a decision of the President on a matter in difference is communicated, the Lieutenant Governor must abide by that decision.** This principle governs those areas which properly lie within the ambit and purview of the executive functions assigned to the Government of the National Capital Territory."

(emphasis added)

The above interpretation indicates that in matters in the executive domain of NCTD, it is the elected government of NCTD which is empowered to take decisions. The

Lieutenant Governor may request the Minister or the Council of Ministers to reconsider its decision. It is only if difference persists even after attempts at resolution that he may refer the matter to the President, and await the decision.

90. Rule 45 of the Transaction of Business Rules also indicates that the Lieutenant Governor must act within the confines of clauses (3) and (4) of Article 239AA in exercising his executive functions, that is, he shall abide by the "aid and advice" of the Council of Ministers on matters in respect of which NCTD has legislative power. Rule 45 provides:

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

91. The Rule provides that the Lieutenant Governor may issue standing orders relating to "his executive functions", which must be consistent with the Rules of Business as a whole. As an exception to the Rule, only "in respect of matters connected with 'public order', 'police' and 'land'", which are matters outside the legislative domain of NCTD under Article 239AA(3)(a), he may "exercise his

executive functions to the extent delegated to him by the President". The second part of this proviso further indicates that in matters outside the legislative domain of NCTD, the Lieutenant Governor may be required to consult with the Chief Minister, if it is so provided under any order issued by the President under Article 239 of the Constitution. This Rule thus clarifies that the Lieutenant Governor may exercise his executive function in relation to matters outside the legislative purview of NCTD only "to the extent delegated to him by the President". As a matter of principle, in the discharge of executive functions within the domain of NCTD, the Lieutenant Governor must abide by the "aid and advice" of the Council of Ministers in the manner indicated in the Rules. Rule 46 thus needs to be construed accordingly.

92. Rule 46 deals with the power of the Lieutenant Governor with respect to persons serving in connection with the "administration" of NCTD. Rule 46 provides that:

> "46. **(1) With respect to persons serving in connection with the administration of the National Capital Territory, the Lieutenant Governor shall, exercise such powers and perform such functions as may be entrusted to him under the provisions of the rules and orders regulating the conditions of service of such persons or by any other order of the President** in consultation with the Chief Minister, if it is so provided under any order issued by the President under Article 239 of the Constitution.
>
> (2) Notwithstanding anything contained in sub-rule (1) the Lieutenant Governor shall consult the Union Public Service Commission on all matters on which the Commission is required to be consulted under clause (3) of Article 320 of the Constitution; and in every such case he shall not make any order otherwise than in accordance with the advice of the

> Union Public Services Commission unless authorised to do so by the Central Government.
>
> (3) All correspondence with Union Public Service Commission and the Central Government regarding recruitment and conditions of service of persons serving in connection with the administration of National Capital Territory shall be conducted by the Chief Secretary or Secretary of the Department concerned under the direction of the Lieutenant Governor."
>
> (emphasis supplied)

The Rule provides that the Lieutenant Governor shall exercise such powers and functions with respect to persons serving in the "administration" of NCTD, "as may be entrusted to him under the provisions of the rules and orders regulating the conditions of service of such persons or by any other order of the President". The term "administration" in this Rule must be considered in the context of Article 239AA(3) and Section 41 of the GNCTD Act. The executive administration by the Lieutenant Governor, in his discretion, can only extend to matters which fall outside the purview of the powers conferred on the Legislative Assembly but it extends to powers or functions entrusted or delegated to him by the President" or "in which he is required by or under any law to act in his discretion or to exercise any judicial or quasi-judicial functions". The term "administration" cannot be understood as the entire administration of GNCTD. Otherwise, the purpose of giving powers to a constitutionally recognised and democratically elected government would be diluted.

93. Therefore, the phrase "persons serving in connection with the administration of the National Capital Territory" in Rule 46 shall refer only to those persons, whose

administration is linked with “public order”, “police”, and “land” which are subjects outside the domain of NCTD.

94. However, as noted in the concurring opinion of Justice Chandrachud in the 2018 Constitution Bench judgment, Section 49 of the GNCTD Act confers an overriding power of general control to the President. According to Section 49, “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.” The directions of the President are in accordance with the “aid and advice” of the Council of Ministers of the Union of India.

95. Thus, the scope of the legislative and executive powers of the Union and NCTD that has been discussed under this section is multi-fold. Under Article 239AA(3)(a), the legislative power of NCTD extends to all subjects under the State List and the Concurrent List, except the excluded entries. As the 2018 Constitution Bench judgment held, the executive power of GNCTD is coextensive with its legislative power. In other words, the executive power of GNCTD extends to all subjects on which its Legislative Assembly has power to legislate. The legislative power of the Union extends to all entries under the State List and Concurrent List, in addition to the Union List. The executive power of the Union, in the absence of a law upon it executive power relating to any subject in the State List, shall cover only matters relating to the three entries which are excluded from the legislative domain of NCTD. As a corollary, in the absence of a law or provision of the Constitution, the executive power of the Lieutenant Governor acting on behalf of the Union Government shall extend only to matters related to the three entries

mentioned in Article 239AA(3)(a), subject to the limitations in Article 73. Furthermore, if the Lieutenant Governor differs with the Council of Ministers of GNCTD, he shall act in accordance with the procedure laid down in the Transaction of Business Rules. However, if Parliament enacts a law granting executive power on any subject which is within the domain of NCTD, the executive power of the Lieutenant Governor shall be modified to the extent, as provided in that law. Furthermore, under Section 49 of the GNCTD Act, the Lieutenant Governor and the Council of Ministers must comply with the particular directions issued by the President on specific occasions.

96. Now, we turn to the present reference before us regarding the scope of the legislative and executive powers of NCTD and the Union over "services" under Entry 41 of the State List. Based on the discussion in this section, NCTD shall have legislative power to make laws on "services". This is because "services" (that is, Entry 41) is not expressly excluded in Article 239AA(3)(a). As it has legislative power, it shall have executive power to control "services" within NCTD. However, we will need to address the argument of the Union of India that the provisions of the Constitution exclude "services" from the legislative and executive control of NCTD to form a conclusive opinion on the issue. The subsequent sections of this judgment deal with the above questions.

J. Triple chain of accountability: Civil Servants in a Cabinet Form of Government

97. Before discussing the question regarding the applicability of Part XIV to NCTD, it would be appropriate to discuss the principles which will guide our analysis on Part XIV. A discussion on the role of civil services in a Westminster-style Cabinet Form of Government is necessary to understand the issues at stake.

(a) Role of civil services in a modern government

98. Civil services form an integral part of modern government. Professor Herman Finer, in his classic work titled "*The Theory and Practice of Modern Governance*", states that "the function of civil service in the modern state is not merely an improvement of government; for without it, indeed, government itself would be necessarily impossible."[29] The efficacy of the State and the system of responsible government to a large part depend upon professionals, who embody the institution of a competent and independent civil service.

99. The policies of the government are implemented not by the people, Parliament, the Cabinet, or even individual ministers, but by civil service officers. Elaborating on the indispensable position of civil services in a parliamentary system of government, DD Basu in his commentary on the Constitution of India states:

> "A notable feature of the Parliamentary system of government is that while the policy of the administration is determined and laid down by ministers responsible to the Legislature, the policy is carried out and the administration of the country

[29] Herman Finer, The Theory and Practice of Modern Governance (New York: The Dial Press, 1932) at page 1163

> is actually run by a large body of officials who have no concern with politics."[30]

100. A Constitution Bench of this Court in **Union of India** v. **Tulsiram Patel**[31] dwelt on the ubiquitous nature of the civil service and observed:

> "34. The concept of civil service is not new or of recent origin. Governments — whether monarchial, dictatorial or republican — have to function; and for carrying on the administration and the varied functions of the government age number of persons are required and have always been required, whether they are constituted in the form of a civil service or not."

101. In the Indian Constitution, an entire Part, Part XIV, is dedicated to 'services', indicating the great significance which the members of the Constituent Assembly reposed in the civil service officers. During the Constituent Assembly Debates, the civil services were referred to as the "soul of administration" and it was said that the "importance of the civil services cannot be gainsaid."[32] Part XIV deals with "Services under the Union and the States". Chapter I comprising of Articles 308 to 313 deals with services, and Chapter II comprising of Articles 315 to 323 deals with Public Service Commissions for the Union and the States. The effectiveness of the elaborate provisions of Part XIV is to a large extent dependent upon the relationship between the ministers and civil service officers.

(b) Accountability of civil servants in a Westminster parliamentary democracy

102. In a democracy, accountability lies with the people who are the ultimate sovereign. The parliamentary form of government adopted in India essentially

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[30] Dr DD Basu, Commentary on the Constitution of India, 9th Edn., 2018, Vol. 13, page 13991
[31] (1985) 3 SCC 398
[32] Muniswamy Pillai and BN Munavalli in Constituent Assembly Debates, Vol. 9 (22nd August 1949)

requires that Parliament and the government, consisting of elected representatives, to be accountable to the people. The Cabinet consisting of elected representatives is collectively responsible for the proper administration of the country and is answerable to the legislature for its actions. The Constitution confers the legislature the power to enact laws and the government to implement laws. The conduct of the government is periodically assessed by the electorate in elections conducted every five years. The government is formed with the support of a majority of elected members in the legislature. The government responsible to the legislature is assessed daily in the legislature through debates on Bills, or questions raised during Question Hour, resolutions, debates and no-confidence motions. The government is responsible for the decisions and policies of each of the ministers and of their departments. This creates a multi-linked chain of accountability, where the legislature is accountable to the people who elected them, and the government is collectively responsible to the legislature. This establishes a link between the electorate and the government. The government is collectively responsible for its actions. The Council of Ministers is accountable to both the legislature and to the electorate. Collective responsibility is an important component of parliamentary democracies.[33]

103. Civil servants are required to be politically neutral. The day-to-day decisions of the Council of Ministers are to be implemented by a neutral civil service, under the administrative control of the ministers. In order to ensure that the functioning of the government reflects the preferences of the elected ministers, and through

[33] Krishna Kumar Singh v. State of Bihar, (2017) 3 SCC 1; Amarinder Singh v. Punjab Vidhan Sabha, (2010) 6 SCC 113; 2018 Constitution Bench judgment.

them the will of the people, it is essential to scrutinize the link of accountability between the civil service professionals and the elected ministers who oversee them. Since civil service officers constituting the permanent executive exercise considerable influence in modern welfare state democracies, effective accountability requires two transactions: "one set of officials, such as the bureaucracy, who give an account of their activity, to another set, such as legislators, who take due account and feed their own considered account back into the political system and, through that mechanism, to the people."[34]

104. In **Secretary, Jaipur Development Authority** v. **Daulat Mal Jain,**[35] this Court held that an individual minister is answerable and accountable to people for the acts done by the officials working under him. This Court observed that:

> "The Government acts through its bureaucrats, who shape its social, economic and administrative policies to further the social stability and progress socially, economically and politically…The Minister is responsible not only for his actions but also for the job of the bureaucrats who work or have worked under him. He owes the responsibility to the electors for all his actions taken in the name of the Governor in relation to the Department of which he is the head… he bears not only moral responsibility but also in relation to all the actions of the bureaucrats who work under him bearing actual responsibility in the working of the department under his ministerial responsibility."

105. In the concurring opinion in the 2018 Constitution Bench decision, Justice Chandrachud highlighted the intrinsic link between government accountability and the principle of collective responsibility. The judgment underscored the

[34] Adam Przeworski, Susan C. Stokes, Bernard Manin, Democracy, Accountability, and Representation (Cambridge University Press 2012), at page 298.
[35] (1997) 1 SCC 35

responsibility of an individual minister to the legislature for any and every action undertaken by public officials in the department which the minister oversees:

> "327. Collective responsibility also exists in practice in situations where ministers have no knowledge of the actions taken by the subordinate officers of their respective departments…
> 343. … Modern government, with its attendant complexities, comprises of several components and constituent elements. They include Ministers who are also elected as members of the legislature and unelected public officials who work on issues of daily governance... All Ministers are bound by a decision taken by one of them or their departments. "

106. Civil service officers thus are accountable to the ministers of the elected government, under whom they function. Ministers are in turn accountable to Parliament or, as the case may be. the state legislatures. Under the Westminster parliamentary democracy, civil services constitute an important component of a *triple chain* of command that ensures democratic accountability. The *triple chain* of command is as follows:

a. Civil service officers are accountable to Ministers;

b. Ministers are accountable to Parliament/Legislature; and

c. Parliament/Legislature is accountable to the electorate.

107. An unaccountable and a non-responsive civil service may pose a serious problem of governance in a democracy. It creates a possibility that the permanent executive, consisting of unelected civil service officers, who play a decisive role in the implementation of government policy, may act in ways that disregard the will of the electorate.

(c) Accountability of Civil Service Officers in a Federal Polity

108. Our Constitution is federal in character. In a federal polity, a fundamental question which arises is which would be the more appropriate authority to whom the civil service officers would be accountable.

109. As discussed before, a paramount feature of a federal Constitution is the distribution of legislative and executive powers between the Union and the regional units. The essential character of Indian federalism is to place the nation as a whole under the control of a Union Government, while the regional or federal units are allowed to exercise their exclusive power within their legislative and co-extensive executive and administrative spheres.[36]

110. In a democratic form of Government, the real power of administration must reside in the elected arm of the State, subject to the confines of the Constitution.[37] A constitutionally entrenched and democratically elected government needs to have control over its administration. The administration comprises of several public officers, who are posted in the services of a particular government, irrespective of whether or not that government was involved in their recruitment. For instance, an officer recruited by a particular government may serve on deputation with another government. If a democratically elected government is not provided with the power to control the officers posted within its domain, then the principle underlying the *triple-chain* of collective responsibility would become redundant. That is to say, if the government is not able to control and hold to account the officers posted in its service, then its responsibility towards the legislature as well as the public is

[36] SR Bommai v. Union of India, (1994) 3 SCC 1
[37] 2018 Constitution Bench

diluted. The principle of collective responsibility extends to the responsibility of officers, who in turn report to the ministers. If the officers stop reporting to the ministers or do not abide by their directions, the entire principle of collective responsibility is affected. A democratically elected government can perform, only when there is an awareness on the part of officers of the consequences which may ensue if they do not perform. If the officers feel that they are insulated from the control of the elected government which they are serving, then they become unaccountable or may not show commitment towards their performance.

111. We have already held that the relationship between the Union and NCTD resembles an asymmetric federal model, where the latter exercises its legislative and executive control in specified areas of the State List and the Concurrent List. Article 239AA, which conferred a special status to NCTD and constitutionally entrenched a representative form of government, was incorporated in the Constitution in the spirit of federalism, with the aim that the residents of the capital city must have a voice in how they are to be governed. It is the responsibility of the government of NCTD to give expression to the will of the people of Delhi who elected it. Therefore, the ideal conclusion would be that GNCTD ought to have control over "services", subject to exclusion of subjects which are out of its legislative domain. If services are excluded from its legislative and executive domain, the ministers and the executive who are charged with formulating policies in the territory of NCTD would be excluded from controlling the civil service officers who implement such executive decisions.

112. In the backdrop of the above discussion on the necessity to provide the control of "services" to GNCTD, we consider the next argument of the Union of India that Part XIV does not envisage "services" for Union Territories.

K. Balakrishnan Committee Report

113. The Union of India relied on the report of the Balakrishnan Committee which led to the 1991 Constitution Amendment and the insertion of Article 239AA to argue that "services" are not available to Union territories. The Statement of Objects and Reasons of the Amending Act referred to the Committee's Report:

> "**Statement of Objects and Reasons**
>
> The question of reorganisation of the administrative set-up in the Union Territory of Delhi has been under the consideration of the Government for some time. The Government of India appointed on 24-12-1987 a Committee [Balakrishnan Committee] to go into the various issues connected with the administration of Delhi and to recommend measures inter alia for the streamlining of the administrative set-up. The Committee went into the matter in great detail and considered the issues after holding discussions with various individuals, associations, political parties and other experts and taking into account the arrangements in the National Capitals of other countries with a federal set-up and also the debates in the Constituent Assembly as also the reports by earlier Committees and Commissions. After such detailed inquiry and examination, it recommended that Delhi should continue to be a Union Territory and provided with a Legislative Assembly and a Council of Ministers responsible to such Assembly with appropriate powers to deal with matters of concern to the common man. The Committee also recommended that with a view to ensure stability and permanence the arrangements should be incorporated in the Constitution to give the National Capital a special status among the Union Territories.

> **2.** The Bill seeks to give effect to the above proposals."

114. The Balakrishnan Committee specifically dealt with Entry 41 (relating to services) of the State List. Its report notes that Entry 41 is not available to the Union Territories, as (i) the Entry only mentions 'State' and not 'Union Territory'; (ii) Part XIV of the Constitution only refers to services in connection with the affairs of the State and services in connection with the affairs of the Union; and (iii) administration of the Union Territories is the responsibility of the Union and thus it falls within the purview of 'affairs of the Union'. The Report stated:

> "8.1 PUBLIC SERVICES IN THE DELHI ADMINISTRATION
>
> 8.1.2. Entry 41 of the State List mentions "State Public Services: State Public Services Commission". Obviously, this Entry is not applicable to Union territories because it mentions only "State" and not "Union territories". This view is reinforced by the fact that the Constitution divides public services in India into two categories, namely, services in connection with the affairs of the Union and services in connection with the affairs of the State as is clear from the various provisions in Part XIV of the Constitution. There is no third category of services covering the services of the Union territories. The obvious reason is that the administration of the Union territory is the constitutional responsibility of the Union under Article 239 and as such comes under "affairs of the Union". Consequently, the public services for the administration of any Union territory should form part of the public services in connection with the affairs of the Union."

115. The Balakrishnan Committee opined that the setting up of a Legislative Assembly with a Council of Ministers will not disturb the position discussed above. According to the Report:

> "Services
>
> 9.3.4. By virtue of the provisions in the Constitution, services in connection with the administration of the Union Territory of Delhi will be part of the services of the Union even after the setting up of a Legislative Assembly with a Council of Ministers. This constitutional position is unexceptionable and should not be disturbed. There should, however, be adequate delegation of powers to the Lt. Governor in respect of specified categories of services or posts. In performing his functions under such delegated powers the Lt. Governor will have to act in his discretion but there should be a convention of consultation, whenever possible, with the Chief Minister."

116. The extracts from the Balakrishnan Committee Report were relied upon by Justice Bhushan in his 2019 split judgment to hold that the Legislative Assembly of NCTD does not have the power to make laws under Entry 41 of List II.

117. We do not agree with the reliance on the Balakrishnan Committee Report to rule out the scope of legislative power of NCTD over Entry 41 (services). We reiterate the view expressed in the opinion of the majority in the 2018 Constitution Bench that there is no necessity to refer to the Report to interpret Article 239AA because the judgment authoritatively dealt with the scope of the said Article. It was held:

> **"277.** There can be no quarrel about the proposition that the reports of the Committee enacting a legislation can serve as an external aid for construing or understanding the statute. **However, in the instant case, as we have elaborately dealt with the meaning to be conferred on the constitutional provision that calls for interpretation, there is no necessity to be guided by the report of the Committee."**
>
> (emphasis supplied)

118. Contrary to the suggestion in the report, the 2018 Constitution Bench judgment provided that NCTD shall have legislative power over all subjects in List II, except the excluded subjects provided in Article 239AA(3)(c).

119. The report of the Balakrishnan Committee was referred to in the Statement of Objects and Reasons of 1991 Constitution Amendment. The Statement of Objects and Reasons can only be referred to the limited extent of understanding the background, the antecedent state of affairs, the surrounding circumstances in relation to the amendment, and the purpose of the amendment.[38] In **RS Nayak** v. **AR Antulay**[39],a Constitution Bench of this Court held that the reports of a committee which preceded the enactment of a legislation, reports of joint parliamentary committees, a report of a commission set up for collecting information leading to the enactment are permissible external aids to construction. Thus, the report of the Balakrishnan Committee can be relied on by this Court to understand the intent behind the introduction of Article 239AA. However, this Court is not bound by the report of a committee to construe specific phrases. It is for this reason that the 2018 Constitution Bench construed the text of Article 239AA contextually with reference to the constitutional structure envisaged for NCTD without relying on the Report of the Balakrishnan Committee.

120. Moreover, the arguments made in the Balakrishnan Committee Report against the inclusion of "services" for NCTD have been rejected by this Court. The argument in the Balakrishnan Committee Report that the use of the word 'State' in

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[38] State of West Bengal v. Subodh Gopal Bose, AIR 1954 SC 92; Bhaiji v. Sub-divisional Officer Thandla, (2003) 1 SCC 692

[39] (1984) 2 SCC 183

an Entry leads by itself to that Entry not being available to the legislature of a Union Territory has been specifically rejected in the concurring opinion of Justice Chandrachud in the 2018 Constitution Bench in the following terms:

> "461. […] The expression "insofar as any such matter is applicable to Union Territories" cannot be construed to mean that the Legislative Assembly of NCT would have no power to legislate on any subject in the State or Concurrent Lists, merely by the use of the expression "State" in that particular entry. This is not a correct reading of the above words of Article 239-AA(3)(a)."

The concurring opinion refers to Entries 38 and 40 of List II which read thus:

> **"38.** Salaries and allowances of Members of the legislature of the ***State***, of the Speaker and Deputy Speaker of the Legislative Assembly and, if there is a Legislative Council, of the Chairman and Deputy Chairman thereof.
>
> […]
>
> **40.** Salaries and allowances of Ministers for the ***State***."
>
> (emphasis supplied)

Referring to the provisions of the GNCTD Act which deal with these entries, Justice D.Y Chandrachud in his concurring opinion observed that even Parliament did not construe the use of the word 'State' in an Entry to mean that it was not available to Union Territories, as it acknowledged the power of the Legislative Assembly of GNCTD to deal with said issues. We agree with the above observations. The mere use of the word 'state' in the entries will not exclude the legislative competence of NCTD. By that logic, all the entries in List II would be

impliedly excluded from the legislative competence of NCTD because list II of the Seventh Schedule is titled 'State list'.

121. Furthermore, the conclusion of the Balakrishnan Report that Entry 41 of the State List of the Seventh Schedule is not available to Union Territories because the Constitution does not envisage a third category of services covering the services of Union territories is contrary to the judgment of this Court in **Prem Kumar Jain** (supra), which had upheld services for NCTD**.** The judgment in **Prem Kumar Jain** (supra) was rendered prior to the Balakrishnan Committee Report of December 1989. The Balakrishnan Committee did not refer to the said judgment. Thus, the report of the Balakrishnan Committee cannot be relied upon determine if "Services" is available to NCTD.

L. Applicability of Part XIV to Union Territories

122. The Union of India has submitted that NCTD does not have legislative competence over Entry 41 of List II because Part XIV of the Constitution does not contemplate any services for Union Territories. It has been argued that the legislative power of NCTD can be restricted if Part XIV does not contemplate services to Union Territories since Article 239AA begins with the phrase "Subject to the provisions of the Constitution".

(a) Meaning of "State" for the purpose of Part XIV of the Constitution

123. It needs to be seen if the phrase "State" in Part XIV of the Constitution includes Union Territory. Article 308 provides the definition of 'State' for Part XIV

of the Constitution. Article 308 as it stood prior to the Constitution (Seventh amendment) Act 1956[40] provides as follows:

> **"**308. In this part, unless the context otherwise requires the expression 'State' means a State specified in Part A or Part B of the First Schedule."

124. The States Reorganization Act 1956 and the consequential 1956 amendment altered the provisions of the First Schedule. Prior to the amendment in 1956, States were divided into three categories as specified in Parts A, B and C of the First Schedule of the Constitution. By the seventh amendment, Article 308 was amended and State for the purposes of Part XIV was defined as follows:

> "308. In this Part, unless the context otherwise requires, the expression "State" does not include the State of Jammu and Kashmir."

125. In terms of unamended Article 308, the definition of 'State' included Part A and Part B states of the First Schedule and did not include Part C States, since they were administered by the Union. After the 1956 Constitutional Amendment, Article 308 provides an exclusionary definition of 'State' by only excluding the State of Jammu and Kashmir. Article 308 does not provide any clarity on whether "State" includes Union Territories for the purposes of Part XIV.

126. Article 366 defines "State" with reference to Articles 246-A,268, 269-A and Article 279-A to include a Union Territory with Legislature. Article 366 does not apply for the interpretation of any of the provisions in Part XIV of the Constitution. Thus, we must fall back on Article 367. Article 367 stipulates that unless the context

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[40] "1956 amendment"

otherwise requires, the General Clauses Act shall apply for the interpretation of the Constitution. Section 3(58) of the General Clauses Act defines "State" to mean a State specified in the First Schedule and includes a Union Territory.

127. GNCTD contends that this Court in **Prem Kumar Jain** (supra) has expressly sanctified the existence of services of a Union Territory by holding that the definition of "State" would include Union territories for the purpose of Article 312 of the Constitution. The Union has argued that the decision in **Prem Kumar Jain** was limited for the purpose of the IAS (Cadre) Rules 1954[41] read with the All-India Services Act 1951. Furthermore, it was argued that the reference to Article 312 made therein has been made without any reference to the import of Article 308. It is the contention of the Union that interpreting the ratio of **Prem Kumar Jain** in a broad sense would cause violence to the machinery envisaged in Part XIV of the Constitution.

128. In **Prem Kumar Jain,** the judgment of the High Court of Delhi setting aside the establishment of a joint cadre exclusively for the Union Territories in the IAS was challenged. Article 312 stipulates that Parliament may by law create "All India Services" common to the Union and the States. A joint cadre of all the Union Territories was created under Rule 3(1) of the Indian Administrative Service (Cadre) Rules 1954.[42] The creation of a new joint cadre was challenged before the High Court on the ground that it was contrary to Article 312 of the Constitution and the All-India Services Act 1951. It was argued that Article 312 does not contemplate an all-India service common to Union territories because the term "State" in the

[41] 1954 Cadre Rules
[42] "1954 Cadre Rules"

provision does not include Union territories. The definition of "State" under Rule 2(c) of the 1954 Cadre Rules, which provides that a State means a "State specified in the First Schedule to the Constitution and includes a Union Territory" was also challenged.

129. In that context, the High Court held that Union territories could not be said to be "States", and held the definition of "State" under Rule 2(c) of the Cadre Rules to be ultra vires the Constitution and the All India Services Act 1951. The High Court held that the Union Territories were not "States" for the purpose of Part XIV of the Constitution, in view of the definition of "State" in Article 308, which did not include Part C states before its amendment. The High Court reasoned that Union territories are successors of Part C States, and accordingly Union Territories were excluded from the definition of 'State' in Part XIV. The High Court declined to place any reliance on the definition of the word 'State' in Section 3(58)(b) of the General Clauses Act, as amended in 1956. The High Court reasoned that only the adaptations made in the General Clauses Act under Article 372(2) applied to the interpretation of the Constitution in view of Article 367(1), and accordingly the adaptations made later, by Article 372A, were inapplicable. The High Court observed that:

> '(7) **The next question, therefore, is whether the Union Territories are "State" for the purpose of Article 312(1)**. Article 312 is a part of Chapter XIV of the Constitution, which is significantly entitled "Services under the Union and the States". Part XIV does not create an All India Service. [...] **The key to the meaning of the word "State" used in Part XIV including Articles 309 and 312(1) is provided by the interpretation clause in Article 308**. Before the Constitution (VII Amendment) Act, 1956 Article 308 was as follows:

> "IN this part. unless the context otherwise requires the expression "State" means a State specified in Part A or Part B of the I Schedule".

> **This definition, thus, made it clear that the word "State" in Part XIV was not to include part C States. Union Territories are the successors of the Part C States. It follows, therefore, that they are also expressly excluded from the definition of "State" in Part XIV**. There is nothing particular in the context of Article 313 which would require the word "State" therein to include a Union Territory.
>
> …
>
> **Article 367(1) of the Constitution applies to the interpretation of the Constitution the provision of the General Clauses Act as adapted under Article 372(2) of the Constitution. In view of Article 372(2)(a) such an adaptation had to be made within three years from the commencement of the Constitution. The definition of a "State" in section 3(58) of the General Clauses Act as adapted by the Adaptation of laws Order, 1950 issued under Article 372(2) of the Constitution [...]"**

(emphasis supplied)

130. In appeal, this Court set aside the judgment of the High Court of Delhi. Firstly, this Court held that in view of the amended definition of the expression "State" under Section 3(58) of the General Clauses Act, as adapted by the Adaptation of Laws Order 1956, there was nothing repugnant to the subject or context to make that definition inapplicable to Part XIV of the Constitution. This Court reasoned that Article 372A was incorporated in the Constitution since Parliament felt the necessity of giving a power akin to Article 372 to the President for the purpose of bringing the provisions of any law in force immediately before the commencement of the 1956 Constitution Amendment in accordance with the provisions of the Constitution, as amended by the 1956 Constitution Amendment. This Court relied on **Advance Insurance** (supra) to hold that Article 372-A gave a

fresh power to the President which was equal and analogous to the power under Article 372(2). This Court held that:

> "**8.** It follows therefore that, as and from November 1, 1956, when the Constitution (Seventh Amendment) Act, 1956, came into force, the President had the power to adapt the laws for the purpose of bringing the provisions of any law in force in India into accord with the provisions of the Constitution. It was under that power that the **President issued the Adaptation of Laws (No. 1) Order, 1956, which, as has been shown, substituted a new clause (58) in Section 3 of the General clauses Act providing, inter alia, that the expression "State" shall, as respects any period after the commencement of the Constitution (Seventh Amendment) Act, 1956, mean "a State specified in the First Schedule to the Constitution and shall include a Union Territory". It cannot be said with any justification that there was anything repugnant in the subject or context to make that definition inapplicable**. **By virtue of Article 372A(1) of the Constitution, it was that definition of the expression "State" which had effect from the first day of November, 1956**, and the Constitution expressly provided that it could "not be questioned in any court of law". **The High Court therefore went wrong in taking a contrary view and in holding that "Union territories are not 'States' for purposes of Article 312(1) of the Constitution and the preamble to the Act of 1951**". That was why the High Court erred in holding that the definition of "State" in the Cadre Rules was ultra vires the All India Services Act, 1951 and the Constitution, and that the Union territories cadre of the service was "not common to the Union and the States" within the meaning of Article 312(1) of the Constitution, and that the Central Government could not make the Indian Administrative Service (Cadre) Rules, 1954 in consultation with the State Governments as there were no such governments in the Union territories."
>
> (emphasis supplied)

131. In **Prem Kumar Jain** (supra), this Court did not find anything repugnant to the subject or context of Part XIV of the Constitution or Article 312 specifically to make the definition of 'State' in terms of amended Section 3(58)(b) of the General Clauses Act inapplicable. Hence, the expression 'State' as occurring in Part XIV was held to include Union Territories. In the preceding section of this judgment, we have approved the decision in **Advance Insurance** (supra) and held that the definition of "State" in Section 3(58) of the General Clauses Act as amended by Adaptation of Laws (No. 1) Order, 1956 must be applied for the interpretation of the Constitution unless the context otherwise requires.

132. The definition provided in the definition clause article should be applied and given effect to for the purposes of the relevant Part of the Constitution. However, when the definition clause is preceded by the phrase 'unless the context otherwise requires', there may be a need to depart from the normal rule if there is something in the context in which such expression occurs to show that the definition should not be applied.[43] Section 3(58) of the General Clauses Act, by virtue of Article 367(1) of the Constitution, applies to the construction of the expression 'State' in the Constitution, unless there is something repugnant in the subject or context of a particular provision of the Constitution. The burden is on the party opposing the application of the definition under the General Clauses Act to the interpretation of a constitutional provision to prove that the context requires otherwise. The Union of India has been unable to suggest that the context of Part XIV suggests otherwise. There is nothing in the subject or context of Part XIV of the Constitution

[43] SK Gupta v. KP Jain, (1979) 3 SCC 54; Ichchapur Industrial Coop. Society Ltd. v. Competent Authority, Oil & Natural Gas Commission, (1997) 2 SCC 42; Ratnaprova Devi v. State of Orissa, (1964) 6 SCR 301

which would exclude its application to Union territories. Rather, the application of the inclusive definition of “State” as provided under Clause 3(58) would render the constitutional scheme envisaged for Union Territories workable.

(b) Omission in Part XIV by the 1956 Constitution Amendment

133. The Union of India has argued that services for a Union Territory are not contemplated in Part XIV of the Constitution because of the conscious omissions by the 1956 Constitution Amendment in Part XIV. There are two prongs to this argument: (i) the words “Part A States” and “Part B States” in Article 308 were substituted by the word “State”, simpliciter, instead of *States and Union territories*; and (ii) while the term ‘Raj Pramukh’ was omitted in different Articles in Part XIV, the term ‘Administrator’ was not added.

134. Under erstwhile Article 239, the President occupied in regard to Part C States, a position analogous to that of a Governor in Part A States and of a Rajpramukh in Part B States. Unamended Article 239 envisaged the administration of Part C States by the President through a Chief Commissioner or a Lieutenant Governor to be appointed by them or through the Government of a neighbouring State.

135. The 1956 Constitution amendment was adopted to implement the provisions of the States Re-organization Act 1956. The Seventh Amendment abrogated the constitutional distinction between Part A, B and C States, and abolished the institution of the Rajpramukh on the abrogation of Part B States. In terms of Section 29 of the 1956 Constitution amendment, Parliament provided for “consequential and minor amendments and repeals in the Constitution" as directed

in the Schedule. One of the amendments made in terms of the Schedule was to omit the phrase “Part A or Part B of the First Schedule ", and “Rajpramukh”, as occurring in the Constitution. It is necessary to note that the expressions “Part A”, “Part B” and “Rajpramukh” were not necessarily substituted by another expression by Parliament.

136. Article 239 as it was amended by the 1956 Constitution Amendment states that subject to any law enacted by Parliament every Union Territory shall be administered by the President acting through an Administrator appointed by them with such designation as they may specify. It is relevant to note that the term ‘administrator’, at the time of the amendment was not added to any provision of the Constitution other than Article 239. Even within Article 239, the provision did not use the term ‘administrator’ as a designation. Instead, Article 239 provides that:

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

137. Furthermore, it is important to note that Articles 239A and 239AA were inserted much later after the 1956 Constitution Amendment. In 1962, Article 239A was inserted through the Constitution (Fourteenth Amendment) Act 1962, which gives discretion to Parliament to create by law, local legislatures or a Council of

Ministers or both for certain Union Territories. In 1991, Article 239AA was inserted through the 1991 Constitution Amendment to accord NCTD a *sui generis* status from the other Union Territories, including the Union Territories to which Article 239A applies. Parliament could not have envisaged when the 1956 Constitution Amendment was adopted that Union Territories would have been accorded diverse governance models. Therefore, the argument of the Union on legislative intent by drawing upon the omissions in the Seventh Amendment is not persuasive.

(c) Existence of power and exercise of power

138. It is not in contention that presently, a Public Service Commission for NCTD does not exist. However, the existence of power and the exercise of the power are two different conceptions, and should not be conflated. It is settled law that whether a power exists cannot be derived from whether and how often it has been exercised.

139. In **State of Bihar** v. **Maharajadhiraja Sir Kameshwar Singh**,[44] the Constitution Bench of this Court rejected the argument that the power to enact a law under Entry 42 of the Concurrent List was a power coupled with a duty. It was held that the Legislature does not have an obligation to enact a law in exercise of its power under the Seventh Schedule:

> "**19.** It was further contended that the power to make a law under entry 42 of List III was a power coupled with a duty, because such law was obviously intended for the benefit of the expropriated owners, and where the Legislature has authorised such expropriation, it was also bound to exercise the power of making a law laying down the principles on

[44] 1952 SCR 889

which such owners should be compensated for their loss. …While certain powers may be granted in order to be exercised in favour of certain persons who are intended to be benefited by their exercise, and on that account may well be regarded as coupled with a duty to exercise them when an appropriate occasion for their exercise arises, the power granted to a legislature to make a law with respect to any matter cannot be brought under that category, **It cannot possibly have been intended that the legislature should be under an obligation to make a law in exercise of that power, for no obligation of that kind can be enforced by the court against a legislative body**."

(emphasis supplied)

140. Similarly, in **State of Haryana** v. **Chanan Mal**,[45] while upholding the constitutional validity of the Haryana Minerals (Vesting of Rights) Act, 1973, after noticing the declaration made in Section 2 of the Mines and Minerals (Regulation and Development) Act, 1957, as envisaged by Entry 54 of the Union List, it was held that exercise and existence of power cannot be conflated:

"**24**. In the two cases discussed above no provision of the Central Act 67 of 1957 was under consideration by this Court. Moreover, power to acquire for purposes of development and regulation has not been exercised by Act 67 of 1957. **The existence of power of Parliament to legislate on this topic as an incident of exercise of legislative power on another subject is one thing. Its actual exercise is another**. It is difficult to see how the field of acquisition could become occupied by a Central Act in the same way as it had been in the *West Bengal* case even before Parliament legislates to acquire land in a State. Atleast until Parliament has so legislated as it was shewn to have done by the statute considered by this Court in the case from West Bengal, the field is free for State legislation falling under the express provisions of entry 42 of List III."

(emphasis supplied)

[45] (1977) 1 SCC 340

141. Article 309 of the Constitution provides for recruitment and conditions of service of persons serving the Union or a State. In terms of Article 309, subject to the provisions of the Constitution, an appropriate legislature may enact a legislation to regulate the recruitment and conditions of service of persons appointed to public services and posts in connection with affairs of the Union or any State. The legislative field indicated in this provision is the same as indicated in Entry 71 the Union List or Entry 41 of the State List of the Seventh Schedule . In terms of the proviso to Article 309, the President for the Union of India or the Governor of the State respectively or such person as they may direct, have the power to make similar rules as a stopgap arrangement until provisions in that behalf are made by the appropriate legislature. The proviso to Article 309 is only a transitional provision[46], as the power under the proviso can be exercised only so long as the appropriate legislature does not enact a legislation for recruitment to public posts and other conditions of service relating to that post. If an appropriate legislature has enacted a law under Article 309, the rules framed under the proviso would be subject to that Act.[47] Article 309 provides that:

> **"309. Recruitment and conditions of service of persons serving the Union or a State**
> Subject to the provisions of this Constitution, Acts of the appropriate Legislature may regulate the recruitment, and conditions of service of persons appointed, to public services and posts in connection with the affairs of the Union or of any State:
>
> Provided that it shall be competent for the President or such person as he may direct in the case of services and posts in connection with the affairs of the Union, and for the Governor 2 *** of a State or

[46] A.B. Krishna v. State of Karnataka, (1998) 3 SCC 495
[47] B.S. Vadera v. Union of India, (1968) 3 SCR 575

> such person as he may direct in the case of services and posts in connection with the affairs of the State, to make rules regulating the recruitment, and the conditions of service of persons appointed, to such services and posts until provision in that behalf is made by or under an Act of the appropriate Legislature under this article, and any rules so made shall have effect subject to the provisions of any such Act."

142. The rule-making function under the proviso to Article 309 is transitional. The President with respect to the posts in connection with the affairs of the Union, and the Governor in connection with the affairs of State shall have the power to make rules under the proviso only until a statute is enacted in this connection. Any rule that is made by the President or the Governor shall be "Subject to the provisions of any such Act" made by the appropriate legislature. The exercise of power by the President and the Governor under Article 309 does not in any way restrict the power that is otherwise available under Article 309. The exercise of rule making power by the President under Article 309 does not *substitute* the legislative power granted.

143. In **Tulsiram Patel** (supra), a Constitution Bench of this Court held that the appropriate legislature, to enact laws under Article 309, would depend upon the provisions of the Constitution with respect to legislative competence and the division of powers. This Court further held that the rules framed by the President or the Governor under Article 309 must conform with a statute enacted in exercise of power under Entry 70 of List I and Entry 41 of List II:

> "**51. Which would be the appropriate Legislature to enact laws or the appropriate authority to frame rules would depend upon the provisions of the Constitution with respect to legislative competence**

> **and the division of legislative powers.** Thus, for instance, under Entry 70 in List I of the Seventh Schedule to the Constitution, Union Public Services, all-India Services and Union Public Service Commission are subjects which fall within the exclusive legislative field of Parliament, while under Entry 41 in List II of the Seventh Schedule to the Constitution, State public services and State Public Service Commission fall within the exclusive legislative field of the State Legislatures. The rules framed by the President or the Governor of a State must also, therefore, conform to these legislative powers.**"**
>
> (emphasis supplied)

144. The above discussion demonstrates that even if the President has made relevant rules in exercise of his power under the proviso to Article 309, the power of NCTD to legislate on "services" is not excluded. Infact in the next section, we shall be dealing with instances of exercise of legislative power by NCTD under Entry 41 of List II, that is, "services".

145. In view of the above reasons, we hold that Part XIV is applicable to Union territories as well.

M. Exercise of Legislative Power by NCTD on Entry 41

146. It has been argued on behalf of NCTD that numerous laws have been enacted by the Legislative Assembly of Delhi relating to creation of posts and terms and conditions of service. Reliance was placed upon different state services, such the Delhi Fire Services under the Delhi Fire Service Act 2007, Delhi Commission for Safai Karamcharis Act, 2006, Delhi Minorities Commission Act, 1999, Delhi Finance Commission Act, 1994, Delhi Lokayukta and UpaLokayukta Act, 1995, Delhi Commission for Women Act, 1994, and Delhi Electricity Reform Act, 2001. It

was argued that these statutes which *inter alia,* create posts and details of salary, was enacted in exercise of the subject referable to Entry 41 of the State List.

147. However, Justice Ashok Bhushan in the 2019 split verdict rejected this argument related to Delhi Fire Service Act 2007, as he held that the statute falls under Entry 5 of the State List and not under Entry 41 of the State List. Justice Bhushan held:

> "208. We may first notice that the word "services" used in the Act has been used in a manner of providing services for fire prevention and fire safety measures. The word "services" has not been used in a sense of constitution of a service. It is to be noted that fire service is a municipal function performed by local authority. Delhi Municipal Council Act, 1957 contains various provisions dealing with prevention of fire etc. Further fire services is a municipal function falling within the domain of municipalities, which has been recognised in the Constitution of India. Article 243(W) of the Constitution deals with functions of the municipalities in relation to matters listed in the 12th Schedule. Entry 7 of the 12th Schedule provides for "Fire Services" as one of the functions of the municipalities. The nature of the enactment and the provisions clearly indicate that Delhi Fire Services Act falls under Entry 5 of List II and not under Entry 41 of List II."

148. Article 243W of the Constitution read with Entry 7 of the Twelfth Schedule provides that the legislature of a state may, by law, endow on the municipalities responsibilities with respect to 'fire services'. Under Entry 5 of List II, an appropriate legislature may enact a law related to 'local government, that is to say, the constitution and powers of municipal corporations, improvement trusts, districts boards, mining settlement authorities and other local authorities for the purpose of local self-government or village administration'.

149. The test to determine whether a legislation creates a service under Entry 41 or not has been laid down by this Court. In the Constitution Bench judgment in **State of Gujarat** v. **Raman Law Keshav Lal**,[48] while holding that Panchayat Service contemplated under Section 203(1) of the Gujarat Panchayats Act 1961 was a State civil service, it was held that the administration of a service under a State broadly involves the following functions: (i) the organisation of the Civil Service and the determination of the remuneration, conditions of service, expenses and allowances of persons serving in it; (ii) the manner of admitting persons to the civil service; (iii) exercise of disciplinary control over members of the service and power to transfer, suspend, remove or dismiss them in public interest as and when occasion to do so arises. This Court noted:

> "21. […] In the instant case, we feel that there is no compelling reason to hold that the Panchayat Service is not a Civil Service under the State. It is seen that further recruitment of candidates to the Panchayat Service has to be made by the Gujarat Panchayat Service Selection Board constituted by the State Government. **Entry 41 of List II of the Seventh Schedule to the Constitution, as mentioned earlier, also refers to State Public Services suggesting that there can be more than one State Public Service under the State…...** We have indeed a number of such services under a State e.g. police service, educational service, revenue service etc. **State Public Services may be constituted or established either by a law made by the State legislature or by rules made under the proviso to Article 309 of the Constitution or even by an executive order made by the State Government in exercise of its powers under Article 162 of the Constitution.** The recruitment and conditions of service of the officers and servants of the State Government may also be regulated by statute, rules or executive orders. **The administration of a service under a State involves broadly the following functions: (*i*) the organisation of the Civil Service and the determination of the remuneration, conditions of**

[48] (1980) 4 SCC 653

> **service, expenses and allowances of persons serving in it; (*ii*) the manner of admitting persons to civil service; (*iii*) exercise of disciplinary control over members of the service and power to transfer, suspend, remove or dismiss them in the public interest as and when occasion to do so arises.** […]"
>
> (emphasis supplied)

150. Thus, to determine whether the power to enact a legislation is traceable to Entry 41 of the State List, it is necessary to examine whether that legislation contains provisions regulating the recruitment, conditions of service, and exercise of control including power to transfer, and suspend. It is with this approach in mind that we need to examine the Delhi Fire Service Act 2007.

151. The Delhi Fire Service Act 2007[49] was enacted by the Legislative Assembly of NCTD to provide for "maintenance of a fire service and to make more effective provisions for the fire safety prevention and fire safety measures in certain buildings and premises in the National Capital Territory of Delhi and the matters connected therewith." The Delhi Fire Service Act 2007 is a comprehensive Act which replaced three legislations or, as the case may be, rules which operated in NCTD:

a. The United Provinces Fire Safety Act 1944, as extended to Delhi. The Act was notified by the Governor of the United Provinces in exercise of the powers assumed by him under a Proclamation issued under Section 93 of the Government of India Act 1935. The Act was enacted to constitute and

[49] Delhi Fire Service Act 2007, Delhi Act 2 of 2009

maintain a provincial fire service in the United Provinces for staffing and operating the fire brigades;

b. The Delhi Fire Service (Subordinate Services) Rules 1945 framed under Section 241(1)(b) and Section 241(2)(b) of the Government of India Act 1935[50]; and

c. The Delhi Fire Prevention and Fire Safety Act 1986. The Act which was enacted by Parliament focused on making effective provisions for fire prevention and fire safety measures in the Union Territory of Delhi. It did not contain any provision related to maintenance of a 'fire service'.

152. The purpose of the Delhi Fire Service Act 2007 is to provide for "maintenance of a fire service". Section 2(l) defines 'Fire Service' to mean the Delhi Fire Service constituted under Section 5 of the Act. Section 5 stipulates the constitution of a fire service. In terms of Section 5(a), the Fire Service shall consist of such numbers in several ranks and have such organization and such powers, functions and duties as the Government may determine. In terms of Section 5(b), the recruitment to, and the pay, allowances and all other conditions of service of the members of the Fire Service shall be such as may be prescribed. Section 3 stipulates that there would be one fire service for the whole of Delhi and all officers and subordinate ranks of the fire service shall be liable for posting to any branch of the Fire Service. Chapter II of the Act provides for the organization, superintendence, control and maintenance of the fire service. Chapter III provides for the control and discipline of the fire service.

[50] Section 65, The Delhi Fire Service Act 2007

153. The Delhi Fire Service is constituted under the Delhi Fire Service Act 2007, enacted by the Legislative Assembly of NCTD. Provisions relating to administration, recruitment and conditions of service have been provided in the framework of the Act. In terms of Section 4, the superintendence of, and control over, the Fire Service vests in the Government, as defined in the Act. Section 6 provides for the classification of posts of the Fire Service into Group A, B, C and D posts. Section 7 stipulates that the Government shall make appointments to any Group A or Group B posts after consultation with the Union Public Service Commission. Section 8 stipulates the appointment of a Director of the Delhi Fire Service for the direction and supervision of the Fire Service in Delhi. Section 14 stipulates that the Central Civil Services (Conduct) Rules 1964 and the Central Civil Services (Classification, Control and Appeals) Rules 1965 and the Central Civil Services (Pension) Rules 1972, as amended, shall be extended mutatis mutandis to all employees of the Delhi Fire Service.

154. Furthermore, under the powers conferred by Section 63 of the Act, the Lieutenant Governor has notified the Delhi Fire Service Rules 2019, regulating the establishment, organization, and management on the Services. Rule 9 provides that the recruitment to various ranks in Fire Service shall be made in accordance with the recruitment rules notified by the Government. Rule 10 provides that the pay and allowances for various ranks in Fire Service shall be in accordance with the recommendations of the Pay Commission or any other authority as may be appointed by the Government.

155. On an analysis of the provisions of the Delhi Fire Service Act 2007 and the Rules of 2019, it is clear that the statute includes posts, their recruitment process, salary and allowance, disciplinary power and control – all of which are constituents of a "service" under Entry 41 of the State List, as held in **Raman Law Keshav Lal** (supra). Thus, the Delhi Fire Service Act 2007 was enacted by the Legislative Assembly of NCTD in exercise of its power under Entry 41 of the State List.

156. NCTD has already exercised its legislative power relating to Entry 41 of the State List. However, the contours of "services" are very broad, and may be related to even "public order", "police", and "land" – which are outside the legislative domain and executive domain of NCTD. The question that then emerges is what "services" are within the domain of NCTD.

N. "Services" and NCTD

157. Now that we have held that NCTD has legislative and executive power with respect to "services" under Entry 41, a natural question that arises is as to the extent of control of NCTD over "services". The question becomes pertinent because the three entries (public order, police, land), which are excluded from the scope of NCTD's legislative power, also have some relation with "services". This Court must create a distinction between "services" to be controlled by NCTD and the Union in relation to NCTD. The distinction must be drawn keeping in mind the ambit of legislative and executive power conferred upon NCTD by the Constitution, and the principles of constitutional governance for NCTD laid down in the 2018 Constitution Bench judgment.

158. This Court has laid down that the scope of an Entry in the Seventh Schedule needs to be read widely. In **IK Saksena** v. **State of Madhya Pradesh**[51], a four judge Bench of this Court held that the entries in Schedule VII have to be read in their widest possible amplitude. The Bench held that the area of legislative competence defined by Entry 41 is far more comprehensive than that covered by Article 309:

> "32. It is well settled that the entries in these legislative lists in Schedule VII are to be construed in their widest possible amplitude, and each general word used in such entries must be held to comprehend ancillary or subsidiary matters. Thus considered, **it is clear that the scope of Entry 41 is wider than the matter of regulating the recruitment and conditions of service of public servants under Article 309. The area of legislative competence defined by Entry 41 is far more comprehensive than that covered by the proviso to Article 309.**"
>
> (emphasis added)

159. But, in our context, we may not be able to read Entry 41 in relation to NCTD in the widest possible sense because all entries in List II (including Entry 41) need to be harmonized with the limitation laid down in Article 239AA(3)(a) on NCTD's legislative and executive power by excluding matters related to 'public order', 'police', and 'land'.

160. The legislative and executive power of NCTD over Entry 41 shall not extend over to services related to "public order", "police", and "land". However, legislative and executive power over services such as Indian Administrative Services, or Joint Cadre services, which are relevant for the implementation of policies and vision of

[51] (1976) 4 SCC 750

NCTD in terms of day-to-day administration of the region shall lie with NCTD. Officers thereunder may be serving in NCTD, even if they were not recruited by NCTD. In such a scenario, it would be relevant to refer, as an example, to some of the Rules, which clearly demarcate the control of All India or Joint-Cadre services between the Union and the States. NCTD, similar to other States, also represents the representative form of government. The involvement of the Union of India in the administration of NCTD is limited by constitutional provisions, and any further expansion would be contrary to the constitutional scheme of governance.

161. We shall take the example of the Indian Administrative Service (Cadre) Rules, 1954, which deal with the posting of IAS Officers. Rule 2(a) defines 'cadre officer' to mean a member of IAS. Rule 2(b) defines 'Cadre post' as any post specified under item I of each cadre in the schedule to the Indian Administrative Service (Fixation of Cadre Strength) Regulations, 1955. Rule 2(c) defines 'State' to mean a State specified in the First Schedule of the Constitution and includes a Union Territory. Rule 2(d) defines 'State Government concerned', in relation to a Joint cadre, to mean the Joint Cadre Authority. The constitution and composition of a 'Joint Cadre Authority' is understood with reference to the All India Services (Joint Cadre) Rules 1972. The 1972 Rules apply to a "Joint Cadre constituted for any group of States other than the Joint Cadre of Union Territories."[52] Rule 3 of the IAS (Cadre) Rules 1954 provides for the constitution of cadres for each State or group of States "as a 'State Cadre' or, as the case may be, a 'Joint Cadre'". Rule 5 empowers the Central Government to allocate cadre officers to various cadres. In terms of Rule 5(1), the allocation of cadre officers to the various cadres shall be

[52] Section 1(i), All India Services (Joint Cadre) Rules 1972

made by the Central Government in consultation with the State Government or the State Government concerned. Rule 7 stipulates that all appointments to cadre posts shall be made "on the recommendation of the Civil Services Board" — by the State Government "in the case of a state cadre", and by the State Government concerned, as defined in Rule 2(d), "in the case of a joint cadre". Under Rule 11A, the "Government of that State" is provided with powers to take decisions under Rule 7 (and other mentioned rules) in relation to the members of the Joint Cadre Service "serving in connection with the affairs of any of the Constituent States". A combined reading of Rules 2, 7, and 11A indicates that the postings within the State Cadre as well as Joint Cadre of a Constituent State shall be made by the "Government of that State", that is, by the duly elected government. In our case, it shall be the Government of NCTD. We accordingly hold that references to "State Government" in relevant Rules of All India Services or Joint Cadre Services, of which NCTD is a part or which are in relation to NCTD, shall mean the Government of NCTD.

162. We reiterate that in light of Article 239AA and the 2018 Constitution Bench judgment, the Lieutenant Governor is bound by the aid and advice of the Council of Ministers of NCTD in relation to matters within the legislative scope of NCTD. As we have held that NCTD has legislative power over "services" (excluding 'public order', 'police', and 'land') under Entry 41 in List II, the Lieutenant Governor shall be bound by the decisions of GNCTD on services, as explained above. To clarify, any reference to "Lieutenant Governor" over services (excluding services related to 'public order', 'police' and 'land') in relevant Rules shall mean Lieutenant Governor acting on behalf of GNCTD.

163. The division of administrative powers between the Union and the NCTD as explained in this section must be respected.

O. Conclusion

164. In view of the discussion above, the following are our conclusions:

a. There does not exist a homogeneous class of Union Territories with similar governance structures;

b. NCTD is not similar to other Union Territories. By virtue of Article 239AA, NCTD is accorded a "*sui generis"* status, setting it apart from other Union Territories;

c. The Legislative Assembly of NCTD has competence over entries in List II and List III except for the expressly excluded entries of List II. In addition to the Entries in List I, Parliament has legislative competence over all matters in List II and List III in relation to NCTD, including the entries which have been kept out of the legislative domain of NCTD by virtue of Article 239AA(3)(a);

d. The executive power of NCTD is co-extensive with its legislative power, that is, it shall extend to all matters with respect to which it has the power to legislate;

e. The Union of India has executive power only over the three entries in List II over which NCTD does not have legislative competence;

f. The executive power of NCTD with respect to entries in List II and List III shall be subject to the executive power expressly conferred upon the Union by the Constitution or by a law enacted by Parliament;

g. The phrase 'insofar as any such matter is applicable to Union Territories' in Article 239AA(3) cannot be read to further exclude the legislative power of NCTD over entries in the State List or Concurrent List, over and above those subjects which have been expressly excluded;

h. With reference to the phrase "Subject to the provisions of this Constitution" in Article 239AA(3), the legislative power of NCTD is to be guided, and not just limited, by the broader principles and provisions of the Constitution; and

i. NCTD has legislative and executive power over "Services", that is, Entry 41 of List II of the Seventh Schedule because:

   (I) The definition of State under Section 3(58) of the General Clauses Act 1897 applies to the term "State" in Part XIV of the Constitution. Thus, Part XIV is applicable to Union territories; and

   (II) The exercise of rule-making power under the proviso to Article 309 does not oust the legislative power of the appropriate authority to make laws over Entry 41 of the State List.

165. We have answered the issue referred to this Constitution Bench by the order dated 6 May 2022. The Registry shall place the papers of this appeal before the Regular Bench for disposal after obtaining the directions of the Chief Justice of India on the administrative side.

……………………………………………CJI.
[Dr Dhananjaya Y Chandrachud]

……………………………………………J.
[MR Shah]

……………………………………………J.
[Krishna Murari]

……………………………………………J.
[Hima Kohli]

……………………………………………J.
[Pamidighantam Sri Narasimha]

New Delhi;
May 11, 2023