

NOMINATED MLA'S IN THE UNION TERRITORY OF PUDUCHERRY ASSEMBLY: A FAÇADE OF DEMOCRACY

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Abstract

The Union Territory of Puducherry Assembly was suspended, and placed under President rule from 22nd February 2021 by the notification issued by the Ministry of Home Affairs (MHA), after receiving a report from the Lieutenant Governor of the Union Territory. The situation occurred due to a confidence motion moved by the ruling party which ultimately could not succeed.

Because of the Supreme Court's Judgment in 2018 of Lakshminaraya Thenan vs. Lieutenant Governor, Puducherry, (popularly known as the nominated MLAs case), the opposition parties with nominated members could overthrow the ruling government in power. Keeping in mind the instability prevailing in Puducherry, the article revolves upon the basic question, whether the nominated MLAs can exercise their voting rights and whether the Union Territories are given a democratic set up with adequate autonomy.. The concept of "Union Territory" is one of the many ways in which India regulates the relations between the Centre and its units. It should not be used to subvert the basis of an electoral democracy. In short, parliamentary democracy should either have a unicameral legislature or a bicameral legislature, and not a mix of both, as partly elected and partly nominated. Experience shows that the Union Territories having legislatures with ultimate control vested in the Union Government do not work.

Keywords: Parliamentary Democracy, National Capital Territory, Union Territories Act, Jammu and Kashmir reorganization Act, Pondicherry Code, Legislative power of the Assembly, Constitution of French Republic, Voting Right, Union Government.

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Introduction

The Assembly in the Union Territory of Puducherry was suspended and the Union Territory placed under President rule from 22nd February 2021 by a notification¹ issued by the Ministry of Home Affairs (“MHA”). This situation occurred due to a confidence motion moved by the ruling party, which ultimately could not succeed. There was a tie between the ruling party alliance members and the opposition members as there were 13 votes on both sides. The 13 numbers of opposition includes three members nominated by the Union Government. Two members of the ruling alliance resigned from their positions as MLAs on the eve of the confidence motion and brought the strength down to 11. There were only 10 elected members belonging to the opposition alliance. There were 11 elected members present on the ruling side, as against the opposition which had only 10 elected members and 3 nominated members.

The overthrowing of the ruling government in power, by the nominated members of the opposition parties, was made possible by the 2018 Supreme Court judgment in the nominated MLAs case (*Lakshminarayanan vs. Lieutenant Governor, Puducherry*).² This altered the balance of powers in the representative character of the legislature. The Supreme Court judgment held that the nominated MLA’s of Puducherry had a right to vote in all matters including the right to participate in the budget and to vote in a no-confidence motion. This judgment nullified the democratic spirit of the representative character of the Legislative Assembly. The end result of the judgment reveals the façade or deficit of democracy in the Union Territory with Assembly. This article dwells on the comparative deficit of democracy in the Union Territories (“UT”) with Legislatures in India.

Thiru P.D.T Achary, former Secretary General of the Lok Sabha, in his article rightly pointed out that Union Territories were never given a fully democratic set up with necessary autonomy. Experience shows that the UTs having Legislatures with ultimate control vested in the Union Government do not work. The redemption for the harried Governments of these territories lies

¹ Notification No. 11012/3/2021-UTL, Ministry of Home Affairs (Feb. 25, 2021), <https://egazette.nic.in/WriteReadData/2021/225455.pdf> (The notification issued by Union Home Secretary Ajay Kumar Bhalla said the “Legislative Assembly of the said Union Territory is hereby placed under suspended animation”).

² K. Lakshminarayanan v. The Union of India, (2020) 14 SCC 664.

in the removal of the legal and constitutional provisions, which enable the Union Government to break down the neck of an elected Government, via nominated MLAs.

Backdrop

Nomination as such is not new to the Indian Legislature. It started with the Government of India Act, 1919, i.e, the Montagu-Chelmsford Reforms.³ It provided special provisions for the nomination of Anglo-Indians to the elected Parliament from the year 1920. This provision lasted up to January 24th 2020 through the subsequent Government of India Acts 1935 and Constitution of India, 1950. As of October 31st, 2019 there were eight UTs with two categories. i.e five UTs without Legislature⁴ and three UTs with Legislature⁵ - Puducherry, Jammu & Kashmir and Delhi. These UTs, also have representation in the Rajya Sabha.

Legislative Framework

Article 239 stipulates that every Union Territory is to 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. The opening words of Article 239, however, are ‘save as otherwise provided by Parliament by law’, which means that Parliament by law can provide different schemes of administration for such Union Territories, i.e., different from what is stated in Article 239.⁶ Article 239A⁷ is applicable for Puducherry and Jammu and Kashmir whereas Article 239AA is applicable for Delhi as it is the National Capital Territory.

Articles 239A and 239AA provide for an elected Legislature through the following Parliamentary Acts:

³ The Montagu–Chelmsford Reforms or more briefly known as Mont-Ford Reforms (MCR) were reforms introduced by the colonial government in British India to introduce self-governing institutions gradually in India. MCR along with brought various new dimensions in Indian polity which were unknown hitherto like parliamentary system in India, involvement in budget making and policy formulation, participation in central legislative assembly, diarchy i.e. decentralized form of govt etc.

⁴ The Union Territories without Legislature are Andaman & Nicobar Islands, Lakshadweep, Dadra Nagar Haveli & Daman & Diu, Chandigarh and Ladakh.

⁵ These three union territories have representation in the upper house of the Indian Parliament, the Rajya Sabha.

⁶ Government of NCT of Delhi v. Union of India, (2020) 12 SCC 259.

⁷ INDIA CONST. art. 239A; In the year 1962, Article 239A was inserted, providing a little departure from the Scheme of administration contained in Article 239, insofar as Union Territory of Puducherry is concerned.

1. Government of Union Territories Act, 1963.
2. Jammu & Kashmir Reorganization Act, 2019
3. Government of National Capital Territory of Delhi, Act 1991

The first two Acts provide for the creation of a Legislature which is partly nominated and partly elected. Under the Government of Union Territories Act, 1963, Puducherry is the only U.T. with Legislature till 30.10.2019. With effect from 31.10.2019, the provisions contained in Article 239A which are applicable to U.T of Puducherry, also apply to U.T of Jammu & Kashmir (J&K) by the Section 13 of the Jammu and Kashmir Reorganization Act, 2019.

Government of U.T. Act, 1963 Section 3(3) states that the Central Government may nominate not more than three persons, other than persons in the service of Government, as Members of the Legislative Assembly of the UT.⁸ Section 13 of the Jammu & Kashmir Reorganization Act, 2019⁹ provides for the applicability of Article 239A, which is applicable to the UT of Puducherry. Section 14(3) and Section 15 of the J&K Reorganization Act, provide for elected and nominated Members of Legislature.

Section 14(3) states that the total number of seats in the Assembly of Jammu and Kashmir to be filled by persons through direct election shall be 107. After excluding 24 members assigned for Pakistan occupied Kashmir, the net elected members will be 83.¹⁰ Further, Section 15 highlights that the Legislative Government may nominate two Members to the Legislative Assembly to give representation to women, if, in the L.Gs opinion, women are not adequately represented in the Legislative Assembly.¹¹

⁸ §3(3), The Government Of Union Territories Act, No. 20 of 1963 (“The Central Government may nominate not more than three persons, not being persons in the service of Government, to be members of the Legislative Assembly of the Union territory”).

⁹ §13, The Jammu and Kashmir Reorganisation Act, No. 34 of 2019 (“On and from the appointed day, the provisions contained in article 239A, which are applicable to ‘Union territory of Puducherry’, shall also apply to the ‘Union territory of Jammu and Kashmir’”).

¹⁰ §14(3), The Jammu and Kashmir Reorganisation Act, No. 34 of 2019 (“The total number of seats in the Legislative Assembly of the Union territory of Jammu and Kashmir to be filled by persons chosen by direct election shall be 107”).

¹¹ §15, The Jammu and Kashmir Reorganisation Act, No. 34 of 2019 (“Notwithstanding anything in sub-section (3) of section 14 the Lieutenant Governor of the successor Union territory of Jammu and Kashmir may nominate two members to the Legislative Assembly to give representation to women, if in his opinion, women are not adequately represented in the Legislative Assembly”).

In effect, Jammu and Kashmir will have 83 elected MLAs with 2 women nominated MLAs and 3 other nominated under the Government of Union Territory Act, 1963. Thus, the total number of MLAs will be 88 or 86 depending upon availability of elected women MLAs. In the case of nominated MLAs, Puducherry and Jammu & Kashmir are in the same boat. Both are peculiarly covered by Treaties with the Union of India. Jammu and Kashmir was annexed by the Union by the Instrument of Accession, 1948 which was executed under the India Independence Act, 1947. Puducherry is annexed with the Union of India under the French-India Treaty of Cession 1956, which was executed under the 5th Constitution of French Republic and Constitution of India (Article 253).

The Union Territory of Delhi escaped from the provisioning of nominated MLAs. The Government of National Capital Territory of Delhi, Act, 1991 enacted under Art 239AA does not provide for nominated MLAs. However, being a national capital it suffers from the attitude of the Union, which is explicitly subjugated recently by the Government of National Capital Territory of Delhi (Amendment) Act 2021. The Act stated that the Legislative Assembly shall not make any rule to enable itself or its committees to consider the matters of the day-to-day administration of the National Capital or conduct inquiries in relation to the administrative decisions vide section 21, 24, 33 and 44 of the GNCT Act, 1991.

The difference between the nominated and elected MLAs can also be seen from the forms of oaths or affirmations made by the MLAs of Puducherry, Jammu & Kashmir and Delhi. The form of oath is provided for only elected members, in the case of the Legislative Assembly of the Union Territory Delhi. The form of oath does not provide for nominated members in the Delhi UT. On the other hand, the Government of Union Territory Act, 1963 for Puducherry and Reorganization of Jammu and Kashmir Act, 2019 provides for a form of oath or affirmation to be made by elected or nominated Members of the Legislative Assembly.

Rationale behind Nomination

Section 3(3) of the Government of Union Territory Act, 1963 and Sec. 13 and Sec. 15 of the Jammu and Kashmir Reorganization Act, 2019 are not regulated clearly in respect of nominated MLAs. But the provisions for nomination to the Rajya Sabha, Lok Sabha,

Legislative Council and Legislative Assembly have some rationale and reasons to have the provisions. They provide inter-alia, the rationale for the nominated members and the criteria for the persons:

1. Should be an Indian Citizen and resident of a State
2. Should have the age not less than thirty years
3. Special knowledge or practical experience in respect of matters of Literature, Science, Art and Social Service and Co-Operative movement
4. Women, wherever applicable.
5. Anglo –Indian, wherever applicable.
6. Limitation of 70 years of time period as in case of Anglo-Indian nomination. It is expired on 24th January, 2020.

So, there is a nexus between the object of nomination and regulation of nominated MP and MLA and MLC.

Such regulation or rationale or object is not found in providing power to the Central Government in Sec. 3(3) of the Government of Union Territory Act, 1963 and in Sec. 13 of Jammu Kashmir Recognition Act, 2019. It is an unbridled, unregulated and unguided power to the Union Executive, which amounts to excessive delegation of power by the Parliament. This is against the recommendation of Lok Sabha Committee on Delegated Legislation. Delegation to the Executive by the Parliament should be on details and not on substantive matters. When it was pointed out to the Supreme Court, in order to fill the gap, it refused to do so, in *K. Lakshminarayanan v Union of India & AIR*.¹² It held that “the power is to be exercised by the Central Government is presumed. The Central Government, in exercise of its power, shall be guided by objective and rational considerations. We, however, hasten to add there is no inhibition in the Central Government or the Legislature to make Rules or a Statute for more convenient transaction of business regarding nominations”. In our opinion, the Supreme Court should have filled the gap in law by invoking its power under Article 142 to render complete justice to the elected MLAs. Instead it set aside all the recommendations made by the High Court of Madras to the Central Government in respect of nominated MLAs of Puducherry.

¹² K Lakshminarayanan, *Supra* note 2, ¶91.

The Supreme Court Judgement and its implications

The Supreme Court in Lakshminarayan's Nominated MLA case held that all members including the nominated members are entitled to vote in the sitting of the Legislative Assembly.¹³ It was added that when nomination of MLAs has to be done by the Centre, then there is no occasion for consultation with the council of ministers or the Chief Minister by the administrator. The Court held that the nomination in the Legislative Assembly in the Puducherry is to be made by the Central Government by virtue of Article 239A read with Section 3(3) of the Act. In view of the foregoing discussion, we are of the clear opinion that nomination in the Legislative Assembly of Puducherry is not the Business of the Government of Puducherry. It is a business of the Central Government as per Sec. 3(3) of Act, 1963.¹⁴

Further, the Court held that there is no basis for the submission that the nominated members cannot exercise their vote in the budget, and in the no confidence motion against the Government because the statutory provision does not give any such indication. This enabled the nominated MLAs to topple the elected Government of Puducherry in February 2021. This is the first time that an elected Government, while having a majority of elected members, was defeated in Puducherry, with the help of 3 nominated MLAs.

Revisit Rationale for Nomination

1. No Voting Power to Nominated Members

The constitutional provisions do not provide for voting powers to the nominated Members of Parliament and Legislatures. Article 54 states that the President shall be elected by the elected Members of an electoral college consisting of

¹³ The Supreme Court ruled that the Central Government was empowered to nominate three members to the Legislative Assembly of Puducherry. A bench of Justices A K Sikri, Ashok Bhushan and S Abdul Nazeer rejected two separate petitions filed by K Lakshminarayanan and S Dhanalakshmi against the Madras High Court's judgement of March 22 that dismissed their plea questioning the power of the Union government to nominate. The top court said the nomination to the State Assembly is to be made by the Central Government by virtue of Article 239A of the Constitution read with Sec. 3(3) of the Government of Union Territories Act, 1963.

¹⁴ Press Trust of India, *SC upholds Centre's decision to nominate three BJP members to Puducherry Assembly*, BUSINESS STANDARD (Dec. 6, 2018), https://www.business-standard.com/article/pti-stories/sc-upholds-centre-s-decision-to-nominate-three-bjp-members-to-puducherry-assembly-118120601123_1.html.

(a) the elected Members of both houses of Parliament (Nominated 12 Rajya Sabha Members and 2 Lok Sabha Members are excluded implicitly);

(b) the elected Members of the Legislative Assemblies of the States (nominated MLAs of Puducherry and Jammu Kashmir Legislatures are excluded by Explanation to Art. 54).

Under Art. 54 and Art. 55, the “State” includes the National Capital Territory of Delhi and the Union Territory of Pondicherry. The Union Territory of Jammu and Kashmir is not included in this explanation to Art. 54. Thus, the elected MLAs of Jammu and Kashmir U.T. Legislature, of Election to the President of India took place would have no right to vote, unless an amendment to Explanation to Article 54 of the Constitution is carried out.

Section 53(1)(b) of the Government of Union Territory Act, 1963, provides to fill the seat in the House of the People and the seat in the Council of States allotted to the Union territory of Puducherry. It does not mention the voting right of a nominated MLA to fill the seat in the Council of States. Article 54(b) provides right to vote to elected MLAs of the Legislature. Article 54(a) also does not give the right to vote to nominate Anglo-Indian Member of Parliament in Lok Sabha and State Assemblies.

Accordingly to Article 55 of the constitution, there shall be uniformity in the scale of representation of the different states at the election of the president. Every elected member of the Legislature Assembly shall have different vote value based on the population of the state divided by the total number of the only elected members of the Assembly.

In addition, the Constitution bars the Rajya Sabha and Legislative Councils that a Money Bill shall not be introduced in the Council of States and Legislative Council vide Article 109 (1), (5) and Article 198 (1), (4), (5). The Money Bill transmitted to the Rajya Sabha and the Legislative Council shall be deemed to have been passed at the expiration of 14 days if the Money Bill is not returned to the House of the People or State Legislature with or without recommendation. These facts show that the nominated MP, MLA and MLCs have no vote with respect to the:

a) Election of President

- b) Election of Rajya Sabha Member
- c) Vote on Money Bill
- d) Vote on confidence or No confidence motion against the Government.

Elected members only could move no confidence motion in the parliament and in the Legislative Assembly have to be noted.

At most, the nominated MLAs in Legislatures can be considered as Council Members in the House as they do not represent any territorial constituencies and have no population based vote value. Thus, they must be treated as Legislative Council members and not as Legislative Assembly members. Therefore, the decision of the Supreme Court deserves review and guidance for fair procedure. According to P.D.T. Achary, the Supreme Court took too technical a view on the matter of nomination and did not go into the need to specify the fields from which those persons could be nominated, and also lay down a fair procedure to be followed for nomination of members. As things stand, the law invites arbitrariness in dealing with the nomination of members to the Union territory Legislatures.¹⁵

The Supreme Court judgment Dated December 06, 2018 in Para 54 says: “At the same time, this Constitutional provision, i.e. Art. 239A, with regards to the Union territory of Puducherry itself envisages the Constitution of Legislative Council partly by nomination and partly by election.” Further, specific authority to nominate in the Legislative Council has been conferred by law i.e. under Sec. 3¹⁶ to the Central Government. Factually, Government of Union Territory Act, 1963, speak about two kinds of MLAs under Part II Legislative Assemblies for Union territories and their composition in section 3(2) for elected MLA and in section 3 (3) for nominated MLA.

¹⁵ P.D.T Achary, *The Structural Fragility of Union Territories*, THE HINDU (Feb. 25, 2021), <https://www.thehindu.com/opinion/lead/the-structural-fragility-of-union-territories/article33927116.ece>

(The Vice-President is elected by all the members including nominated Lok Sabha and Rajya Sabha members of both House of Parliament. There is a difference in wording of “members” between election of President and Vice-President in Art 55 and 66 of the constitution).

¹⁶ §3, The Government Of Union Territories Act, No. 20 of 1963 (“(1) There shall be a Legislative Assembly for each Union territory. (2) The total number of seats in the Legislative Assembly of the Union territory to be filled by persons chosen by direct election shall be thirty. (3) The Central Government may nominate not more than three persons, not being persons in the service of Government, to be members of the Legislative Assembly of the Union territory”).

The people chosen by direct election under Sec. 3(2) of the Act, 1963 to the Assembly are to be members of Legislative Assembly and nominated members by the Central Government under Section 3(3) to the Assembly are to be Members of Legislative Council as correctly said by the Supreme Court in Para 54. These Council members should have the limited powers as available in the matters of election of President, election of Rajya Sabha Member, Money Bills and Confidence /No confidence motions.

This must be reflected in the Government of Union Territory Act, 1963 by way of explicit explanation. This arbitrariness of the Union Executive needs to be corrected to uphold the supremacy of the people, or otherwise it would shed the relevance of election in respect of Union Territories with Legislatures, as they will have no meaning. It will become a farce or a façade.

Puducherry U.T Distinguishable

Union Territories of Puducherry (1962), NCT of Delhi (1991) and Jammu and Kashmir (2019) are each distinct union territories with separate Acts. Out of the three Union Territories, Puducherry is more distinguishable by virtue of French-India Treaty, 1956. In pursuance of the Facto Agreement dated 21st October, 1954, Article 2 and 3 the Representative Assembly of Pondicherry¹⁷ shall be maintained. The Government of India shall succeed to the rights and obligations resulting from such acts of the French Administration as are binding on these Establishments. The fact is not so in respect of the Pondicherry State in 1962.¹⁸ The existence of French Fifth Constitution and Pondicherry State under the Ministry of Overseas Territories as one of the States of France vindicate that Puducherry had a pre-existing State with a constitution of its own.

¹⁷ The Representative Assembly of the State of Pondicherry was established under the French Decree No.46 – 2381 dated 25th October, 1946 i.e. under the Fourth Constitution of French Republic 1946 dated 13th October 1946 which lasted up to 3rd October 1958. The French-India treaty dated 28th of May, 1956 was ratified by the French Parliament in May, 1962 under the Fifth Republic of French Constitution, 1958. The Fifth Constitution of French Republic was in force in the State of Puducherry on the eve of De jure independence of Puducherry in August 1962. This applicability of French Fifth Republic Constitution in Pondicherry since August 1962 is distinguishable. H.R. Seervai, in his book Constitutional law of India under the “Chapter Federalism in India” says “Our Constitution also constituted new States into the provinces of India and there were no pre-existing States with Constitutions of their own.”

¹⁸ H.M. SEERVAI, CONSTITUTIONAL LAW OF INDIA 288 (4th ed., 2015).

This State of Puducherry became a Union Territory of India by the Constitution (14th amendment) Act, 1962. The Jammu and Kashmir Act, 2019 converted the Jammu and Kashmir State into two Union Territories as UTs of Jammu and Kashmir with Legislature and Ladakh without a Legislature. At the time of accession to India in 1948, J&K had no vestige of sovereignty outside the Constitution of India. The constitution of Jammu and Kashmir was subordinate to the Constitution of India. It is therefore wholly incorrect to describe Jammu and Kashmir as being sovereign in the sense of its residents constituting separate and distinct classes in themselves. Permanent residents of Jammu and Kashmir are first and foremost citizens of India so ruled by the Supreme Court of India in *State Bank of India v Santosh Gupta* AIR 2017 Civil Appeal No.12237, 12238 of 2016 dated 16th December, 2016. But, Puducherry being sovereign in the sense of its residents constitute a separate and distinct class in themselves till August 15, 1962.¹⁹

Unlike Jammu and Kashmir, Puducherry is distinguishable in respect of having vestige of sovereignty being outside the Constitution of India which was ceded to India under French-India Treaty, 1956. The treaty of 1956 is not subordinate to the Constitution of India, vide Art. II,²⁰ Art. III,²¹ and Art. XXX²² of the Treaty 1956. This treaty of 1956 and the Constitution of India, 1950 came into force in the State of Puducherry on 16th August, 1962. Article 53²³ of French Constitution is in force from 16th August, 1962 to till date in vide Article 2, Article 3 and Article 30 of the Treaty 1956. This is another distinguishable feature. Parliament of India before making any law under Article 3 (a) of the Constitution by uniting any territory of Puducherry to part of any State has to abide by the Article 2, 3 and 30 of the Treaty, 1956 read

¹⁹ See The Pondicherry (Administration) Act, No. 49 of 1962.

²⁰ Treaty Establishing De Jure Cession of French Establishments in India, France-India, art. II, May 28, 1956, <https://mea.gov.in/bilateraldocuments.htm?dtl/5302/Treaty+establishing+De+Jure+Cession+of+French+Establishments+in+India> (“The Establishments will keep the benefit of the special administrative status which was in force prior to 1st November, 1954. Any constitutional changes in this status which may be made subsequently shall be made after ascertaining the wishes of the people”).

²¹ *Id.*, art. III (“The Government of India shall succeed to the rights and obligations resulting from such acts of the French administrations as are binding on these Establishments”).

²² *Id.*, art. XXX (“Any disagreement in respect of the application or interpretation of the present treaty which cannot be resolved through diplomatic negotiation or arbitration shall be placed before the International Court of Justice at the request of one or other of the High Contracting Parties”).

²³ 1958 CONST. 53 (France) (“Peace Treaties, Trade Agreements, treaties or agreements relating to international organization, those committing the finances of the State, those modifying provisions which are the preserve of Statute law, those relating to the status of persons, and those involving the ceding, exchanging or acquiring of territory, may be ratified or approved only by an Act of Parliament. They shall not take effect until such ratification or approval has been secured”).

with Article 53 of the 5th Constitution of French Republic and Article 51(C) of the Constitution of India.²⁴

The Representative Assembly of the State of Pondicherry by the Decree No.46-2381, Dated 25th October, 1946 and the Council of Government in the State of Pondicherry by the Decree No.47-1490 Dated 12th August, 1947 did not have provisions for nominated MLAs in the Representative Assembly. Not having nominated MLAs in the Representative Assembly by French Decrees are rights inherited by the people of Puducherry. This has to be honored in letter and spirit in view of the Treaty, 1956. Thus, from the above, it is clear that nominated MLA under Art. 3(3) of the Government of Union Territory Act 1963 are violative of the International Treaty and principles of representative democracy of the Constitution of India. It also weakens co-operative federalism.

Judicial Remedy vis-à-vis Legislative remedy

These facts of French-India Treaty of cession Treaty 1956, obligations of the Central Government for maintaining elected MLAs only in Puducherry Assembly should be placed before the Supreme Court by way of review of its judgment dated December 06, 2018 to invoke its power under Art. 142 for doing complete justice and for fulfilling democracy in the matter of elected MLAs. The following points need to be considered for the said purpose.

- a. The Legislature of Puducherry, as rightly said by the Supreme Court in para 91 of the judgment, dated 06.12.2018, could make Rule or a Statute for more convenient transaction of business regarding nominations.
- b. The President shall, under Art. 239 A(1) make rules for the more convenient transaction of business with regard to the powers and functions in respect of partly nominated MLAs. The rule shall make explicit that the nominated MLAs will be treated with powers as of nominated members of Legislative council i.e. they cannot move cut motion in Money Bills and motion of confidence/no confidence.

²⁴ INDIA CONST. art 51(c) (“The State shall endeavor to foster respect for international law and treaty obligations in the dealings or organized people with one another”).

c. Alternatively, Section 3(3) of the Government of Union Territory Act 1963 should be struck down by filing a review for excessive and unregulated delegation of power by Parliament to the Union Executive.

d. Parliament by itself should delete the Section 3(3) of the Government of Union Territory Act, 1963 as it is an anachronism to the spirit of democracy and the Rule of Law.

e. The words in Art. 239A(1)(a) “or partly nominated and partly elected” should be deleted altogether so as to bring the Article in harmony with Democratic Republican spirit.

Excessive delegation of Power to Union Executive by the Parliament

It is already mentioned that there is an excessive delegation of power by the Parliament to the Executive under Section 3(3) of the Government of Union Territory Act 1963, and in Sec. 13 of the Jammu and Kashmir Reorganization Act, 2019. By enacting further amendments to the Government of National Capital Territory of Delhi (Amendment) Act, 2021 under Sections 21, 24, 33 and 44 of the Government of National Capital Territory of Delhi Act, the Parliament empowered the Union Executive and the Lieutenant Governor of Delhi as the Viceroy of India and Resident Commissioner respectively. The amendment of NCT of Delhi Act, 2021, provides that “*before taking any executive action in pursuance of the decision of the Council of Ministers or a Minister to exercise power of Government, under any law in force in the Capital, the opinion of Lieutenant Governor shall be obtained on all such matters as may be specified by general or special order, by Lieutenant Governor.*” This proves to be another incidence of excessive delegation of power.

There were provisions for five nominated MLAs in the Delhi Administration Act, 1966. Instead of nominated MLAs, the Union Executive by this Amendment Act, 2021 straight away bestowed unlimited and unregulated power to its subordinate executive i.e. the Lieutenant Governor. Thus, Delhi will have an unrepresentative administration.

Article 239AA(7)(a) does not intend for such matters incidental or consequential power to the Parliament to amend the basic structure of the constitution which²⁵ consists of

1) Supremacy of the Constitution

²⁵ Lakshminarayana, *Supra* note 2, ¶46.

- 2) Republican and Democratic form of Government
- 3) Federal character of Constitution and
- 4) Separation of powers between the Legislature, the Executive and the Judiciary

The present GNLT Amendment Act, 2021 violates the aforementioned four basic structures of the Constitution. This affects the dignity and freedom of the people of Delhi, which is of supreme importance. Sanjay Hegde in an article²⁶ said, the Supreme Court has already cautioned “Interpretation [viz (Art. 239AA(7) (b) deemed not to be an amendment of the Constitution - Authors] cannot ignore the conscience of the Constitution”. That apart, when we take a broader view, we must also address the consequence of such an interpretation. If the expressions in case of difference and on any matter are construed to mean that the Lieutenant Governor can differ on any proposal, then the expectations of the people which has its legitimacy in a democratic set up, although different from states as understood under the Constitution, will lose its purpose in simple semantics. This Amendment of 2021, brings forth the urgency of statehood to the Delhi Union Territory. The delegation of excessive power to the Union Executive leads to autocracy and weakening of the federal democracy.²⁷

Conclusion

Our Indian democracy is structured as per the Westminster form of Parliamentary system. There can be no liberty where the legislative and executive powers are united in the same person, or body of authority. It may justly be pronounced as the very definition of tyranny. Basic structure of the Constitution is built on the basic foundation i.e. the dignity and freedom of the individual which is of supreme importance. This cannot by any form be destroyed. The law declared by the Supreme Court clearly indicates that the Indian Constitution is basically federal in form. The “Union Territory” concept is one of many ways in which India regulates relations between the Centre and its units. It should not be used to subvert the basis of electoral democracy.

²⁶ Sanjay Hedge, *Delhi's administration as the tail wagging the dog*, THE HINDU (Mar. 23, 2021), <https://www.thehindu.com/opinion/lead/delhis-administration-as-the-tail-wagging-the-dog/article34135140.ece>.

²⁷ See The Government of National Capital Territory of Delhi (Amendment) Act, No. 15 of 2021.

The mindset of the Union Government is that Union Territory is “their property and under the absolute control of the Union Government”. It means people in Union Territory with legislatures are merely the subjects and not citizens, notwithstanding that though they are empowered to elect their Government under the People Representation Act. This mindset is against the basic structure of the Republican and Democratic form of Government and Federal character of the Constitution.

The working of Union Territories with legislatures with ultimate control vested in the Central Administrator causes alienation from participatory democracy among the electorates of those peoples. In fact the working of the Constitution under Art. 239A(1) and the Government of Union Territory Act, 1963 with provision for nominated MLAs shows that India is one country but has two systems of governance. The provision for nominated MLAs in the Act, 1963 and Art. 239A(1) of the Constitution itself should be deleted. There should be only either Union Territory without Legislatures or Union Territory with Legislature but without nominated MLAs. A Legislature without a Council of Ministers or a Council of Ministers without a legislature is a conceptual absurdity. Similarly, a legislature that is partly elected and partly nominated is another anomaly. This is why Puducherry, Jammu and Kashmir and NCT of Delhi people longing for full statehood so as to feel not as subject to the Union Government but to feel as free citizens of India having full and equal sovereignty power. Otherwise people of Union Territory with Legislature will feel the Union Government “grabbed” their right to vote for those they deem fit to administer.

In short, parliamentary democracy either should have a unicameral legislature or bicameral legislature and not a mix of both as partly elected and partly nominated. Experience shows that the Union Territories having legislatures with ultimate control vested in the Union Government are not workable. As things stand, either the same party or different party runs the Government in the Union Territories this nomination provision of Acts and Art. 239A (1) will be used by the Union Government as if they are its own territorial possession, which is what happened in Puducherry. To supplant this democracy deficit in Union Territories with Legislatures, remedy lies in having one country one system of elected representative states, abolishing thereby Union Territory with Legislatures and by upgrading them to full Statehood.
