PROVISO TO SECTION 44(2) OF THE GOVERNMENT OF NATIONAL CAPITAL TERRITORY OF DELHI ACT, 1991: A CONSTITUTIONAL PERSPECTIVE

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Abstract

Recently, the Government of National Capital Territory of Delhi (Amendment) Act, 2021, which amends the Government of National Capital Territory of Act, 1991, received the Presidential assent and became an enacted law. Broadly speaking, the Amendment Act enhances the powers of the Lieutenant Governor and limits the elected government's powers in Delhi. Despite enjoying immense support from the Central Government, the Amendment Act has faced harsh criticism from the Government of Delhi and various legal luminaries. One such amendment made by the Amendment Act to section 44 of the Government of National Capital Territory of Delhi Act, 1991 forms the main subject of this article. The article, along with the amendment made to section 44, discusses in detail the legal and constitutional challenges associated with it. The article is divided into five parts, where Part-I conducts a detailed diagnosis of Article 239AA of the Constitution, Part-II spells out the amendments made by the Government of National Capital Territory of Delhi (Amendment) Act, 2021, Part-III illustrates the functioning of the executive branch of the government of Delhi before the amendment was made to section 44, Part-IV deciphers the amendment made to section 44 and attempts to shed light upon the various legal challenges faced by it, and lastly, Part-V cumulates all the arguments and findings of the article into a conclusion. The article is written in an interpretative style and draws heavily from the 2018 decision of the Supreme Court of India in the Government of National Capital Territory of Delhi v. Union of India.

Keywords: Executive, Article 239AA, Constitution, Supreme Court, Assembly, Council.

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Constitutional Status of Delhi— State or Union Territory

The fundamental purpose behind inserting Article 239AA in the Constitution of India, as observed by the Hon'ble Supreme Court of India in *Government of National Capital Territory of Delhi v. Union of India*[163] (hereinafter the "*LG Case*"), was to *"…establish a democratic setup and a representative Government [in Delhi] wherein the majority has a right to embody their opinion in laws and policies"*.[164] Delhi, a union territory, was granted special constitutional status in 1991 by Parliament in the exercise of its power under Article 246(4) of the Constitution. Articles 239AA and 239AB were added in Part-VIII of the Constitution (dealing with general provisions for administration of UTs) vide the Constitution (Sixty-ninth Amendment) Act, 1991. As per the Balakrishnan Committee[165], the objective behind the Sixty-ninth Amendment was ensuring *"stability and permanence"* in the national capital.

A nine-Judge Bench of the Supreme Court in the 1999 case of *New Delhi Municipal Corporation v. State of Punjab*[166] held that Delhi, though a "class apart" and not on the same pedestal with other UTs, cannot be considered a State and thus, in substance remains a UT governed by an elected legislature. However, "Union Taxation" being the main issue before the Court in this case, it didn't provide detailed reasoning while making this observation. Article 239AA of the Constitution lays down *'Special provisions with respect to Delhi'* mandating the existence of a legislative assembly, a council of ministers, and a lieutenant governor for governing the affairs of the NCT. In order to analyse the status of Delhi and to truly ascertain whether it is a state or union territory, it is pertinent to study the constitutional mechanism governing Delhi.

1. Legislative Assembly

Clause (1) to Article 239AA renamed Delhi as the National Capital Territory of Delhi (hereinafter "NCT of Delhi"). Article 239AA(2) established a participatory, representative and responsive government in the NCT of Delhi. It provides for the mandatory existence of a

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[163] Government of National Capital Territory of Delhi v. Union of India and Another, (2018) 8 SCC 501.
[164] *Id.*
[165] Report of Committee on Reorganisation of Delhi Set-Up, 1989, Ministry of Home Affairs, Report, India.
[166] New Delhi Municipal Corporation v. State of Punjab, (1997) 7 SCC 339.

Legislative Assembly *"chosen by direct elections from territorial constituencies"*.[167] To ensure free and fair elections in Delhi, clause (c) to Article 239AA(2) further provides that provisions pertaining to superintending, directing and controlling the conduct of elections viz. Articles 324 to 327 and 329 under Part XV of the Constitution will be applied in NCT of Delhi, in the same manner, the said provisions apply to other States. This clearly shows the degree of importance attached by the Constitution to the Legislative Assembly of NCT of Delhi.[168]

Clause (3) to Article 239AA defines the powers of the Legislative Assembly. Article 239AA(3)(a) grants the Legislative Assembly the power to legislate over all matters in List-II, except the ones enumerated in Entries 1, 2, and 18 viz. land, public order, and police (and also the matters in Entries 64, 65, and 66 viz. offences, jurisdiction of courts, and fees, inasmuch as they relate to Entries 1, 2, and 18) and overall, the matters under List-III. Parliament has also been granted the power to make laws for NCT of Delhi vide Article 239AA(3)(b) on all the matters enumerated under Lists-II & III, including the ones which are specifically carved out by clause (a) to Article 239AA(3) from the purview of legislative powers of the Assembly (viz. Entries 1, 2, 18, 64, 65, and 66). This indicates that the legislative powers of the Assembly for NCT is not coextensive with that of State Legislatures, as unlike the latter who has exclusive power to legislate over all matters in List-II under Article 246(3), the former does not possess exclusive legislative competence over the List-II subjects. Clause (c) to Article 239AA(3) makes it clear that the doctrine of repugnancy will govern any inconsistency between the laws made by Parliament and those by Legislative Assembly and the law of Parliament is to prevail unless Legislative Assembly's law has received presidential assent.

Hence, from the above discussion it can be concluded that while clause (2) to Article 239AA grants special constitutional status on the Legislative Assembly for NCT coextensive with that of State Legislatures, clause (3) circumscribes the ambit of its legislative powers. Clause (3) does so, firstly by excluding certain subjects from Legislative Assembly's competence and vesting them in Parliament, secondly by *"enabling Parliament to enact law on matters falling*

[167] India Const. art. 239AA, cl. 2.
[168] Government of National Capital Territory of Delhi v. Union of India and Another, (2018) 8 SCC 501.

both in the State and Concurrent lists"[169], and thirdly by subjecting the laws made by the Legislative Assembly to laws which are enacted by the Parliament.

2. Council of Ministers and Lieutenant Governor

While legislative powers with respect to the NCT are dealt with under clause (3) to Article 239AA, executive powers form the subject matter of clause (4). There are majorly two bodies that exercise control over the executive sector in the NCT, i.e., the Council of Ministers and the Lieutenant Governor (hereinafter the "LG").

Article 239AA(2) mandates the existence of a Council of Ministers. It is headed by the Chief Minister and consists of *"not more than ten per cent. of the total number of members in the Legislative Assembly"*.[170] Observing the principle of collective responsibility, Article 239AA(6) provides that the Council shall be collectively responsible to the Legislative Assembly. Both the Council and the Assembly are to act as a *responsible government* in the NCT of Delhi. Clause (1) to Article 239AA, on the other hand, talks about the LG, it says that the Administrator appointed under Article 239 for the NCT of Delhi shall be designated as the LG. Article 239 is a general provision talking about *"Administration of Union Territories"*. It says a union territory is administered by the President through an administrator appointed by them under any designation.[171]

Clause (4) to Article 239AA provides that the Council of Ministers is to aid and advise the LG in relation to matters on which the legislative assembly has the legislative power to make laws.[172] This implies two things, a) executive power of Council of Ministers extends to all subjects on which the Legislative Assembly can legislate and b) *"What is beyond the legislative competence of the Assembly is ultra vires the executive powers of the Council of Ministers"*.[173] Thus, it can be said that the executive powers of the Council are co-extensive with the powers of the Assembly.

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[169] *Id.*
[170] India Const. art. 239AA, cl. 4.
[171] India Const. art. 239, cl. 1.
[172] India Const. art. 239AA, cl. 4.
[173] Government of National Capital Territory of Delhi v. Union of India and Another, (2018) 8 SCC 501.

Secondly, as per the Supreme Court, the LG is *bound* by the aid and advice of the Council of Ministers and has to act in accordance with such aid and advice.[174] However, in case of *"any difference"* between the LG and the Council, the LG is granted the power under proviso to clause (4) of Article 239AA to refer the said matter to the President for a binding decision. This means that the LG is bound by the aid and advice of the Council of Ministers so long as they do not exercise their abovementioned power of reference. The Apex Court expounded on the true nature of the said power of the LG and observed:

> *"the words 'any matter' employed in the proviso to clause (4) of Article 239AA cannot be inferred to mean 'every matter'. The power of the Lieutenant Governor under the said proviso represents the exception and not the general rule which has to be exercised in exceptional circumstances by the Lieutenant Governor… The Lieutenant Governor should not act in a mechanical manner without due application of mind so as to refer every decision of the Council of Ministers to the President."*

The Apex Court, therefore, has considerably narrowed down the scope for LG to refer matters to the President. In reference to this, Chandrachud, J. makes a very important observation that is worth reproducing in the article. He says:

> *"…save and except in regard to areas <u>which are reserved for the exercise of his discretion</u>, the Lieutenant Governor must act on the aid and advice tendered to him by the Council of Ministers."*

The above quoted passage indicates that the LG can exercise their power of making a reference to the President only regarding those matters which are specially and specifically reserved under any law for the exercise of their discretion. The Parliament has been conferred the power to make any such law under clause (7) of Article 239AA.

[174] Government of National Capital Territory of Delhi v. Union of India and Another, (2018) 8 SCC 501.

The proviso to Article 239AA(4) lays down the detailed course of action to be followed in case of any *"difference of opinion"* between the Council and LG. It says that in such a situation the LG is under a constitutional mandate to refer the matter to President, meaning that they cannot take any action as per their personal discretion. As a consequence, to such reference, LG is bound to act in accordance with the decision given by the President. Pending a decision of the President, the LG is empowered to take any action they deem fit, where the matter is of an emergent nature as to require immediate action. Therefore, the LG has two courses of action to follow, i.e., either to act in accordance with aid and advice of the Council or to refer the matter to the President and follow the above procedure. In *New Delhi Municipal Corporation v. State of Punjab*,[175] the Apex Court, while drawing distinction between LG of NCT and an Administrator of Delhi, observed that LG does not possess any special power like that of a governor of state and the status of LG is not akin to that of a Governor of a State rather they remain an Administrator under Article 239.

3. Executive Powers of the Council of Ministers for Delhi vis-à-vis the Union Executive

The Constitution has expressly provided that the executive powers of the Council of Ministers for Delhi extend over all those matters on which the Legislative Assembly for Delhi has the power to make laws. However, this seems to be in contradiction with Article 73. Article 73 of the Constitution defines the *"Extent of executive powers of the Union"*. Clause (a) to Article 73(1) says that the executive powers of the Union extend to all the matters with respect to which Parliament has power to laws. In respect to this, Article 239AA(2) confers concurrent powers on Parliament to make laws for NCT on all matters in List-II and III. This means that the Union, by application of Article 73(1)(a), shall possess executive powers in NCT with respect to all matters under List-II and III. Nonetheless, the Supreme Court rejected this reasoning. Defining the powers of Union over NCT, it observed:

> *"…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*

[175] New Delhi Municipal Corporation v. State of Punjab, (1997) 7 SCC 339.

> *the Delhi Legislative Assembly has legislative powers. Thus, it can be…said that the executive power of the Union in respect of NCT of Delhi is confined to the matters in the State List for which the legislative power of the Delhi Legislative Assembly has been excluded under Article 239AA(3)(a).”*

Thenceforth, the Council of Ministers has exclusive executive powers over all but 6 matters (viz. matters under Entries 1, 2, 18, 64, 65, 66) of List-II and over all matters of List-III, while the Union has executive powers over NCT of Delhi in respect of only those matters on which Legislative Assembly for Delhi does not have powers to make laws. As per the Supreme Court, *"Such an interpretation would thwart any attempt on the part of the Union Government to seize all control"* over NCT of Delhi.

It is pertinent to mention that a proviso is attached to Article 73(1) which says that the executive powers of Union under clause (a) to Article 73(1) do not extend over matters *"with respect to which the Legislature of State has also power to make laws"*.[176] This view is supported by Article 162 of the Constitution which defines the *"Extent of executive powers of the State"*. As per Article 162, *"executive power of a State shall extend to the matters with respect to which the Legislature of the State has power to make laws"*. In *Rai Sahib Ram Jawaya Kapur v. State of Punjab*,[177] the Supreme Court said that:

> *"…executive authority of the State is exclusive in respect to matters enumerated in List II of Seventh Schedule. The authority also extends to the Concurrent List…"*

This means that the executive powers of NCT of Delhi differ from that of the States. This is because the former does not have exclusive executive powers with respect to all matters in List-II, for the Union may exercise executive powers on the matters excluded from the legislative purview of Legislative Assembly for NCT.

[176] Government of National Capital Territory of Delhi v. Union of India and Another, (2018) 8 SCC 501.
[177] Rai Sahib Ram Jawaya Kapur and Ors. v. State of Punjab, AIR 1955 SC 549.

The executive powers of the government of NCT of Delhi are substantially wider as compared to the other union territories. Article 239 provides that every Union Territory is to be administered by the President of India. As per Article 53(1), the powers of the Union executive are vested under the President and shall be exercised by them. This reflects that the Union Territories are under the control of the Union executive through the President. However, the opening words of Article 239 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 than what is stated in Article 239.[178] In pursuance of this power, read with Article 246(4), Article 239AA was introduced in the Constitution by Parliament, providing a departure from the then existing structure for governance of Delhi under Article 239. As observed, now Delhi has an executive collectively responsible to the Legislative Assembly, having powers over matters *"with respect to which the Legislature of State has also power to make laws"*, thereby, making it different from the other Union Territories.

Government of National Capital Territory of Delhi (Amendment) Act, 2021

The preceding part of the article provided a brief constitutional background surrounding the NCTD. Now, coming to the "meat of the matter"; the much-debated Government of National Capital Territory of Delhi Bill, 2021[179] (hereinafter the "GNCTD-Bill") after receiving the President's assent on March 27, 2021, became an Act of the Parliament and thus, hereinafter, is referred to as the "GNCTD-Amendment Act" or simply the "Amendment Act". The said Amendment Act amended 4 provisions viz. sections 21, 24, 33, and 44 of the Government of National Capital Territory of Delhi Act, 1991 (hereinafter the "GNCTD Act" or the "Act").

Section 21 of GNCTD Act dealing with *"Restrictions on laws passed by Legislative Assembly with respect to certain matters."* is amended and a new sub-clause (3) is added, which provides that the term "Government" shall mean "Lieutenant Governor" in any law made by the Legislative Assembly for NCT. This amendment is prospective in nature and will be applicable

[178] Government of National Capital Territory of Delhi v. Union of India and Another, 2019 SCC OnLine SC 193.
[179] Government of National Capital Territory of Delhi Bill, 2021, Bill No. 55 of 2021.

to only those laws which will be made by the Legislative Assembly after this amendment is notified by the Central Government in the Official Gazette.[180]

Section 24 contains substantive and procedural laws prescribing mechanism for LG to either assent to a Bill, withhold their assent or reserve the Bill for reference of President. The second proviso to section 24 provides three distinguished grounds upon which LG is prohibited from giving their assent to any Bill passed by the Legislative Assembly and is further directed to reserve such Bill for the consideration of President. The GNCTD-Amendment Act amended this proviso to add one more such ground in Clause (d) to the second proviso to Section 24. As per this ground, the LG is barred to convey their assent to any such bill which deals with matters falling outside the purview of the Legislative Assembly for NCT. It reads *"the Lieutenant Governor shall not assent to, but shall reserve for the consideration of the President, any Bill which…. incidentally covers any of the matters which falls outside the purview of the powers conferred on the Legislative Assembly."*

As per section 33 of the Act, the Legislative Assembly is permitted to make rules of procedure for regulation of the conduct of business in the Assembly. However, this provision stands changed after the amendment made in clause (1) to section 33, inasmuch as it now requires that the rules made by the Legislative Assembly for regulating the conduct of its business must conform to and be consistent with the Rules of Procedure and Conduct of Business in House of People. This section is further amended to prohibit the Legislative Assembly from making any rules to enable itself or its committees from:

i. considering the day-to-day matters of administration of NCT, and;
ii. conducting any inquiry with respect to administrative decisions.

The Amendment Act also amended section 44 of the Act. However, it is discussed in Part-IV of this article. The author feels that except for the amendment made to section 24, all other amendments face certain legal challenges. Nevertheless, this article will discuss only the amendment made to section 44 of the Act.

180 Government of National Capital Territory of Delhi Act, 1991, No.1, Acts of Parliament, 1991.

Government of National Capital Territory of Delhi Act, 1991- Before Amendment

Before reading the amendment made to section 44 of the Act, it is pertinent to study the functioning of the executive branch of the government of NCT of Delhi in the pre-amendment era of the GNCTD Act. The GNCTD Act was enacted by Parliament in pursuance of the authority given to it under Article 239AA(7)(a) to *"...supplement the provisions of the Constitution relating to the legislative assembly and a Council of Ministers for the National Capital Territory of Delhi"*[181]. This Act is divided into five parts, Part-I deals with preliminary provisions, Part-II with provisions dealing with the Legislative Assembly, Part-III with the delimitation of constituencies, Part-IV with provisions relating to LG and Council of Ministers, and Part-V with certain miscellaneous provisions. This article is primarily concerned with Part-IV of the Act. Part-IV contains five provisions i.e., from sections 41 to 45.

Section 41 of the Act lays down the matters in which the LG shall act in their discretion. The LG can broadly act as per their discretion in two categories of matters, namely: (a) matters which are outside the ambit of legislative powers of the NCT Assembly but in respect of which the President has delegated powers and functions to the LG and (b) matters where the LG is required to act in their discretion by or under any law or under which they exercises judicial or quasi-judicial functions.[182] This means that LG is free from the constitutional mandate of complying with the aid and advice of Council of Ministers on matters coming under section 41. Expanding on this, the Apex Court said, on all other matters, except the ones enumerated under section 41(1), the LG is bound to act as per the aid and advice of the Council.[183] All executive decisions in NCT of Delhi are to be taken in the name of the LG whether taken with or without the aid or advice of the Council of Ministers.[184] Section 44(3), similarly, provides for the manner of authentication of the orders and instruments made and executed in the name of the LG. It further says that the orders or instruments so authenticated shall not be challenged on the ground that they are not made or executed by the LG.

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[181] Government of National Capital Territory of Delhi Act, 1991, No.1, Acts of Parliament, 1991, Preamble.
[182] Government of National Capital Territory of Delhi Act, 1991, No.1, Acts of Parliament, 1991, section 41, cl. (1).
[183] Government of National Capital Territory of Delhi v. Union of India and Another, (2018) 8 SCC 501.
[184] Government of National Capital Territory of Delhi Act, 1991, No.1, Acts of Parliament, 1991, section 44, cl. (2).

Section 41(1) of the Act must be read with rules 14 and 23 of the Transaction of Business of the Government of National Capital Territory of Delhi Rules, 1993 (hereinafter the "TB-Rules" or the "Rules"). The TB-Rules were formulated by the President in 1993 in the exercise of his powers under section 44(1)(b) of the Act. Clause (b) to Section 44(1) vests the power to frame rules for the convenient transaction of business among ministers and for laying down the procedure to be followed where there is a difference of opinion between the LG and the Council of Ministers on the President.

Rule 14 of the TB-Rules deals with the decision of the Council on different proposals. Sub-rule (1) of rule 14 provides that once a decision of the Council has been approved by the Chief Minister or the presiding minister, the said approved decision shall be forwarded by the Council to the LG. Sub-rule (2), on the other hand, vests on ministers the duty to give effect to the decision. It says that when an executive proposal has been approved by the Council, the concerned ministers shall take necessary action to give effect to the decision.

As distinguished from rule 14, rule 23 sets out a list of nine matters which are essential to be submitted to the LG by the Council before issuing any orders. Therefore, ministers can "take necessary action to give effect to the decision" of Council under rule 14(2) in situations except the ones mentioned under rule 23. The Court, in respect of the relationship between rules 14 and 23 of the TB-Rules, observed that[185] various provisions of the TB-Rules cast a duty upon the Council to appraise the LG on matters relating to the administration of NCT of Delhi, however, no provision, either under Article 239AA or under the TB-Rules require the Council to take concurrence of LG before implementing executive decisions taken by it. Rule 14 of TB-Rules, in fact, explicitly indicates that the legal duty of the Council is only to inform, either before the implementation of the decision or after it, and not to seek the concurrence of the LG. Only the matters mentioned under rule 23 are to be submitted to the LG before any orders could be issued on them.

This reasoning of the Supreme Court seems to be in consonance with section 45 of the Act which provides that the Chief Minister has a duty to furnish information to the LG with respect to (a) the decisions of the Council of Ministers relating to the administration of NCT and (b)

[185] Government of National Capital Territory of Delhi v. Union of India and Another, 2019 SCC OnLine SC 193.

information which LG may call for regarding the administration of the affairs of the Capital and proposals for legislation. Therefore, the law broadly casts a duty upon Chief Minister to merely inform the LG, but does not mandate them to seek LG's prior assent before implementing any executive decision.

Amendment to Section 44 of the GNCTD Act

The preceding section showed how the executive procedure roughly worked in NCTD, until section 44 was amended. The amendment to section 44 of the Act adds a proviso to section 44(2) which mandates the Council to take the *"opinion"* of LG *"on all such matters as may be specified by… Lieutenant Governor"* before *"taking any executive action in pursuance of the decision of the Council of Ministers or a Minister"* This means that once the Central Government notifies this amendment, the Council of Minister for NCT will be obligated to take the "opinion" of the LG before issuing any executive action on all such matters which may be notified by them. The forthcoming sections of this article critically examine the various flaws associated with the impugned proviso to section 44(2).

1. Structural Flaws of the Amendment

Before discussing the legal flaws with this amendment, it is pertinent to discuss the structural flaws first. Apropos to this, the said amendment is firstly, *silent upon the time frame* within which the LG shall give their *opinion*. LG can, therefore, go as long as their conscience may instruct them without giving any opinion of theirs, thereby, critically delaying the executive action. This may hamper the smooth functioning of the government which is often tasked with implementing important yet urgent decisions on issues concerning the lives of people. Secondly, there is *no clarity* as to what the term *"opinion"* may amount to in the newly added proviso. On an honest reading of the provision, it tends to indicate that here the term *"opinion"* amounts to some sort of validation or rejection by the LG. In that, the implementation of the executive decision will depend on the LG's validating or a concurring *"opinion"*. The usage of the term *"opinion"* in the impugned proviso, therefore coveys that now the Council is bound to take the validation or concurrence of the LG on all matters specified by them before implementing them.

2. Legal Deformities

As per the Statement of Objects and Reasons to the GNCTD-Bill, *"no structural mechanism [was] provided in the Act for effective time bound implementation of said section [section 44]. Further, there is no clarity as to what proposal or matters are required to be submitted to Lieutenant Governor before issuing order thereon."*[186] After reading part-III of the article, it becomes extremely hard to subscribe to the reasons enlisted by the Government for making the said amendment to section 44. This is because rule 23 of the TB-Rules clearly provides the list of matters which are required to be submitted to the LG before issuing executive orders.

Nonetheless, the impugned amendment fatally frustrates the existing mechanism laid down under the aforementioned legal provisions. It has now been made *compulsory* for the Council to take the opinion of LG *on all* the executive decisions *specified by* LG *before* they are implemented, otherwise, any implementation on the contrary would, by necessary legal implications, lack the authority of law. Earlier, the Council could inform the LG about the decisions taken, either before their implementation or shortly after they had been implemented, except the decisions taken on matters which fall under rule 23 of the TB-Rules (as in these matters the LG must be appraised before the implementation of the decision) and once apprised about the decision, LG was bound to act as per the said aid and advise, i.e. decisions taken by the Council, as far as the decisions so apprised were not related to matters falling under the purview of section 41(1) of the Act, where the LG is not bound by the aid and advise of the Council.

3. Amendment Offends the Collective Responsibility Principle

This amendment also offends the well-known *collective responsibility principl*e. As per the Supreme Court, *"the Westminster style cabinet system of government*" was introduced by Article 239AA in Delhi, like in the rest of the States and the Union. As per Chandrachud, J., the principle of *collective responsibility* is *"a cornerstone of the Westminster model"*. Speaking

[186] Government of National Capital Territory of Delhi Bill, 2021, Bill No. 55 of 2021.

on *collective responsibility*, the Apex Court, in the case of *R.K. Jain v. Union of India,*[187] observed that every member of the Council of Ministers *"has personal responsibility to his conscience and also responsibility to the Government"*. While in *Amrinder Singh v. Special Committee, Punjab Vidhan Sabha,*[188] the Apex Court opined that *collective responsibility principle* makes a government liable for every act it does to the electorate, through the legislature. As per Chandrachud, J., collective responsibility manifests itself in two senses, in that it first makes ministers collectively responsible for the policies of the government and secondly it also makes them collectively responsible for the *work* performed by their government.[189] In *Common Cause, A Registered Society v. Union of India,*[190] the Supreme Court, in the context of Parliament, said, collective responsibility of the Council ensures transparency in government decisions.

Rule 4(1) of the TB-Rules embodies the principle of collective responsibility and says that the Council in NCT of Delhi shall be collectively responsible to the Legislative Assembly. It shall be kept in mind that the LG is merely the titular head of the NCT of Delhi and thus, not collectively responsible to the electorate. The Supreme Court in this context observed that *"If a well deliberated legitimate decision of the Council of Ministers is not given effect to due to… the Lieutenant Governor, then the concept of collective responsibility would stand negated"*. Therefore, allowing the LG to interfere in the implementation of the executive's decisions as per their discretion would unreasonably harm the executive, as the executive would now be answerable to the electorate, through the legislature, for the LG's *opinions*. The powers given to the LG under proviso to section 44(2) empowers them in two ways to unreasonably interfere with the functioning of the executive in Delhi. First, they have been granted the power to notify any matter, which they may think fit, on which Council shall seek their "opinion" before implementing the executive decision taken by it. Secondly, they have been impliedly given the liberty to take as much time as they wish for giving their "opinion" upon the decisions taken by Council. Both these powers are extremely wide and bound to be abused. For any such abuse or misuse of the powers by the LG, the Council and not the LG would be collectively responsible, thereby, harming the principle of collective responsibility.

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187 R.K. Jain v. Union of India and Ors., (1993) 3 SCR 802.
188 Amrinder Singh v. Special Committee, Punjab Vidhan Sabha, (2010) 6 SCC 113.
189 Government of National Capital Territory of Delhi v. Union of India and Another, (2018) 8 SCC 501.
190 Common Cause, A Registered Society v. Union of India and Ors., (1999) 6 SCC 667.

4. Ultra vires the Constitution

It is argued that the impugned proviso to section 44(2) is ultra vires the clause (4) of Article 239AA of the Constitution. Before proceeding with the argument, a relevant extract of the said proviso is reproduced below:

> *"…before taking any executive action in pursuance of the decision of the Council of Ministers… the opinion of Lieutenant Governor in term of proviso to clause (4) of article 239AA of the Constitution shall be obtained..."*[191]

The focus must be kept on the words *"in term of proviso to clause (4) of article 239AA of the Constitution"* in the proviso to section 44(2) of the Act. As seen above, proviso to Art.239AA(4) grants power to LG to only refer any matter to the President upon which there is a difference of opinion between them and the Council. However, the proviso to Article 239AA(4) does not provide the LG with the power to specify matters based on their own will and discretion, upon which their prior opinion must be taken by the Council. This amendment empowers the LG to specify literally any matter which they may think is appropriate. By virtue of this new proviso, the LG may unreasonably enlarge the scope of the matters, on which the Council would be obligated to take their opinion. Chandrachud, J., in the ***LG case*** opined that:

> *"The proviso to Article 239AA(4) is in the nature of a protector to safeguard the interests of the Union on matters of national interest in relation to the affairs of the National Capital Territory. Every trivial difference does not fall under the proviso. The proviso will, among other things, encompass substantial issues of finance and policy which impact upon the status of the national capital or implicate vital interests of the Union."*[192]

[191] Government of National Capital Territory of Delhi v. Union of India and Another, (2018) 8 SCC 501.
[192] *Id.*

It is fairly discernible from the above observation of the Supreme Court that the proviso to Article 239AA(4) deals with matters which are of national interest or which impact the very status of NCT of Delhi. Every trivial difference of opinion does not fall in the proviso, meaning that LG's opinion will not mandatorily matter in trivial issues i.e., issues that do not fall under the two abovementioned categories. In such cases, LG will be bound by the aid and advice i.e. the decision of the executive. However, by the impugned amendment the LG has been empowered to include even these trivial issues under the domain of the proviso to section 44(2), thereby, necessitating the executive to take their opinion before the decision could be executed.

The said amendment equips the LG with powers that were not originally granted to them under the Constitution. The amendment clearly travels past Article 239AA(4), ironically though, through which it partakes its quiddity. For this reason, the amendment is called being ultra vires the Constitution. The said change should have only been brought by a constitutional amendment in accordance with Article 368.

5. Underscores Supreme Court's Verdict in the LG Case

Last but not the least, this amendment clearly underscores the Supreme Court's verdict in the *LG case* as well. In this case, the Court observed that the *"real decision-making authority in a democratic form of government vests in the executive"* and the LG is merely the constitutional head of NCT of Delhi and that *"the Lieutenant Governor has not been entrusted with any independent decision-making power [like Governor of a State or the President]. 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."*[193]

Court also observed that *"In a cabinet form of government, the substantive power of decision making vests in the Council of Ministers with the Chief Minister as its head. The aid and advice provision contained in the substantive part of Article 239AA(4) recognises this principle."*[194] However, it is argued that the impugned proviso to section 44(2) of the Act steals the decision-making power of the executive from it and gives it to the LG, inasmuch as the LG would now

[193] *Id.*
[194] *Id.*

possess the ultimate power to either validate the decision of the executive or reject it by virtue of their *opinion*. The very fate of the executive decisions now depends on the LG's *opinion*.

In *People's Union of Civil Liberties v. Union of India,*[195] the Supreme Court said that the legislature has no power to set at nought the decisions of the courts. Similarly, in the case of *Assistant Commissioner of Agricultural Income-Tax v. M/s Netley 'B' Estate,*[196] the Apex Court held that *"In exercising legislative power, the legislature by mere declaration, without anything more, cannot directly overrule, revise or override a judicial decision."*

Conclusion

The arguments made under part-IV of the article must be seen in the view of the fact that the Supreme Court had time and again observed the *sui generous* status of the NCT of Delhi and had called it a class apart from the other union territories. However, the impugned proviso to section 44(2) dilutes this *sui generous* status of Delhi as pushes it back towards the old regime of Article 239. Since this amendment offends the principle of collective responsibility, is ultra vires the Constitution, undermines the decision of the Supreme Court of India, and lastly suffers from various structural flaws and legal deformities, it should be struck down. However, one can really do nothing but expect that until corrective measures are taken, the powers granted to LG under this amendment will not be misused, either by themself or by any other person through them, directly or indirectly. That the LG will continue to resolve their differences of opinion with the Council by the process of dialogue and discussion through the course of action prescribed in the TB-Rules. That blind references to the President will not be made on every second matter which comes before the LG, and that the said amendment will not affect co-operative federalism, a concept deeply embedded in our beloved Constitution.

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[195] People's Union of Civil Liberties v. Union of India and Anr., Writ Petition (Civil) 490 of 2002.
[196] Assistant Commissioner of Agricultural Income-tax and Ors. v. M/S. Netley 'B' Estate & Ors., Civil Appeal Nos. 8617-8635 Of 2003.