

GOVERNMENT OF NCT OF DELHI V. UNION OF INDIA: A TALE OF TWO JUDGMENTS

Aditya Anand^Y

Abstract

The 'Government of NCT of Delhi v. Union of India' judgment delivered by the Constitution Bench of the Supreme Court with respect to the powers of the Lieutenant Governor vis-à-vis the elected government of the union territory of Delhi can be described as a milestone judgment, not only because of the substantial interpretative questions that it answers concerning Article 239AA of the Constitution, but also because of the fact that it is one of those rare constitutional law judgments wherein the Supreme Court undertook a substantial analysis of the various, multi-faceted themes of constitutional theory, such as constitutional morality. However, the impact of the same was short-lived as the state of affairs became murkier after the division bench sat in the year 2019 for deciding certain specific questions of law and issues pertaining to the division of powers. There were several conjectures wherein there was judicial ambiguity and contradictions to what the constitution bench had decided. At certain points, the division bench's judgment can also be seen as tilted in the favour of the centre, which directly affects the federal structure and division of powers between the centre and the state. This paper will give the background of the entire dispute, while covering the overarching themes of both the judgments and the limitations in the approach of the respective Courts. Towards the end, the paper will analyse the judgments from the focal lens of prominent constitutional law scholars Philip Bobbitt and Richard H. Fallon Jr.

Keywords: federalism; federal governance; Article 239AA; separation of powers; constitutional morality; constitutional theory

^Y Aditya Anand is a graduate of the National Law University, Delhi. Please feel free to contact the author at aditya.anand16@nludelhi.ac.in for any constructive feedback or suggestions.

Constitutional Morality: Overview & Need

“Constitutional morality is not a natural sentiment. It has to be cultivated. We must realize that our people are yet to learn it. Democracy in India is only a top-dressing on an Indian soil, which is essentially undemocratic.”

- Dr. B.R. Ambedkar¹

1. Overview

The above quote by Ambedkar highlights both the vision as well as the susceptibility that he saw in the Constitution. As per him, constitutional morality would mean effective coordination between the conflicting and myriad interests of people and administrative cooperation to resolve the conflicts amicably without confrontation amongst the various stakeholders.

Over time, constitutional morality has been of paramount reverence for the Constitution. Constitutional morality provides a principled understanding with respect to the task of governance and specifies the norms necessary for the democratic institutions to survive.² It also ensures that they function not only as per the text but also as per the soul of the Constitution. It affixes accountability on these institutions and ensures that they represent the true values that have been enshrined in the Constitution .

Recently, we have seen interesting discourses and applications of the same by the Supreme Court in the realm of issues surrounding fundamental rights in several important judgments such as *Navtej Singh Johar*,³ *Puttaswamy*,⁴ *Sabarimala*,⁵ etc. The court dwelled upon certain important elements of constitutional morality such as individual liberty, freedom of choice,

¹ AMBEDKAR BHIMRAO RAMJI, ANNIHILATION OF CASTE – AN UNDELIVERED SPEECH, ARNOLD PUBLISHERS, DELHI (1990).

² Mohammad Ahmad, ‘*The Challenge of Constitutional Morality Before the Supreme Court*,’ THE LEAFLET, (MARCH 26, 2021), <https://www.theleaflet.in/the-challenge-of-constitutional-morality-before-the-supreme-court/>.

³ *Navtej Johar v. Union of India*, 2018 10 SCC 1.

⁴ *KS Puttaswamy v. Union of India*, 2017 10 SCC 1.

⁵ *Indian Young Lawyers Association & Ors v. The State of Kerala & Ors*, 2019 SCC 11 1.

right to equality etc. In the *Sabarimala* case, the court bypassed the *Doctrine of Essentiality*⁶ to uphold the virtue of Constitutional morality.

It was interesting to see the same being made a part of judicial discussions. After all, it was by virtue of constitutional morality that the Basic Structure Doctrine was propounded in the landmark judgment of *Kesavananda Bharti v. Union of India*.⁷

2. Why Constitutional Morality?

Constitutional morality does not just restrict itself to the allegiance of substantive provisions and principles of the Constitution. It signifies a constitutional culture that should be imbibed by every individual in the Indian Democracy.⁸ One of the key aspects of constitutional morality is the ability to arrive at decisions on issues in a consensual manner. The Constitutional institutions should, despite all their differences, be a part of the common deliberative process.

This prevents the institutions and the administration from becoming tyrannical while ensuring checks and balances on the power of the majority. The institutions of democracy ought to provide for cooperation and coordination so that constitutional aspirations can be achieved.⁹ Hence, the Constitution places duties on individuals who occupy the institutions and offices. Hon'ble Justice Dipak Misra, in the case of *Manoj Narula v Union of India*,¹⁰ held that,

“The democratic values survive and become successful where the people at large and the persons-in-charge of the institution are strictly guided by the constitutional parameters without paving the path of deviancy and reflecting in action the

⁶ Explained Desk, *Sabarimala order: What is the ‘essentiality’ test in religious practice?*, THE INDIAN EXPRESS, (MAY 25, 2021), <https://indianexpress.com/article/explained/explained-supreme-courts-sabarimala-order-and-the-essentiality-test-in-religious-practice-6119369>.

⁷ KESAVANANDA BHARATI V. UNION OF INDIA, (1973) 4 SCC 225.

⁸ Pratap Bhanu Mehta, *What is constitutional morality?*, INDIA SEMINAR (2010), (December 28, 2020), http://www.indiaseminar.com/2010/615/615_pratap_bhanu_mehta.html.

⁹ ANDRE BATEILLE, DEMOCRACY AND ITS INSTITUTIONS (2012).

¹⁰ *Manoj Narula v Union of India*, (2014) 9 SCC 1.

primary concern to maintain institutional integrity and the requisite constitutional restraints”.

Therefore, for upholding constitutional morality, it is important that the constitutional principles are enforced through proper negotiation and accommodation. These principles can also be used to fill the gaps that exist in the text so as to provide completion and enhancement to the spirit of the Constitution. They act as a source of direction for the interpretation of the Constitution and were utilized by the Supreme Court while hearing the case of *Government of NCT Delhi v Union of India*,¹¹ which revolved around interpretation of Article 239AA of the Constitution. While interpreting the same, the court not only looked into the text and its background but also used constitutional theory, the ideas of constitutional governance, pragmatic federalism, the balance of power, constitutional objectivity and of course, constitutional trust and morality.

The battle for the Capital - How did it start?

1. Federalism & The Changing Dynamics of the Centre-State Relations

Federalism has been a basic feature of our Constitution.¹² Article 245 can be understood as the source behind federalism, which grants powers to the Parliament to make laws for the Union of India and to the State legislatures to make laws for the States.¹³ Article 245 in the form of Schedule VII also provides for three lists that mention the subjects on which both the State and Central legislatures have jurisdiction.¹⁴

The disputes between the Centre and the States have been a burning question with regard to the separation of powers between the two.¹⁵ The outcomes of all those disputes are the fact that the States have certain powers that the Centre *cannot* take away in the ordinary course of business.¹⁶

¹¹ *Government of NCT Delhi v Union of India*, (2018) 8 SCC 501.

¹² *Bharati supra note 7*

¹³ INDIA CONST. art. 245.

¹⁴ INDIA CONST. sch 7.

¹⁵ Alok Prasanna Kumar, ‘*Statehood for Delhi – A Legitimate Demand*’, *Economic & Political Weekly*, Vol.53, Issue No.28, (2018).

¹⁶ COMMITTEE ON REORGANISATION OF DELHI, S. BALAKRISHNAN (BALAKRISHNAN REPORT) 1989.

Talking about the historical origins of the federal structure, the framers of the Indian Constitution divided the States into different classes – Part A, Part B, Part C and Part D States. Not all of these States had a representative form of governance, some were special territorial units that were ruled directly by the Centre. Prominent example being the National Capital Territory of Delhi. After the States Reorganisation Act, 1956 removed the categorization based on Part A, B, C and D, there were two categories left – states and union territories.¹⁷

2. Post States Reorganisation Act & the Balkrishna Committee Report

The Government of Union Territories Act, 1963 was enacted and it provided for Legislative Assemblies and Council of Ministers for various union territories but it was not made applicable to Delhi.¹⁸ There was a Delhi Administration Act, 1966 that was passed later that provided for a limited representative Government for Delhi through a Metropolitan Council.¹⁹

Finally, in the year 1987, the Balkrishna Committee²⁰ was set up with the objective of submitting its recommendations about the status to be conferred upon Delhi and the committee recommended that Delhi should continue to be a Union territory but there must be a Legislative Assembly and Council of Ministers responsible to the said Assembly with appropriate powers. The Committee believed that if Delhi became a full-fledged state, then it would lead to the constitutional division of sovereign, legislative and executive powers, which would make it impossible for the Union to discharge its special functions in relation to the National Capital.²¹ If the administration of Delhi is divided into the rigid compartments of Union & State, then it would lead to conflicts over a lot of vital matters, especially, if there are two different political parties, at the Centre and the State.

¹⁷ Nehmat Kaur, 'Delhi, a history of governance: A look back at legal journey 1858 – 2018', THE LEAFLET, (February 21, 2021), <https://www.theleaflet.in/delhi-a-history-of-governance-a-look-back-at-the-legal-journey-from-1858-to-2018/>.

¹⁸ The Government of Union Territories Act, 1963, No. 20, Acts of Parliament, 1963 (India).

¹⁹ The Delhi Administration Act, 1966, No. 19, Acts of Parliament, 1966 (India).

²⁰ Krishandas Rajgopal, 'The Supreme Court Relies on 1987 Report to Declare Delhi Is Not a State', THE HINDU, (DECEMBER 28, 2020), <https://www.thehindu.com/news/cities/Delhi/supreme-court-relies-on-1987-report-to-declare-delhi-is-not-a-state/article24332519.ece>.

²¹ *Id.*

Delhi was supposed to ‘belong’ to the nation as a whole and as it was the seat of National Governance. Hence, Delhi was never accorded the status of a ‘State’ and was administered by the Lieutenant Governor (LG) appointed by the Central Government. However, with the increasing demand for self-governance, the Constitution in 1991, was amended and Delhi was provided with an elected Legislative Assembly.²² The Assembly was given the power to legislate for the items in the State list except for three items – police, public order and land.

3. Beginning of the Dispute

Article 239AA introduced two parallel authorities in Delhi. One was the elected Assembly and the second was the appointed Lieutenant Governor. A very important proviso was sub-clause (4) which stated that:

“....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”

This scheme made functioning difficult, depending upon which Government was in power at the Centre and in Delhi. Prior to 2015, for the longest time, the United Progressive Alliance (UPA) which was an alliance comprising of the Indian National Congress, was in power and had the Government both at the Centre and at the state. In 2015, the Aam Aadmi Party, led by Arvind Kejriwal came to power with a landslide victory crushing the National Democratic Alliance (NDA), which occupied the annals of power at the centre. This led to continuous rounds of tussles between the Centre and the elected Government.²³

The Lieutenant Governor of NCT of Delhi and the Union Government were causing hurdles in the functioning of the elected Government of Delhi. The LG was not sending files to the Chief

²² The Constitution (Sixty-ninth Amendment) Act, 1991, No. 1, Acts of Parliament, 1992 (India).

²³ Pratyush Kumar, ‘Asymmetrical Symmetricalism of Indian Constitutional Structure & Practice’, *Corte Suprema dell’ Unione Indiana*. SENTENZA 4 LUGLIO 2018.

Minister on the following three entries of the State List (Schedule VII) – *Police* (Entry 1), *Public Order* (Entry 2) and *Land* (Entry 18) affecting the routine functioning of the Government.²⁴

4. Contentions of the Parties & Judicial Recourse

The Delhi Government contended that the NCT of Delhi is tantamount to a full-fledged ‘State’ as per Article 239AA of the Constitution of India when read with the Government of National Capital Territory of Delhi Act 1991. The Government of NCT claimed to derive its powers from its democratically elected nature and thereby claimed that it was qualified to legislate on State subjects. The LG does not have any independent decision-making power and has to act on the ‘aid and advice’ of the council of ministers. The Government claimed that the executive power is always ‘co-extensive’ with the legislative power and just like the President is bound by the ‘aid and advice’²⁵ of the Union Cabinet, the Governor is bound by the ‘aid and advice’ of the council of ministers of the state, similarly the LG is bound by the aid and advice of the democratically elected council of ministers of Delhi.

The second contention was that the provision that has been mentioned above. The proviso stated that the LG can refer ‘any matter’ upon which there was a disagreement with the Council of Ministers to the President. While the Central Government contended that the same should be given a literal reading, the Delhi Government contended that ‘any matter’²⁶ was treated by the LG as ‘every matter’²⁷ and this would vest all the powers with the LG, making him the supreme ruling authority with all the powers getting accumulated with the centre with respect to Delhi.

Interesting aspect is that the Supreme Court has delivered *three* judgments on this matter, of which two judgments were delivered by the benches comprising of Justice Dipak Misra, Justice AK Sikri and Justice AM Khanwilkar while the second judgment was authored by Justice Ashok Bhushan and Justice DY Chandrachud. Both of these judgments were delivered together in the month of July 2018.

²⁴ INDIA CONST. Schedule VII.

²⁵ Para 25, *supra* note 11.

²⁶ Para 44, *supra* note 11.

²⁷ Para 232, *supra* note 11.

Finally, in the month of February, 2019, a bench comprising of Justice AK Sikri and Justice Ashok Bhushan faced with certain specific issues that were not addressed lucidly in the majority judgment and thereby clarified certain key aspects. This paper will analyse the key elements from all the three judgments.

The Court in all the three judgments reiterated the position that the LG is not a superior authority and is only a representative of the Central Government. The Court also advocated for the executive power vested in the hands of the elected government and observed that the executive power is co-extensive with the legislative power. While on the surface, it appears to back the principles of democracy, political accountability and representative democracy, there should be a closer look given to the same to get a ‘clearer’ picture, beyond the fog.

A Tale of Two Judgments

1. Constitutional Bench Judgment (2018)²⁸

Justice Misra in Para 204²⁹ of the judgment observed that:

“The exercise of establishing a democratic and representative form of government for NCT of Delhi by insertion of Articles 239AA and 239AB 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 the power to legislate for the NCT of Delhi.”

a. First Issue

The then Chief Justice went into the context of Article 239AA and observed that the Constitution specifically provides for the representative structure for Delhi. The executive power of the Union with respect to NCT of Delhi was said to be confined to the three matters in the State List for which the legislative powers of the legislature of Delhi were specifically excluded under Article 239 AA (3).³⁰

²⁸ *supra* note 11.

²⁹ *supra* note 11.

³⁰ Para 218, *supra* note 11.

b. Second Issue

As regarding the proviso under Article 239 AA (4)³¹ was concerned, Justice Misra observed that the word ‘any’ if given a literal interpretation would lead to a situation wherein the Central Government through the LG would obstruct the ‘*stream of governance*.’³² The Delhi Government suggested that the proviso can be made applicable to only three subjects in the State list and it should have a free hand as far as the other subjects are concerned, but the same was rejected by the Chief Justice, stating that the Constitutional text did not provide for doing so.

c. Taking the Normative Route?

Justice Misra did not address the concern pragmatically but rather ended up giving a normative standard as mentioned in the following para 233³³ of the judgment:

“The power given to the Lieutenant Governor under the proviso to Article 239AA (4) contains the rule of exception and should not be treated as a general norm. The Lieutenant Governor is to act with constitutional objectivity keeping in view the high degree of constitutional trust reposed in him while exercising the special power ordained upon him unlike the Governor and the President who are bound by the aid and advice of their Ministers. The Lieutenant Governor need not, in a mechanical manner, refer every decision of his Ministers to the President. He has to be guided by the concept of constitutional morality”

The paragraph signifies the normative and procedural framework enshrined in the text but does not elaborate much upon the substantial part of it. Interestingly, Justice Chandrachud in his separate opinion tried to give some clarity on the same. In para 141³⁴ of his opinion, he gives certain scenarios such as issues of policy, financial concerns etc. in which Article 239 AA (4) can be relied on. The same has been produced here for a better understanding -

³¹ Para 219, *supra* note 11.

³² Para 223, *supra* note 11.

³³ *Supra* note 11.

³⁴ *Supra* note 11.

“The Lieutenant Governor may, for instance, be justified in seeking recourse to the proviso where the executive act of the government of the NCT is likely to impede or prejudice the exercise of the executive power of the Union government. The Lieutenant Governor may similarly consider it necessary to invoke the proviso to ensure compliance with the provisions of the Constitution or a law enacted by Parliament. There may well be significant issues of policy which have a bearing on the position of the National Capital Territory as a national capital. Financial concerns of the Union government may be implicated in such a manner that it becomes necessary for the Lieutenant Governor to invoke the proviso where a difference of opinion remains unresolved.”

The majority opinion did not really place any constraint on the powers of LG as he still had the right to disagree with the Government and to escalate the same to the President for decision. In addition, in Para 284, the majority arrived at 23 *conclusions in seriatim* that talked more about the constitutional principles and less about the interpretation of the text.

2. Division Bench Judgment (2019)³⁵

After the Constitution bench set out the principles regarding the interpretation of Article 239AA and defined the scope of the legislative and executive power, in order to address the specific disputes between the parties, the case was reverted to the division bench. Six issues were identified by the division bench in total, which in addition to the Constitutional law questions, dealt with a variety of substantive and procedural laws like the Code of Criminal Procedure, Commission of Inquiry Act, 1952, Delhi Electricity Reforms Act, 2000, Electricity Act.³⁶ This paper will primarily focus on questions of constitutional law.

a. The ‘Services’ Issue

The most significant issue was over the subject ‘services.’ The question was over the control of Government regarding the transfers and postings of the Civil Servants once they are assigned to the Union Territory of Delhi. The Central Government, through certain

³⁵ 2019 SCC Online SC 193 (Division Bench).

³⁶ Para 7, *supra* note 32.

notifications, had excluded ‘State Public Services and State Public Service Commissions’ from the ambit of the Delhi Government.

Justice Sikri on the same case observed that as far as the allocation of personnel belonging to various services is concerned, the Central Government through the Ministry of Home Affairs passes the necessary orders. The Central Government is therefore empowered to transfer personnel from one Union territory to another.

In Para 89³⁷ of the judgment, he remarked:

“The fulcrum of dispute pertains to the control of GNCTD over these personnel after they are allocated to the NCTD. As per GNCTD, it has the power to post such workforce at different places and the LG is to act on the aid and advice of the Council of Ministers. For this purpose, the executive power is sought to be drawn by virtue of Entry 41 of List II in the Seventh Schedule of the Constitution. The submission on behalf of the Union of India is that it comes within the discretionary powers of the LG as the subject matter is not covered by Entry 41 of List II and, therefore, by virtue of Section 41 of GNCTD Act, the LG is empowered to act in his discretion in such a matter.”

b. The Contradictions in the opinion

Justice Sikri, however, gave rise to certain ambiguities as well. First, it was the majority bench which held that barring the three subjects in the state list i.e., *land, police and public order*, the legislature had the power to make laws on any other subject in the state list. But now, Justice Sikri raised the contention that Entry 41, which deals with ‘State Public Services and State Public Service Commissions’ will not apply to Delhi as it did not have a Public Service Commission of its own.³⁸ The Government of Delhi, even cited the rulings of the Supreme Court which mentioned that with respect to the Indian Administrative Rules (Cadre), ‘States’ would include Union Territories but Justice Sikri was firm in his opinion. In fact, he seconded the suggestion proposed by Senior Counsel CA Sundaram, which is as follows –³⁹

³⁷ Para 89, *supra* note 32.

³⁸ Para 86, *supra* note 32.

³⁹ Para 82, *supra* note 32.

“The transfers and postings of Secretaries, HODs and other officers in the scale of Joint Secretary to the Government of India and above can be done by the Lieutenant Governor and the file submitted to him directly. For other levels, including DANICS officers, the files can be routed through the Chief Minister to Lieutenant Governor. In case of difference of opinion between the Lieutenant Governor and the Chief Minister, the view of the Lieutenant Governor should prevail and the Ministry of Home Affairs can issue a suitable notification in this regard.”

Gautam Bhatia describes the same as, “Solomon ordering the dismemberment of the child instead of settling the dispute over who the mother really was.”⁴⁰ The reason why he uses this phrase to describe the situation is that first of all Sikri contradicted the judgment on which he himself was a signatory, and secondly while answering the question about the distribution of power, he did not substantially ‘answer’ the issue but made a trite remark that a ‘harmonious working relation should exist between the LG and the Chief Minister.’

c. Analysis of other issues decided in favour of the Centre

Another issue of constitutional law was whether the Central Government was within its power to exclude the jurisdiction of the Anti – Corruption Bureau of Delhi to investigate the offences which were committed by the officials of the Central Government.⁴¹ The subject ‘Police’ was a List II entry that was excluded from the legislative purview of the Delhi legislature. Justice Sikri observed that the subject of ‘Criminal Procedure’⁴² falls in the concurrent list and that the legislative entries should always be interpreted broadly and liberally which would impute them the widest amplitude including all ancillary as well as subsidiary matters.

Thereby, it was observed that ‘police’ would not only include the constitution of the force but also supervise and control by issuing directions that would delineate the powers, functions, and

⁴⁰ BHATIA, GAUTAM, *JUDICIAL EVASION, JUDICIAL VAGUENESS, AND JUDICIAL REVISIONISM: A STUDY OF THE NCT OF DELHI VS UNION OF INDIA JUDGMENT(S)*, (JUNE 27, 2020).

⁴¹ Para 73, *supra* note 32.

⁴² Para 104.

jurisdiction of the different wings of the police. However, despite all this rationale, Justice Sikri relied on the Delhi Police Act and its provisions and held that the power is vested with the Administrator or the L.G.⁴³

He believed that the CrPC did not provide for a “*parallel jurisdiction*”⁴⁴ and any such jurisdiction would result in chaos and anarchy and would frustrate the very purpose of investigation. Justice Sikri vested the power solely in the hands of the Central Government so that there is no confusion in the future and no overlapping of jurisdiction.

Now, this might look like a clear demarcation on the surface but in reality, the balance of power was tilted in the favour of the Central Government. The Court took a wide approach to the contention, to say the least, and answered the same in a very vague and platitudinal manner. The dispute was between two federal units and a broad reading would mean that the powers of one would necessarily encroach upon the power of the other.

While deciding on the other two issues as to whether the word ‘State Government’ under the Commission of Inquiry (COI) Act, 1952 includes union territories, the court relied on the *Goa Sampling Employees*⁴⁵ case and held that there is no concept of state government with respect to union territories. It is interesting to note that the *Goa Sampling* case was decided before the insertion of Article 239AA into the Constitution, thereby, the understanding of ‘Union Territory’ was very limited at that time. The *sui generis* status of Delhi was not in existence back then, as was stated in the text that, “*every union territory is to be administered by the President*”, therefore the understanding of Justice Sikri was based on this restricted premise.

d. Analysis of issues decided in favour of the NCT of Delhi

The division bench did accord certain important powers to the elected Government and gave the decision in their favour on certain other key issues. For instance, while deciding on the issue pertaining to Delhi Electricity Reforms Act, 2011, the Court held that the ‘Appropriate

⁴³ Para 108, *supra* note 32.

⁴⁴ Para 110, *supra* note 32.

⁴⁵ *Goa Sampling Employees' Association v. General Superintendence Co. Of India Pvt. Ltd.*, 1985 AIR 357.

Government’⁴⁶ under the Electricity Act is different from the ‘State Government’⁴⁷ under the COI Act. With respect to Delhi, the Delhi Electricity Reform Act 2011 had been enacted by the state legislature and the President accorded his assent to the same.

The Delhi Electricity Regulatory Commission (DERC) was also established to exercise powers under the Act and the Delhi Government has the power to issue directions to the DERC over public policy matters involving public interest. If the term Central Government is read in the definition of “*government*” then this would lead to conflict in the provisions of the DERC Act. Further, the Court also held that the LG cannot appoint the ‘Public Prosecutor’ under Section 24 of the CrPC without the aid and advice of the council of ministers as the same was considered an executive function as per Section 24(8) of CrPC, whereas the LG alone can decide on judicial and quasi-judicial functions. For legislative and executive functions, the powers were vested in the hands of the elected government, as held by the Constitution Bench.⁴⁸

Further, with respect to the notifications issued under the Indian Stamp Act and Delhi Stamp (Prevention of Under Valuation of Instruments) Rule, 2007, the court held that circle rates are fixed for the purpose of payment of stamp duty and they do not pertain to ‘land’, namely rights over land, land tenures, transfer of alienation of agricultural land, etc. Stamp duty is not on a duty on the instrument but it is, in reality, a duty on transfer of property. The occasion of levy of stamp duty is the document which is executed as distinguished from the transaction which is embodied in the document.⁴⁹

While the Council of Ministers is well within their rights to issue such notifications, still it cannot be said that the LG is bound to act on the aid and advice of the council of ministers. Even with respect to matters upon which the legislature is competent to make laws, the same needs to be communicated to the LG as per the Constitutional scheme.

Thereby, in a nutshell, certain issues were discussed at length and then were accorded to the

⁴⁶ Section 2(5), Electricity Act, 2003.

⁴⁷ Section 2(a), Commission of Inquiry Act, 1952.

⁴⁸ Para 168, *supra* note 32.

⁴⁹ Para 158, *supra* note 32.

domain of Centre or the elected Government of NCT. However, how coherent and rational it was, keeping in mind the judgment of the Constitution bench is an interesting question to ponder upon, in the light of the above-mentioned arguments.

Constitutional theory and Interpretation

1. Constitutional Interpretation, Constitutional Culture & Importance of Constitutional Theory

The task of interpreting the Constitution is extremely important in a democracy. There has to be an expansion of the provisions to align them with modern times, but at the same time, there is a duty on the judiciary to preserve the rights and liberties of the citizens without disturbing the fundamental principles of the Constitution.⁵⁰

Primarily, the approach towards the same was the ‘literal rule’ which was the normative approach taken for interpreting statutory as well as constitutional provisions. However, the adherence to the literal meaning of words might lead to a lack of flexibility and the requisite ‘societal progressive adjustability’.⁵¹

This is the reason Justice Dipak Misra mentions in the judgment that a bird’s eye view⁵² is important in order to observe how the American theorists and academicians have approached the science of constitutional interpretation. An interesting observation over here is the usage of the word ‘science’, which shows that maybe Justice Misra had in his mind certain checkboxes or criteria which would act as parameters in order to bring certain objectivity in the process of providing constitutional interpretation.

Justice Misra also elaborates the fact that the principles of constitutional interpretation occupy a prime place in the method of adjudication. There exist two methods of reading and interpreting the Constitution - *originalist* and *living tree doctrine*. The *originalist* school is of the opinion that the provisions of the Constitution should be interpreted as it was understood

⁵⁰ CARDOZO, THE NATURE OF JUDICIAL PROCESS, YALE UNIVERSITY (1921).

⁵¹ BODENHEIMER, EDGAR, JURISPRUDENCE – THE PHILOSOPHY AND METHOD OF THE LAW, HARVARD UNIVERSITY PRESS (1974).

⁵² Para 134, *supra* note 11.

at the time of the framing of the Constitution, while being unmindful of the circumstances at the time when it was subsequently interpreted. On the other hand, the *living tree doctrine* prescribes that the constitutional provisions should be interpreted in the light of contemporaneous needs, experiences, and knowledge.⁵³

Justice Misra observed that *our Constitution is an organic and living document and the provisions should be interpreted to meet and cover the changing conditions of social and economic life*.⁵⁴

Justice Chandrachud, in his separate opinion,⁵⁵ observed that each provision, when placed in the wide canvas of constitutional values can lead to a true understanding of the text. To perceive the Constitution as a mere legal document would thereby be a huge injustice as it is a political document that provides a blueprint for democratic governance. The legislative entries are to be interpreted in a broad or liberal manner consistent with the widest possible meanings.

The room for discretion in the process of constitutional interpretation allows the judges to come up with methods that not only result in solving the disputes but also are in consonance with the spirit of the Constitution and constitutional theory, acting as an important tool in the entire process. Moreover, it reminds the judges that the Constitution was never intended to be a rigid and obstinate document and the concepts present in it are supposed to evolve as per the needs and demands of the situation.

Lastly, it is also important for the courts to take into account the constitutional culture while giving meaning to the provisions to reflect the purpose and objective of the Constitution. ‘Constitutional Culture’ can be defined as a set of norms and practices that breathe ‘life’ into the words of the Constitution.⁵⁶ The State and the Sovereign usually cultivate the same in the populace, but the Courts also have to be pragmatic in their approach, for fostering the same.

⁵³ State v Superior Court 103 Ariz. 208 (1968).

⁵⁴ Para 163, *supra* note 11.

⁵⁵ Para 17, *supra* note 11 (Chandrachud J’s Opinion).

⁵⁶ Mazzone, J. (2005), *The Creation of a Constitutional Culture*, 40 (4), TULSA LAW REVIEW, 671-698.

This can also be done while keeping in mind certain parameters that have been given by various political theorists. The paper would focus on two theorists in this regard – Philip Bobbitt & Richard H. Fallon. After analysing their theory in brief, would try to identify the same in the *NCT of Delhi*⁵⁷ judgment.

The reason for choosing these theories is that choosing one out of the two ways of reading the Constitution – *originalist* and *living tree*⁵⁸ method has both merits and demerits associated with it, thereby a more holistic approach should be taken to understand the complete spirit of the Constitution. The two scholars provided for more holistic methodologies. In layman terms, their methods tick off the most items in the ‘checklist’ and make the entire process objective in nature rather than leaving it to the judges for applying their subjective discretion.

2. Bobbitt’s Modalities & their application

Philip Bobbitt,⁵⁹ in his seminal work on the nature of constitutional theory, came up with six modalities, i.e., the ways in which legal propositions are characterized as true from a constitutional perspective. These are – *historical* (relying on the intentions of the framers and drafters of the constitution), *textual* (looking to the meaning of the words of the Constitution), *structural* (inferring rules from the relationships that the Constitution mandates among the structural setup), *doctrinal* (applying rules by precedent), *ethical* (deriving rules from the moral commitments of the ethos reflected in the Constitution) and *prudential* (seeking to balance the costs and benefits).

The Constitution as well as the Division Bench highlighted the importance of constitutional morality and theories in their respective judgments. Further, the emphasis on various modalities can also be observed throughout the two judgments. Firstly, the court analysed the entire dispute by looking at the *historical*⁶⁰ background of Delhi as to how it became the capital in the year 1911 up to the insertion of Article 239 AA in the Constitution. The court went into the

⁵⁷ Both the Constitution Bench & the Division Bench.

⁵⁸ Miguel Schor, *Contextualizing the Debate Between Originalism & Living Constitution*, LEGAL STUDIES RESEARCH PAPER SERIES, Drake University (12-29).

⁵⁹ PHILLIP BOBBITT, THE MODALITIES OF CONSTITUTIONAL ARGUMENT, CONSTITUTIONAL INTERPRETATION 12–22 (1991).

⁶⁰ Para 15, *supra* note 32.

entire Part A, B, C, D differentiation which was followed by the differentiation based on states and Union Territory.

As far as the *textual modality* is concerned, the judgments focused on the term ‘aid and advise’ used in Article 239 AA (4) in order to arrive at the power vested with the LG and it was held that LG did not possess any individual power and has to act on the ‘aid and advice’ of the council of ministers.⁶¹

The *structural modality* involved the court going into elaborate discussions about the federal structure⁶² which is provided in our Constitution and the same was supported by the *doctrinal modality* by relying upon certain important precedents in order to answer the questions about constitutional interpretation. For instance, the court cited Para 12 of *Ram Jawaya Kapur*⁶³ while talking about the doctrine of separation of powers with respect to the legislature, executive, and judiciary –

“The Indian Constitution has not indeed recognized the doctrine of separation of powers in its absolute rigidity but the functions of the different parts or branches of the Government have been sufficiently differentiated and consequently it can very well be said that our Constitution does not contemplate assumption, by one organ or part of the State, of functions that essentially belong to another. The executive indeed can exercise the powers of departmental or subordinate legislation when such powers are delegated to it by the legislature.”

On coming to *ethical modality*, the Court, while referring to the Balakrishna Committee Report⁶⁴ observed the importance which the National Capital and why the framers of the Constitution aimed at keeping the powers vested in the hands of the Union regarding key matters of the State list and why full Statehood was not granted to Delhi. In fact, relying on the *ethical modality* itself, Delhi was granted *sui generis*⁶⁵ status.

⁶¹ Para 284, *supra* note 32.

⁶² Para 16, *supra* note 11.

⁶³ *Rai Sahib Ram Jawaya Kapur And Ors. vs The State Of Punjab*, AIR 1955 SC 549.

⁶⁴ Para 16, *supra* note 11.

⁶⁵ Para 207, *supra* note 32.

Lastly, in relation to *prudential modality*, the best example is the division bench's judgment in which Justice Sikri reads the term 'Government' or 'Appropriate Government' in statutes like the Electricity Act and Delhi Stamp Rules, but does not read the same in CrPC and Commission of Inquiry Act. In fact, for balancing the costs and benefits, he even excludes 'State Public Services' from the ambit of the Delhi Legislature even though it was a part of the state list and only *land, police and public order* were excluded from the ambit of Delhi Legislature as per Article 239AA. The argument which was agreed upon by Justice Sikri was that since Delhi is not a state, it cannot have a State Public Service Commission and only the State Public Service Commission can decide with respect to the postings and transfer of the State Public Service officials.⁶⁶

3. Fallon's Theory & Application

Professor Richard H. Fallon⁶⁷, identified five different aspects that should be taken into account by the judges, which are: –

- i. Arguments from the plain, necessary or meaning of the constitutional text
- ii. Arguments about the intent of the framers
- iii. Arguments of constitutional theory that explain either particular provisions or constitutional text as a whole
- iv. Arguments based on judicial precedent
- v. Value arguments that assert claims about justice and social policy

Fallon insists that judges should play the role of practical lawyers⁶⁸ and try to find workable solutions to the institutional, structural and political difficulties. It is the duty of the Supreme Court to not only determine the general moral principles but to implement them as well. This can be seen in application in the *NCT of Delhi* case, wherein not only the five considerations were taken into account by relying on arguments from plain text, argument from original intent, constitutional theory and judicial precedent but the Constitutional Bench of the Supreme Court first decided the moral principles and interpretation of the Constitution and then subsequently the division bench was set up in order to provide for the implementation of the same.

⁶⁶ Para 86, *supra* note 32.

⁶⁷ Fallon, 'A Constructivist Coherence Theory of Constitutional Interpretation', Vol.100 No. 6 HARVARD LAW REVIEW (April 1987).

⁶⁸ FALLON, 'IMPLEMENTING THE CONSTITUTION', HARVARD UNIVERSITY PRESS (2001).

Fallon also provides for doctrinal rules and texts which are essentially the judicial precedents, which are also covered in both the judgments. Certain elements of Fallon and Bobbitt are overlapping but essentially, the judgments by the Constitution Bench as well as the Division bench encapsulated the discussions around the constitutional theory in a holistic manner.

Conclusion

The Constitution Bench judgment can be understood as a normative judgment that did not decide on the practical application of Article 239AA. It is therefore difficult to show glaring discrepancies in them, as much as it is possible to see them in the judgment of the division bench. Justice Sikri, for instance, could not have arrived at the conclusion that he did, if he had relied on the interpretation of the Constitution Bench. Every point that was decided by Justice Sikri could be given two interpretations, in the favour of both the centre as well as the government of NCT Delhi.

The judgments talk about certain important constitutional values but do not list or carve out the pragmatic application of the same. The pronouncements are so vague that they do not place any significant restriction on the powers of the Union. This has failed to put an end to the administrative chaos. A recent example being of the Covid19 pandemic where even though 'Health' is a state list subject, the LG passed orders that had an overriding effect on the orders of the Delhi Government and led to a lot of maladministration. These orders were subsequently reversed.⁶⁹ This could have been avoided, if only the Supreme Court had been clearer and had not given a vague judgment.

In addition to that, the division bench highlighted a conundrum in itself wherein Justice Bhushan stated that the Constitution Bench has decided upon the issues in a 'general manner' and that he can ignore the same and can express his own position with respect to the law. Justice Sikri also changed his stance from the Constitution Bench's judgment on certain issues and this is ironical as he himself had signed on that judgment. This shows a lack of clarity of both

⁶⁹ Press Trust of India, '*Delhi LG orders mandatory 5-day institutional quarantine*', FIRSTPOST, (December 31, 2020), <https://www.firstpost.com/health/delhi-l-g-anil-baijal-orders-mandatory-5-day-institutional-quarantine-for-covid-19-cases-under-home-quarantine-aap-calls-decision-arbitrary-8504271.html>.

the judges regarding the original judgment rendered by the constitution bench and highlights an interesting situation, which can be a terrible precedent for the future. There has to be a common yard-stick in place based on which the judges should approach matters pertaining to constitutional interpretation.

Further, the entire scheme of the decision-making reeks of judicial delay. The notifications and circulars that led to these disputes were issued in the year 2015, the Delhi High Court gave its judgment in 2016⁷⁰ and after adjournments through November 2016 – January 2017, the division bench of the Supreme Court referred the matter to the Constitution Bench which took nine months in its hearing and concluded in December 2017.

The Constitution bench took another eight months in delivering its judgment and delivered the same in July 2018. The division bench then held various hearings throughout the months of August – November 2018, in order to decide on the modalities of certain issues, however, when the judgment was given in February 2019, there was a split regarding the issue of ‘services.’ The three-judge bench assembled to decide on the same but there has not been a substantive hearing so far. The COVID pandemic further delayed the scheme of things. As on the date of writing, the last hearing was made on 18 February 2020.

The disputes started when the AAP government came to power, the first time with a complete majority and continued till the next Delhi Assembly state elections wherein AAP emerged victorious again. One of the Supreme Court’s key functions is to resolve constitutional disputes and to settle disputes between different federal units in order to ensure the smooth functioning of the Constitution. But the decisions give an impression of a strong centre, which is highly problematic.

Another prominent delay was also caused in the matter of Aadhaar, where the constitutional challenges were filed in the year 2012 itself but the judgment was only delivered finally came in 2018, which gave a ‘*Hobson’s choice*’ to the people to opt-out of the program if they wished

⁷⁰ Soibam Singh, ‘*LG is the boss in Delhi*’, *Delhi HC tells AAP Govt*, HINDUSTAN TIMES, (December 31, 2020), <https://www.hindustantimes.com/delhi-news/court-blow-to-aap-all-delhi-decisions-have-to-go-through-l-g/story-9fB7KV9NgsjgaP9TQyENiJ.html>.

but in reality, people could not, as Aadhaar was considered mandatory for availing the subsidies and direct benefits programs by the Supreme Court. This was because there existed a strong Centre and the legislative power was tilted in its favour. There were no checks and balances in place to curb the illegal data collection carried out by the Government before any legal validity was granted to Aadhaar.

Thereby, what appears to be a solution for the federal units and a proper interpretation of the constitutional text, is vague, incoherent and shifts the balance of power to the pavilion of the centre in reality. The same has wide political ramifications as was observed in the Delhi Riots case wherein a lot of tussles took place with respect to the appointment of the Public Prosecutor.⁷¹ This highlighted how helpless the Delhi Government really is; this further affects the system of checks and balances, which the framers intended would have primary importance while drafting the Constitution.

Suggestions

The three limbs of the State – *the legislature, the executive and the judiciary* must remain true to the Constitution by upholding the trust reposed in them by the Constitution. The decisions taken by these functionaries should not only be reasonable but also acceptable as per the constitutional norms. The decisions must be ‘constitutionally objective’ and should be in synchronisation with the spirit of the Constitution. The Constitution is the supreme instrument providing for the system of checks and balances, that establishes the trust which is to be showcased by all constitutional functionaries.

Thereby, when the Supreme Court delayed the proceedings of matters pertaining to the administration and functioning of one of the key federal units of our federal structure i.e., the NCT of Delhi, it gave a strong impression of an evasion of judicial duties and responsibilities.

⁷¹ Ashish Khetan, *Delhi Riots – LG’s Order on Appointment of Prosecutor Smacks of Bad Faith*, THE WIRE, (December 31, 2021), <https://thewire.in/government/delhi-riots-lgs-order-on-appointment-of-prosecutors-smacks-of-bad-faith-immorality>.

On the surface, both the judgments given by the Supreme Court seem to be balanced, adhering to constitutional principles, theory, morality and suggest a solution that can improve the federal structure, while establishing a strong system of ‘checks and balances.’ However, a closer observation would communicate the fact that the evasion, delay and vagueness on behalf of the Supreme Court, ended up putting more restraints on the federal unit i.e., the Government of NCT of Delhi and lesser restraints on the Union. This damaged not only the system of checks and balances but also damaged the overall constitutional scheme.

There should be a collaborative federal structure wherein harmonious co-existence and interdependence amongst the Union and State Governments should prevail. The difference of opinions between the Lieutenant Governor and the Council of Ministers should be solved, keeping in mind the standards of constitutional trust and morality and the principle of collaborative federalism, maintaining the constitutional balance.

It is correct that the Union of India has executive powers with respect to the NCT of Delhi relating to certain subjects in the State List but what also needs to be kept in mind is that Article 239AA provides for the Delhi Legislative Assembly the power to make laws as well. The Lieutenant Governor has not been entrusted with any independent decision-making power and has to either act on the ‘aid and advice’ of Council of Ministers or can make a reference to the President, if not satisfied with the recommendation. However, he is bound to implement the decision given by the President on any reference, that has been made to the President by the Lieutenant Governor.

The Lieutenant Governor should therefore not act in a mechanical or strict manner, without due application of mind. Rather, he should solve the difference of opinions with the Council of Ministers, if any, with affirmative constructionism and sagacity. There should not be any undue obstruction caused by him in the governance of the NCT of Delhi.

The Constitution has been carefully drafted to ensure that there is no scope for any form of ‘absolutism’ and the constitutional functionaries should also cultivate this understanding by exhibiting the same in their public functioning.

Towards the end, these words which were spoken by Dr. Ambedkar in the Central Hall of the Parliament (among the greatest speeches made in the Indian Parliament) on 25 November 1949, a day before the Constitution was formally adopted, pave way for an interesting after-thought:⁷²

“I feel, however good a Constitution may be, it is sure to turn out bad because those who are called to work it, happen to be a bad lot. However bad a Constitution may be, it may turn out to be good if those who are called to work it, happen to be a good lot. The working of a Constitution does not depend wholly upon the nature of the Constitution. The Constitution can provide only the organs of State such as the Legislature, the Executive and the Judiciary. The factors on which the working of those organs of the State depend are the people and the political parties they will set up as their instruments to carry out their wishes and their politics.”

⁷² Dr BR Ambedkar, ‘Grammar of Anarchy’ Speech, 1949.