

“Asymmetrical Symmetricalism” of Indian Constitutional Structure and Practice: Note on Govt. of National Capital Territory (“NCT”) of Delhi v. Union of India

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Title: “Simmetrismo asimmetrico” della struttura e della prassi costituzionale Indiana: una nota su *Govt. of National Capital Territory (“NCT”) of Delhi v. Union of India*

Keywords: Lieutenant Governor; Governor; federalism; cooperative federalism; symmetrical federalism.

1. – The then Lieutenant Governor of NCT of Delhi (in 2015) with active help of the Central Government (Government of India) was creating executive hurdles in the functioning of the elected government of the NCT of Delhi. The Lieutenant Governor was not sending files to the Chief Minister on subjects related to police (entry 2), public order (Entry 1) and land (Entry 18) (State List, Schedule VII, Constitution of India, on which the states have the power to legislate; reserved subjects of the Lieutenant Governor for the NCT of Delhi); his unacceptance of the raise in circle rates of agricultural land in the NCT decided by the government of NCT; and his opposition to the setting up of the Commission of enquiry by the Government of NCT to investigate the alleged CNG fitness scam by the previous government; among other things. This affected the routine functioning of the elected government of the NCT of Delhi.

The appellants, i.e., the elected government of NCT of Delhi contended that it is a full-fledged state within the meaning of the Constitution of India (Art. 239-AA) read with The Government of National Capital Territory of Delhi Act 1991 (GNCTD Act, 1991) of the Parliament along with the Government of National Capital Territory of Delhi Rules, 1993. The Government of NCT of Delhi claimed that as a democratically elected government under the constitution it had full powers to legislate on matters in the State List (where the states have powers to legislate) and Concurrent List (where both the state and the central government have powers to legislate; in cases of conflict the central act prevails over the state act) of Schedule VII of the Constitution of India. The Lieutenant Governor does not have his independent decision-making authority and has to act on the aid and advice of the Council of Ministers of the NCT of Delhi.

On the other hand, the Government of India contended a strict and literal reading of Article 239AA-(4) (giving independent decision making powers to the Lieutenant Governor without the aid and advice of the Council of Ministers of the NCT of Delhi; acting in reference to the Government of India; union executive and

legislative functions coincide here) which would make the elected government of NCT of Delhi redundant and turn it into a Union Territory like any other.

2. – One of the first parameters of a functioning democracy is that of having a representative government based on universal suffrage. The representative form of government has to be present at the union, state and even local levels of governance. In the present case, in the majority judgement was delivered by *Misra, C.J., Sikri and Khanwilkar, JJ.*, in concurrence with *Chandrachud, J. and Bhushan, J.*, where the Constitutional validity of the representative nature of Indian democracy was upheld. There was no dissenting opinion.

In citing its own previous judgement in the case of *State of Bihar and another v. Bal Mukund Sah and others* (AIR 2000 SC 1296) the court held,

“The Constitution of India has embraced the representative model of governance at all levels, i.e. local, State and the Union. Acknowledging the representative form of governance adopted by our Constitution and the elected representatives being the instruments for conveying the popular will of the people, the Court in *State of Bihar and another v. Bal Mukund Sah and others* has observed: ‘[...] [b]esides providing a quasi-federal system in the country and envisaging the scheme for distribution of legislative powers between the State and the centre, it emphasizes the establishment of the rule of law. The form of Government envisaged under a parliamentary system of democracy is a representative democracy in which the people of the country are entitled to exercise their sovereignty through the legislature which is to be elected on the basis of adult franchise and to which the executive namely, the Council of Ministers is responsible. The legislature has been acknowledged to be a nerve centre of the State activities. It is through parliament that elected representatives of the people ventilate people’s grievances”.

For the proper functioning of a democracy there is horizontal distribution of powers, functions and limitations in the form of legislature, executive and the judiciary but there is also a vertical distribution of powers in the union government and the state/union territory/NCT government. There have been attempts at bringing competence at the local levels of governance but it is still falling short of expectations. The separation between the union and the state levels has been made part of the constitutional structure in order to improve "representative governance" through "accessibility and approachability".

For this reason, the court held, “Since responsiveness to the needs and demands of the people is the basis parameter for evaluating the effectiveness of representative governance, it is necessary that elected representatives develop a sense of belonging with their constituents.”

In expounding on Indian constitutional principles, the court held,

“When elected representatives and constitutional functionaries enter their office, they take oath to bear allegiance to the Constitution and uphold the Constitution. Thus, it is expected of them not only to remain alive to the provisions of the Constitution but also to concepts like constitutionalism constitutional objectivity and constitutional trust, etc. The support expressed by the sovereign in the form of votes cannot become an excuse to perform actions which fall foul to the Constitution or are ultra vires. Though the elected representatives are expected to act as instruments of transforming popular will into policies and laws, yet they must do so within the contours of the Constitution. They must display constitutional objectivity as a standard of representative governance, for that is ingrained in the conceptual democratic majority which neither tolerates ideological fragmentation nor encourages any kind of utopian fantasy. It lays stress on realizable constitutional ideologies.”

These constitutional principles can be realised only when coupled with the practice of constitutional morality. And according to the court, the "constitutional morality" could be achieved through the "constitutional impulse" of meeting the standards of "constitutional justness" through "checks and balances", and "constitutional objectivity",

"Constitutional morality, appositely understood, means the morality that has inherent elements in the constitutional norms and the conscience of the Constitution. Any act to garner justification must possess the potentiality to be in harmony with the constitutional impulse. [...] when one shows justness in action, there is no feeling of any grant or generosity. That will come within the normative value. That is the test of constitutional justness which falls within the sweep of constitutional morality. It advocates the principle of constitutional justness without subjective exposition of generosity. [...] Our Constitution, in its grandness, resolutely embraces the theory of 'checks and balances'. This concept of checks and balances, in turn, gives birth to the principle of 'constitutional objectivity'. The Constitution expects the organs of the State adorned by high constitutional functionaries that while discharging their duties, they remain alive to the allegiance they bear to the Constitution. Neutrality as envisaged under the constitutional scheme should guide them in the performance of their duties and functions under the Constitution. This is the trust which the Constitution reposes in them. [...] It can be said without inviting any controversy that the concept of constitutional objectivity has to be equally followed by the Executive and the Legislature as it is the Constitution from which they derive their power and, in turn, the Constitution expects them to be just and reasonable in the exercise of such power."

And the parameters of "checks and balances", and "constitutional objectivity" is achieved through "constitutional governance" and "collective responsibility" which can be achieved by institutional trust between the horizontal branches of government which in the present case included the Lieutenant Governor as the executive on the one hand and the elected legislature of NCT of Delhi on the other. Such collective responsibility and institutional trust would include the concept of "aid and advice" of the Council of Ministers.

The court held,

"The Constitution of India, as stated earlier, is an organic document that requires all its functionaries to observe, apply and protect the constitutional values spelt out by it. These values constitute the constitutional morality. This makes the Constitution of India a political document that organizes the governance of Indian society through specific functionaries for requisite ends in an appropriate manner. The constitutional culture stands on the fulcrum of these values. The element of trust is an imperative between constitutional functionaries so that Governments can work in accordance with constitutional norms. It may be stated with definiteness that when such functionaries exercise their power under the Constitution, the sustenance of the values that usher in the foundation of constitutional governance should remain as the principal motto. There has to be implicit institutional trust between such functionaries. [...] The principle of collective responsibility is of immense significance in the context of 'aid and advice' of the Council of Ministers. The submission of the learned counsel of the appellant is that when after due deliberation between the Chief Minister and the Council of Ministers a decision is taken, but the same is not given effect to because of Interdiction of the Lieutenant Governor, the value of collective responsibility that eventually gets transformed into a Cabinet decision stands absolutely denuded. It is emphatically submitted that if the collective responsibility of the Council of Ministers is not given the expected weightage, there will be corrosion of the essential feature of the representative government."

While discussing the concept of federalism in India, without giving a definitive conceptual answer of whether it was quasi-federal or absolutely federal, the court laid emphasis on its ontological significance in practical governance by naming it "collaborative federalism" or "pragmatic federalism".

To quote,

“[i]n common parlance, federalism is a type of governance in which the political power is divided into various units. These units are the Centre/Union, States and Municipalities. Traditional jurists like Prof. K.C. Wheare lay emphasis on the independent functioning of different governing units and, thus, define federalism as a method of dividing powers so that the general/central and regional governments are each within a sphere co-ordinate and independent. As per Prof. Wheare "the systems of Government embody predominantly on division of powers between Centre and regional authority each of which in its own sphere is coordinating with the other independent as of them, and if so is that Government federal? [...] However, modern jurists lay emphasis on the idea of interdependence and define federalism as a form of government in which there is division of powers between one general/central and several regional authorities, each within its sphere interdependent and co-ordinate with each other. [...] Both the concepts, namely, democracy, i.e., rule by the people and federalism are firmly imbibed in our constitutional ethos. Whatever be the nature of federalism present in the Indian Constitution, whether absolutely federal or quasi-federal, the fact of the matter is that federalism is a part of the basic structure of our Constitution as every State is a constituent unit which has an exclusive Legislature and Executive elected and constituted by the same process as in the case of the Union Government. The resultant effect is that one can perceive the distinct aim to preserve and protect the unity and the territorial integrity of India. This is a special feature of our constitutional federalism. [...] The idea behind the concept of collaborative federalism is negotiation and coordination so as to iron out the differences which may arise between the Union and the State Governments in their respective pursuits of development. The Union Government and the State Governments should endeavour to address the common problems with the intention to arrive at a solution by showing statesmanship, combined action and sincere cooperation. In collaborative federalism, the Union and the State Governments should express their readiness to achieve the common objective and work together for achieving it. In a functional Constitution, the authorities should exhibit sincere concern to avoid any conflict. [...] It is useful to state that pragmatic federalism has the inbuilt ability to constantly evolve with the changing needs and situations. It is this dynamic nature of pragmatic federalism which makes it apt for a body polity like ours to adopt. The foremost object of the said concept is to come up with innovative solutions to problems that emerge in a federal setup of any kind.”

The court emphasized on "purposive interpretation" of the constitution rather than "literal interpretation" to infuse life into the constitutional document forming India's "constitutional culture",

“[i]t is imperative that judges must remain alive to the idea that the Constitution was never intended to be a rigid and inflexible document and the concepts contained therein are to evolve over time as per the needs and demands of the situation. Although the rules of statutory interpretation can serve as a guide, yet the constitutional courts should not, for the sake of strict compliance to these principles, forget that when the controversy in question arises out of a constitutional provision, their primary responsibility is to work out a solution. [...] It needs no special emphasis that the reference to some precedents has to be in juxtaposition with

other concepts and principles [...] the literal rule is not to be the primary guiding factor in interpreting a constitutional provision, especially if the resultant outcome would not serve the fructification of the rights and values expressed in the Constitution. In this scenario, the theory of purposive interpretation has gained importance where the courts shall interpret the Constitution in a purposive manner so as to give effect to its true intention. [...] The term 'constitutional culture' is to be perceived as set of norms and practices that breathe life into the words of the great document. It is the conceptual normative spirit that transforms the Constitution into a dynamic document. It is the constitutional culture that constantly enables the words to keep in stride with the rapid and swift changes occurring in the society."

Bhushan, J. and *Chandrachud, J.*, both gave separate but concurring judgements. They both reiterated the principles explained by the majority judges in their own manner. Some additional enumerated points, especially on the constitutional provisions, as identified by *Chandrachud, J.*, deserve special mention.

On the *powers, functions and limitations* under Article 239 AA, he writes,

"By adopting Article 239AA, Parliament as a constituent body, provided Delhi with a special status by creating constitutionally entrenched institutions of governance. Article 239AA mandates the existence of a legislative assembly and Council of Ministers to govern the affairs of the National Capital. [...] The provisions of Article 239AA represent a clear mandate of the Constitution to provide institutional governance founded on participatory, representative and responsive government. These features emerge from the provisions of Article 239AA which: (i) require direct election to the legislative assembly from territorial constituencies; (ii) engage the constitutional functions of the Election Commission of India under Articles 324, 327 and 329; (iii) confer law making authority on the legislative assembly in respect of matters governed by the State List (save for excepted matters) and the Concurrent List; (iv) mandate the collective responsibility of the Council of Ministers to the legislative assembly; and (v) provide (in the substantive part of Article 239AA(4)) that the Lieutenant Governor shall act on the aid and advise of the Council of Ministers headed by the Chief Minister. In adopting these provisions through an amendment, the Constitution has recognized the importance of the cabinet form of government to govern the affairs of Delhi. [...] The distribution of legislative power in Article 239AA is indicative of the predominant role assigned to Parliament as a legislative body. This emerges from: (i) the position that Parliament is empowered to legislate on subjects falling in the State List as well as the Concurrent List; and (ii) the carving out of the three subjects of public order, police and land (Entries 1, 2 and 18 of the State List) and of offences, jurisdiction of Courts and fees (Entries 64, 65 and 66 in so far as they relate to the previous entries), all of which are within the exclusive legislative domain of Parliament. Principles of repugnancy govern any inconsistency between laws enacted by the legislative assembly and those by Parliament and the laws of Parliament are to prevail unless a Presidential assent has been received. [...] The executive power of the government of NCT is co-extensive with the legislative power. The principle of aid and advice under clause 4 of Article 239AA extends to areas where the Lieutenant Governor exercises functions in relation to matters where the legislative assembly has the power to make laws. In consequence, those matters on which the legislative assembly does not have the power to enact legislation are not governed by the principle of aid and advice. Similarly, the Lieutenant Governor is not subject to aid and advice on matters where he is required to exercise his own discretion by or under any law."

Even though Delhi as National Capital Territory remains a Union territory under Part VIII of the Constitution, the 69th amendment (1991) to the constitution introduced Article 239AA as an exercise of its constituent power. Such an amendment had "sought to bring stability and permanence to the democratic governance of the

NCT” which “could not be constrained” by constitutional practice prior to 69th amendment. He adds, “An amendment which enhances the basic features of the Constitution must bear an interpretation which will fulfil its true character.” The powers and functions of a Lieutenant Governor is different from that of the Governor of a state, but the powers and functions of the Lieutenant Governor of NCT of Delhi is another sub-category due to the constitutional amendment,

“The Administrator appointed by the President under Article 239(1) is designated, with reference to the NCT as its Lieutenant Governor. The substantive source of power to appoint the Lieutenant Governor arises from Article 239 of the Constitution. While Article 239(1) indicates that the administration of a Union territory is by the President, the opening words of the provision (“Save as otherwise provided by Parliament by law”) indicate that the nature and extent of the administration by the President is as indicated in the law framed by Parliament. Moreover, the subsequent words of the provision (“to such extent as he thinks fit”) support the same position.”

Under Clause 7(a) of Article 239AA, the Parliament enacted the GNCTD Act, 1991 and the President made the Transaction of Business Rules for the NCT as authorized under it. *Chandrachud, J.* states,

“Section 41 of the GNCTD Act indicates that: (i) in matters which lie outside the legislative powers entrusted to the legislative assembly and where there has been an entrustment or delegation of functions by the President to the Lieutenant Governor under Article 239; and (ii) on matters where the Lieutenant Governor exercises his own discretion by or under any law, he is not subject to the aid and advice of the Council of Ministers. Section 44 of the GNCTD Act indicates that aid and advice govern areas other than those specified in Section 44(1)(i).”

On the "transaction of business rules", he writes,

“Under the Transaction of Business Rules, the Lieutenant Governor must be kept duly apprised on all matters pertaining to the administration of the affairs of the NCT. The Rules indicate the duty of the Council of Ministers to inform the Lieutenant Governor right from the stage of a proposal before it. The duty to keep the Lieutenant Governor duly informed and apprised of the affairs of the NCT facilitates the discharge of the constitutional responsibilities entrusted to him and the fulfilment of his duties under the GNCTD Act, 1991 and the Transaction of Business Rules. While the provisions contained in the Transaction of Business Rules require a scrupulous observance of the duty imposed on the Council of Ministers to inform the Lieutenant Governor on all matters relating to the administration of the NCT, neither the provisions of Article 239AA nor the provisions of the Act and Rules require the concurrence of the Lieutenant Governor to a decision which has been taken by the Council of Ministers. Rule 14 of the Transaction of Business Rules in fact indicates that the duty is to inform and not seek the prior concurrence of the Lieutenant Governor. However, in specified areas which fall under Rule 23; it has been mandated that the Lieutenant Governor has to be apprised even before a decision is implemented.”

On the concept of “State” and “Union Territory” within the Union of India, he writes,

“Since the decision of this Court in *Kanniyan* (1968 AIR 637) and right through to the nine-judge Bench decision in *NDMC*, it is a settled principle that the expression ‘state’ in Article 246(4) will not include a Union territory and that the definition contained in the General Clauses Act will not apply having regard to the subject and context of the provision. Decisions of this Court have applied the subject and context test to determine whether the expression ‘state’ in other provisions of the Constitution and in statutory provisions would include a Union territory. [...] The use of the expression “State” in a particular provision is not dispositive of whether or

not its application would stand excluded in relation to a Union territory. The outcome is essentially based on the subject and context in which the word has been used. [...] While giving meaning and content to the proviso to Article 239AA(4), it is necessary to harmonise two significant precepts: (i) The Constitution has adopted a cabinet form of government for the Union territory of Delhi by creating institutions for the exercise of legislative power and an executive arm represented by the Council of Ministers; and (ii) Vital national interests are implicated in the governance of the National Capital Territory. The doctrines of aid and advice and of collective responsibility give effect to point (i) while the empowerment of the Lieutenant Governor to refer any matter on which there is a difference of opinion to the President is a reflection of point (ii)."

On the issue of the Lieutenant Governor referring a matter to the President of India, he writes,

"While it may not be possible to make an exhaustive catalogue of those differences which may be referred to the President by the Lieutenant Governor [...]. If the expression 'any matter' were to be read as 'every matter', it would lead to the President assuming administration of every aspect of the affairs of the Union territory, thereby resulting in the negation of the constitutional structure adopted for the governance of Delhi. [...] Before the Lieutenant Governor decides to make a reference to the President under the proviso to Article 239AA(4), the course of action mandated in the Transaction of Business Rules must be followed. The Lieutenant Governor must, by a process of dialogue and discussion, seek to resolve any difference of opinion with a Minister and if it is not possible to have it so resolved to attempt it through the Council of Ministers. A reference to the President is contemplated by the Rules only when the above modalities fail to yield a solution, when the matter may be escalated to the President [...]. 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. [...] The provisions of Article 239AA(4) indicate that the Lieutenant Governor must either act on the basis of aid and advice or, where he has reason to refer the matter to the President, abide by the decision communicated by the President. There is no independent authority vested in the Lieutenant Governor to take decisions (save and except on matters where he exercises his discretion as a judicial or quasi-judicial authority under any law or has been entrusted with powers by the President under Article 239 on matters which lie outside the competence of the Government of NCT); and [...] The proviso to Article 239AA 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. Given the complexities of administration, and the unforeseen situations which may occur in future, it would not be possible for the court in the exercise of judicial review to exhaustively indicate the circumstances warranting recourse to the proviso. In deciding as to whether the proviso should be invoked the Lieutenant Governor shall abide by the principles which have been indicated in the body of this judgment."

3.- This is a very exhaustive judgement running into more than 500 pages (535 to be exact), on the constitutional relationship between the National Capital Territory of Delhi and the Union of India by the highest court of India (both as court of appeal as well as the Constitutional Court), the Honourable Supreme Court of India located in New Delhi. It has been a decision by the constitutional bench (at least 5 judges of the Supreme Court deciding on a constitutional matter referred to by the Chief Justice, Art.145 (3), Constitution of India), with five honourable judges of the

Supreme Court led by the Honourable Chief Justice of India. The Chief Justice (Dipak Misra) along with two other judges (A.K.Sikri, A.M.Khanwilkar) gave the leading judgment with Justice D.Y. Chandrachud and Justice Ashok Bhushan giving their separate but concurring opinions. The case arose due to constant administrative wrangles between the elected government of the NCT of Delhi and its Lieutenant Governor. The judgement was delivered on July 4th, 2018.

Delhi represents in many senses the classical capital with all the three major branches of government: the legislature, the executive and the judiciary being centred there. Just like the political-historical imperatives for Rome being the capital of Italy (CHIOLA, G., *Roma Capitale: Percorsi storici e giuridici*, Bologna: Il Mulino, 2012, pp. 143-147), Delhi being the ancient Indraprastha and at times being the imperial centre specially right before the British rule along with its more central-northern military focus became the imperative for being made the capital. The quintessential colonial city, the second city of the empire, namely Calcutta today's Kolkata lost out to Delhi in 1911 and now contends as just the "cultural capital" of India. Mumbai (earlier Bombay) like Milan for Italy (CHIOLA, G., *Roma Capitale: Percorsi storici e giuridici*, Bologna: Il Mulino, 2012, p. 143) is the financial capital of India with the central bank, the Reserve Bank of India being located there. And Patna; the ruined, filthy and unorganised city of today; has never been in the reckoning even though it was the imperial capital in the ancient times for more than a millennium. Without such a historical-political baggage, though reminiscent of colonial violence, South Africa could locate its three branches of the government in three different cities, though again having a single capital. Spreading capital functions across a nation is an interesting proposal but administratively and bureaucratically extremely difficult to implement and there is no precedent which might instructively help. (CHIOLA, G., *Roma Capitale: Percorsi storici e giuridici*, Bologna: Il Mulino, 2012, 143-147).

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3.1. – Delhi became the capital of British India in 1911 and went through various constitutional phases: (1) governed by the Chief Commissioner's office and called as the Chief Commissioner's province; centrally administered by the Government of India Act 1919 and Government of India Act 1935; (2) with the coming of the Constitution of India on 26th January, 1950, Delhi became part of C State, 'Government of Part C States Act, 1951' was enacted providing, inter alia, for a Legislative Assembly in Delhi which could legislate on List II of VIIth Schedule barring few exceptions; (3) on 19th October, 1956 the Constitution of India (Seventh Amendment) Act, 1956 was passed to implement the provisions of the States Re-organization Act, 1956 which did away with Part A, B, C and D States and only two categories, namely, States and Union Territories remained and Delhi became a Union Territory to be administered by an administrator appointed by the President. The Legislative Assembly of Delhi and the Council stood abolished; (4) 1987 Balakrishnan Committee recommended that Delhi should remain a Union Territory but there must be an elected Legislative Assembly and Council of Ministers with requisite powers and functions meeting the democratic aspirations of people; (5) the Parliament, in exercise of its constituent power, amended the Constitution by the Constitution (Sixty-ninth Amendment) Act in the year 1991 and inserted Articles 239AA¹ and 239AB in the Constitution providing constitutionally protected status, powers and functions to the National Capital Territory (NCT) of Delhi.

¹ **Article 239AA {Special provisions with respect to Delhi}**

1. As from the date of commencement of the Constitution (Sixty ninth Amendment) Act, 1991, the Union territory of Delhi shall be called the National Capital Territory of Delhi (hereafter in this Part referred to as the National Capital Territory) and the administrator thereof appointed under article 239 shall be designated as the Lieutenant Governor.

3.2. – The principle of representative government is enshrined in the constitution and its functioning at all levels of government. It is the Westminster model with an elected parliament acting as the legislature headed by a council of ministers from the leading party/coalition along with an elected President forming the executive. The Balakrishnan Committee vindicated this in its recommendations and it became the precipitant for constitutional amendment allied with parliamentary act (1991) and rules (1993) for the functioning of the National Capital Territory (NCT) of Delhi.

Constitutional morality demands respect for constitutional functionaries not just in letter but also in spirit thus vindicating the functioning of the elected government of NCT of Delhi and not stalling all efforts at governance because its powers and capacities are circumscribed. The circumscription is to be used judiciously and only when absolutely required. At each stage of decision making the Lieutenant Governor is constitutionally and legally apprised of matters of governance making it constitutionally prudent for him to exercise his veto judiciously. These inherent checks and balances provided not just in Art 239AA but also coupled with the 1991 Act and 1993 Rules establish constitutional objectivity guiding the work of constitutional functionaries. This vindicates the idea of collective responsibility in a parliamentary democracy where the executive acts on the 'aid and advice' of the council of ministers.

2.

a. There shall be a Legislative Assembly for the National Capital Territory and the seats in such Assembly shall be filled by members chosen by direct election from territorial constituencies in the National Capital Territory.

3.

a. Subject to the provisions of this Constitution, the Legislative Assembly shall have power to make laws for the whole or any part of the National Capital Territory with respect to any of the matters enumerated in the State List or in the Concurrent List in so far as any such matter is applicable to Union territories except matters with respect to Entries 1, 2 and 18 of the State List and Entries 64, 65 and 66 of that List in so far as they relate to the said Entries 1, 2 and 18.

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

c. If any provision of a law made by the Legislative Assembly with respect to any matter is repugnant to any provision of a law made by Parliament with respect to that matter, whether passed before or after the law made by the Legislative Assembly, or of an earlier law, other than a law made by the Legislative Assembly, then, in either case, the law made by Parliament, or, as the case may be, such earlier law, shall prevail and the law made by the Legislative Assembly shall, to the extent of the repugnancy, be void: Provided that if any such law made by the Legislative Assembly has been reserved for the consideration of the President and has received his assent, such law shall prevail in the National Capital Territory: Provided further that nothing in this sub-clause shall prevent Parliament from enacting at any time any law with respect to the same matter including a law adding to, amending, varying or repealing the law so made by the Legislative Assembly.

4. There shall be a Council of Ministers consisting of not more than ten per cent of the total number of members in the Legislative Assembly, with the Chief Minister at the head to aid and advise the Lieutenant Governor in the exercise of his functions in relation to matters with respect to which the Legislative Assembly has power to make laws, except in so far as he is, by or under any law, required to act in his discretion: Provided that in the case of difference of opinion between the Lieutenant Governor and his Ministers on any matter, the Lieutenant Governor shall refer it to the President 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.

8. The provisions of article 239B shall, so far as may be, apply in relation to the National Capital Territory, the Lieutenant Governor and the Legislative Assembly, as they apply in relation to the Union territory of Pondicherry, the administrator and its Legislature, respectively; and any reference in that article to "clause (1) or article 239A" shall be deemed to be a reference to this article or article 239AB, as the case may be.

The honourable court went on to add, “while interpreting the provisions of Article 239AA(3)(a) and Article 239AA(4) would reveal that the executive power of the Government of NCT of Delhi is conterminous with the legislative power of the Delhi Legislative Assembly which is envisaged in Article 239AA(3) and which extends over all but three subjects in the State List and all subjects in the Concurrent List and, thus, Article 239AA(4) confers executive power on the Council of Ministers over all those subjects for which the Delhi Legislative Assembly has legislative power.”

The constitution is an *organic document, not rigid and inflexible*, requiring all its functionaries to observe, apply and protect the constitutional values spelt out by it. Such an application is not a mechanical implementation but a prudent and balanced application based on ‘purposive interpretation’. The court said, “the literal rule is not to be the primary guiding factor in interpreting a constitutional provision, especially if the resultant outcome would not serve the fructification of the rights and values expressed in the Constitution”.

Federalism and democracy (with an elected parliament with a council of ministers and an elected president) are part of the *basic structure* of the constitution,

“[a]ccording to this doctrine of basic structure, the amendment power (of the legislature-parliament) is not unlimited; rather, it does not include the power to abrogate or change the identity of the constitution or its basic features [...] Since *Minerva Mills (Minerva Mills Ltd. v. Union of India, AIR 1980 SC 1789)*, the ‘Basic Structure Doctrine’ has been accepted and applied in various other cases, and is now an established constitutional principle in India. It now includes general features of a liberal democracy, such as the supremacy of the Constitution, the rule of law, separation of powers, judicial review, judicial independence, human dignity, national unity and integrity, free and fair elections, federalism and secularism.” (Cf. ROZNAI, Y., *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers*, Oxford University Press, 2017, pp. 42-47).

Collaborative federalism entails “negotiation and coordination so as to iron out the differences which may arise between the Union and the State Governments in their respective pursuits of development”. The court also spoke on pragmatic federalism as “[...] a form of federalism which incorporates the traits and attributes of sensibility and realism. Pragmatic federalism, for achieving the constitutional goals, leans on the principle of permissible practicability”. Therefore, the structure as well as the functioning of the constitution demands ‘federal balance’ and the Supreme Court of India in a classic *autopoietic moment* declared itself to be the “final arbiter and defender of the Constitution”.²

The concepts of constitutionalism, constitutional governance or constitutional trust and morality are not listed out in the constitution as such but are inherent in the various articles of the constitution, its functioning and even in ‘constitutional silences’. An inculcation of this constitutional culture leads to a constitutional renaissance.

3.3. – The NCT of Delhi is neither a “state” nor a “union territory” within the meaning of the constitutional scheme and its interpretation. Its competences are not as wide as that of a full-fledged state but not as limited as that of a “union territory”. Within the constitutional scheme (Art. 239-AA) read with 1991 Act and 1993 Rules, the government of NCT of Delhi did have a victory in respect of its constitutional and administrative functioning on an everyday basis. The Government of India’s constitutional competences remain unaffected on the other hand but their nagging

² Based on my discussion of the concept with my maestro Prof. (Dr.) Jörg Luther, full professor, UNIUPO, Alessandria, Italy. Unfortunately, and tragically, we lost him March 3, 2020.

interference remains clipped. The Supreme Court of India again reasserted its supremacy despite there being a strong central government by holding that democracy and federalism are the basic structures of the constitution and that it itself is the final authority deciding on issues of the constitution. Additionally, the Supreme Court has not (and even cannot) list out the exact nature (with competence, functions and limitations) of Indian federalism even though the broader principle of federalism is considered to be a part of the basic structure of the constitution. It is the prerogative of the Central Government in the Union Parliament functioning within the competence provided to it in the Indian Constitution to formulate the structure of Indian Federalism.

On Indian federalism, Domenico Amirante writes, "In my opinion, a realistic definition could be "a federal State with centripetal tendencies", indicating the multiple possibilities of the federal system to function alternatively as a more decentralised or centralised system, according to the evolution of historical conditions. This view is also in tune with an idea of federalism described not as a fixed model but as a continuous bargaining process between different levels of government (generally labelled as 'dynamic federalism')." (See: AMIRANTE, D., 'Nation Building Through Constitutionalism: Lessons from the Indian Experience', in *Hong Kong Law Journal*, v. 42, n. 1, 2012, p. 32. As among the senior-most scholars in Europe working on Indian constitution, his most recent work is worth exploring.

For more, See: AMIRANTE, D., *La democrazia dei superlativi. Il sistema costituzionale dell'India contemporanea*, Napoli: ESI, 2019). K.C. Wheare had characterised Indian federalism as quasi-federal based on a strict theoretical formulation of what components shall constitute a federal structure, one being that of a 'contractual federation' where the states came together to give some powers to the union (generally defence, international relations, and communications) like that in U.S., Canada, Australia and Switzerland (apart from having separate constitutions, dual citizenship, separate flag, dual set of court system, bureaucracy and civil services) (WHEARE, K.C., *Federal Government*, Oxford University Press, 1951). Critiquing Wheare, Alexandrowicz explains how even in these 'ideal' prototypes of federal states, there has been far greater unionization/centralization than what was anticipated, whereas in the constitutional structure of India which is definitely and heavily tilted towards the centre, yet it is a *sui generis Indian federalism* which works for itself (ALEXANDROWICZ, C.H., 'Is India a Federation?', in *International & Comparative Law Quarterly*, v. 3, n. 3, 1954, pp. 393-403). Therefore, there are plurality of working federal systems subsuming flexibility and there cannot be one standard format for its structure or functioning ("Indian constitutionalism could be addressed as an example of a 'sui generis pristine Constitution' in the Asiatic scenario. In fact, the Indian Constitution represents an interesting case of a subtle use of many instruments of Western constitutionalism to build up an 'autochthonous document', characterized by a remarkable originality. [...] Indian federal system displaying very peculiar features, like, for instance, a successful policy of inclusion of cultural identities through the creation of the so-called linguistic States. In 65 years, India has nearly doubled the number of States in the attempt of reducing conflicts between regional and ethnical groups and the State with very good results, deserving the label of 'flexible federalism.'" Cf. AMIRANTE, D., and VIOLA, P., 'South Asian Constitutionalism in Comparative Perspective: the Indian "prototype" and some recent borrowings in the 2015 Nepalese Constitution (Chap. 6)', in SINGH, M.P., KUMAR, N., (eds.) *The Indian Yearbook of Comparative Law 2018*, Springer, 2019, pp. 154-155).

On federalism, Jörg Luther writes, "[F]ederalism can be seen as a "vertical" separation of powers and duplication of democracy" (LUTHER, J., 'The Search for a Constitutional Geography and Historiography of Second Chambers', in LUTHER, J,

PASSAGLIA, P., and TARCHI, R. (eds.), *A World of Second Chambers: Handbook for Constitutional Studies on Bicameralism*, Milano: Giuffrè Editore, 2006, p. 22). “Indian Federalism” is an ongoing process with both cooperation/separation between the various vertical branches of government central/state/union territories/hybrid (NCT of Delhi). The concept and practice have kept on evolving and giving shape and substance to Indian constitutional culture whose “union of states” model itself has plurality of federal structures with a bias towards the centre. Peter Häberle points out, “If today a return to more separative federalism is talked about, this means that federalism is a living ensemble, an ongoing process, a “mixed composition” in which in the course of constitutional history elements that are sometimes of cooperation, sometimes of unity and sometimes of separation emerge. Only a “mixed” theory of the federal state strongly accentuating the cultural differences [...] may offer here an appropriate theoretical framework.” (HÄBERLE, P., ‘Legal Comparison for Constitutional Development – The Relevance of Federalism and Regionalism’, in LUTHER, J, PASSAGLIA, P., and TARCHI, R. (eds.), *A World of Second Chambers: Handbook for Constitutional Studies on Bicameralism*, Milano: Giuffrè Editore, 2006, pp. 58-59).

Keeping the analytical distinction between “preconditions of asymmetry” (this “precondition of asymmetry”, rather than aspirations for “symmetrical federalism” in the formation of “full-fledged” states within the Indian Union like Jharkhand, Chhattisgarh, Uttarakhand and Telangana in the recent past, not to mention the linguistic reorganization of states in 1950s-60s, is given undue significance in writings like: TILLIN, L., ‘Asymmetrical Federalism (Chap. 30)’, in CHOUDHRY, S., KHOSLA, M., MEHTA, P.B. (eds.) *The Oxford Handbook of the Indian Constitution*, Oxford University Press, 2016, pp. 540-559) and “asymmetrical outcomes” the practice of Indian asymmetrical federalism assumes asymmetry as a social fact by keeping it “temporary” and “transitional” in the Constitutional provisions (Part XXI) to reach cooperative federalism as a contingent functioning, if not completely symmetrical federalism as its outcome (BURGESS, M., ‘The Paradox of Diversity – Asymmetrical Federalism in Comparative Perspective’, in PALERMO, F., ZWILLING, C., and KÖSSLER, K., (eds.) *Asymmetries in Constitutional Law: Recent Developments in Federal and Regional Systems*, EURAC Book 53, 2009, p. 24). On “cooperative federalism”, Granville Austin writes, “Cooperative federalism produces a strong central, or general, government, yet it does not necessarily result in weak provincial governments that are largely administrative agencies for central policies. Indian federalism has demonstrated this” (AUSTIN, G., *The Indian Constitution: Cornerstone of a Nation*, Oxford University Press, 2015 (25th imp.), p. 232). Political scientist Mahendra Prasad Singh writes, “Thus, despite its great cultural and regional diversities and historical patterns of disunity, indeed, in a very real sense, because of it, in 1950 India adopted a heavily centralized system of parliamentary federalism under the dual impacts of the British colonial and nationalist interventions.” (SINGH, M.P., ‘Federalism: Constitution and Dynamics (Chap. 8)’, in SINGH, M.P., ROY, H. (eds.), *Indian Political System*, Noida: Pearson, 2018, p. 146). The constitutionalist Mahendra Pal Singh writes, “According to Article 1(1) of the Constitution, ‘India, that is Bharat, shall be a Union of States.’ So long as this Article stands as it is, India must have more than one State. The question of whether Article 1(1) may be deleted or amended to read ‘India that is Bharat, shall be a Union’ or ‘unitary state’ stands answered by the basic structure doctrine. [...] federalism is part of the basic structure of the Constitution and is therefore beyond the power of amendment.” (SINGH, M.P., ‘The Federal Scheme (Chap. 25)’, in CHOUDHRY, S., KHOSLA, M., MEHTA, P.B. (eds.) *The Oxford Handbook of the Indian Constitution*, Oxford University Press, 2016, pp. 452-453).

The present case is an example of the aspiration of the NCT of Delhi for symmetrical federalism within the Union of India. The formation of the state of Telangana is also an example of the formation of symmetrical federalism where the "preconditions of asymmetry" as a social fact within the state of Andhra Pradesh was resolved with a symmetrical outcome. For the NCT of Delhi being the national capital of the Union of India, the present judgement suits fine to keep a "functioning cooperative federalism" as part of a contingent "asymmetrical federalism" rather than reaching a full "symmetrical federalism" which was its aspirational ideal.

