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Indian Federalism and the Government of National Capital Territory (Amendment) Act 2021

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ABSTRACT

The adoption of the Government of National Capital Territory of Delhi Act, 2021, violates the principles established in the constitution, primarily the federal structure, as the notion of power-sharing between the centre and the NCT of Delhi is fully tilted toward the centre. Ambiguity in the interpretation of Articles 239 and 239AA has caused controversy between the federal and state governments. The solution of enacting the Government of National Capital Territory of Delhi Act, 2021 is not the solution because it violates constitutional norms. Providing statehood to the NCT of Delhi is one idea that could help to solve this situation more effectively.

I. INTRODUCTION

The country was divided into four parts for administrative purposes when the constitution was enacted in 1950. Part A states were colonial British India's provinces, Part B states were princely states, and Part C and D states were regions administered by the president through the Chief Commissioner (Union territories). Part C included Delhi, which was a centrally managed area with no legislative assembly or council of ministers.

The Indian Government Act of 1951 established the Delhi State Legislative Assembly. Section 21(1) empowered the Legislative Assembly to pass laws on all matters listed in List II of the seventh schedule, with the exception of public order, police, constitution, powers of municipal corporations, local authorities, and land and buildings in possession of the Union in Delhi. On March 27, 1952, the Legislative Assembly of Delhi held its first legislative assembly election. However, the 7th Amendment Act to the Indian Constitution was approved in 1956, which implemented the provisions of the State Reorganisation Act, 1956, which abolished parts A, B, C, and D. With the passing of the 7th Amendment Act, the Delhi legislative assembly and council were abolished. Resulting in states being divided into two categories: states and union

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territories, with Delhi becoming a union territory to be governed by a person nominated by the president.

The Government of Union Territories Act, 1966 was adopted to establish legislative assemblies and councils of ministers for several union territories; however, it did not apply to Delhi. However, the Delhi administration was established in 1966, and a Metropolitan Council was established to give limited representation for Delhi.

There was a demand for the full-fledged legislature in Delhi because still, the elected representatives did not have enough power to legislate on matters independently in the cities governance. In 1987, the government established the Balakrishnan Committee to examine the subject of administration in Delhi. The committee's report, which was submitted in 1989, proposed that Delhi remain a union territory but that it should have a legislative assembly and a Council of Ministers with suitable powers to deal with routine administrative concerns. The Government of National Territory Act, 1991, was passed in response to this advice, and it came into force in 1992.

This Act added special provisions to the constitution for the national capital territory, namely Article 239AA, which states that the Legislative Assembly has the power to make laws for the entire capital of India, except in matters relating to public order, police, high court officers, and land in the national capital territory. In reality, the Legislative Assembly of Delhi was given far fewer powers than legislative assemblies in full-fledged states.

But there were problems relating to the interpretation of Article 239 AA, which led to a tussle between the central government and the government of Delhi. The issue of whether the “aid and advice” of the council of ministers and the legislature is binding on the administrator was the most controversial. In an attempt to solve this problem government came up with the Government of National Capital Territory of Delhi Act, 2021.

According to the controversy between the Government of the National Capital Territory of Delhi and the Union government, the coexistence of Articles 239 and 239AA has resulted in a jurisdictional dispute between the two.

According to the Union government, because New Delhi is a Union Territory, Article 239 empowers the Lieutenant Governor (LG) to function independently of his Council of Ministers. The Delhi state government, on the other hand, asserted that Article 239AA of the Constitution gives it unique status as it has a legislatively elected government. This led to a power struggle in the NCT of Delhi over the LG's and state governments' administrative powers.

(A) Literature Review**1. The Paradox of ‘Centralised Federalism’: An Analysis of the Challenges to India’s Federal Design – A.K Ghosh²**

In this paper chronological evolution of the structure of Indian Federalism is talked about starting from the very beginning when India became a republic to the present day. This paper highlights the debates which have been undertaken in India for the purpose of keeping the spirit of Indian Federalism intact. The article examines the varied patterns of Indian federal reaction across time, as affected by various political circumstances, and makes recommendations for improving India's federal structure.

2. Statehood for Delhi: Chasing a Chimera- Niranjan Sahoo³

This paper answers question such as why is statehood a contentious issue in politics will providing statehood to Delhi will end the power struggle in the capital. The author answers these questions by throwing light on worldwide experiences on capital city governance; this article also examines the politics and complicated dynamics involved in arriving at a feasible political and administrative shape for India's capital.

3. Changing Dimensions of Federalism in India: An Appraisal - M Asad Malik⁴

In today's world, federalism is a compromise between two opposing forces: the expansion of common interests and the need for local autonomy. This paper will look at the concept of federalism as well as the changing features of federalism in India. In order to achieve constitutional goals, this paper will emphasise the importance of cooperative and collaborative federalism.

(B) Statement of the problem

The principles enshrined in the constitution are violated by the introduction of the Government of National Capital Territory of Delhi Act, 2021, mainly the federal structure, as the concept of power-sharing between the centre, and NCT of Delhi is completely tilted toward the centre.

(C) Research Objective

1. To understand the evolution of Delhi’s status as a Union territory.

² AK Ghosh, 'The Paradox of ‘Centralised Federalism’: An Analysis of the Challenges to India’s Federal Design' [September 2020] 1(4) ORF Occasional paper <https://www.orfonline.org/wp-content/uploads/2020/09/ORF_OccasionalPaper_272_Federalism_.pdf> accessed 1 November 2021

³ Niranjan Sahoo, 'Statehood for Delhi: Chasing a Chimera' [July 2017] 1(1) ORF Occasional paper <<https://www.orfonline.org/research/41571-statehood-for-delhi-chasing-a-chimera/>> accessed 2 Nov 2021

⁴ M Asad Malik, 'Changing Dimensions of Federalism in India: An Appraisal' [2019] 2(1) ILI Journal <<https://www.ili.ac.in/pdf/mam.pdf>> accessed 2 November 2021

2. To explain the spirit of Indian federalism.
3. To analyse the impact of the Government of National Capital Territory of Delhi Act, 2021 on the spirit of federalism.
4. To find an effective solution for a power struggle between the centre and Delhi.

(D) Hypothesis

Ambiguity in the interpretation of Article 239 and Article 239AA is the reason for the tussle between the central government and the state government. The solution of introducing the Government of National Capital Territory of Delhi Act, 2021 is not the solution as it is violating principles enshrined in the constitution. Providing statehood NCT of Delhi is a solution that could solve this problem in a better manner.

(E) Research Questions

1. Whether the Government of National Capital Territory of Delhi Act, 2021 is inconsonance with the spirit of the Indian Constitution?
2. What is the nature of Indian federalism with reference to Union territories?
3. Whether providing Statehood to Delhi can effectively tackle the power tussle between the Centre and the state?

II. FEDERALISM

The word federalism is derived from the Latin word "feodus", which means treaty or agreement. It is a governance system where sovereignty is divided between the centre and the state in the sense that both are given certain subjects on which they can exercise legislative and executive powers. Federalism can be classified into two forms centripetal, which means when powers are divided where residuary powers remain with the centre and centrifugal means where residuary powers remain with the state. "Under the system of federalism, the powers of State Government and the central government are defined in the constitution."⁵

The powers are divided between the centre and the state governments where the central government can make laws for the whole country on matters which are essential for the nation as a whole, and states can make laws for the whole of state without any interference from the centre on matters mentioned under their respective List. Each of the governments is a legally independent entity.

"Each government has its own area of powers and exercises their powers without being

⁵ Durga Das Basu,, *Comparative Federalism* (2 edn, Lexis Nexus 2008) 5-6

controlled by other governments, and in doing so, neither is subordinate to the other, but both are co-ordinated.”⁶

The States have their own constitutional existence and play an equal part in the people's political, social, educational, and cultural lives as the Union does. “They are neither the Centre's satellites nor its agents.”⁷

The federal scheme was first introduced in India by the government of India Act 1935 this is the document where the first time the word Federation was used. But it is worth mentioning the process of decentralization of power had started way back in the year 1919 in the Government of India Act of 1990.

Indian federal system is not, as the word federalism suggest, a Treaty or an agreement amongst States. In India unitary system was converted into a federal one by giving certain powers and responsibilities to the states by the constitution. It is said that every 100 km in India, the language, culture, traditions changes which is the reason why the framers of the body made it a federal constitution because of this social diversity separatist tendency might arise if the grievances and the concerns of individuals of states are not adequately addressed. To avoid such things, the framers of the Constitution of India provided this feature of federalism.

“The word Federation or Federal do not appear in any article of the constitution the framers of the Constitution use the word ‘Union’ under Article 1(1) of the constitution which describes India as follows India is Bharat shall be a union of States”.⁸

The word “Federation” was adopted by the union constitution committee, but the word “Union” was later substituted by the drafting committee of the constituent assembly. Each government has its own set of powers and exercises them independently of other governments. As a result, neither is dependent on the other, yet both work together.

Moving the Draft constitution for the consideration of the Constituent Assembly on November 4, 1948, B.R. Ambedkar, Chairman of the Drafting Committee, explained the significance of the use of the expression “Union” instead of the expression “Federation”.⁹

“It is true that South Africa, which is a unitary State, is described as a Union. But Canada, which is a Federation, is also called a Union. Thus, the description of India as a Union, though its constitution is federal, does no violence to usage. But what is

⁶ C Wheare, Modern Constitutions (1 edn, Oxford University Press, London 1975)

⁷ HM seervai, Constitutional Law of India (4 edn, Central Law publisher 2015)

⁸ RS French, Federalism in The Supreme Court of India and the High Court of Australia, <<http://www.hcourt.gov.au/assets/publications/speeches/currentjustices/frenchcj/frenchcj03june09.pdf>> accessed Nov. 3, 2021

⁹ Hinsa Virodhak Sangh v. Mirzapur Moti Kuresh Jamat, AIR 2008 SC 1892

*important is that the use of the word **Union** is deliberate. I do not know why the word **Union** was used in the Canadian constitution. But I can tell you why the Drafting Committee has used it. The Drafting Committee wanted to make it clear that though India was to be a federation, the federation was not the result of an agreement by the States to join in a federation, and that the federation not being the result of an agreement, no State has the right to secede from it. The federation is a union because it is indestructible. Though the country and the people may be divided into different States for convenience of administration, the country is one integral whole, its people a single people living under a single imperium derived from a single source. The Americans had to wage a civil war to establish that the States had no right to secession and that their federation was indestructible. The Drafting Committee thought that it was better to make it clear at the outset rather than to leave it to speculation or to dispute.”*

“Indian Constitution is basically federal in form and is marked by the traditional characteristics of a federal system, namely, the supremacy of the constitution”¹⁰, The establishment of an independent judiciary, a strict system for amending the constitution, and a distribution of power between the Union and state governments. It establishes a dual polity with clearly defined areas of authority between the Union and the states, which they would exercise in their respective jurisdictions. To handle conflicts between the Union and the states, or between states, there is an independent judiciary.

In re: Under Article 143, Constitution of India, (Special Reference No. 1 of 1964)¹¹

“The division of limited administrative, legislative, and judicial authority among entities that are both coordinated and independent of one another is a key feature of federalism, according to the author. The Supreme Court also stated that the supremacy of the Constitution is essential to the existence of a federal state in order to prevent either the federal legislature or the legislatures of the member states from destroying or impairing the delicate balance of power that satisfies the particular needs of states desirous of the union but unwilling to merge their individuality in unity.”

Bommai v. Union of India,¹² a nine-judge bench, has enunciated that the Indian Constitution is

¹⁰ In Special Reference No.1 of 1964 UP Assembly Case, AIR 1965 SC 745. The court observed: “The supremacy of the constitution is fundamental to the existence of a federal State in order to prevent either the legislature of the federal unit or those of the member States from destroying or impairing that delicate balance of power which satisfies the particular requirements of States which are desirous of union, but not prepared to merge their individuality in a unity.”

¹¹ AIR 1965 SC 745

¹² *Bommai v. Union of India* AIR 1994 SC 1918

federal. The court held that:

“In order to understand whether our Constitution is truly federal, it is essential to know the true concept of federalism. Dicey calls it a political contrivance for a body of States that desire Union but not unity. Federalism is, therefore, a concept that unites separate States into a Union without sacrificing their fundamental political integrity. The separate States, therefore, desire to unite so that all the Member-States may share in the formulation of the basic policies applicable to all and participate in the execution of decisions made in pursuance of such basic policies. Thus the essence of a federation is the existence of the Union and the States and the distribution of powers between them. Federalism, therefore, essentially implies demarcation of powers in a federal compact.”

UCO Bank v. Dipak Debbarma,¹³ it was held that :

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

This decision shows that, while the idea of federal supremacy exists, it does not imply that states lack autonomy. Within their assigned area, the state is paramount, and the centre has no right to go beyond it. If the centre does so, the court must interpret the entries by giving each entry the broadest permissible interpretation.

III. GOVERNMENT OF THE NATIONAL CAPITAL TERRITORY OF DELHI ACT, 2021

On March 28, 2021, the governance of the national territory of the Delhi Amendment Act came into force. The Act's purpose was to change various provisions of the National Capital Territory of Delhi Act of 1991. The main legislation established a foundation for the legislative assembly's operation and governance of the national capital of Delhi.

Delhi, after the 69th Amendment Act, 1991, had given the power to form a legislative assembly and Council of Ministers in the national capital; this was done through introducing Article 239 AA in the constitution.

The Government of National Capital Territory of Delhi Act, 1991 was made in pursuance of this constitutional amendment. It provided for duties of chief ministers, duties of the

¹³ *UCO Bank v. Dipak Debbarma* 7 (2017) 2 SCC 585

administrator and discretionary powers of the administrator.

(A) Main provisions of the Amendment Act

1. The act specifies that in any statute passed by the Legislative Assembly, the term "Government" refers to the Lieutenant Governor (L-G).

2. The Principal Act of 1991 mandates the L-G to reserve for the President's consideration certain bills passed by the Legislative Assembly. These bills may limit the High Court of Delhi's powers, be reserved by the President, deal with the Speaker, Deputy Speaker, members of the Assembly, and Ministers' salaries and allowances, or deal with the Assembly's or the NCT of Delhi's official languages. According to the Amendment Act 2021, the L-G must additionally reserve for the President any bills that concern subjects outside the scope of the Legislative Assembly's competence.

3. The Amendment Act 2021 prohibits the Legislative Assembly or its Committees from passing any regulation that would allow them to evaluate matters of day-to-day administration in the NCT of Delhi and conduct an investigation into administrative decisions. The Act also declares that all such rules made previous to its enactment are null and void.

4. All executive measures made by the government, whether on the advice of the Ministers or otherwise, must be done in the name of the L-G, according to the Principal Act of 1991. Before taking any executive action on the Minister's/Council of Ministers' decisions, the Amendment Act 2021 adds that the LG's opinion on specific matters, as mentioned by the L-G, must be obtained.

5. Under the Principal Act of 1991, the Legislative Assembly can pass Regulations to govern the Assembly's procedure and conduct of business. Such regulations must follow Lok Sabha's Rules of Procedure and Conduct of Business, according to the Amendment Act 2021.

IV. CRITICISM OF GOVERNMENT OF THE NATIONAL CAPITAL TERRITORY OF DELHI ACT, 2021

1. It is against the spirit of 'Federalism

On federalism, the core philosophy is to bring independent states together with the Union without compromising on its identity and political integrity. Political integrity means to make policies for the benefit of the public or in consonance with the public interest without being interfered with by any external force. If we see union government cannot understand the interest of individuals of a state better than the state government, the reason being it also has the duty to take care of the national interests as well.

The core of a federation is thus the presence of the Union and the States, as well as the division of powers between them. As a result, federalism merely refers to a federal constitution's separation of powers.

2. Collaborative federalism

The constitutional vision addresses both the Central and State Governments with the goal of constructing a comprehensive structure. As a result, the Union and the States must embrace a collaborative federal architecture by demonstrating peaceful coexistence and interdependence in order to avoid any potential constitutional disagreement.

The goal of any government, be it centre or state, should be public welfare, if with this intention both the government work then problems will never arise but we have seen in case of Delhi this concept cannot work as the agenda of centre and state are often different such as doorstep delivery of ration scheme, the constitution of a panel on the death of people due to oxygen, list of appointment of lawyers which will represent the farmer's protesters and etc.

3. Pragmatic Federalism

Pragmatic federalism means interpreting the concept of federalism with a sensible and realistic approach for this essential characteristic such as power distribution between the centre, and the state, Supremacy of the constitution should always be appreciated.

The spirit and conscience of the Constitution should not be lost in grammatical details, and the people's will, which is valid in a democratic system, should not be lost in simple semantics.

The Amendment Act is not made according to the spirit of federalism since it has given way too much power in the hands central government. LG's approval is required in all the policy decisions as well as on issues of daily administration in the capital this violates the distribution of power concept between the centre and the state.

In the case where *Govt. Of NCT of Delhi v. Union*¹⁴ of India held that:

“The LG's concurrence is not required on issues other than police, public order and land. The Court further added that the decisions of the Council of Ministers will, however, have to be communicated to the LG and that the LG was bound by the aid and advice of the Council of Ministers. The Court also said that the status of the LG of Delhi is not that of a Governor of a State; rather, he remains an Administrator, in a limited sense. It had also pointed out that the elected government must keep in mind that Delhi is not a state.”

¹⁴ *Govt. Of NCT of Delhi v. Union* (2018) 8 SCC 501

In cases of interpretation of power between the centre and the state Supreme Court is the final arbitrator, the amendment act not being on the lines of the judgement, in this case, is violating the concept of pragmatic federalism.

4. Federal balance

The Constitution mandates a federal balance in which state governments are guaranteed a certain level of independence. In contrast to centralism, a balanced federal system ensures that the Union does not usurp all powers and that the States are free to pursue their own interests without interference from the union government.

Since on every matter approval of Lieutenant governor is to be taken to the concept of federal balance is also violated.

5. Representative government

Representative governance is a type of democracy in which the people of a country elect and choose their law-making representatives under a Republican form of democracy. Citizens entrust citizens' representatives with the task of developing policies that reflect the public will. A Representative Government's primary purpose is to incorporate the public's will, views, and emotions into legislation. Politicians that are accountable to the people must be accessible, available, and open in their activities.

The newly passed Amendment Act will force the National Capital Territory of Delhi's government to seek the LG's approval before making executive decisions. In addition, the LG has become synonymous with the government. Moreover, the Act grants the LG extensive discretion to present the President with "any issue." The LG, who is appointed by the president, will have no responsibility and will be free to act without concern of being dismissed by the electorate.

6. Collective responsibility

Our government operates under a parliamentary system founded on the principle of Cabinet collective responsibility. Every action taken by any of the Ministries owes an obligation to the legislature, and each Minister is personally responsible for the Ministry's actions. This concept of collective accountability is highly significant in the context of 'aid and advise.' The value of collective responsibility, which finally becomes a Cabinet decision, is utterly destroyed when a decision is taken after proper discussion by the Chief Minister and the Council of Ministers, but the decision is not carried out owing to the Lieutenant Governor's injunction.

V. POSSIBLE SOLUTION IS TO PROVIDE DELHI WITH STATEHOOD

The demand for statehood arose in 1987 as a result of the findings of the Committee on Reorganisation of Delhi Set Up, often known as the Balakrishnan Committee. The group recommended establishing a legislative structure and looked into the overlap of authorities in municipal governance. It agreed to provide the national capital special status and to establish a legislative assembly in the UT with authority to pass legislation on issues not covered by the state list, with the exception of matters relating to police, land, and public order.

(A) Advantages

1. The Delhi government has no control over DDA's operations. This obstructs proper land allocation, use, and implementation of social systems. Police: The Delhi government is having difficulty maintaining law and order in the state due to a lack of authority over the police force. The MCD is not under the supervision of the Delhi government. The administration believes it obstructs the implementation of development measures. Controlling the DDA means the Delhi state government would have control over land and housing, which are now under the domain of the central government. Controlling the Delhi Police, which now reports indirectly to the federal government via the Lieutenant Governor, will result in more accountability for the Delhi government in areas of law and order. Full statehood will also bring the MCD, which reports to the Ministry of Home Affairs, within the purview of the Delhi government.

2. The administration believes it obstructs the implementation of development measures. The function of the LG and the Council of Ministers of the Delhi administration has long been a source of contention. The LG has been accused of causing delays and disturbances in the elected government's functioning. Statehood will bring administrative power under one roof – the state government, led by the CM and his Council of Ministers – and eliminate the need for several authorities

3. Housing, water, energy, transportation, and the recruitment and terms of service of IAS officials, clerks, and others in Delhi are all matters over which the Delhi government has little control. Other states in the country can recruit their own cadre of officers to run the government's administration, but Delhi is unable to do so through its own Public Service Commission. By directing these cadres through the Home Ministry rather than the Delhi government, the Centre possesses enormous, if problematic, influence in this sector. It is only logical for a democratically elected government to select its officials in order to increase accountability and transparency.

(B) Disadvantages

1. Granting statehood could result in a slew of administrative issues, particularly in the area of law and order, which would be damaging to the national capital. Because of the financial impact, the quality of governance may suffer.

2. Concerns about security include embassies and parliaments. Furthermore, the safety and security of visiting dignitaries from many countries, as well as heads of state, is a concern. It is the obligation of the Centre to ensure their protection, and the state cannot be entrusted with this task. Land control is especially important in locations containing central government institutions and embassies.

3. The concept was quite apparent when Delhi was declared the National Capital Territory (NCT) in 1991 by a Constitutional Amendment, and that is that since Delhi is the seat of the Union Government, there can't be two administrations. In addition, when we look at examples from around the world, the practice is consistent. Consider the city of Washington, D.C. There is just one mayor in Washington. There is no democratically elected government in place. Delhi, as the country's capital, is home to a number of vital infrastructures, including the parliament, presidential estates, and embassies. These are extremely vital to maintain and cannot be delegated to another business.

VI. CONCLUSION

With respect to the division of power between the centre and the state, the conflict does not arise frequently, but when it comes to Union territories especially Delhi, then there is a constant power struggle between the centre and the state government. We have seen in this paper how Delhi has a sui generis status where it is neither considered as a complete state nor as a Union territory various amendments have given more power in the hands of the state government of Delhi since the spirit of our constitution believes in a representative form of government where people elect government at different levels, and each level is accountable to its separate electorates, with each government having a constitutional mandate to work for the people's welfare. Solely on this ground, we can conclusively say that GNCT,2021 is not inconsonance with the principles of democracy since it makes it mandatory for the Government of NCT of Delhi to take the opinion of the LG before taking executive actions. Further, the LG has been made synonymous with the government. Also, the Act confers upon the LG enormous powers to refer all matters to the President. Providing Statehood may have certain disadvantages, but certainly, it will be in consonance with the ideals of our democratic setup.

VII. SUGGESTIONS

1. Only an elected government should be given decision making power since they are accountable to the people, and these decision making powers should be free from any external control.
2. Like Washington D.C has carved been out of the state of Virginia, a smaller area can be carved out from Delhi and allotted to the central government for direct administration of it.
3. The elected government should be given authority over MCD since urban planning should not be done by the federal government.
4. Controlling crime is the duty of the state government, so police should also be under the control of Delhi. So that it can be held accountable when the crime is the state rises.

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